Date and Time: Monday, October 23, 2023 11:04:00 AM CST

Job Number: 208660389

Documents (100)

1. [Flying J Inc. v. TA Operating Corp., 2008 U.S. Dist. LEXIS 92852]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

2. [Edwards v. City of Henry, 385 Ill. App. 3d 1026]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

3. [Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

4. [Romero v. Philip Morris, Inc., 145 N.M. 658]

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

5. [Lykes Bros., Inc. v. Aaction Mulch, Inc., 2008 U.S. Dist. LEXIS 126781]

   Client/Matter: -None-

   Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

6. [In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2008 U.S. Dist. LEXIS 104439]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

7. [Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

8. [Champagne Metals v. Ken-Mac Metals, Inc., 2008 U.S. Dist. LEXIS 100216]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

9. [Commercial St. Express LLC v. Sara Lee Corp., 2008 U.S. Dist. LEXIS 102298]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

10. [Haw. Children's Blood & Cancer Group v. Haw. Pac. Health, 2008 U.S. Dist. LEXIS 136232]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

11. Dist. 1199P Health & Welfare Plan v. Janssen, L.P., 2008 U.S. Dist. LEXIS 103526

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

12. Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

13. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

14. In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d 29

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

15. Gulf States Reorganization Group v. Nucor Corp., 2009 U.S. Dist. LEXIS 154734

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

16. [Studio v. Action Dvd, 2009 U.S. Dist. LEXIS 147479]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

17. [VIBO Corp. v. Conway, 594 F. Supp. 2d 758]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

18. [Oregon v. Legal Servs. Corp., 552 F.3d 965]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

19. [Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

20. [Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

21. [Somerville v. Stryker Orthopaedics, 2009 U.S. Dist. LEXIS 3052]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

22. Teague v. Bayer AG, 195 N.C. App. 18

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

23. Lambert v. Bd. of Comm'rs, 2009 U.S. Dist. LEXIS 124097

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

24. Hackman v. Dickerson Realtors, Inc., 595 F. Supp. 2d 875

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

25. DSM Desotech Inc. v. 3D Sys. Corp., 2009 U.S. Dist. LEXIS 5980

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

26. Patel v. Callies, 2009 U.S. Dist. LEXIS 149050

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

27. *Applera Corp. v. Mich. Diagnostics, LLC, 594 F. Supp. 2d 150*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

28. *In re Marine Hose Antitrust Litig., 2009 U.S. Dist. LEXIS 154963*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

29. *Delta Turner, Ltd. v. Grand Rapids - Kent County Convention/Arena Auth., 600 F. Supp. 2d 920*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

30. *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 554 F.3d 300*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

31. *BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp., 2009 Del. Ch. LEXIS 17*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

32. Alternative Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

33. Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 2009 U.S. Dist. LEXIS 8831

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

34. In re K-Dur Antitrust Litig., 2009 U.S. Dist. LEXIS 11756

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

35. Lannett Co. v. Kv Pharm., 2009 U.S. Dist. LEXIS 149745

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

36. Walter Kozak D v. Hillsborough Pub. Transp. Comm'n, 2009 U.S. Dist. LEXIS 151011

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

37. *Apple Inc. v. Psystar Corp., 2009 U.S. Dist. LEXIS 14370*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

38. *In re K-Dur Antitrust Litig., 2009 U.S. Dist. LEXIS 126249*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

39. *Fair Isaac Corp. v. Experian Info. Solutions, 2009 U.S. Dist. LEXIS 146330*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

40. *Grynberg v. BP P.L.C., 596 F. Supp. 2d 74*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

41. *Advanced Sci. Applications v. Pac. Bell Tel. Co., 2009 Cal. App. Unpub. LEXIS 1155*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

42. [Savarirayan v. White County Cmty. Hosp., 2009 U.S. Dist. LEXIS 10933]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

43. [Flying J, Inc. v. Van Hollen, 597 F. Supp. 2d 848]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

44. [Sabry Lee, Inc. v. Genera Corp., 2009 U.S. Dist. LEXIS 144549]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

45. [In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

46. [Aventis Pharma S.A. v. Amphastar Pharms. Inc., 2009 U.S. Dist. LEXIS 132345]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

47. [Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

48. [Delano Farms Co. v. Cal. Table Grape Comm'n, 623 F. Supp. 2d 1144]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

49. [Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 2009 U.S. Dist. LEXIS 13113]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

50. [Pac. Bell Tel. Co. v. linkLine Communs., Inc., 555 U.S. 438]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

51. [Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 605 F. Supp. 2d 1118]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

52. [Arandell Corp. v. XCel. Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 2009 U.S. Dist. LEXIS 66875]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

53. Bullet Concrete Materials v. Union Pac. R.R. Co., 2009 U.S. Dist. LEXIS 148828

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

54. MacQuarie Group Ltd. v. Pac. Corporate Group, LLC, 2009 U.S. Dist. LEXIS 16554

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

55. Capitol Records, Inc. v. Mp3tunes, LLC, 611 F. Supp. 2d 342

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

56. Hynix Semiconductor, Inc. v. Rambus, Inc., 609 F. Supp. 2d 988

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

57. In re TFT-LCD Antitrust Litig., 599 F. Supp. 2d 1179

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

58. *In re TFT-LCD Antitrust Litig., 2009 U.S. Dist. LEXIS 17792*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

59. *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

60. *AVX Corp. v. Cabot Corp., 600 F. Supp. 2d 286*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

61. *Bruce Foods Corp. v. SK Foods, LP, 2009 U.S. Dist. LEXIS 147787*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

62. *Parker v. Viacom Int'l, Inc., 605 F. Supp. 2d 659*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

63. [Warrior Sports, Inc. v. NCAA, 2009 U.S. Dist. LEXIS 25700]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

64. [Fairfax County Water Auth. v. City of Falls Church, 78 Va. Cir. 177]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

65. [FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

66. [Wiwa v. Royal Dutch Petroleum Co., 2009 U.S. Dist. LEXIS 34843]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

67. [Doe v. Ariz. Hosp., 2009 U.S. Dist. LEXIS 42871]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

68. [Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC, 605 F. Supp. 2d 870]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

69. [Haines v. Verimed Healthcare Network, LLC, 613 F. Supp. 2d 1133]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

70. [Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

71. [Habitat, Ltd. v. Art of the Muse, Inc., 2009 U.S. Dist. LEXIS 25096]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

72. [Arnold v. Petland, Inc., 2009 U.S. Dist. LEXIS 31377]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

73. [Hearing Components, Inc. v. Shure, Inc., 2009 U.S. Dist. LEXIS 25050]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

74. In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

75. Flying J, Inc. v. Van Hollen, 2009 U.S. Dist. LEXIS 30793

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

76. Packaging Supplies, Inc. v. Harley-Davidson, Inc., 2009 U.S. Dist. LEXIS 25732

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

77. Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

78. Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP, 612 F. Supp. 2d 330

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

79. Graco, Inc. v. PMC Global, Inc., 2009 U.S. Dist. LEXIS 26845

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

80. Guimerfe, Inc. v. Perez-Perdomo, 2009 U.S. Dist. LEXIS 28758

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

81. In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

82. Mahmud v. Kaufmann, 607 F. Supp. 2d 541

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

83. Palmyra Park Hosp., Inc. v. Phoebe Putney Mem. Hosp., Inc., 2009 U.S. Dist. LEXIS 144937

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

84. *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc., 608 F. Supp. 2d 1166*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

85. *Trident Holdings, LLC v. Great Wraps, Inc., 2009 U.S. Dist. LEXIS 140229*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

86. *CBC Cos. v. Equifax, Inc., 561 F.3d 569*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

87. *CWIE, LLC v. Bandwith Consulting, Inc., 2009 U.S. Dist. LEXIS 135999*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

88. *Nichols v. Mahoney, 608 F. Supp. 2d 526*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

89. Sun Microsystems Inc. v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

90. William O. Gilley Enters., Inc. v. Atl. Richfield Co., 561 F.3d 1004

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

91. PSKS, Inc. v. Leegin Creative Leather Prods., 2009 U.S. Dist. LEXIS 28505

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

92. In re Chocolate Confectionary Antitrust Litig., 607 F. Supp. 2d 701

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

93. In re Flonase Antitrust Litig., 610 F. Supp. 2d 409

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

94. Hoffman v. Northern States Power Co., 764 N.W.2d 34

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

95. *Garrard v. Gateway Fin. Servs., 2009 UT 22*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

96. *Bonanno v. Quizno's Franchise Co., LLC, 2009 U.S. Dist. LEXIS 37702*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

97. *Princo Corp. v. ITC, 563 F.3d 1301*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

98. *Energy Mktg. Servs. v. Columbia Gas Transmission Corp., 639 F. Supp. 2d 643*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

99. *D&G Inc. v. SuperValu, Inc., 2009 U.S. Dist. LEXIS 35514*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

100. *Gurvey v. Cowan, Liebowitz & Latman, P.C., 2009 U.S. Dist. LEXIS 34839*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 26, 2004 to Dec 31, 2022

Flying J Inc. v. TA Operating Corp.

United States District Court for the District of Utah, Northern Division

November 14, 2008, Decided; November 14, 2008, Filed

Case No. 1:06-CV-30-TC

Reporter

2008 U.S. Dist. LEXIS 92852 *; 2008-2 Trade Cas. (CCH) P76,396

FLYING J INC.; TCH LLC; TRANSPORTATION ALLIANCE BANK, INC.; and TON SERVICES, INC., Plaintiffs, vs. TA OPERATING CORPORATION, now known as TA OPERATING LLC d/b/a TRAVELCENTERS OF AMERICA; TRAVELCENTERS OF AMERICA, LLC; PILOT TRAVEL CENTERS LLC; PILOT CORPORATION; COMDATA NETWORK, INC. d/b/a COMDATA CORPORATION, Defendants.

Subsequent History: Motion denied by *Flying J Inc. v. TA Operating Corp., 2008 U.S. Dist. LEXIS 105381 (D. Utah, Dec. 30, 2008)*

Prior History: *Flying J Inc. v. TA Operating Corp., 2008 U.S. Dist. LEXIS 66822 (D. Utah, Sept. 2, 2008)*

Core Terms

antitrust, Card, Fuel, allegations, Fleets, truck stop, Truck, Trucker, monopolization, conspiracy, Settlement, competitors, claim for relief, Sherman Act, motion to dismiss, anti trust law, pre-settlement, vertical, boycott, antitrust statute, anticompetitive, Network, parties, group boycott, drivers, cause of action, defendants', concerted, contends, markets

Counsel: **[*1]** For Flying J Inc, a Utah corporation, TCH, a Utah limited liability company, Transportation Alliance Bank, a Utah corporation, TON Services, a Utah corporation, Plaintiffs: Gregory J. Kerwin, LEAD ATTORNEY, Katrina Casey Lewis, GIBSON DUNN & CRUTCHER (CO), DENVER, CO; Jonathan A. Dibble, LEAD ATTORNEY, Justin T. Toth, Keith A. Kelly, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; T. Michael Crimmins, GIBSON DUNN & CRUTCHER (DC), WASHINGTON, DC.

For Pilot Travel Centers, a Delaware limited liability company, Defendant: Alan M. Grimaldi, LEAD ATTORNEY, HOWREY SIMON ARNOLD & WHITE, WASHINGTON, DC; Gary F. Bendinger, LEAD ATTORNEY, John H. Bogart, Richard W. Casey, Scott D. McCoy, Zachary J. Weyher, HOWREY LLP (UT), SALT LAKE CITY, UT.

For Pilot, a Tennessee corporation, Defendant: Alan M. Grimaldi, LEAD ATTORNEY, HOWREY SIMON ARNOLD & WHITE, WASHINGTON, DC; Gary F. Bendinger, Richard W. Casey, LEAD ATTORNEYS, John H. Bogart, Scott D. McCoy, Zachary J. Weyher, HOWREY LLP (UT), SALT LAKE CITY, UT.

For Comdata Network, doing business as Comdata Corporation, Defendant: Brent O. Hatch, LEAD ATTORNEY, Phillip J. Russell, HATCH JAMES & DODGE, SALT LAKE CITY, UT; J. Gordon Cooney, Jr., LEAD ATTORNEY, **[*2]** Mark P. Edwards, Rebecca J. Hillyer, MORGAN LEWIS & BOCKIUS (PA), PHILADEPHIA, PA.

Judges: TENA CAMPBELL, Chief Judge.

Opinion by: TENA CAMPBELL

Opinion

ORDER AND MEMORANDUM DECISION

In this antitrust case, the Plaintiffs (Flying J Inc. et al.) [1] recently added Defendant Comdata Network, Inc. to their First Amended Complaint. [2] Comdata now moves for dismissal under *Rule 12(b)(6)* of all of Plaintiffs' claims, or, in the alternative, an order striking all allegations (and exhibits) relating to pre-settlement conduct (i.e., acts occurring before May 2001 when Flying J and Comdata settled a separate antitrust action). [3] The Pilot Defendants (Pilot Travel Centers LLC and Pilot Corporation) have filed a motion to dismiss that simply joins in Comdata's motion (similarly, Flying J's opposition to the Pilot Defendants' motion incorporates by reference its memorandum opposing Comdata's motion). [4] For the reasons set forth below, the motions to dismiss or strike pre-settlement allegations are DENIED, with the exception that the court dismisses Flying J's allegations under non-Utah state antitrust statutes.

PROCEDURAL BACKGROUND

The First Amended Complaint (consisting of 148 pages of allegations and claims, 9 unsealed exhibits totaling approximately 120 pages, and a Confidential Appendix containing 43 exhibits) asserts seven claims for relief against Comdata: [5]

. First Claim for Relief: **Unlawful Group Boycott,** in violation of Sherman **[*4]** Act, *15 U.S.C. § 1*

. Second Claim for Relief: **Conspiracy to Monopolize,** in violation of Sherman Act, *15 U.S.C. § 2*

. Third Claim for Relief: **Violation of the Utah Antitrust Act and the "Antitrust Statutes of Any State Where Defendants Are Found To Have Caused Damages"**

. Fourth Claim for Relief: **Tortious Interference With Economic Relations and Prospective Economic Advantage**

. Fifth Claim for Relief: **Civil Conspiracy**

. Sixth Claim for Relief: **Unlawful Monopolization,** in violation of Sherman Act, *15 U.S.C. § 2*

. Seventh Claim for Relief: **Unlawful Attempt to Monopolize,** in violation of Sherman Act, *15 U.S.C. § 2*

Comdata raises numerous bases for dismissal, with the most central being release language in a May 2001 "Settlement Agreement and Release" (Ex. C to Comdata's Mem. Supp. [hereinafter "Settlement Agreement"]) [6]

---

[1] The "Flying J Plaintiffs" include Flying J, Inc., TCH LLC, Transportation Alliance Bank, Inc., and TON Services, Inc.

[2] Earlier **[*3]** in the case, the Flying J Plaintiffs agreed to dismiss all claims against Defendants TA Operating Corporation and TravelCenters of America LLC. The order granting their joint motion for dismissal was entered on May 5, 2008 (see Dkt # 335). Accordingly, the Defendants now consist of the Pilot Defendants (Pilot Travel Centers LLC and Pilot Corporation) and Comdata.

[3] Comdata moves to strike under *Federal Rule of Civil Procedure 12(f)*, which allows the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

[4] The Pilot Defendants did file a Reply, but it is, at least in part, improper because it relies on responses to interrogatories, which are not appropriate for consideration on a motion to dismiss. The court disregards those materials outside the pleadings that are presented by the Pilot Defendants.

[5] The first five claims for relief also name the Pilot Defendants.

[6] Because the First Amended Complaint refers to the Settlement Agreement (indeed both Comdata and Flying J attach it to their respective briefs), its contents may be considered part of the allegations the court considers when determining whether to grant

between Comdata, three of the four Plaintiffs in this case (Flying J, TCH LLC, and TON Services), and others involved in an earlier antitrust action (Flying J Inc. v. Comdata Network, Inc., No. 1:96-CV-66-DAK (D. Utah) [hereinafter Flying J I]). On similar grounds, Comdata asserts a res judicata defense, contending **[*5]** that resolution of Flying J I bars all of Flying J's claims here. Comdata also asserts specific defenses to individual claims. For example, Comdata contends that (1) Plaintiffs' conspiracy allegations do not meet the standards set forth in *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; (2) TON and Flying J lack "antitrust standing" as defined in *Associated Gen. Contractors v. Cal. Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; (3) Flying J lacks "antitrust injury," as defined in *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; and (4) choice of law principles preclude consideration of other states' antitrust acts and common law of torts.

ANALYSIS

First, this Order addresses the discrete issue of whether the court should consider Comdata's alternative request to strike allegations of pre-settlement conduct. The Order then focuses on the merits of Comdata's defenses.

1. COMDATA'S REQUEST TO STRIKE ALLEGATIONS OF PRE-SETTLEMENT CONDUCT

Comdata moves to strike allegations relating to pre-settlement conduct, citing *Federal Rule of Civil Procedure 12(f)*, which allows the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Flying J contends that it is not relying on pre-settlement conduct to establish the antitrust liability of Comdata. Instead, it says the material in the First Amended Complaint (FAC) provides context and also serves to present allegations against the Pilot Defendants, who were not party to the Settlement Agreement.

Striking the allegations of pre-settlement conduct would be an extreme measure. Given the multiple purposes of the allegations, striking them here would not be proper. Accordingly, that portion of Comdata's **[*7]** motion is DENIED.

Whether the court may consider them when determining whether Flying J has met its pleading obligations under *Rule 8* and Twombly is another matter, which is discussed below.

2. COMDATA'S MOTION TO DISMISS

a. The Fate of Flying J's Common Law and State Antitrust Statute Claims is Tied to Flying J's Federal Antitrust Claims.

Flying J alleges violations of the Utah Antitrust Act (and forty-five other state antitrust acts), [7] Tortious Interference with Prospective Economic Relations, and Civil Conspiracy. To a large extent, the fate of these causes of action is tied to the fate of the federal antitrust claims.

---

the 12(b)(6) motion to dismiss. See *GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997)* (holding that where a written contract is referred to in a complaint and is central to a breach of contract claim, but is not submitted for judicial review, an indisputably **[*6]** authentic copy of the contract may be considered on a motion to dismiss without converting motion to one for summary judgment).

[7] Flying J does not allege violations under each of the other forty-five state antitrust acts. It simply provides the citation to each statute. Because the court should apply the law of the forum in which it sits (Utah), Flying J cannot maintain its alternative claims under other states' statutes. Indeed, the Plaintiffs say they "alleged alternative claims under the applicable statute of each state that prohibits the unlawful conduct complained of in the FAC as protection in the event that this Court finds that the ***antitrust law*** of Utah is not the governing state law applicable **[*8]** to Defendants' conduct. While Plaintiffs realize that applying the law of every one of these states to the claims in this case is not feasible (and Plaintiffs have no intention of attempting to proceed to trial under each of these state statutes), asserting alternative state law claims ensures that Plaintiffs will have recourse to state ***antitrust law*** if this Court were to find that the law of Utah does not apply." (Pls.' Opp'n at 38.) Accordingly, the court dismisses those causes of action that do not arise out of Utah or federal antitrust laws.

First, in the Utah Antitrust Act, the Utah Legislature provided that it "intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes." Utah Code Ann. § 76-10-926 ("Interpretation of Act"). And Flying J admits in its First Amended Complaint that the Utah Antitrust Act "is essentially identical to the Sherman Act." (FAC P 246.) Furthermore, Flying J relies on its Sherman Act allegations to support its claim that the Defendants violated the Utah Antitrust Act.

Second, Flying J alleges, in its **[*9]** Tortious Interference Claim, that violation of the antitrust laws satisfies the tort's "improper means" element.

Third, Flying J contends that tortious interference or violation of the federal and state antitrust statutes satisfies the Civil Conspiracy's requirement that the party prove the existence of one or more unlawful, overt acts.

At this point, no separate analysis of the state law claims is necessary because they are so closely tied to the federal antitrust claims.

b. Effect of the Settlement Agreement and Comdata's Res Judicata Defense

In 1996, Flying J brought suit against Comdata and others in the District Court of Utah, alleging antitrust and tort claims. See Flying J Inc. v. Comdata Network, Inc., Case No. 1:96-CV-66-DAK (D. Utah). In May 2001, the parties settled the action and obtained a stipulated judgment dismissing "all claims and counterclaims that have been or could have been asserted in this action." (May 18, 2001 Order Granting Stipulated Motion for Dismissal of Claims (Dkt # 572 in 1:96-CV-66).)

As part of the Settlement Agreement and Release (effective May 21, 2001), Comdata agreed to pay $ 49 million to the plaintiffs and enter into two license agreements: the "Trendar **[*10]** License" and the "Comdata License." (First Am. Compl. (FAC) P 89.) For a good description of the settlement and the licenses, see *Flying J Inc. v. Comdata Network, Inc., 405 F.3d 821 (10th Cir. 2005)*.

i. Settlement Agreement and Release

The key language of the Settlement Agreement and Release is found in two places in the document: First, the Recitals provide:

> E. WHEREAS, without admitting any wrongdoing or liability and to avoid the expense of further litigation, the Parties to the Settlement Agreement desire to settle the Utah Lawsuit and the Ceridian Lawsuit in their entirety, including all claims, whether known or unknown, that have been asserted or could have been asserted therein against any person or entity . . . .

(Settlement Agreement Recitals P E (incorporated by reference and made part of the agreement).)

Second, in the "Mutual Releases" section, the Settlement Agreement contains a very broadly worded release that reads in pertinent part as follows:

> Subject to the provisions of this Settlement Agreement, FLYING J, TCH, CFJ, TON SERVICES, and TFJ, on behalf of themselves and each of their affiliates, hereby forever release, discharge and acquit COMDATA, TRENDAR, CERIDIAN, and ARBITRON, **[*11]** and each of them, together (as applicable) with each of their successors, assigns, parent corporations, subsidiaries, affiliates, partners, and joint venturers, and each of its or their respective present or former officers, directors, employees, agents, servants, shareholders, attorneys, experts, consultants, insurers, and representatives from any and all rights, claims, obligations, liabilities, causes of action, costs, damages, losses, expenses, compensation, and demands of every kind and nature, whether known or unknown, that are based in whole **or in part** on any conduct occurring on or before the Effective Date [of May 21, 2001] including **but not limited to** conduct that **relates in any way** to i. all claims that have been asserted or could have been asserted in any respect whatsoever in the Utah Lawsuit . . . . v. any and all claims arising out of the relationship between FLYING J, TCH, CFJ, TON SERVICES, and TFJ, on

> the one hand, and COMDATA, TRENDAR, CERIDIAN and ARBITRON, on the other hand through the Effective Date.

(Settlement Agreement & Release P 5.1 (emphasis added).) The court interprets the language "and each of their affiliates" to include Transportation Alliance Bank Inc. **[*12]** (TAB), even though TAB was not actually listed in the release. (Indeed, no party argues that TAB is not subject to the release language.) Accordingly, the fact that the Settlement Agreement only lists three of the four Plaintiffs is not material, and the language of the release should be read to apply to all of the Flying J Plaintiffs.

While the language of the release is very broad, the court agrees with Flying J that it cannot be read to release claims that did not arise as of May 21, 2001, and that are based on post-settlement conduct. (See Settlement Agreement § 5.5 ("Release of Unknown Claims") (containing language agreeing that a "general release does not extend to claims which the [party] does not know or suspect to exist in his favor at the time of executing the release."). Moreover, such a prospective release of antitrust claims would be void as against public policy. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (stating in *dicta* that Court would "have little hesitation in condemning [any] agreement as against public policy" if it were interpreted to be "a prospective waiver of a party's right to pursue statutory remedies **[*13]** for antitrust violations"); *Redel's Inc. v. General Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974)* ("[T]he effect of [a prospective] release could be to permit a restraint of trade to be engaged in, which would have impact, not simply between the parties, but upon the public as well."); *Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955)* (holding that any contract absolving liability for future violation of antitrust statutes would be void as against public policy).

Flying J expressly states that it only alleges claims against Comdata that arose after May 21, 2001. (See FAC P 91.) Such claims are fair game here. Accordingly, Comdata may not prevail on its res judicata defense either, as discussed below.

The only question remaining is to what extent the court may consider the pre-settlement conduct allegations in analyzing the issues raised by the Motion to Dismiss. But if the court finds that post-settlement conduct alleged in the First Amended Complaint is sufficient to survive the motion to dismiss, then the question need not be answered at this point.

ii. Comdata's Res Judicata Defense

Plaintiffs have the better argument on this issue because they alleged anti-competitive acts **[*14]** that have occurred since May 2001. The United States Supreme Court decision in *Lawlor v. National Screen Service Corporation, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)*, is the leading case addressing res judicata in the context of antitrust cases. In Lawlor, the defendants raised res judicata as a defense in a second antitrust suit brought by plaintiffs after an earlier suit between the same parties based on similar conduct was reduced to judgment in 1943. The Court stated:

> That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct - for example, an abatable nuisance - may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here [that were] not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possible have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' **[*15]** alleged monopoly . . . .

Lawlor, 349 U.S. at 327-328.

The overall question is whether the Plaintiffs allege the same cause of action as was alleged in the 1996 suit. The answer is "no." Clearly, Flying J has alleged anti-competitive actions occurring since May 2001. (See, e.g., FAC PP

103 (August 2001 extension of transaction fee increase to all truck stops with 5,000 or fewer Comdata Card transactions per month); 105-196 (revising "Merchant Transaction Pricing Structure"); 123-137 (attempt to punish Irving Oil for switching to TCH card in 2003); 156 (bundling of SmartFuel software with fuel card transaction fee discounts); 178-180 (post-2001 failures to enter fleet card market because of significant barriers to entry); 186 (post-2001 significant barriers to entry into POS system market); 189-194 (insisting on "reverse most favored nations" clauses in agreements with Pilot and TA). See also *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 421 F.2d 1313, 1318 (5th Cir. 1970)* ("[S]ignificant actions (or non actions) occurring subsequent [to the earlier judgment], either alone or in combination with acts which have been completed prior to [the judgment date] may be the basis for **[*16]** new claims for damages traceable to such [actions].").

Also, the District Court for the Southern District of New York, facing a similar issue, emphasized the "public policy considerations against giving a defendant immunity--in fact, perpetual immunity--from liability, for such violations in the future . . . . Here, as in *Lawlor*, while the course of conduct alleged may be a continuing one, the cause of action is not the same but different from that on which the judgments in the 1926 and 1949 actions were rendered." *United States v. Gen. Elec. Co., 358 F. Supp. 731, 740 (S.D.N.Y. 1973)*. See also *Exhibitors Poster Exch., 421 F.2d at 1316* ("the use of [the res judicata doctrine] can cloak a party in perpetual immunity and thus possibly protect conduct lasting long past the prior judgment - conduct that the law may grow to abhor.").

Even though some of the alleged events occurred before May 21, 2001, such as Comdata's acquisition of monopoly power, that does not bar claims asserted by Flying J which are all based on situations and conduct that existed or occurred on or after May 21, 2001.

c. Flying J's Claims Under Sherman Antitrust Act *Sections 1* & *2*

Section 1 of the Sherman Antitrust Act **[*17]** provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1* (emphasis added). Flying J asserts an **"unlawful group boycott"** claim under this provision (see First Claim for Relief). [8] To establish a claim under *Section 1*, the plaintiff must allege facts that show the defendants entered into a contract, combination or conspiracy that unreasonably restrains trade in the relevant market. *TV Comm. Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th Cir. 1992)*. "Under section one we determine the illegality of a . . . conspiracy by examining whether: (1) it constitutes a per se violation of the statute; or (2) its purpose or effect is to create an unreasonable restraint of trade." *Id*. (internal alterations and quotation marks omitted). In other words, the court's analysis under *Section 1* must be either under the "per se" rule or the "rule of reason." The distinction between the two modes of analysis and the circumstances when each applies is discussed below.

Section 2 of the Sherman Antitrust Act provides that a person "shall [not] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 2*. Flying J alleges three causes of action under this provision: **Conspiracy to Monopolize** (Second Claim for Relief), **Unlawful Monopolization** (Sixth Claim for Relief), and **Unlawful Attempt to Monopolize** (Seventh Claim for Relief). For a quick summary of the elements of each cause of action, see *TV Communications Network, 964 F.2d at 1025-26*. See also *Verizon Commc'ns. Inc. v. Law Office of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (addressing claim of "refusal to deal," the Court said, "the possession of monopoly power will not be found **[*19]** unlawful unless it is accompanied by an element of anticompetitive *conduct.*") (emphasis in original).

i. Brief Description of Each Party's Business and Function in the "Relevant Markets"

---

[8] The Clayton Act provides the private cause of action **[*18]** to sue under the Sherman Act and allows for monetary and injunctive relief. See *15 U.S.C. § 12* (called the Clayton Act, it nevertheless defines "Antitrust Laws" to include the Sherman Act); *§ 15* (Clayton Act Section 4) (allowing for damages to person injured by antitrust violation); *§ 26* (Clayton Act Section 16) (allowing injunctive relief for private parties).

Before getting into the legal arguments, it is important to understand the business and function of each of the parties in the markets at issue.

(a) The Parties

Flying J, Inc. owns or operates nearly 170 truck stops in the United States. It brings the case "in both its capacity as operator and also on behalf of the owners of the Flying J truck stops that Flying J operates, including itself." (FAC P 3.)

TCH (partially owned by Flying J) provides "a transportation clearinghouse and trucker fuel cards to truck fleets, trucking companies, their drivers, and independent owner/operators throughout the United States." (FAC P 4.) It "offers a Trucker Fuel Card [specifically called a 'TCH Card'] to long-haul truck drivers and their truck fleets . . . and processes Trucker Fuel Cards for other card issuers." (Id.) The Plaintiffs define "Truck Fleets" as "[l]ong-haul 'over the road' truck drivers, including both drivers who work for trucking companies and independent owner/operators." (FAC P 16.) [9] A "Trucker Fuel **[*20]** Card" (sometimes generically called a trucker fleet card) is a charge or credit card with additional features offered to Truck Fleets, including real-time data capture (information is immediately transmitted to the trucking company for monitoring driver's movements and activities, equipment, and costs), frequent and specialized reporting (e.g., for the purpose of tracking fuel taxes), purchase controls (allowing the trucking company to limit the amount and nature of the driver's purchases), and negotiated or discounted diesel fuel prices. (FAC P 25.)

> By gathering such data from truck drivers at every fuel stop, Truck Fleets are able to monitor and control such things as the location of their trucks, when fuel is purchased, the amount of fuel that is purchased, the purchases of their drivers, and other information desired by Truck Fleets. Truck Fleets rely on gathering such electronic data to control their costs and to plan effective utilization of their assets and employees. Purchase controls are essential to Truck Fleets who must monitor and control the expenditures by their truck driver employees or leased owner/operator drivers who are purchasing fuel or other goods or services using **[*21]** the Truck Fleet's money at remote locations across the United States, in an industry with high driver turnover. Individual owner/operator truck drivers use Trucker Fuel Cards for such things as credit services, recordkeeping including tracking of information needed for state fuel taxes, and to obtain special fuel pricing that is sometimes available.

(FAC P 24.) The special features of Trucker Fuel Cards are only available if the cards are used at merchants that accept those cards at their fueling locations.

Transportation Alliance Bank Inc. (TAB) (a wholly owned subsidiary of Flying J) "provides financial products and services to Truck Fleets and others." (Id. P 5.) It issues the TCH card, and extends credit to the trucking fleets. It retains a portion of fees paid by the truck stops for processing the card purchases.

TON Services Inc. (a wholly owned subsidiary of Flying J) provides "transportation related services and products to Truck Fleets and others." (FAC P 6.) For example, it provides Wi-Fi Services (e.g., wireless internet access, and mobile **[*22]** phone service) and calling cards to truckers.

The Pilot Travel Centers LLC and **Pilot Corporation** own and operate a large national chain of truck stops (travel plazas).

The now-dismissed **TA Defendants (TA Operating LLC and TravelCenters of America LLC)** are nationwide chains that own and operate travel centers to serve long-haul trucking fleets and their drivers, independent truck drivers and general motorists. They compete with Flying J and Pilot.

---

[9] "Truck Fleets" does not include local truck fleets and local truck drivers whose routes do not require an overnight stay away from home.

Comdata Network, Inc. d/b/a Comdata Corporation issues trucker fleet cards like the TCH cards, and it provides hardware and software for point-of-sale (POS) transactions (the Trendar System). Pilot and TA accept Comdata's fleet cards but refuse to accept the TCH card.

(b) The Markets

For antitrust analysis, a market has a geographic component and a product component. Areeda & Hovenkamp, ***Antitrust Law*** P 530 (3d ed. 2007). The court's inquiry under *Sections 1* and *2* of the Sherman Act usually begins by defining the "relevant market" (i.e., the "market relevant to the legal issue before the court"). *SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958, 966 (10th Cir. 1994)*. "'That market is composed of products that have reasonable interchangeability for **[*23]** the purposes for which they are produced--price, use, and qualities considered.'" Id. (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*.

Flying J has identified three relevant product markets: the "Trucker Fuel Card Market," the "Truck Stop POS Systems Market," and the "Major Truck Stops Market." The relevant geographic market for all three product markets is the continental United States.

Flying J discusses all three markets, which are intertwined. But the market where it alleges anti-competitive conduct (i.e., injury to competition) is the Trucker Fuel Card Market.

Plaintiffs allege antitrust violations in the Trucker Fuel Card Market, [10] which is a "two-sided" market (that is, the market serves two classes of customers: truck stops and truck fleets). The two-sided market has "network effects," meaning that "'demand for a fleet card rises with the number of truck stops that accept the card, which in turn depends on the number of fuel purchase automation systems that accept the card.'" *Flying J Inc. v. Comdata Network, Inc., 405 F.3d 821, 827 n.1 (10th Cir. 2005)* (quoting FTC analysis of antitrust issues concerning Comdata). The 2005 Tenth Circuit case **[*24]** just cited provides a very good explanation of the relationship between the parties and the details of the business transactions at issue. (See also Paragraphs 32-40 of the First Amended Complaint (discussing product and geographic markets).)

ii. Summary of Flying J Plaintiffs' Dispute with Defendants

Under *Section 1* of the Sherman Act, the Plaintiffs allege an unlawful horizontal and vertical conspiracy that harms competition in the Trucker Fuel Card Market and the Major Truck Stops Market and is perpetuated through concerted action by Comdata, Pilot, and TA. *Section 1* of the Sherman Act prohibits illegal restraints of trade. There are several categories of restraints of trade, including horizontal restraints (agreements among competitors such as TA and Pilot) and vertical restraints (agreements between purchaser and supplier, such as TA and Pilot on the one hand and Comdata on the other hand). Specifically, Flying J alleges a group boycott, also known as concerted refusals to deal, which "are agreements among **[*25]** rivals to refuse to deal either with a competitor or with third parties who deal with the competitor." Federal ***Antitrust Law*** § 9.2 (Matthew Bender & Co. 2007).

The group boycott, which has aspects of both horizontal and vertical restraints, is explained in the First Amended Complaint as follows:

> Pilot and TA, two major truck stop chains, have worked in concert with each other and with Comdata as though they are all part of one vertically integrated entity instead of three separate firms. This conspiracy, resulting from the cooperative and concerted action among Comdata, Pilot, and TA, is referred to in this Complaint as: "The Conspiracy." Both on its own and in concert with Pilot and TA, Comdata has sought to limit TCH's card acceptance network and the attractiveness of the TCH Trucker Fuel Card to Truck Fleets, through its high transactions fees to the independent truck stops that accept the TCH card and through low transaction fees as a "*quid pro quo*" to the large truck stop chains, including Defendants Pilot and TA, that are willing to maintain

[10] Flying J notes that Comdata's request to dismiss any claim relating to the POS Systems Market is moot because the Plaintiffs do not allege harm to competition in that market.

> their boycott of TCH Trucker Fuel Card transactions. [This is referred to as the two-tier pricing structure.] Comdata has induced and rewarded **[*26]** Pilot and TA to maintain their boycott of the TCH Trucker Fuel Card, while suppressing fuel discount competition between Pilot and TA. Comdata has worked closely with Pilot and TA, providing financial and other rewards to them while disadvantaging their truck stop competitors, all in exchange for their assistance in helping Comdata to maintain its dominant position in the Trucker Fuel Card Market. That structure benefits Defendants Pilot and TA by lowering their costs while dramatically increasing the costs of their rivals that also are able to accept Comdata Cards as a method of payment, the independent truck stops.

(FAC P 43.) "The Conspiracy derives its market power from Comdata's monopoly power in the Trucker Fuel Card Market and Truck Stop POS Systems Market, and the substantial combined market share of Pilot and TA in the Major Truck Stops Market." (Id. P 46.)

Under Sherman Act *§ 2*, the Plaintiffs challenge the unilateral anti-competitive conduct of Comdata, alleged to have a monopoly in the Trucker Fuel Card Market and Truck Stop POS Systems Market.

> *Section 2* [of the Sherman Act] creates three offenses: monopolization, attempted monopolization, and conspiracy to monopolize. [Plaintiffs **[*27]** have alleged all three.] Monopolization is the acquisition or maintenance of monopoly power to inefficient collusive or exclusionary means, which may include, but are not limited to restraints that violate *Section 1*. Thus, the offense requires a showing of monopoly power and inefficient acts used to acquire or maintain it. Monopolistic acts include mergers to monopoly and various exclusionary practices, like predatory pricing, refusals to deal, exclusive contracts, and so forth. Attempted monopolization is the doing of these kinds of monopolistic acts with the specific intent to monopolize in circumstances in which there is a dangerous probability of success. Thus, while monopolization and attempted monopolization typically involve similar conduct, the attempt offense requires a showing of somewhat more egregious conduct, and something less than present monopoly power.

Id. (footnotes omitted).

d. Sufficiency of Conspiracy Allegations Under *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Comdata challenges the sufficiency of conspiracy allegations supporting Flying J's First and Second Claims for Relief--Unlawful Group Boycott and Conspiracy to Monopolize--which are brought, respectively, **[*28]** under the Sherman Antitrust Act *Sections 1* and *2*. Given the "plausible" standard in *Twombly*, and taking the Plaintiffs' allegations as true, the allegations of post-settlement conduct (and inferences to be drawn from them) are sufficient to establish a conspiracy under the standards applicable to 12(b)(6) motions to dismiss. (See Pls.' Opp'n Mem. at 22-23 (citing to post-settlement conduct allegations in the First Amended Complaint and Confidential Appendix).) Consequently, the court need not determine whether the pre-settlement conduct allegations may be considered.

e. Antitrust Injury and Antitrust Standing

Antitrust injury is a component of antitrust standing, which is a concept wholly separate from traditional standing under the United States Constitution. *Abraham v. Intermountain Health Care, Inc., 461 F.3d 1249, 1267 (10th Cir. 2006)*. Antitrust standing essentially derives from the Clayton Act, which defines who may maintain an antitrust action for damages or injunctive relief, and from decisions by the United States Supreme Court. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *Sports Racing Servs., Inc. v. Sports Car Club of America, Inc., 131 F.3d 874, 881 (10th Cir. 1997)*. **[*29]** The Tenth Circuit decision in *Sports Racing Services* contains a very good description of antitrust standing. See also, e.g., *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (discussing antitrust injury).

Courts apply a two-prong test to determine whether a plaintiff has antitrust standing.

> To maintain standing to bring an antitrust claim under § 4 of the Clayton Act, *15 U.S.C. § 15* [providing for treble damages], a plaintiff must show (1) an "**antitrust injury;**" and (2) a **direct causal connection** between that injury and a defendant's violation of the antitrust laws. . . . To meet the first prong, [plaintiffs] must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . To establish the second prong of antitrust standing, [plaintiffs] must show the antitrust injury resulted directly from [defendants'] violation of ***antitrust law***.

Sports Racing Servs., 131 F.3d at 882 (internal quotations omitted; emphasis added) (providing non-exhaustive list of factors to consider when **[*30]** evaluating antitrust standing). Antitrust laws were intended to prevent injury to competition, not injury to competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Tal v. Hogan, 453 F.3d 1244, 1257-58 (10th Cir. 2006)* ("The primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm.") (citing Brunswick Corp.).

Comdata contends that Flying J has not alleged antitrust injury because the effects of the alleged conspiracy actually would benefit Flying J by hurting its rivals (other truck stops). Comdata also argues that Flying J and TON have not alleged antitrust standing because they do not compete in the relevant market (truck fleet cards) and their alleged injuries (lost sales) are indirect and too remote from the alleged restraint of competition.

First, the court finds that Flying J has established antitrust injury (that is, a business or property injury that the antitrust laws were intended to prevent and that flows from the alleged anticompetitive conduct of the Defendants). The network effects of the two-sided market shows how interconnected the parties, their businesses, and their **[*31]** markets are. See, e.g., *Blue Shield of Virginia v. McCready, 457 U.S. 465, 483-84, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (holding that "although [Plaintiff] was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on [the relevant] market" and that her injury was the type Congress intended to address by the antitrust laws); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 963 (10th Cir. 1990)* ("[A]n antitrust plaintiff need not necessarily be a competitor or consumer.") (citing McCready). The First Amended Complaint alleges the negative "network effects" of Comdata's two-tiered pricing strategy in the two-sided market (one side is the truck stop market, which Flying J directly competes in). An antitrust injury must be "attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Although there may be a small "benefit" to Flying J, the overall harm is much more substantial, and the allegations establish that Flying J's loss of customers and diesel fuel sales is attributable to the anticompetitive actions alleged in the First Amended **[*32]** Complaint.

Second, the court finds that Flying J and TON have established antitrust standing. Flying J participates in the Trucker Fuel Card Market as a consumer, and consumers are favored as antitrust plaintiffs. Also, TON's injury is "inextricably intertwined with the injury the conspirators sought to inflict" on market participants. See *McCready, 457 U.S. at 484*. (See also Pls.' Opp'n Mem. at 27-31 (persuasively analyzing allegations under the factors set forth in *Elliott Indus. Ltd. P'ship v. BP America Prod. Co., 407 F.3d 1091, 1124 n.31 (10th Cir. 2005)*, and *Abraham, 461 F.3d at 1268*).)

f. Does *Per Se* Analysis Apply to Allegations of Illegal Restraint?

To determine whether an alleged restraint of trade is unreasonable (i.e., illegal) under Sherman Act *§ 1* (a reasonable restraint of trade is not actionable), the court applies either a "per se" analysis or a "rule of reason" analysis. The Tenth Circuit decision in *Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195 (10th Cir. 2006)*, provides a thorough description of the two modes of analysis.

The Plaintiffs allege that the Defendants' conduct is illegal under both a per se analysis and a rule of reason analysis. Comdata contends **[*33]** that the per se rule is not applicable here because the alleged conspiracy contains a vertical agreement (for which a per se analysis is prohibited under Tenth Circuit law) and does not rise to the level of egregiousness required to apply the per se rule.

The presumption is that the "rule of reason" analysis applies to a court's analysis of whether defendants' conduct unreasonably restrains trade. *Diaz v. Farley, 215 F.3d 1175, 1182 (10th Cir. 2002)*.

> [The rule of reason approach] requires the factfinder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Per se analysis is reserved for agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal* without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Id. (emphasis added).

Some group boycotts have been deemed per se illegal, but not all. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 293-94, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* ("not every cooperative **[*34]** activity involving a restraint or exclusion will share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences."); *Gregory, 448 F.3d at 1203-04* (per se approach "'has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.'") (quoting *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

> Cases to which the U.S. Supreme Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In these cases, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market.

Northwest Wholesale Stationers, 472 U.S. at 294 (internal citations omitted).

The *Northwest Wholesale Stationers* description of per se illegal boycotts resembles the boycott alleged in the Plaintiffs' First Amended Complaint. The Plaintiffs **[*35]** allege that Comdata (who has a dominant position in the fleet card market) provides a *quid pro quo* to TA and Pilot (who, in combination, hold a dominant position in the truck stop market) by charging TA and Pilot much lower transaction fees in exchange for TA's and Pilot's boycott of the TCH Card. By refusing to accept the TCH Card, TA and Pilot cut off access to the dominant fuel card processing technology-- Comdata's Trendar POS system--which in turn cuts off access to an entire section of the market for fleet cards and diesel fuel and other services typically provided by travel plazas. Moreover, Plaintiffs allege that Comdata uses its market power to financially punish truck fleets and truck stops (typically independent truck stops) who use or accept the TCH card. This is akin to denial of access to a facility that TCH and independent truck stops need to compete. The allegations, taken as true, fall within the requirements of a per se rule.

The other hurdle that the Plaintiffs must clear to salvage their *per se* theory of liability is the Tenth Circuit rule that a vertical group boycott is, as a matter of law, not subject to the *per se* rule. See *Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1392* **[*36]** ("In this circuit, to establish that a group boycott is *per se* illegal 'there must be an agreement among conspirators whose market positions are horizontal to each other.'") (quoting *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1224 n.1 (10th Cir. 1986))*. "While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at the same market level." *Key Financial Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 641 (10th Cir. 1987)*.

Comdata contends that because Comdata's relationship with TA and Pilot is vertical, the Plaintiffs' per se theory fails as a matter of law. But the case law is not completely clear on this issue. Here, Plaintiffs have alleged a horizontal boycott of TCH by TA and Pilot (competitors in the same market and on the same market level). But the conspiracy also has a vertical component to it (Comdata's quid pro quo with TA and Pilot). The court is not convinced that Comdata's presence in the alleged agreement is sufficient to nullify a *per se* analysis. Comdata is not boycotting TCH; TA and Pilot are. Comdata facilitates the boycott by TA and Pilot. The court finds that the **[*37]** rule stated in Coffey does not apply here, because the concerted activity includes "two or more competitors at the same market level," as Key required. See *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136, 119 S. Ct. 493, 142*

L. Ed. 2d 510 (1998) (holding that precedent in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, "makes the per se rule inapplicable [in] the case before us [because it] concerns only a vertical agreement and a vertical restraint[.]") (emphasis added).

CONCLUSION

Given the detailed First Amended Complaint and the Confidential Appendix incorporated into it, Comdata and Pilot cannot prevail on their motions to dismiss. The allegations are extensive and must be taken as true. Ultimately, the Plaintiffs have the better arguments at this stage, and so the motions to dismiss are denied, with the exception that the claims under state antitrust acts other than Utah's antitrust act are dismissed.

ORDER

For the foregoing reasons, Comdata Network, Inc.'s Motion to Dismiss the Amended Complaint, or, in the Alternative, Strike All Allegations of Pre-Settlement Conduct pursuant to *Fed. R. Civ. P. 12(f)* (Docket Entry No. 346) is DENIED, with the exception that the request to dismiss all claims under **[*38]** non-Utah antitrust statutes is GRANTED. Similarly, the Pilot Defendants' Motion to Dismiss First Amended Complaint (Docket Entry No. 354) is DENIED, with the exception that the request to dismiss all claims under non-Utah antitrust statutes is GRANTED.

SO ORDERED this 14th day of November, 2008.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

Chief Judge

Edwards v. City of Henry

Appellate Court of Illinois, Third District

November 17, 2008, Modified Opinion Filed; August 19, 2008, Filed

No. 3-07-0652

Reporter

385 Ill. App. 3d 1026 *; 924 N.E.2d 978 **; 2008 Ill. App. LEXIS 1351 ***; 338 Ill. Dec. 452 ****

KENIN L. EDWARDS, Individually and as Sole Stockholder of Corsaw Log and Lumber, Inc., and as Sole Stockholder of Illinois River Holdings, Inc., Plaintiff-Appellant and Cross-Appellee, v. THE CITY OF HENRY, an Illinois Municipal Corporation, Defendant-Appellee and Cross-Appellant.

Subsequent History: Appeal denied by *Edwards v. City of Henry, 231 Ill. 2d 666, 904 N.E.2d 979, 2009 Ill. LEXIS 916, 328 Ill. Dec. 469 (Ill., Mar. 25, 2009)*

Prior History: [*1]** Appeal from the Circuit Court of the 10th Judicial Circuit, Marshall County, Illinois, No. 07-CH-05. Honorable John A. Barra, Judge, Presiding.

Edwards v. City of Henry, 894 N.E.2d 177, 2008 Ill. App. LEXIS 820, 323 Ill. Dec. 618 (Ill. App. Ct. 3d Dist., 2008)

Disposition: Affirmed in part and remanded with directions.

Core Terms

sanctions, Antitrust, amend, immunity, trial court, reconsideration motion, unauthorized practice of law, annexation, municipal, motion to dismiss, drafted, pro se, original complaint, local government, sole stockholder, amended complaint, developer, zoning, corporate interest, immunity provision, city official, reconsider, nonlawyer, disqualification motion, cause of action, proceedings, appearance, requesting, withdraw, damages

LexisNexis® Headnotes

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

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN1[] **Standards of Review, Abuse of Discretion**

As a general rule, a motion to amend a complaint is a matter that lies within the trial court's sound discretion, and the court's decision will not be disturbed on review in the absence of an abuse of discretion.

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

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

An abuse of discretion is demonstrated if no reasonable person would take the view adopted by the trial court.

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

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN3[] **Standards of Review, Abuse of Discretion**

A primary consideration in determining whether the court abused its discretion by denying leave to amend is whether the proposed amendment would cure the defective pleading.

Antitrust & Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN4[] **Antitrust & Trade Law**

740 ILCS 10/5(15) (2006) contains 15 enumerated exceptions to the application of the Illinois Antitrust Act, *740 ILCS 10/1 et seq.* (2006).

Antitrust & Trade Law > General Overview

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN5[] **Antitrust & Trade Law**

See *740 ILCS 10/5(15)* (2006).

Antitrust & Trade Law > General Overview

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Local Governments > Employees & Officials

HN6[] **Antitrust & Trade Law**

740 ILCS 10/5(15) (2006) means that both municipalities and their employees, agents, and officers are immune from liability under the Illinois Antitrust Act, *740 ILCS 10/1 et seq.* (2006).

Governments > Local Governments > Boundaries

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Property

HN7[] Local Governments, Boundaries

Contracting with parties seeking to annex property is not an illegal municipal activity, *65 ILCS 5/11-15.1-1* (2006), and a municipality is not precluded from zoning property outside city limits when the property is subject to an annexation agreement.

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN8[] Baseless Filings, Frivolous Lawsuits

Ill. Sup. Ct. R. 137 provides that a court may impose sanctions upon a party or his attorney, including the reasonable cost of defending an action, that is not warranted by existing law or an action that is interposed for an improper purpose, such as to harass, to cause unnecessary delay, or to increase the expense of litigation.

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

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

HN9[] Standards of Review, Abuse of Discretion

The trial court's ruling on a motion for *Ill. Sup. Ct. R. 137* sanctions should not be reversed on review unless the trial court abused its discretion.

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN10[] Baseless Filings, Frivolous Lawsuits

The purpose of *Ill. Sup. Ct. R. 137* is to prevent parties from abusing the judicial process with vexatious actions unsupported by fact or law, not to punish litigants and their attorneys merely because they were unsuccessful in the litigation.

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Governments > Courts > Rule Application & Interpretation

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN11[] **Baseless Filings, Frivolous Lawsuits**

Since *Ill. Sup. Ct. R. 137* is penal in nature, it is strictly construed.

Business & Corporate Law > Corporations > General Overview

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Agents

Legal Ethics > Unauthorized Practice of Law

Civil Procedure > Parties > Real Party in Interest > Required Representation

HN12[] **Business & Corporate Law, Corporations**

A corporation may not initiate actions in courts of Illinois unless the corporation is represented by an attorney. A complaint drafted by a nonattorney on behalf of a corporation constitutes the unauthorized practice of law rendering the pleading a nullity and any judgment entered on it void. An attorney's subsequent appearance and adoption of a complaint improperly drafted by a nonattorney does not absolve the drafter of the unauthorized practice of law.

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Agents

Business & Corporate Law > Corporations > General Overview

Civil Procedure > Parties > Real Party in Interest > Required Representation

HN13[] **Corporate Governance, Shareholders**

A sole stockholder cannot bring a lawsuit in his own name for a cause of action belonging to a corporation except under very limited circumstances. A logical extension of this principle leads to the conclusion that an individual cannot bring an appeal in his name on behalf of separate corporate interests.

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Agents

Legal Ethics > Unauthorized Practice of Law

Civil Procedure > Parties > Real Party in Interest > Required Representation

HN14[] **Representative Capacity, Agents**

A nonlawyer who initiates a lawsuit to obtain relief on behalf of another person or other corporate entities, other than himself, engages in the unauthorized practice of law.

Civil Procedure > Appeals > Frivolous Appeals

HN15[] **Appeals, Frivolous Appeals**

An award of attorney fees may be granted as a sanction if a party wilfully refuses to comply with appellate rules, or where an appeal is taken in bad faith or for an improper purpose. *Ill. Sup. Ct. R. 375*. An appeal is deemed frivolous if a reasonable, prudent attorney acting in good faith would not have brought it.

Judges: JUSTICE WRIGHT delivered the opinion of the court. McDADE, P.J., and O'BRIEN, J., concur.

Opinion by: WRIGHT

Opinion

[*1027] **[**981]** **[****455]** Modified Upon Denial of Rehearing

JUSTICE WRIGHT delivered the opinion of the court:

On January 24, 2007, plaintiff Kenin L. Edwards filed a single-count, *pro se* complaint against defendant City of Henry requesting damages for alleged violations of the Illinois Antitrust Act (Act) (*740 ILCS 10/1 et seq*. (West 2006)). The City filed a "Motion to Dismiss and for Sanctions" claiming immunity under the Act (*740 ILCS 10/5(15)* (West 2006)) and alleging that plaintiff lacked a good-faith basis for the complaint. The motion also asserted that plaintiff, a nonlawyer, improperly sought to represent two corporations. [1] The trial court granted the City's motion to dismiss but denied the requested sanctions. Edwards subsequently filed a *pro se* "Motion to Reconsider" claiming status as both an individual and as sole stockholder of both **[*1028]** corporations. The motion to reconsider also requested leave to amend the complaint. **[***2]** The court denied Edwards' motion to reconsider, and he appeals. The City cross-appeals from the denial of the motion for sanctions. We affirm in part and remand for further proceedings.

BACKGROUND

Plaintiff's complaint alleged that he was the sole stockholder of two Illinois corporations, Illinois River Holdings, Inc. (IRH) and Corsaw Log & Lumber, Inc. (Corsaw). According to the complaint, Corsaw was the record titleholder of 505 acres located in section 4 of Henry Township, located in Marshall County (County). The complaint stated that IRH was the titleholder of record of all mineral rights to the same 505-acre parcel, and Edwards individually owned mineral leases for the same land.

The complaint stated that, in 2003, Corsaw applied for a special use permit from the Marshall County zoning office to surface mine its 505 acres of land for sand and gravel. The City of Henry (City) opposed the application filed with the County because the land was within 1 1/2 miles of **[***3]** the City's boundaries. Ultimately, Corsaw withdrew its request for a special use permit from the county zoning office and, according to Edwards' complaint, the corporation began mining the land in June 2004 without a special use permit.

According to the complaint, on June 9, 2004, the City instituted litigation against Edwards, Corsaw, and IRH to enjoin the mining operation in the County. The result of that litigation is not stated, and the case (Marshall County circuit court case No. 04-CH-16) apparently remained unresolved when the instant suit was filed in 2007.

The complaint further alleged that, in October 2006, the City and Ozinga Materials, Inc., (the developer), a wholly owned subsidiary of Ozinga Bros., Inc. (Ozinga Bros.), filed joint petitions for reclassification of their acreage located in section 10 of Henry Township within Marshall County, to change the zoning from county agricultural to city heavy industrial I-2, and requested annexation of the property to the City of Henry. The City contemporaneously

[1] In the caption of the notice of appeal and appellate briefs, plaintiff did not include any reference to Corsaw Log & Lumber, Inc., or Illinois River Holdings, Inc. Accordingly, we consider Edwards, as the sole appellant.

began proceedings to amend the City's zoning ordinance to allow surface mining and the operation of a port facility with access to the Illinois River. The joint petition **[***4]** provided that, in the event the developer, Ozinga Materials, Inc., acquired **[**982]** **[****456]** additional land in sections 4 and 9 of Henry Township, the developer agreed to enter into an annexation agreement and a covenant and impact fee agreement with the City for the additional property.

On November 8, 2006, the zoning board for the City heard testimony and comments at the public meeting, held to address the **[*1029]** proposed rezoning of the property subject to the annexation agreement. The city attorney, Richard Joseph, stated that he drafted the covenant and impact fee agreement appended to the joint annexation petition of the City and the developer, Ozinga Materials, Inc. In this document, he included a provision that restricted the developer from allowing the use of the proposed port to transport materials mined from property located within 1 1/2 miles of the City's corporate limits, unless the property was also subject to the terms of an annexation agreement with the City. Joseph explained that the purpose of this clause was to make it uneconomical for persons to mine property within this 1 1/2-mile "collar" that the City did not want mined.

Based on Joseph's statement, the complaint alleged the purpose **[***5]** of the annexation petition was to make it uneconomical for a property owner, who did not have an annexation agreement with the City, to mine the section 4 property and thus diminished the value of the property in the event of a sale. According to Edwards, the City's conduct constituted a violation of the Illinois Antitrust Act by allowing the developer to acquire a monopoly over trade and commerce for the purpose of excluding him, Corsaw, and IRH as competitors. In the prayer for relief, "the plaintiff," Edwards, requested that the Court enter judgment in "their" favor and against defendant in excess of $ 50,000 and award "them" costs.

On February 22, 2007, attorney Jeffery E. Krumpe of the law firm Miller, Hall & Triggs, entered his appearance for the City and filed a motion to dismiss under *section 2-619* of the Code of Civil Procedure (*735 ILCS 5/2-619* (West 2006)). The City requested sanctions against Edwards under *Supreme Court Rule 137* (155 Ill. 2d R. 137) alleging the complaint was not filed in good faith. This motion stated that Edwards' complaint was defective and Edwards lacked standing because Corsaw owned the real estate, IRH owned all mineral rights beneath the property, **[***6]** and Edwards alleged he was the "owner of mineral leases related to the property" but attached nothing to the complaint to verify Edwards had any individual interest in the property. Additionally, the City's motion alleged that Edwards, a nonlawyer, previously had been admonished by the court in related litigation for the unauthorized practice of law by attempting to represent the corporations, Corsaw and IRH, in violation of the Illinois Attorney Act (*705 ILCS 205/1* (West 2006)). Alternatively, the City asserted section 5 of the Act (*740 ILCS 10/5* (West 2006)) provided the City with immunity from antitrust litigation. *740 ILCS 10/5* (West 2006).

On March 7, 2007, attorney Carl F. Reardon entered his appearance as counsel for Edwards, individually. Reardon did not amend, refile **[*1030]** or redraft the complaint as signed by Edwards. Instead, Reardon moved for a substitution of Judge Scott A. Shore, as a matter of right (*735 ILCS 5/2-1001(a)(2)* (West 2006)), and the cause was reassigned to Judge John A. Barra. Next, Reardon filed a motion for disqualification of attorneys Joseph and Krumpe and the law firm of Miller, Hall & Triggs. On June 15, 2007, the court denied the motion to disqualify defense **[***7]** counsel without prejudice.

[983]** **[****457]** Attorney Krumpe argued the City's combined *section 2-619* motion to dismiss and request for *Rule 137* sanctions because Edwards frivolously filed the original complaint against the City. Krumpe emphasized that the Illinois Antitrust Act unambiguously stated that units of local government were immune from liability and that the City was a unit of local government as defined by *article VII, section 1, of the Illinois Constitution* (*Ill. Const. 1970, art. VII, §1*). Krumpe contended Reardon should not have filed a motion to disqualify or argued the motion to dismiss because the complaint was filed against the City in light of this immunity. Instead, Krumpe argued that Reardon had a duty to advise his client that statutory immunity barred the lawsuit.

In response, attorney Reardon argued that the City could only act within the authority granted by the legislature. He contended that, since the section 4 property was located outside the city limits, the City could not claim immunity for unauthorized actions when the City joined with the developer to eliminate competition within a 1 1/2-mile corridor outside the City's boundaries. In reply to Reardon's argument, attorney **[***8]** Joseph argued that the Illinois

Supreme Court ruled that a municipality is authorized to enter into annexation agreements with respect to parcels of property located outside of its boundaries. (*Village of Chatham v. County of Sangamon, 216 Ill. 2d 402, 429, 837 N.E.2d 29, 297 Ill. Dec. 249 (2005)*, citing *65 ILCS 5/11-15.1-2.1(a)* (West 2002)). Finally, Reardon reiterated his position that the City was not authorized by the Illinois Municipal Code (*65 ILCS 5/1-1-1 et seq*. (West 2002)) to enter into an annexation agreement in violation of the State's ***antitrust law***. A discussion between the court and the attorneys ensued discussing that the federal antitrust statutes did not include a similar immunity provision to that which was included in the Illinois Antitrust Act.

Following the parties' arguments, Judge Barra took a brief recess to review case law. When the hearing resumed, he asked the parties whether they were conversant with *Du Page Aviation Corp. v. Du Page Airport Authority, 229 Ill. App. 3d 793, 594 N.E.2d 1334, 171 Ill. Dec. 814 (1992)*. Judge Barra reviewed the appellate court's analysis of the Illinois Antitrust Act's immunity provision at issue in that case (Ill. Rev. Stat 1989, ch. 38, par. 60-5(14)) and observed that the immunity provision **[***9]** under the **[*1031]** current Act (*740 ILCS 10/5(15)* (West 2006)) mirrored the provision considered in *Du Page Aviation*. The *Du Page Aviation* court ruled that the defendant airport authority was a "unit of local government" as defined by the Illinois Constitution of 1970 and was, therefore, immune from liability under the Illinois Antitrust Act.

Based on *DuPage Aviation*, Judge Barra granted the City's motion to dismiss with prejudice and denied sanctions. In so ruling, the court commented as follows:

> "[W]hether the Illinois Legislature made a right decision or not, it's really not for me *** to decide what they are doing is legal or illegal. The question becomes, are they immune from the Illinois Antitrust Act? And it seems about as plain of language as I can get, that it says it is. *** [T]here is an Illinois Appellate Court case on point *** and there is [sic] no other cases that say anything differently.
>
> It's not saying what they did was even legal. The only thing before me is whether it violates the Illinois Antitrust Act. And I believe and the cases say that it is immune. * * * And it's not a question of repleading, because even though you plead more facts, one thing you can't plead is that **[***10]** it is not a unit of **[**984]** **[****458]** local government.*** And therefore *** the motion is granted. The motion for sanctions is denied."

On July 13, 2007, Edwards, acting in an individual capacity and as "sole stock holder of his corporations," filed a *pro se* "Motion to Reconsider." Citing *Lathrop v. Juneau & Associates, Inc., 220 F.R.D. 330 (S. D. Ill. 2004)*, the motion requested leave to amend the complaint to assert the antitrust claim against the city officials and its attorney on the ground that these individuals acted outside the scope of their authority. Edwards did not attach a proposed amended complaint to the motion.

On August 30, 2007, immediately before Edwards presented arguments in support of the *pro se* written motion, attorney Reardon orally moved for leave to withdraw as Edwards' attorney. Reardon noted that Edwards was bringing the motion for reconsideration without counsel's assistance.

Edwards then addressed the court and argued that, pursuant to *Lathrop*, he should be allowed 28 days to file an amended complaint to add city officials as parties and to allege that the city attorney's conduct in drafting the annexation agreement exceeded the scope of his official authority. In response, **[***11]** attorney Krumpe argued the immunity provision of the Act extended to "the activities of the employees, agents and officers of a unit of local government" (*740 ILCS 10/5(15)* (West 2006)).

[*1032] After hearing the parties' arguments, the court denied the motion to reconsider which asked to amend the original complaint. Addressing the assertion that the city attorney acted outside his authority, the court observed, "[T]he only thing you've alleged now is that the lawyer may have given them bad advice. That doesn't make it outside the scope of authority." Edwards appeals this decision of the trial judge.

The City cross-appeals, contending that both plaintiff and attorney Reardon should be sanctioned for violating *Supreme Court Rules 137* and *375* (155 Ill. 2d Rs. 137, 375).

ANALYSIS

I. Appeal

Proceeding *pro se* on appeal, Edwards does not identify himself in dual capacities, but continues to argue for relief for wrongs to the corporations. On appeal, Edwards does not distinguish the causes of action he may have as an individual from an interest as the sole stock holder of either corporation. Edwards generally argues the trial court abused its discretion in denying the request to file an amended complaint. **[***12]** In response, the City contends Edwards waived this issue by failing to tender a proposed amended complaint to the trial court. The City also argues that, waiver aside, nothing contained in the *pro se* "Motion to Reconsider" gives rise to a cause of action under the Act.

HN1[] As a general rule, a motion to amend a complaint is a matter that lies within the trial court's sound discretion, and the court's decision will not be disturbed on review in the absence of an abuse of discretion. *Compton v. Country Mutual Insurance Co., 382 Ill. App. 3d 323, 331-32, 887 N.E.2d 878, 320 Ill. Dec. 734 (2008)*. ***HN2***[] An abuse of discretion is demonstrated if no reasonable person would take the view adopted by the trial court. *In re Marriage of Schneider, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 291 Ill. Dec. 601 (2005)*. ***HN3***[] A primary consideration in determining whether the court abused its discretion by denying leave to amend is whether the proposed amendment would cure the defective pleading. *Compton, 382 Ill. App. 3d at 332*, **[**985]** **[****459]** citing *Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 273, 586 N.E.2d 1211, 166 Ill. Dec. 882 (1992)*.

The original complaint drafted by Edwards relied on the Illinois Antitrust Act as the only basis for the cause of action. *740 ILCS 10/1 et seq*. (West 2006). Edwards' attorney reemphasized **[***13]** this position in his argument during the motion to dismiss hearing. Edwards' complaint asserted that the City's contractual relationship with Ozinga Bros. has "made it uneconomical for *[p]laintiffs* to market *their* REAL PROPERTY." (Emphasis added.) The original complaint did not assert that Edwards was mining the property as an individual. Rather, the complaint alleged the corporation, Corsaw, began surface **[*1033]** mining the land in 2004 without a special use permit. Additionally, the original complaint did not allege that the City's actions were unauthorized, only that the effect of the City's arrangements with Ozinga Bros. caused damages.

HN4[] Section 5 of the Act contains 15 enumerated exceptions to the application of the Act and provides as follows:

> ***HN5***[] "No provisions of this Act shall be construed to make illegal:
> * * *
>
> (15) the activities of a unit of local government or school district *and the activities of the employees, agents and officers of a unit of local government or school district*." (Emphasis added) *740 ILCS 10/5(15)* (West 2006).

Citing *Lathrop v. Juneau & Associates, Inc., 220 F.R.D. 330 (S. D. Ill. 2004)*, Edwards requested the court to reconsider its dismissal and also requested leave **[***14]** to amend the complaint to assert the antitrust claim against the city officials and its attorney on the ground that these individuals acted outside the scope of their authority. Edwards did not attach a proposed amended complaint to the *pro se* motion.

As observed by the federal district court in *Lathrop*, ***HN6***[] the above-cited provision means that both municipalities and their employees, agents and officers are immune from liability under the Act. In *Lathrop*, the original complaint began by specifically naming individual municipal officers and claiming they committed a violation under the Racketeer Influenced and Corrupt Organizations Act (*18 U.S.C. §1961 et seq. (2000)*) and engages in a civil conspiracy to commit unlawful acts, both individually and in their official capacities. The court dismissed all allegations against Granite City or its municipal officers in their "official capacities," based upon municipal immunity, but ruled if Lathrop could make a showing that these individuals committed tortious acts independent of their municipal capacities, plaintiff was not precluded from proceeding on his claim for damages under the Illinois Antitrust Act. *Lathrop, 220 F.R.D. at 336*. The *Lathrop* **[***15]** court dismissed the charges relating to the city and the officials' acts in their municipal capacities, but allowed Lathrop time to amend his complaint to allege illegal acts committed by the municipal officials in their individual capacities.

In this case, unlike *Lathrop*, the complaint has not named any individuals or alleged facts indicating that any city official acted illegally, independent of their official capacities. The alleged antitrust violation cited by Edwards consisted of the City contracting with Ozinga Bros. and its wholly owned subsidiary, Ozinga Materials, Inc., to annex Ozinga Bros.' property and place controls on the port facility along the river which effectively eliminated competitors in the sand **[*1034]** and gravel mining business. It is well settled that ***HN7***[] contracting with parties seeking to annex property is not an illegal municipal activity (*65 ILCS 5/11-15.1-1* **[**986]** **[****460]** (West 2006)), and a municipality is not precluded from zoning property outside city limits when the property is subject to an annexation agreement. *Village of Chatham, 216 Ill. 2d at 432-33*.

Having failed to tender a proposed amended complaint to the trial court demonstrating an amendment would cure the defective **[***16]** pleading, and having failed to argue or present facts claiming that city officials acted outside the scope of their official authority or acted tortiously, Edwards' request to amend the complaint was inadequate. In sum, Edwards cannot overcome the bar of immunity in subsection 5(15) of the Antitrust Act. Accordingly, we conclude the trial court did not abuse its discretion by denying the request for leave to amend the complaint, and we affirm the court's ruling.

II. The City's Cross-Appeal

Next, we consider the City's argument on cross-appeal that the trial court should have granted its motion for *Rule 137* sanctions against Edwards and attorney Reardon. The City claims the court abused its discretion by denying *Rule 137* sanctions against Edwards and Reardon. ***HN8***[] *Supreme Court Rule 137* provides that the court may impose sanctions upon a party or his attorney, including the reasonable cost of defending an action, that is not warranted by existing law or an action that is interposed for an improper purpose, such as to harass, to cause unnecessary delay or to increase the expense of litigation. 155 Ill. 2d R. 137. ***HN9***[] The trial court's ruling on a motion for *Rule 137* sanctions should not be reversed **[***17]** on review unless the trial court abused its discretion. *Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 487, 693 N.E.2d 358, 230 Ill. Dec. 229 (1998)*.

HN10[] The purpose of the rule is to prevent parties from abusing the judicial process with vexatious actions unsupported by fact or law, not to punish litigants and their attorneys merely because they were unsuccessful in the litigation. *Dismuke v. Rand Cook Auto Sales, Inc., 378 Ill. App. 3d 214, 217, 882 N.E.2d 607, 317 Ill. Dec. 727 (2007)*; *Burrows v. Pick, 306 Ill. App. 3d 1048, 1050, 715 N.E.2d 792, 240 Ill. Dec. 105 (1999)*. ***HN11***[] Since the rule is penal in nature, it is strictly construed. *Dowd & Dowd, 181 Ill. 2d at 487*.

Here, the City claims the trial court's denial of sanctions is not entitled to deference because the court "refused to take any evidence or even hear any arguments with respect to the City's motion." Our review of the report of proceedings does not support this assertion. The record shows that on June 15, 2007, the court heard several pending motions, including attorney Reardon's motion to disqualify counsel **[*1035]** for the defense and the City's combined "Motion to Dismiss and for Sanctions." After denying Reardon's motion to disqualify, the court allowed attorney Krumpe to present the City's motion to dismiss and the request for sanctions. **[***18]** In support of the motion to dismiss, Krumpe asserted the case was "so simple [that the] court should dismiss the case with prejudice and award sanctions."

Krumpe noted that, even though Edwards filed the complaint *pro se*, Reardon subsequently entered his appearance and prepared and presented other motions when he "should have told his client at that point that he had no claim." Krumpe argued that, since the Edwards complaint relied on the Illinois statutes, Edwards could not rely on cases interpreting the federal Sherman Act (*15 U.S.C. §1 et seq. (2000)*) holding that a "person" liable under the federal antitrust laws included a municipality because the federal law did not include a similar immunity provision **[****461]** **[**987]** (see, *e.g.*, *City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389, 400, 55 L. Ed. 2d 364, 374-75, 98 S. Ct. 1123, 1130 (1978)*). Krumpe argued statutory immunity set forth in subsection 5(15) of the Illinois Antitrust Act applied to the City as a "unit of local government." Concluding, Krumpe stated:

> "We shouldn't be here. We shouldn't have to brief any of these motions or argue the motion to disqualify or any other motion because it is clear on the statute that **[***19]** there is no cause of action."

In response, Reardon argued, when the City acted without authority to affect land use situated beyond the geographical city limits, the City could not rely on the statutory immunity under the Illinois Act for those actions. Reardon suggested that it was incumbent on the City to show that it had specific authority to take the challenged action before it could claim immunity under subsection 5(15) of the Illinois Act.

The trial judge, after briefly recessing, invited the City's attorneys to reply to Reardon's argument. Attorney Joseph responded that the supreme court ruled, in *Village of Chatham*, that cities had authority to apply their own zoning codes and enter into contracts for purposes of annexing property situated outside of city limits. Concluding, Reardon pointed out that section 11 of the Act (*740 ILCS 10/11* (West 2006)) provided that decisions of the federal courts should be used as a guide when construing language common to federal antitrust statutes and the Act, but that the Act should not be construed to restrict powers granted to units of local government by state statutes and the Illinois Constitution.

In response to the court's inquiry, Reardon **[***20]** acknowledged that the federal antitrust statute did not contain an immunity provision similar **[*1036]** to subsection 5(15) of the Illinois Antitrust Act. Continuing, Reardon posited that subsection 5(15) of the Illinois Antitrust Act should not be construed as a grant of blanket immunity, but immunity for actions taken by the City that were authorized by the Illinois Municipal Code.

The judge took another brief recess to read case law and, when the hearing resumed, he resolved the City's combined motion to dismiss and for sanctions. Relying on *Du Page Aviation*, which attorney Krumpe admitted he had read but not cited in his pleading, the court concluded that the City was immune from liability under the Act, even if the City's actions as alleged by plaintiff were beyond the City's authority. The court then granted the City's motion to dismiss with prejudice but denied its request for *Rule 137* sanctions.

Based on this record, it is apparent to this court that the City was afforded the opportunity to present its combined motion to dismiss and request for sanctions based on the frivolous nature of the lawsuit. The record shows the court gave serious consideration to the positions of both parties **[***21]** and conducted independent research before ruling on the City's argument for dismissal. The court agreed that the complaint could not withstand the City's legal immunity challenge, even if an amended complaint was filed.

However, the City requested sanctions based on two grounds. First, the City claimed the action was frivolous in light of municipal immunity. Importantly, the City also requested sanctions on the grounds that Edwards did not have standing to assert the interests of either corporation without engaging in the unauthorized practice of law. The trial court did not address the unauthorized practice of law before denying sanctions.

In lieu of remanding this issue to the trial court to conduct a hearing to determine **[**988]** **[****462]** if Edwards engaged in the unauthorized practice of law by filing the complaint and thereafter asking the court to reconsider the denial of the request to amend the complaint, we address the issue based on judicial economy.

The principles prohibiting the unauthorized practice of law are well established. ***HN12***[] A corporation may not initiate actions in courts of this state unless the corporation is represented by an attorney. *Siakepere v. City of Chicago, 374 Ill. App. 3d 1079, 1081, 872 N.E.2d 495, 313 Ill. Dec. 512 (2007)*. **[***22]** A complaint drafted by a nonattorney on behalf of a corporation constitutes the unauthorized practice of law rendering the pleading a nullity and any judgment entered on it void. *Housing Authority of the County of Cook v. Tonsul, 115 Ill. App. 3d 739, 740, 450 N.E.2d 1248, 71 Ill. Dec. 369 (1983)*. An attorney's subsequent appearance and adoption of a complaint improperly drafted by a nonattorney does not absolve the drafter of the unauthorized practice of law. *Tonsul, 115 Ill. App. 3d at 740*; *Francorp, Inc. v. Siebert, 211 F. Supp. 2d 1051 (N.D. Ill. 2002)*.

[*1037] ***HN13***[] A sole stockholder cannot bring a lawsuit in his own name for a cause of action belonging to a corporation except under very limited circumstances that do not apply to this situation based on the language of this complaint. See *Brodsky v. Frank, 342 Ill 110, 116-117, 173 N.E. 775 (1930)*; *Cashman v. Coopers & Lybrand, 251 Ill. App. 3d 730, 732-733, 623 N.E.2d 907, 191 Ill. Dec. 317 (1993)*. A logical extension of this principle leads to the conclusion that an individual cannot bring an appeal in his name on behalf of separate corporate interests.

In this case, Edwards drafted the original complaint by identifying himself in dual capacities, individually and as the sole stockholder of the separate corporations. Acting **[***23]** in an individual capacity in the trial court, Edwards could not assert an ownership interest in the real estate as a basis for standing to challenge the annexation agreement requirement before gaining access to the city port. Instead, he relied on corporate interests to attempt to create standing by identifying himself as the only stockholder of the corporations that owned the land and mineral rights at issue. Additionally, Edwards requested damages by asserting that the terms of the annexation contract have made it uneconomical for "*Plaintiffs*" to market "*their REAL PROPERTY*." ***HN14***[] A nonlawyer who initiates a lawsuit to obtain relief on behalf of another person or other corporate entities, other than himself, engages in the unauthorized practice of law.

Attorney Reardon entered his appearance without amending Edwards' complaint or denouncing the corporate interests that Edwards identified in the complaint. Reardon simply pursued the pleading and opposed the motion to dismiss presumably aware that the complaint was drafted by a nonlawyer on behalf of himself but alleging injuries sustained by two corporations. However, Reardon ended his involvement as counsel, shortly thereafter, with an **[***24]** oral motion to withdraw after Edwards filed a *pro se* motion for reconsideration to amend the original complaint, again filed in the dual capacity as individual and sole stockholder.

The City argues that attorney Reardon's oral motion to withdraw was ineffective. We disagree. In this case, the record shows that attorney Reardon did not file a written motion to withdraw as counsel for plaintiff as required. 134 Ill. 2d R. 13(c)(2)-(3). However, neither Edwards nor opposing counsel objected to the oral nature of the motion. The record also **[**989]** **[****463]** shows that Edwards was allowed to argue the motion to reconsider requesting to amend the complaint before the court. Since the judge did not require attorney Reardon to argue the motion to reconsider and amend that had been prepared by Edwards, we conclude the trial court allowed the oral motion to withdraw without objection. We will not disturb the court's decision to deny sanctions against attorney Reardon.

[*1038] The City's written request for sanctions under *Rule 137* exposed Edwards' unauthorized practice of law but failed to directly challenge the complaint as void. Nonetheless, even after the court denied the City's first request for sanctions against Reardon **[***25]** and Edwards on June 15, 2007, Edwards once again identified his status as sole stockholder as part of the motion to reconsider the motion to dismiss and the request to amend the complaint. We note the request to amend the complaint was not for the purpose of denouncing the interests of the corporation, but to add another basis for recovery based on the unauthorized actions of city officials allegedly against Edwards individually and against the interests of the corporations. Here, the City requests this court to consider sanctions as well.

To deny sanctions, we must excuse the unauthorized practice of law by ignoring the fact that Edwards was a nonattorney when he filed the motion to reconsider and amend the complaint in the trial court, when acting as both an individual and as stockholder of the corporate entities. [2] This is a position we are not willing to adopt as a court of review.

Under analogous circumstances, this court *sua sponte* granted a remand for determination **[***26]** of *Rule 137* sanctions where the underlying claim was grounded on false allegations of fact. *First of America Trust Co. v. First Illini Bancorp, Inc., 289 Ill. App. 3d 276, 291, 685 N.E.2d 351, 226 Ill. Dec. 248 (1997)*. We deem the unauthorized practice of law in the drafting of a complaint, a written motion to reconsider and a request to amend that complaint constitutes a defect at least as serious as, if not more serious than, the defects presented to this court in *First of America Trust Co. v. First Illini Bancorp, Inc., 289 Ill. App. 3d 276, 685 N.E.2d 351, 226 Ill. Dec. 248 (1997)*.

Here, the record discloses that the trial court duly admonished Edwards in earlier proceedings that the pursuit of the cause on behalf of Corsaw and IRH constituted an unauthorized practice of law in violation of the Illinois Attorney Act and warned him regarding his contemptuous behavior. Accordingly, we remand this cause to the trial court with directions to conduct an evidentiary hearing to determine the amount of reasonable sanctions that should be

---

[2] In the petition for reconsideration filed with this court on October 6, 2008, Edwards admits "this action was brought by Kenin Edwards individually *and* as sole stockholder of his corporate entities." (Emphasis added)

imposed against Edwards pursuant to *Rule 137* for the filing of the original complaint and the subsequent motion to reconsider and amend that complaint while engaging in the unauthorized practice of law.

III. *Rule 375* **[***27]** Sanctions

Finally, the City requests that the court award attorney fees **[*1039]** incurred in defending this appeal pursuant to *Rule 375*. ***HN15***[] An award of attorney fees may be granted as a sanction if a party wilfully refuses to comply with appellate rules, or where an appeal is taken in bad faith or for an improper purpose. 155 Ill. 2d R. 375. An appeal is deemed frivolous if a reasonable, prudent attorney acting in good faith would not have brought it. *Penn v. Gerig,* ***[**990] [****464]*** *334 Ill. App. 3d 345, 357, 778 N.E.2d 325, 268 Ill. Dec. 339 (2002)*.

We have previously noted that the original motion to reconsider and request to amend the complaint was drafted by Edwards, a nonlawyer, but still asserted causes of actions unique to the corporations. In spite of having an attorney of record at the time, Edwards prepared and filed the motion to reconsider *pro se* based on status as an individual and sole stockholder of the corporations. Based on the status of this record, a prudent attorney acting in good faith would not have brought this appeal to contest the court's ruling on the motion to reconsider the court's dismissal of the complaint with prejudice, prepared by a nonlawyer asserting his own *and* separate corporate interests. The motion to reconsider **[***28]** asked the trial court to amend the complaint that was drafted, signed, and filed by Edwards, once again reciting his dual capacities as individual and stockholder. The denial of this motion to reconsider forms the basis of this appeal.

We are mindful Edwards filed a *pro se* notice of appeal without naming himself as the sole stockholder of the corporations. Even though Edwards pursues this appeal in his name only, it does not cure the underlying unauthorized practice of law, and the void nature of the inartfully drafted complaint that is now the singular subject of this appeal. Further, Edwards seeks review of the trial court's decision below without denouncing the injured corporate interests or requesting that our ruling be limited to amending the complaint solely on the basis of his individual injuries.

Accordingly, we allow the City's request for *Rule 375* sanctions, and we remand this cause to the trial court to conduct an evidentiary hearing on the amount of reasonable *Rule 137* and *Rule 375* sanctions against Edwards for filing of the original lawsuit asserting corporate interests other than his own individual interests, for filing a motion to reconsider to allow him to amend the original **[***29]** complaint seeking corporate damages without the assistance of counsel, and appealing the denial of those motions drafted in violation of the Attorney Act.

CONCLUSION

For the reasons stated, the judgment of the circuit court of Marshall County is affirmed in part and reversed in part. We remand the cause for further proceedings to determine the amount of the appropriate **[*1040]** sanctions and to enter an order for sanctions in favor of the City pursuant to *Rule 137* and *Rule 375* consistent with this opinion.

Affirmed in part and remanded with directions.

McDADE, P.J., and O'BRIEN, J., concur.

Apple Inc. v. Psystar Corp.

United States District Court for the Northern District of California

November 18, 2008, Decided; November 18, 2008, Filed

No. C 08-03251 WHA

Reporter

586 F. Supp. 2d 1190 *; 2008 U.S. Dist. LEXIS 93780 **; 2008-2 Trade Cas. (CCH) P76,398

APPLE INC., a California corporation, Plaintiff, v. PSYSTAR CORPORATION, a Florida corporation, Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Apple Inc. v. Psystar Corp., 2009 U.S. Dist. LEXIS 14370 (N.D. Cal., Feb. 6, 2009)*

Core Terms

counterclaim, aftermarket, operating system, alleges, relevant market, customers, computer hardware, brand, markets, manufacturers, consumers, monopoly, antitrust, asserts, single-brand, products, Sherman Act, interchangeable, competitors, anti-competitive, violations, utilize, avers, motion to dismiss, market power, contractual, derivative, submarket, anti trust law, differential

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN1[] **Sherman Act, Claims**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. All allegations of material fact are taken as true and construed in the light most favorable to a plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. The United States Supreme Court has clarified the pleading standard for *15 U.S.C.S. § 1* Sherman Act claims. Under *Fed. R. Civ. P. 8(a)(2)*, only a short and plain statement of the plaintiff's entitlement to relief is necessary. A plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The Supreme Court does not require that pleadings prove the asserted claims or establish a probable violation, but does require that pleadings set forth factual allegations sufficient to establish plausible grounds for an entitlement to relief.

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

HN2[] Market Definition, Relevant Market

A tying claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 2*, a monopoly-maintenance claim under *§ 2* of the Sherman act, *15 U.S.C.S. § 2*, and an exclusive-dealing claim under *§ 3* of the Clayton Act, *15 U.S.C.S. § 14*, each require a plaintiff to establish market power in a "relevant market." The relevant-market inquiry does not differ for the three claims in any material respect. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim.

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

HN3[] Market Definition, Relevant Market

The definition of an antitrust "relevant market" is typically a factual rather than a legal inquiry, but certain legal principles govern the definition. Whether products are part of the same or different markets under ***antitrust law*** depends on whether consumers view those products as reasonable substitutes for each other and would switch among them in response to changes in relative prices. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. As such, the relevant market must include the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.

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

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

HN4[] Relevant Market, Product Market Definition

In general, a manufacturer's own products do not themselves comprise a relevant product market. A company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product. Single-brand markets are, at a minimum, extremely rare. Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market.

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

HN5[] Relevant Market, Product Market Definition

Antitrust markets consisting of just a single brand, however, are not per se prohibited; markets are defined by the "reasonable interchangeability" of use or the cross-elasticity of demand among products. In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product.

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

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

HN6[] Motions to Dismiss, Failure to State Claim

A plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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

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

HN7[] **Sherman Act, Scope**

With regard to antitrust claims, although the responsiveness of one product to the price of another is at the heart of the market definition analysis, a mere price differential alone does not necessarily signal a distinct market. It is true that a price differential between two products may reflect a low cross-elasticity of demand, if the higher priced product offers additional service for which consumers are willing to pay a premium. The mere existence of a price differential, however, does not necessarily mean that a product is unconstrained by competition: The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purpose for which they are produced -- price, use and qualities considered.

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

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

With regard to an antitrust claim, a tying theory requires a plausible allegation that a company tied sale of one market in which it enjoys market power (the tying market) to a product in a second, distinct market (the tied market).

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

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

With regard to an antitrust claim, although the law permits an antitrust claimant to restrict the relevant market to Eastman Kodak Company v. Image Technical Services, Inc., style single-brand aftermarkets, the law prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that customers knowingly and voluntarily gave to the defendant.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Market Definition**

With regard to an antitrust claim, pre-existing markets and efforts to restrain or suppress that market both provide evidence that the tie is anti-competitive and offer courts guidance of what an efficient price may be.

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

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

With regard to an antitrust claim, a court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Public Enforcement, State Civil Actions**

California's Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700*-16760 was patterned after *§ 1* of the Sherman Act, and the pleading requirements under the two statutes are similar. Moreover, the Cartwright Act does not address unilateral conduct.

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

HN13[] **Trade Practices & Unfair Competition, State Regulation**

Cal. Bus. & Prof. Code § 17200 proscribes any unlawful, unfair or fraudulent business act or practice.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14[] **Trade Practices & Unfair Competition, State Regulation**

California courts hold that if the same conduct is alleged to be both an antitrust violation and an "unfair" business act or practice for the same reason -- because it unreasonably restrains competition and harms consumers -- the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not "unfair" toward consumers.

Counsel: **[**1]** For Apple Inc., a California corporation, Plaintiff, Counter-defendant: James G. Gilliland, LEAD ATTORNEY, Jeb Bacon Oblak, Megan M Chung, Mehrnaz Boroumand Smith, Townsend and Townsend and Crew LLP, San Francisco, CA.

For Psystar Corporation, Defendant: Christine S. Watson, Robert Joseph Yorio, LEAD ATTORNEYS, Christopher Paul Grewe, Colby B. Springer, Carr & Ferrell LLP, Palo Alto, CA.

For Psystar Corporation, Counter-claimant: Christine S. Watson, Robert Joseph Yorio, LEAD ATTORNEYS, Colby B. Springer, Carr & Ferrell LLP, Palo Alto, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

[*1192] ORDER GRANTING MOTION TO DISMISS COUNTERCLAIMS

INTRODUCTION

Plaintiff Apple Inc. brought this lawsuit against defendant Psystar Corporation asserting copyright and trademark violations related to Psystar's alleged use of Apple's operating system. Psystar filed counterclaims against Apple alleging violations of federal and state antitrust laws. Apple moved to dismiss Psystar's antitrust counterclaims. For the reasons stated below, **[*1193]** Apple's motion to dismiss the counterclaims is **GRANTED**.

STATEMENT

Apple Inc. manufacturers and markets the Macintosh Computer and the OS X Operating System ("Mac OS"). Operating **[**2]** systems like Mac OS control and direct the interaction between software applications such as word processors and internet browsers, and the central processing unit and the various hardware in a computer. Apple is the exclusive manufacturer and master licensor of Mac OS (Countercl. 14, P 18, 21).

Psystar manufacturers and distributes a tailored line of computers called Open Computers. Psystar's Open Computers support a wide range of operating systems including Mac OS, Microsoft Windows XP and XP 64-bit, Windows Vista and Vista 64-bit and Linux 32 and 64-bit kernels. Psystar allows its customers to choose the operating system on the computers they purchase (Countercl. P 15).

Numerous companies manufacturer entire computer hardware systems, including (but not limited to) Dell, Acer, Lenovo, Sony and Hewlett-Packard. In addition, numerous companies manufacture and sell components -- such as hard drives, processors and graphics processing cards -- used by those computer manufacturers (Countercl. P 22-25).

The counterclaim, however, identifies no companies other than Apple and Psystar that currently sell computers compatible with Mac OS. Apple manufacturers an exclusive line of hardware systems **[**3]** that support Mac OS, including the Mac Pro, the Mac Mini, the MacBook the MacBook Air, the MacBook Pro, and the iMac. The counterclaim alleges that, by virtue of Apple's End User License Agreement and other anti-competitive conduct, consumers wishing to use Mac OS have no alternative to the Apple-label computer hardware systems. The counterclaim alleges that there is no compelling technological reason why other manufacturers could not produce computer hardware systems capable of hosting, executing and running MAC OS, and that, but for the exclusionary conduct of Apple, such third parties could and would assemble hardware components capable of running Mac OS (Countercl. PP 25-28).

The counterclaim avers that there exist two relevant markets. The first alleged market consists of one product: Mac OS. The complaint asserts that Apple's Mac OS is not reasonably interchangeable with other operating systems such as Microsoft Windows and therefore comprises its own market. The second alleged market consists of computer hardware systems capable of executing Mac OS. The counterclaim avers that, through its anti-competitive conduct, Apple's exclusive line of computer hardware systems dominate **[**4]** the market for Mac OS-capable computer hardware systems (Countercl. P 17).

Psystar offers several (related) allegations in support of its claim that Mac OS constitutes an independent market. *First*, Psystar alleges that Apple has undertaken extensive advertising campaigns -- including the "think different" campaign and the "get a Mac" campaign -- to define the Mac OS as a product separate and distinct from other operating systems, and that through those efforts customers and merchants have come to recognize Mac OS as a separate and distinct market (Compl. PP 30-35). *Second*, the counterclaim avers that, across the spectrum of the Apple-label computer line, Apple computers with traditional computer components are significantly more expensive than similarly configured computers with comparable (or superior) hardware sold by other computer companies utilizing operating systems other than Mac OS, such as Windows. **[*1194]** The counterclaim further asserts that "[n]otwithstanding the consistent upward differentiation in price across a broad spectrum . . . Apple is known for its 'market performance and brand leadership' . . . [and] is 'well known for its passionate and dedicated consumer base.'" Psystar **[**5]** avers that Apple "has made a conscious and successful effort to create inelasticity of demand through product differentiation in its Mac OS," and that there in fact exists an "insufficient" cross-elasticity of demand. Psystar alleges that Apple's customers would not consider any other operating system to be a reasonably interchangeable alternative (Countercl. PP 36-43). *Third*, the counterclaim alleges that a "small but significant non-transitory increase in price" ("SSNIP") would not result in a change in demand for Mac OS (Countercl. P 44).

Psystar claims that Apple has utilized its monopoly power in the alleged "Mac OS market" -- in which Apple is, by definition, the only participant -- in order to dominate the market for Mac OS-capable computer hardware systems. Psystar alleges that Apple has engaged in various forms of anti-competitive conduct in order to "protect its valuable monopoly in the Mac OS market and, by extension, Apple-Labeled Computer Hardware Systems from potential threats." The counterclaim asserts that the following actions constitute the illegal tying of Mac OS to Apple-labeled computer systems, monopoly maintenance or other unlawful behavior (Countercl. PP 47, **[**6]** 63-64, 67, 72-73).

First, Psystar avers that Apple's End User License Agreement for the Mac OS specifically prohibits customers from installing the operating system on non-Apple computers. The license agreement states (Countercl. P 61):

2. Permitted License Uses and Restrictions.

> A. Single Use. This license allows you to install, use and run (1) copy of the Apple Software on a single Apple-labeled computer at a time. You agree not to install, use or run the Apple Software on any non-Apple-Labeled computer or enable another to do so.

Customers, therefore, are contractually precluded from utilizing Mac OS on any computer hardware system that is not an Apple-labeled computer system (Countercl. PP 61-62, 65-66).

Second, Psystar avers that Apple has erected technical barriers that prevent Mac OS from operating on non-Apple computers. Apple, the counterclaim alleges, intentionally embeds code in Mac OS that causes the operating system to recognize any computer hardware system that is not an Apple computer. If Mac OS recognizes a non-Apple computer, Mac OS will not operate properly. The Mac OS will enter "kernel panic," meaning that the operating system believes that it has detected an internal **[**7]** and fatal error from which it can not recover, and discontinues operation. This renders the computer non-functional (Countercl. PP 58-59).

Finally, Psystar asserts that Apple had experimented with licensing its system software to other computer makers but has since abandoned the practice. In 1995, Apple launched a "Clone Program" under which it licensed Macintosh ROMs and system software to other computer makers, but Apple ended the program in 1997. Apple also purchased a computer hardware manufacturer capable of running Mac OS. Apple has since announced that it will not allow the use of Mac OS on anything other than an Apple computer (Compl. PP 49-57).

Psystar alleges that this conduct has caused harmful and anti-competitive effects in the marketplace (Compl. PP 68-77). Psystar asserts six claims for relief: (1) **[*1195]** unlawful tying in violation of Section 1 of the Sherman Act, *15 U.S.C. 1*; (2) monopoly maintenance in violation of *Section 2* of the Sherman Act; (3) exclusive dealing in violation of Section 3 of the Clayton Act, *15 U.S.C. 14*; (4) violations of California's Cartwright Act, *Cal. Bus. & Prof. Code § 16700*; (5) violations of California's unfair competition law, *Cal. Bus. & Prof. Code § 17200*, **[**8]** and (6) violations of the common law of unfair competition. Apple moved to dismiss all claims. [1]

ANALYSIS

HN1[] A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*. The Supreme Court recently clarified the pleading standard for Sherman Act Section 1 claims. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127*

[1] Apple requests that the Court take judicial notice of several documents. For the reasons that follow, this order resolves Apple's motion without recourse to those documents. The request is therefore moot.

S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (May 21, 2007). It reiterated that under Rule 8(a)(2), only a short and plain statement of the plaintiff's entitlement to relief is necessary. Twombly, 127 S.Ct. at 1964. It also acknowledged, however, that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more **[**9]** than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1964-1965 (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209, 232 (1986)). The decision explained,

> stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Id. at 1965. *Twombly* did not require that pleadings prove the asserted claims or establish a probable violation, but it did require that pleadings set forth factual allegations sufficient to establish *plausible* grounds for an entitlement to relief.

1. FEDERAL CLAIMS.

Psystar asserted claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Apple contends (1) that the relevant markets alleged in the counterclaim are neither legally nor factually plausible, and (2) that the antitrust laws do not require Apple to help its competitors compete by forcing it to enter unwanted licensing agreements with them.

A. [10] Market definition: Alleged "Mac OS" market**.

As stated, Psystar asserted three federal claims: ***HN2***[] a tying claim under Section 1 of the Sherman Act, a monopoly-maintenance claim under Section 2 of the Sherman act, and an exclusive-dealing claim under Section 3 of the Clayton Act. [2] Each of these claims requires plaintiff to establish market power in a "relevant market." **[*1196]** *See* Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 42-43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006) (tying). Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) (monopolization); Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1169 (9th Cir. 1997) (exclusive dealing). The relevant-market inquiry does not differ for the three claims in any material respect. *See* Newcal Industries, Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1044 n.3 (9th Cir. 2008) (standards the same under Sections 1 and 2); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 23 n.39, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (standards the same under Sherman Act Section 1 and Clayton Act Section 3). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)* (citation **[**11]** omitted).

The parties dispute whether Psystar may rely on a relevant market comprised of a single brand of a product -- a market consisting only of Apple's Mac OS but excluding other operating systems such as Microsoft's Windows. Apple asserts that the relevant markets alleged in the counterclaim are neither legally nor factually plausible. Psystar responds that market definition is normally a factual question, not to be decided at the pleading stage, and that single-brand markets are permissible.

HN3[] The definition of an antitrust "relevant market" is typically a factual rather than a legal inquiry, but certain legal principles govern the definition. Newcal Industries, Inc., 513 F.3d at 1045. Whether products are part of the same or different markets under ***antitrust law*** depends on whether consumers view those products as reasonable **[**12]** substitutes for each other and would switch among them in response to changes in relative prices:

---

[2] Psystar's tying claim arises under Section 1 of the Sherman Act. It is unclear how Section 1 is applicable, as Psystar alleges only single-firm anticompetitive conduct. Apple, however, does not challenge the counterclaim on this basis. In any event, courts also allow tying theories under Section 2, at least where there is monopolization or attempted monopolization.

> As the Supreme Court has instructed, "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." [*Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)]*. As such, the relevant market must include "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*.

Newcal Industries, Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1045 (9th Cir. 2008).

Psystar relies on Newcal Industries. That decision, plaintiff emphasizes, stated that "the law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue (as in *Eastman Kodak*)." *Id. at 1048*. *Newcal Industries*, however, merely held that a market may be comprised of a single brand in the situation the Supreme Court addressed in *Kodak*: a derivative aftermarket for products related to or dependent on a specific company's **[**13]** products. As in *Kodak*, the *Newcal Industries* plaintiffs had, the decision explained,

> allege[d] the existence of two separate but related markets in intrabrand copier equipment and service. The first market [was] an initial market for copier leases and copier service, which (as the district court correctly found) is a competitive market in which IKON has no significant market power. The second market [was] a derivative aftermarket for replacement equipment, which include[d] markets for lease "buy outs" and for "lease-end service." *As in all three of the cited cases, the relevant market here [was] not the indisputably competitive market in which the consumers first shop for the primary product.* ***[*1197]*** *It [was] an aftermarket in which the consumers claim that they should be able to shop for a secondary product* . . . . The complaint allege[d] that suppliers go through a different economic calculus when competing for consumers of replacement equipment and lease-end service than they do when competing for consumers of initial equipment leases and service contracts.

Id. at 1049 (emphasis added). Plaintiff Newcal and defendant IKON were in the copier-equipment business. The two companies competed both **[**14]** in the primary market for equipment leases and in the aftermarket for equipment upgrades. Newcal challenged certain contracts and practices which "shield[ed] IKON customers from competition in the aftermarkets for upgrade equipment and for lease-end services." *Newcal Industries, Inc., 513 F.3d at 1043-44*. As in *Kodak*, the decision found that these single-brand aftermarkets constituted relevant antitrust markets. *Id. at 1050*. The decision simply did not address the situation for which Psystar cites it -- a primary or independent market alleged to be limited, by definition, to a single brand of a product.

Neither did *Kodak*. That decision, like this case, involved claims of tying and monopolization. *Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451, 459, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. The Eastman Kodak Company, the decision explained, manufactured and sold photocopiers and micrographic equipment. Kodak also sold service and replacement parts for its equipment. Plaintiffs were a group of independent service organizations that serviced Kodak's equipment. Plaintiffs challenged Kodak policies that made it more difficult for them to compete with Kodak in servicing Kodak equipment, including limiting **[**15]** the availability of Kodak parts. Plaintiffs alleged that Kodak unlawfully tied the sale of service for Kodak machines to the sale of Kodak-compatible parts, a market in which Kodak had monopoly power. *Id. at 454-55*. Kodak parts, the decision explained, were not compatible with competitors' machines, and vice versa. *Id. at 456-57*.

A principal issue was "whether a defendant's lack of market power in the primary equipment market precludes -- as a matter of law -- the possibility of market power in derivative aftermarkets." *Id. at 455*. The Supreme Court held that it does not. *Id. at 472-77*. The decision explained that, in some instances, a single brand of a product can constitute a separate market: "[b]ecause service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines." *Id. at 482*. Those single-brand markets, however, were "derivative aftermarkets." *Id. at 455*. *Kodak* found that single-brand aftermarkets -- markets for parts and service for Kodak equipment -- arose once customers have purchased and are "locked in" **[**16]** to Kodak photocopiers or equipment.

Here, in contrast, Psystar alleges not a single-brand aftermarket dependent on and derivative of a specific company's primary product but instead that a single brand of primary product (Apple's operating system) constitutes an independent market. Neither *Newcal Industries* nor *Kodak* addressed such a situation. Psystar has cited no decision lending support to its single-brand product market theory. [3]

[*1198] ***HN4***[] "In general, a manufacturer's own products do not themselves comprise a relevant product market . . . . [A] company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." *Green Country Food Market, Inc. v. Bottling Group, 371 F.3d 1275, 1282 (10th Cir. 2004)*. *See also Lambtek Yogurt Machines v. Dreyer's Grand Ice Cream, Inc*., 1997 WL 108718 at * 3 (N.D. Cal. 1997) (unpublished). Single-brand markets are, at a minimum, extremely rare. "Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market." *Green Country Food Market, 371 F.3d at 1282*. *See also, e.g., Hack v. President and Fellows of Yale College, 237 F.3d 81, 86 (2d Cir. 2000)*, *abrogated on other grounds by Swierkiewicz, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1*; *Spahr v. Leegin Creative Leather Products, Inc., 2008 U.S. Dist. LEXIS 90079, 2008 WL 3914461 at * 9-10 (E.D. Tenn. 2008)*; *Little Caesar Enterprises, Inc. v. Smith, 34 F. Supp. 2d 459, 477 and n.30 (E.D. Mich. 1998)*; **[**18]** *Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 678-79 (S.D.N.Y. 1987)*. Antitrust ***HN5***[] markets consisting of just a single brand, however, are not *per se* prohibited; as stated, markets are defined by the "reasonable interchangeability" of use or the cross-elasticity of demand among products. In theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product. Psystar's factual contentions therefore must be examined under *Twombly's* pleading standards to determine if Psystar has pled such a situation. The pleadings, however, fail to allege facts plausibly supporting the counterintuitive claim that Apple's operating system is so unique that it suffers *no* actual or potential competitors.

Psystar alleges that the "market economics" favor its cause and that a "small but significant non-transitory increase in price" ("SSNIP") would not result in a change in demand for Mac OS. These conclusory allegations offers no support for Psystar's claims; they merely restate a commonly used test for market definition without providing any factual basis for the claim. As stated, ***HN6***[] "a plaintiff's obligation to provide the 'grounds' of his **[**19]** 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1964-65*. Psystar also alleges that Apple computers, with Mac OS, cost more than similarly configured computers which utilize other operating systems. The import of the allegation is not self-evident. ***HN7***[] Although the *responsiveness* of one product to the price of another is at the heart of the market definition analysis, a mere price differential alone does not necessarily signal a distinct market. It is true that "[a] price differential between two products may reflect a low cross-elasticity of demand, if the higher priced product offers additional service for which consumers are willing to pay a premium." *Rebel Oil Co.* ***[*1199]*** *v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995)*. The mere existence of a price differential, however, does not necessarily mean that a product is unconstrained by competition:

> The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability **[**20]** for the purpose for which they are produced -- *price, use and qualities considered*.

---

[3] Psystar's only other example of a single-brand market is *Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984)*. There, Data General manufactured a computer system called NOVA, which included a copyrighted NOVA operating system called RDOS. Plaintiffs sued on various antitrust theories, alleging that the RDOS operating system constituted its own relevant market. The Ninth Circuit agreed. The decision relied on the *per se* rule in tying cases and a presumption of market power when the tying product is copyrighted or patented. *Id. at 1339-41*. It also emphasized the presence of market imperfections such switching costs and customer "lock in." *Id. at 1342-43*. That decision, however, was implicitly overruled by *Illinois Tool Works v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*, **[**17]** which rejected the *per se* rule in tying cases and the presumption of market power for copyrighted or patented products. Moreover, as explained below, unlike the situation addressed in *Digidyne*, Psystar's pleadings do not suggest market imperfections such as switching costs and customer "lock in."

United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 406, 76 S. Ct. 994, 100 L. Ed. 1264 (1956) (emphasis added). In *duPont*, the Supreme Court concluded that cellophane was in the same market as other flexible packaging materials despite costing two or three times more, because the products were reasonably interchangeable despite the price difference. Id. at 401. *See also* AD/SAT v. Associated Press, 181 F.3d 216, 228 (2nd Cir. 1999); Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 840 (2nd Cir. 1980). The price-differential allegation, alone, is inconclusive and must be considered in the context of the pleading as a whole.

The pleading as a whole does not allege facts that, if true, plausibly indicate that Mac OS is an independent, single-product market. The counterclaim itself explains that Mac OS performs the same functions as other operating systems (Countercl. P 21):

> Operating systems -- like the Mac OS -- manage the interaction between various pieces of hardware such as a monitor or printer. The operating system also manages various software applications running on a computer device.

The counterclaim **[**21]** further avers that "[a] seemingly infinite list of manufacturers . . . construct entire hardware systems (i.e., computers) marketed and sold to the consumer" (Countercl. P 22). Psystar's business model is predicated on a degree of interchangeability between computers utilizing Mac OS and other operating systems (Countercl. P 15):

> Psystar manufacturers and distributes computers tailored to customer choosing. As a part of its devotion to supporting customer choice, Psystar supports a wide range of operating systems including Microsoft Windows XP and XP 64-bit, Windows Vista and Vista 64-bit, Linux (32 and 64-bit kernels), and Mac OS. Psystar generally refers to this custom tailored line of computers as Open Computers.

The counterclaim admits that market studies indicate that, although Apple computers with Mac OS enjoy strong brand recognition and loyalty, they are not *wholly* lacking in competition (Countercl. P 38):

> [n]otwithstanding the consistent upward differentiation in price across a broad spectrum . . . by and between a Computer Hardware System without a Mac OS and a Apple-Labeled Computer Hardware System with the Mac OS, studies by Satmetrix Systems found that Apple is known for **[**22]** its "market performance and brand leadership" and that APPLE "far outranks its closest competitor."

Psystar fails to explain why these "competitor[s]" should be excluded from the definition of the relevant market.

Psystar also points to Apple's extensive advertising campaigns. Those advertising campaigns more plausibly support an inference contrary to that asserted in the counterclaim -- vigorous advertising is a sign of competition, not a lack thereof. If Mac OS simply had no reasonable substitute, Apple's vigorous advertising would be wasted money. The advertising campaigns suggest a need to enhance brand recognition and lure consumers from a **[*1200]** competitor. The "brand leadership" and brand loyalty Psystar alleges, if true, suggest that Apple's efforts have borne fruit.

Indeed, Psystar's allegations are internally contradictory. Psystar alleges that Mac OS is, by definition, an independent and unique market. That is, Mac OS, by definition, admits no reasonable substitutes. Psystar further avers, however, that Apple engages in the alleged anti-competitive conduct "in order to protect its valuable monopoly in the Mac OS market and, by extension, Apple-Labeled Computer Hardware Systems *from* ***[**23]*** *potential competitive threats*," and that Apple's "unreasonable restraints on trade allow APPLE to maintain its monopoly position with respect to the Mac OS and Apple-Labeled Computer Hardware Systems submarket" (Countercl. PP 47, 72, 73, 75) (emphasis added). Apple must be "protect[ing] its valuable monopoly in the Mac OS market" from something; anticompetitve behavior may be constrained by potential competitive threats. Psystar admits that operating systems constitute a "market"-- the counterclaim asserts that "there are substantial barriers to entry in the *market for operating systems*, including the Mac OS market" (Countercl. P 20; emphasis added). If this order were to accept Psystar's proposed market definition, Apple would no doubt enjoy the protections of a "barrier to entry" into the alleged market far more daunting than the listed technical, financial and logistical barriers: Psystar's own definition of the relevant market. The circular nature of Psystar's market definition becomes unavoidable: Psystar "alleges that given the prevalence of the Mac OS in the Mac OS market, customers need a computer hardware system on which to operate the Mac OS," and that Apple leverages that **[**24]** "prevalence" to dominate the Mac OS compatible computer hardware market (Countercl. P 96).

For the above-stated reasons, this order concludes that the counterclaim does not plausibly allege that Mac OS is an independent market.

B. Market definition: Alleged "Mac OS-capable computers" market.

As stated, the complaint alleges two relevant markets: Mac OS, and computer hardware systems which utilize Mac OS. All of Psystar's federal claims require the existence of these two distinct markets. Psystar has alleged tying, monopoly maintenance and exclusive dealing. ***HN8***[] The tying theory requires a plausible allegation that Apple tied sale of one market in which it enjoys market power (the "tying market") to a product in a second, distinct market (the "tied market"). *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 35, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Similarly, Psystar's Sherman Act *Section 2* and Clayton Act *Section 3* theories -- if they differ from the tying theory -- are also dependent on the existence of a distinct "submarket" or aftermarket because Psystar challenges only the maintenance of a monopoly in, or exclusion of competitors from, that alleged submarket or aftermarket.

Psystar alleges that, by tying **[**25]** or other exclusionary behavior, Apple seeks to dominate a distinct *aftermarket*, the market for Mac OS-compatible computer hardware systems. Relying on *Newcal*, Psystar specifically asserts that this market is not an independent, stand-alone product but rather is a "submarket [] that 'would not exist' without the primary market for the Mac OS and is thus 'wholly derivative from and dependent' on that market" (Opp. at 7).

Newcal found such a single-brand aftermarket to be properly pled. *Newcal*, however, distinguished two other appellate decisions which had found that *contractually* ***[*1201]*** *created* aftermarkets could *not* be relevant antitrust markets. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*; *Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997)*. Applying *Kodak's* reasoning, *Newcal* held that, ***HN9***[] although the law permits an antitrust claimant to restrict the relevant market to *Kodak-style* single-brand aftermarkets, "the law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that customers knowingly and voluntarily gave to the defendant (as in *Queen City Pizza* and *Forsyth*)." *Newcal Industries, Inc., 513 F.3d at 1048* **[**26]** (emphasis in original). Psystar rests on precisely such a claim: the counterclaim alleges that, by its End User License Agreement and other means, Apple specifically restricts the use of Mac OS to Apple-labeled computer hardware systems. Customers, therefore, knowingly agree to the challenged restraint. [4]

In *Kodak*, the **[**27]** single-brand aftermarkets were distinct antitrust markets because, the decision found, customers did not adequately consider the total -- or lifecycle -- cost of the equipment, parts and service in their initial equipment purchase. Only after they were "locked in" to Kodak equipment were they forced to evaluate costs in the parts and service markets. Market imperfections such as information costs and switching costs prevented customers from doing so at the time of the original purchase or from imposing market discipline in the aftermarkets by switching among participants in the primary equipment market. *Eastman Kodak Company, 504 U.S. at 464-78*. The plaintiffs had also alleged that a market for the aftermarket service already existed (*i.e.*, firm other than Kodak already provided service for Kodak copiers) and that Kodak sought to restrain the participants in that market. ***HN10***[] Pre-existing markets and efforts to restrain or suppress that market both provide evidence that the tie is anti-

[4] *Newcal* further explained that "in determining whether the defendant's market power falls in the *Queen City Pizza* category of contractually-created market power or in the *Eastman Kodak* category of economic market power, the law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket. The law permits an inquiry into whether consumers entered into such 'contracts' knowing that they were agreeing to such a commitment." *Id. at 1048-49*. Here, no such functional-equivalent analysis is necessary: not only did customers purchase the alleged primary- and aftermarket-products at the same time, as a package, they entered and express agreement that the former could not be used beyond the latter.

competitive and offer courts guidance of what an efficient price may be. *See* *Verizon Communications, Inc. v. Trinko, 540 U.S. 398, 409-10, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Unlike in *Kodak* -- where customers did not knowingly bind **[**28]** themselves to a single brand of the aftermarket and market imperfections (information costs and switching costs) prohibited customers from imposing market discipline in the *aftermarket* by switching among competitors in the *primary* market -- here Apple asks its customers to purchase Mac OS knowing that it is to be used only with Apple computers (Compl. P 28). It is certainly entitled to do so. *See* *Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 762-63 (7th Cir. 1996)*. Psystar also asks the Court to create a non-existent market. This order declines to do so.

The aftermarket alleged here is more analogous to that addressed in *Forsyth*. That decision "reject[ed] the plaintiffs' attempt to limit the relevant market to acute **[*1202]** care hospitals used by Humana insureds. The plaintiffs used Sunrise Hospital and obtained medical care from few other hospitals because of contractual provisions in their insurance policies. This tie-in defeats the plaintiffs' argument for a submarket consisting only of those hospitals Humana insureds actually used." *Forsyth, 114 F.3d at 1476*. Here, similarly, Apple customers must utilize Mac OS only in Apple-labeled computers because they agreed **[**29]** to do so when they purchased the product. As *Queen City Pizza* explained, ***HN11***[] "[a] court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." *Queen City Pizza, Inc., 124 F.3d at 438*. In *Queen City Pizza*, therefore, the "plaintiffs' acceptance of a franchise package that included purchase requirements and contractual restrictions is consistent with the existence of a competitive market in which franchises are valued, in part, according to the terms of the proposed franchise agreement and the availability of alternative franchise opportunities." *Id. at 442*.

Psystar also relies on two recent Northern District decisions in other litigation involving Apple. *In re Apple & AT&TM Antitrust Litigation, C. 07-5152 JW, Dkt No. 144, 2008 U.S. Dist. LEXIS 88923 (N.D. Cal. 2008)* (Ware, J.) (slip op.); *Slattery v. Apple Computer, Inc., 2005 U.S. Dist. LEXIS 32423, 2005 WL 2204981 (N.D. Cal. 2005)* (Ware, J.) (unpublished). The former explained that Apple sold the iPhone, a handheld device that acts as a cellular telephone, among other functions. AT&T Mobility provided cellular voice **[**30]** and data services over its cellular network. *In re Apple & AT&TM Antitrust Litigation* concerned a challenge to an agreement that made AT&T Mobile the exclusive cellular service provider for the iPhone for five years, through 2012. As with other cellular service providers, customers who purchased an iPhone were required to sign a two-year service agreement with AT&TM. The plaintiffs alleged, *inter alia*, that due to the five-year exclusivity agreement (which was neither public nor disclosed to customers, although parts of it had been revealed publicly), customers were effectively "locked in" to AT&TM and would be forced to renew with AT&TM beyond the agreed-upon two year contract. *In re Apple & AT&TM Antitrust Litigation, C. 07-5152, 2008 U.S. Dist. LEXIS 88923 at *3-4, *8*. The plaintiffs alleged "an aftermarket for iPhone voice and data services that 'would not exist' without the primary market for iPhones, and is thus 'wholly derivative from and dependent on the primary market.'" *2008 U.S. Dist. LEXIS 88923 at *27*. The decision concluded,

> [e]ven though Apple rightly contends that Plaintiffs entered into two-year [AT&TM] service contracts at the time of purchase, Plaintiffs allege that the aftermarket includes the full five-year period during **[**31]** which they are bound to use AT&TM voice and data services, including the three years after the initial contract expiration, which is enforced by both technological and contractual means . . . . Plaintiffs are alleging that at the point of purchase and initiation of service, Defendants involuntarily impose on consumers a contract exclusivity restriction . . . for at least five years.

Id. at 15. The decision found that the undisclosed exclusivity agreement allowed the plaintiffs to plead a viable aftermarket. The decision is inapposite because Psystar does not allege any undisclosed exclusivity agreement; like the initial two-year service contract in *In re Apple & AT&TM Antitrust Litigation*, the aftermarket restriction in this case was fully disclosed and expressly agreed upon.

[*1203] Psystar also relies on *Slattery v. Apple Computer, Inc., 2005 U.S. Dist. LEXIS 32423, 2005 WL 2204981 (N.D. Cal. 2005)* (Ware, J.) (unpublished). That decision was prior to *Newcal*, and it did not discuss the critical distinctions between *Newcal*, on the one hand, and decisions like *Queen City Pizza* and *Forsyth*, on **[**32]** the other, such as whether the market power in the alleged relevant market arose solely by contract or the functional equivalent thereof.

Finally, Psystar relies on *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (C.A.D.C. 2001)*. In *Microsoft*, the District Court had defined a relevant market consisting of 'the licensing of all Intel-compatible PC operating systems worldwide,' finding that there [were] 'currently no products -- and . . . there [were] not likely to be any in the near future -- that a significant percentage of computer users worldwide could substitute for [these operating systems] without incurring substantial costs.'" *Id. at 52*. The court of appeals affirmed the district court's factual findings. *Ibid*. Psystar argues that those findings aid its cause. Although some of those factual findings arguably support Psystar's claims, [5] others directly contradict it. [6] The district court made those factual findings nearly ten years ago and their continued applicability is far from certain. Moreover, although the decision found that Microsoft had attained a very large market share in the above-described operating system market, it did not limit the relevant market to a single brand **[**33]** or product, as Psystar seeks to do. The decision, similarly, did not address anticompetitive conduct targeted at a submarket or aftermarket defined with reference to a single brand of a product, as Psystar attempts to do. Rather, it addressed Microsoft's effort to utilize its operating system monopoly to gain monopoly power in "the browser market," a market that included Microsoft's Internet Explorer as well as competitors such as Netscape's Navigator. *United States v. Microsoft Corp., 87 F.Supp.2d 30, 45 (D.D.C. 2000)*. This order places no weight on the decision.

For the above-stated reasons, Psystar's claim that Mac OS-compatible **[**34]** computer hardware systems constitute a distinct submarket or aftermarket contravenes the pertinent legal standards, and Apple's motion to dismiss Psystar's federal counterclaims is therefore granted.

2. STATE CLAIMS.

Psystar's fourth claim for relief arises under California's Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700-16760*. ***HN12***[] The Cartwright Act was patterned after *Section 1* of the Sherman Act, and the pleading requirements under the two statutes are similar. *See* *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1476-77 (9th Cir. 1986)*. Moreover, the Cartwright Act "does not address unilateral conduct." *Ibid*. Psystar's complaint fails to allege any concerted action or inter-firm agreement. Psystar asserts that the standards under the Cartwright Act are not necessarily contemporaneous with those under federal antitrust laws, but Psystar points to no relevant distinction between the standards. As stated, Psystar's counterclaim fails to plead relevant antitrust markets, and the **[*1204]** counterclaim alleges only unilateral anticompetitive conduct. The Cartwright Act claim, therefore, must be dismissed.

Psystar's fifth claim for relief arises under California's unfair competition statute, *Cal. Bus. & Prof. Code § 17200*. **[**35]** That ***HN13***[] statute proscribes "any unlawful, unfair or fraudulent business act or practice." *Ibid*. Psystar asserts that *Section 17200* is broader than the federal antitrust laws and proscribes not only violations of those laws but also "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*. ***HN14***[] California courts, however, have held that "[i]f the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason -- because it unreasonably restrains competition and harms consumers -- the determination that the conduct

[5] For example, "[t]he District Court found that consumers would not switch from Windows to Mac OS in response to a substantial price increase because of the costs of acquiring the new hardware needed to run Mac OS (an Apple computer and peripherals) and compatible software applications, as well as because of the effort involved in learning the new system and transferring files to its format." *Id. at 52*.

[6] For example, "[t]he court also found the Apple system less appealing to consumers because it costs considerably more and supports fewer applications." *Ibid*.

is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (2001)*. *See also* RLH Industries, Inc. v. SBC Communications, Inc., 133 Cal. App. 4th 1277, 1286-87, 35 Cal. Rptr. 3d 469 (2005) (similar). Apart from its conclusory allegations regarding the "sweeping **[**36]** nature of *section 17200*" (Opp. at 14), Psystar fails to explain a relevant distinction in the standards. Psystar's *section 17200* claim, therefore, must be dismissed.

Psystar's sixth claim for relief alleges violations of the common law of unfair competition. Psystar, however, fails to explain the pertinent standards for the cause of action or how its counterclaim satisfies them. Psystar cites, for example, *Aydin Corp. v. Loral Corp., 1981 U.S. Dist. LEXIS 17410, 1981 WL 2178 (N.D. Cal. 1981)* (Patel, J.) (unreported). That decision stated,

> [s]uch a common law cause of action does apparently exist in California . . . . This court, however, does not locate any California decisions delineating the elements of such a cause of action, nor does plaintiff direct the court to any . . . . As with Count III, this court is unwilling to find a cause of action where plaintiff fails to demonstrate either the illegality of the contract with Moyes or the bad faith of the state action. Therefore the court finds no tortious unfair competition in this case.

The remaining cases Psystar cites are similarly unenlightening (Opp. at 14-15). Psystar's sixth claim, therefore, is dismissed.

CONCLUSION

For all of the above-stated reasons, Apple's **[**37]** motion to dismiss Psystar's counterclaims is **GRANTED**. Psystar may move for leave to amend within twenty calendar days of the date of entry of this order. Any such motion should be accompanied by a proposed pleading and the motion should explain why the foregoing problems are overcome by the proposed pleading. Plaintiff must plead its best case. Failing such a motion, all inadequately pled claims will be dismissed without further leave to amend.

IT IS SO ORDERED.

Dated: November 18, 2008

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

End of Document

Romero v. Philip Morris, Inc.

Court of Appeals of New Mexico

November 18, 2008, Filed

NO. 26,993

Reporter

145 N.M. 658 *; 2009-NMCA-022 **; 203 P.3d 873 ***; 2008 N.M. App. LEXIS 147 ****; 2008-2 Trade Cas. (CCH) P76,392

BEATRICE C. ROMERO, and MICHAEL FERREE, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. PHILIP MORRIS INC.; R.J. REYNOLDS TOBACCO CO.; BROWN & WILLIAMSON TOBACCO CORP.; LORILLARD TOBACCO CO.; LIGGETT GROUP, INC.; and BROOKE GROUP, LTD., Defendants-Appellees.

Subsequent History: Certiorari Granted, No. 31,433, February 27, 2009. Released for Publication March 17, 2009.

Writ of certiorari granted *Romero v. Philip Morris Inc., 145 N.M. 705, 204 P.3d 30, 2009 N.M. LEXIS 28 (N.M., 2009)*

Writ of certiorari granted *Romero v. Philip Morris, Inc., 2009 N.M. LEXIS 59 (N.M., Feb. 27, 2009)*

Writ of certiorari granted *Romero v. Philip Morris, Inc., 2010 N.M. LEXIS 25 (N.M., Feb. 22, 2010)*

Reversed by *Romero v. Philip Morris, 2010 NMSC 35, 2010 N.M. LEXIS 370 (N.M., 2010)*

Prior History: [**1]** APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. James A. Hall, District Judge.

Core Terms

cigarettes, prices, parallelism, discount, premium, generic, conspiracy, conscious, summary judgment, segment, manufacturers, increases, coordination, Plaintiffs', antitrust, federal court, oligopolistic, market share, anti trust law, brands, reasonable factfinder, Sherman Act, deep, alleged conspiracy, present case, trial court, supracompetitive, Defendants', collusion, wholesale

LexisNexis® Headnotes

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

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

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

N.M. R. Ann. 1-056(C) states that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. An issue of fact is "genuine" if the evidence before the court considering a motion for summary judgment would allow a hypothetical fair-minded factfinder to return a verdict favorable to the non-movant on that particular issue of fact. An issue of fact is "material" if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute.

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

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

N.M. R. Ann. 1-056(C) derives from the corresponding provision of the Federal Rules of Civil Procedure. Although New Mexico courts have continued to assume a general correspondence (except for the specific exception recognized in Bartlett) between federal and New Mexico summary judgment standards subsequent to Matsushita, Anderson, and Celotex, New Mexico appellate decisions have not relaxed the traditional stringent standard that a movant must meet in order to satisfy a New Mexico court that a dispute as to a material fact is not genuine, and unlike their federal counterparts, New Mexico courts continue to view summary judgment with disfavor. Thus, notwithstanding the correspondence between the operative language of Rule 1-056(C) and *Fed. R. Civ. P. 56(c)*, the ethos of New Mexico courts is less favorable to disposing of cases through summary judgment than that of federal courts in the period following Matsushita, Anderson and Celotex. Accordingly, the appellate court recognizes that there may be cases where a New Mexico court will allow a case to go to trial on the same record on which a federal court would grant summary judgment.

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

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

HN3[] **Standards of Review, De Novo Review**

In reviewing a grant of summary judgment, the appellate court steps into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if the appellate court were ruling on the motion in the first instance. This standard requires the appellate court to engage in the its own independent review of the record, and the appellate court is not relieved of this responsibility merely because some other court has granted summary judgment, or upheld a grant of summary judgment, applying analogous substantive law to a similar record.

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

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

HN4[] **Standards of Review, De Novo Review**

The principles the appellate court applies in conducting its de novo analysis are well settled. The appellate court views the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits. Judges should not make credibility determinations or weigh circumstantial evidence at the summary judgment stage.

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

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

HN5[] **Sherman Act, Scope**

Section 1 of the New Mexico Antitrust Act (NMAA) provides as follows: Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful, N.M. Stat. Ann. § 57-1-1 (1987). As the New Mexico Supreme Court has observed, this language is patterned after Section 1 of the Sherman Antitrust Act. The close relationship between the NMAA and the Sherman Act is reinforced by Section 15 of the NMAA, which directs the appellate court to construe the NMAA in harmony with judicial interpretations of the federal antitrust laws, N.M. Stat. Ann. § 57-1-15 (1979). Accordingly, the appellate court draws upon federal case law interpreting Section 1 of the Sherman Act for substantive rules defining the scope of liability under NMAA Section 1.

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

HN6[] **Sherman Act, Scope**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal, 15 U.S.C.S. § 1. Section 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy. The several statutory terms for combined action are usually treated interchangeably. In construing Section 1 of the New Mexico Antitrust Act, the appellate court likewise will treat the several statutory terms, "contract, agreement, combination or conspiracy," as interchangeable.

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

HN7[] **Jury Trials, Province of Court & Jury**

A plaintiff cannot make his case just by asking the jury to disbelieve the defendant's witnesses.

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

HN8[] **Scope, Monopolization Offenses**

It is well established that antitrust conspiracies, like other conspiracies, may be proved circumstantially: Because direct proof of an illegal agreement is rarely available, an antitrust conspiracy may be proved through the use of circumstantial evidence alone.

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

HN9[] **Scope, Monopolization Offenses**

Inferring an antitrust conspiracy from circumstantial evidence is complicated by a judge-made antitrust doctrine variously known as conscious parallelism or tacit collusion. Since early in the nineteenth century economists have argued that firms in concentrated markets can increase their prices above the competitive level without expressly communicating with one another, and certainly without the need for anything resembling a conspiracy or agreement among the parties. Courts and commentators have debated for decades whether parallel price changes by oligopolists who recognize their interdependence provide a sufficient basis for a court to infer an unlawful horizontal agreement under Sherman Act *§ 1*, *15 U.S.C.S. § 1*, and if not what additional circumstantial evidence is required to prove a conspiracy.

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

***HN10*[]** **Scope, Monopolization Offenses**

Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

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

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

***HN11*[]** **Scope, Monopolization Offenses**

The courts are nearly unanimous is saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act *§ 1*, *15 U.S.C.S. § 1*. Following the lead of federal courts as required by New Mexico Antitrust Act (NMAA), *N.M. Stat. Ann. § 57-1-15* (1979), the appellate court likewise holds that behavior of market participants characterizable as mere conscious parallelism does not satisfy the conspiracy element requirement of NMAA *Section 1*, *N.M. Stat. Ann. § 57-1-1* (1987).

Antitrust & Trade Law > Sherman Act > Claims

***HN12*[]** **Sherman Act, Claims**

Under federal ***antitrust law***, a court may not allow a Sherman Act *Section 1*, *15 U.S.C.S. § 1*, case to go to trial unless the court is persuaded that the evidence, viewed in the light most favorable to the plaintiff, would allow a reasonable factfinder to rule out legitimate conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff: To survive a motion for summary judgment a plaintiff seeking damages for a violation of *§ 1* of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

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

***HN13*[]** **Scope, Monopolization Offenses**

Federal courts typically characterize the evidence required by Matsushita as "plus factors." Unfortunately, the federal plus factor approach has proven to be more a complication than an analytical tool: First, federal courts rarely attempt to rank plus factors according to their probative value or to specify the minimum critical mass of plus factors that must be established to sustain an inference that the observed market behavior resulted from concerted conduct rather than from consciously parallel choices. Nor have courts generally devoted extensive effort to evaluating the likely competitive effect of each plus factor. This condition makes judgments about the disposition of future cases unpredictable and imparts an impressionistic quality to judicial decision making in agreement-related disputes.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Sherman Act, Claims**

The variation in judicial analysis of plus factors suggests that the outcome in many cases depends upon the court's unarticulated intuition about the likely cause of observed parallel behavior. Judges appear to vary in their acceptance of the proposition that conscious parallelism does not necessarily bespeak concerted behavior. Judges who regard pricing uniformity as a sign of collaboration and market failure will give lip service to the principle that conscious parallelism does not bespeak concerted behavior but will expand the range and reduce the quantum of conduct that, when added to parallel behavior, can support a finding of agreement. Thus, some decisions go to great lengths to characterize proof as hinting of collective activity. On the other hand, judges who see parallelism as a desirable, natural manifestation of rivalry implicitly will hold the plaintiff to more rigorous standards of proof. Where these judges control the panel or court in question, their decisions are likely to display a greater reluctance to give effect to asserted plus factors and a greater willingness to entertain the defendants' explanations about why such plus factors implicate conduct that is either procompetitive or essentially benign.

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

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

HN15[] **State Regulation, Claims**

The plus factor approach adds an additional layer of labels without materially advancing the analysis required by Matsushita. Rather than deferring to federal precedent accepting or rejecting a given circumstance as a plus factor, the sounder approach for a New Mexico court is to engage in an independent and rigorous evaluation of the evidence in deciding whether or not the plaintiff's evidence tends to suggest a degree of coordination that exceeds the parallelism that could be accomplished through lawful conscious parallelism.

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

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

HN16[] **State Regulation, Claims**

Federal courts, drawing on economic theory, assume that some background level of supracompetitive parallelism in prices is inherent in an oligopoly such as the tobacco industry even in the absence of express coordination of prices. The non-existence of conscious parallelism is not a separate element of the plaintiff's case; rather, the doctrine of conscious parallelism merely supports an alternative, exculpatory inference that may be drawn from the parallelism proved by the plaintiff: i.e., the parallelism proved by the plaintiff is nothing more than the parallelism resulting from lawful conscious parallelism. If the plaintiff comes forward with evidence that would allow a reasonable factfinder to exclude lawful conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff, then the plaintiff has made out a prima facie case that would defeat summary judgment. At trial, then, the burden of negating the exculpatory inference of lawful conscious parallelism simply merges into the plaintiff's ultimate burden of convincing the factfinder that the parallelism proved by the plaintiff was more likely than not the result of a conspiracy.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN17[] Summary Judgment, Evidentiary Considerations

A party objecting to trial court's consideration of evidence in ruling on motion for summary judgment bears the burden of moving to exclude such evidence; in the absence of an objection, the trial court may consider such evidence in ruling on a summary judgment motion.

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

HN18[] Scope, Monopolization Offenses

When the Supreme Court in Matsushita referred to the costs of "mistaken inferences" that chill the very conduct the antitrust laws are designed to protect, it was speaking in the specific context of allegations of predatory pricing, which requires the factfinder to find an anticompetitive conspiracy in the face of evidence that the defendants set prices below a competitive level. A mistaken inference of conspiracy in such a case punishes the defendants for engaging in cut-to-the-bone competition--truly the very type of behavior that antitrust laws are designed to protect. Supracompetitive pricing--is conduct that at best is tolerated by ***antitrust law***. While predatory pricing threats like the one in Matsushita always risk chilling procompetitive behavior, no comparable policy reasons justify reluctance about going after a naked price fixing conspiracy.

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

HN19[] Scope, Monopolization Offenses

Matsushita spoke in the context of an alleged highly implausible decades-long predatory pricing conspiracy and found a severe proof requirement in such cases. Where a claim is plausible and does not implicate facially procompetitive behavior, more liberal inferences from the evidence should be permitted than in Matsushita because the attendant dangers from drawing inferences recognized in Matsushita are not present. In a case in which conspiracy is deemed quite plausible, perhaps by virtue of the industry's structure and past attempts at collusion, then a broader range of inferences can be drawn from ambiguous evidence.

Counsel: Shane C. Youtz, Youtz & Valdez, P.C., Albuquerque, NM; Daniel Cohen, Jonathan W. Cuneo, Cuneo Gilbert & Laduca, LLP, Washington, DC; Gordon Ball, Law Offices of Gordan Ball, Knoxville, TN; Megan Jones, Michael D. Hausfeld, Paul Gallagher, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC for Appellants.

Sarah M. Singleton, Andrew S. Montgomery, Kenneth Chernof, Montgomery & Andrews, P.A., Santa Fe, NM; Andrew G. Schultz, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, NM; Patricia G. Williams, Wiggins, Williams & Wiggins, P.C., Albuquerque, NM; Eric R. Burris, Amy J. Diaz, Brownstein, Hyatt & Farber, P.C., Albuquerque, NM; Edwin L. Fountain, William V. O'Reilly, Thomas F. Cullen, Jr., Washington, DC; Colin R. Kass, Kirkland & Ellis LLP, Washington, DC; Irving Scher, Weil, Gotshal & Manges LLP, New York, NY; David Boies, Jack G. Stern, Amy J. Mauser, Boies, Schiller & Flexner LLP, New York, NY; Stephen R. Patton, Andrew R. McGaan, Barack S. Echols, Kirkland & Ellis LLP, Chicago, IL; Holly E. Loiseau, Cleveland Lawrence III, Peter D. Isakoff, Weil, Gotshal & Manges LLP, Washington, DC; James **[****2]** F. Speyer, Arnold & Porter LLP, Los Angeles, CA; Leonard A. Fiewus, Julie R. Fischer, Kasowitz, Benson, Torres & Friedman LLP, New York, NY for Appellees.

Judges: A. JOSEPH ALARID, Judge. WE CONCUR: CYNTHIA A. FRY, Judge, RODERICK T. KENNEDY, Judge.

Opinion by: A. JOSEPH ALARID

Opinion

[*660] [*875] ALARID, Judge.**

[1]** This is an appeal from the district court's grant of summary judgment in favor of Defendants on Plaintiffs' claim that Defendants engaged in an unlawful conspiracy to fix the prices of cigarettes sold in New Mexico. We affirm the summary judgment in favor of Defendants Liggett and Lorillard; we reverse the summary judgment in favor of Defendants Philip Morris, Brown & Williamson, and R.J. Reynolds.

BACKGROUND

[2]** Plaintiffs-Appellants are a statewide class of retail customers who purchased cigarettes manufactured by Defendants during an approximately seven-year period commencing in 1993. Defendants-Appellees are five leading domestic manufacturers of cigarettes: Philip Morris, Incorporated (Philip Morris), R.J. Reynolds Tobacco Company (R.J. Reynolds), Brown & Williamson Tobacco Corporation (Brown & Williamson), Lorillard Tobacco Company (Lorillard), and Liggett Group, Incorporated (Liggett).

[3]** The American tobacco industry **[****3]** is a textbook example of an oligopoly: an industry in which production is concentrated in a handful of manufacturers. *See generally* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 213-15, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; Walter Adams & James W. Brock, *Tobacco: Predation and Persistent Market Power,* in *Market Dominance: How Firms Gain, Hold, or Lose It and the Impact on Economic Performance* 39 (David I. Rosenbaum ed. (1998)) (hereinafter *Market Dominance*). "[T]he cigarette industry is one of the most concentrated industries in the United States and has been so throughout the postwar [World War II] period." Walter Adams & James W. Brock, *The Structure of American Industry* 52 (11th ed. 2005) (hereinafter *Structure of American Industry*).

[4] [***876] [*661]** There were two major outbreaks of price competition within the domestic tobacco industry during the 20th century. The first outbreak occurred during the Great Depression of the 1930s, with the introduction of cheaply priced "ten-cent brands." *Market Dominance* at 44. "To contain this outbreak of competition, the oligopoly responded with a lethal price-cost predation squeeze." *Id.* The industry's response was both effective in suppressing the competition from **[****4]** ten-cent brands--and illegal. The United States brought criminal charges against three of the major domestic cigarette manufacturers of the time, charging that the defendants restrained and monopolized the cigarette industry in violation of the Sherman Antitrust Act. *Id.* at 45. The three defendants were convicted by a jury, and the convictions ultimately were upheld by the Supreme Court. *Am. Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

[5]** The second major outbreak of price competition occurred in 1980, when Liggett became the first major cigarette manufacturer to promote generic cigarettes. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 349 (M.D. N.C. 1990)*. At one time Liggett had been one of the larger manufacturers of branded cigarettes, [1] enjoying market shares of over 20 percent; however, by 1980, Liggett's market share had declined to slightly over 2 percent, and Liggett was on the verge of going out of business. *Id.* "Out of desperation" Liggett turned to a strategy of promoting generic cigarettes. *Id.* In contrast to branded cigarettes, which have distinctive packaging, are advertised heavily, and are sold at full price, *id. n.8*, Liggett's generic **[****5]** cigarettes were sold in plain packages mimicking the packaging of generic groceries, *id.* n.9. The principal competitive advantage of generic cigarettes was their lower price. *Brooke Group, 509 U.S. at 214*. Liggett's innovation was a success, and by 1984, generic cigarettes accounted for about 4 percent of domestic cigarettes, with Liggett's generic cigarettes accounting for 97 percent of the generic segment. *Liggett Group, 748 F. Supp. at 349*.

[6]** Brown & Williamson, recognizing that it was losing a proportionally greater market share to Liggett than were other manufacturers, decided to wrest leadership of the generic segment from Liggett. *Brooke Group, 509 U.S. at 214-15*. Beginning in late May 1984 and continuing until the end of 1985, Liggett found itself embroiled in a fierce

---

[1] *Am. Tobacco, 328 U.S. at 794-96* (setting out market data demonstrating that that Liggett, along with American Tobacco Company and R.J. Reynolds, were the "Big Three" tobacco manufacturers during the 1930s).

price war in the wholesale cigarette market initiated by Brown & Williamson. Liggett Group, 748 F. Supp. at 349-50 (describing "rebate war" between Liggett and Brown & Williamson). In addition to vigorously **[****6]** competing in the marketplace, Liggett responded by suing Brown & Williamson in federal court, alleging, inter alia, that Brown & Williamson had engaged in unlawful predatory pricing by reducing the prices for its generic cigarettes below its average variable costs in order to pressure Liggett to raise its list prices for generic cigarettes. Brooke Group, 509 U.S. at 217. Liggett claimed that "[t]he resulting reduction in the list price gap . . . would restrain the growth of the economy segment and preserve Brown & Williamson's supracompetitive profits on its branded cigarettes." *Id.*

[7]** After a lengthy trial, a jury found in Liggett's favor and awarded Liggett $ 49.6 million in actual damages, which the trial court trebled, resulting in an award of nearly $ 150 million. Liggett Group, 748 F. Supp. at 348. Brown and Williamson filed various post-trial motions, including a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. *Id.* Liggett's case ultimately foundered due to key failures of proof. Liggett's expert had assumed that there was "an alignment of interest" among cigarette manufacturers in protecting the profits generated **[****7]** by premium cigarettes that would lead Brown & Williamson's competitors to join with Brown & Williamson in raising the prices of generic cigarettes so as to narrow the price gap between generic and premium **[***877]** **[*662]** cigarettes (thereby reducing the competitive advantage enjoyed by generic cigarettes and slowing the growth of the generic segment). Id. at 357. The trial court concluded that "[n]o substantial record evidence supports [Liggett's expert's] alignment of interest theory." *Id.* The trial court emphasized evidence establishing that very early in the development of generic cigarettes, R.J. Reynolds had entered and vigorously promoted the generic segment, that both R.J. Reynolds and Liggett had resisted Brown & Williamson's attempt to raise the prices of generic cigarettes, and that, by the time of trial, five of the six major manufacturers were selling some type of generic cigarettes. *Id.*

[8]** The trial court entered judgment in Brown & Williamson's favor. Id. at 366. Liggett appealed. The Court of Appeals affirmed the trial court, Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335 (4th Cir. 1992), and the United States Supreme Court affirmed the Court of Appeals, Brooke Group, 509 U.S. at 242. **[****8]** Overwhelmed by its rivals and denied protection under federal law, Liggett lost and never recovered leadership of the generic segment. *Market Dominance* at 48. During the period that the Liggett-Brown & Williamson predatory-pricing litigation was proceeding in the federal court system, the market share of generic and other discount cigarettes [2] continued to grow. The trend favoring the discount segment cigarettes continued into the next decade, so that by 1993 discount and deep discount cigarettes had captured 40 percent of the United States cigarette market. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1292 (11th Cir. 2003). However, rather than growing the overall market for cigarettes, the growth of the discount segment depended upon cannibalizing sales of premium cigarettes. Brooke Group, 509 U.S. at 214. Accordingly, the growth of the discount segment was "extremely undesirable from the perspective of premium-intensive manufacturers like [Philip Morris] and Lorillard." Williamson Oil Co., 346 F.3d at 1292. In an internal document, Philip Morris estimated that each percentage point of market share claimed by the discount segment cost the cigarette industry $ 150 million **[****9]** *per month* in income. The industry faced what Philip Morris later described as a "cycle of despair":

> Ironically, each manufacturer worked independently to create a self-reinforcing "cycle of despair." . . . [M]anufacturers compensated for the income impact of weakening premium volumes and mix by raising premium prices. These funds were reinvested to grow the Discount category to replace the los[t] volume. In essence they were fueling the very situation they were trying to counteract.

[9]** In April 1992, Philip Morris attempted to lead an industry-wide increase in the prices of non-premium cigarettes in an effort to reduce the price advantage that non-premium cigarettes enjoyed over premium brands. Williamson Oil Co., 346 F.3d at 1292. **[****10]** Philip Morris was forced to retract its price increases when R.J. Reynolds, Brown & Williamson, and Lorillard did not follow suit with parallel increases. *Id.* An attempt by Philip

[2] Generic "black and white" cigarettes were supplemented by other varieties of discount cigarettes, including branded discount cigarettes such as R.J. Reynolds's "Doral," and "Value-25s" (a 25-cigarette pack sold at the same price of a conventional 20-cigarette pack). In the late 1980s, Liggett introduced subgeneric (or deep discount) cigarettes priced even lower than discount cigarettes. The industry often refers to discount and deep discount cigarettes as "value for money" or "VFM" products.

Morris to raise the price of deep discount cigarettes in March 1993 was similarly rebuffed by Philip Morris's rivals. *Id.*

[10]** Having failed to reduce the price gap between discount and premium cigarettes from the bottom up, Philip Morris settled on a dramatic alternative: reducing the price gap from the top down by cutting the retail price of its Marlboro premium brand--the best selling brand of cigarettes in the United States--by 40 cents per pack. *Id.* April 2, 1993, the day Philip Morris announced its price cut, came to be known as "Marlboro Friday." *Id.* Soon after, Brown & Williamson, R.J. Reynolds, and Lorillard matched Philip Morris's price reductions. *Id.* "[O]n July 20, 1993, [Philip Morris] announced that **[***878]** **[*663]** its Marlboro Friday price reduction would be made permanent and [would be] expanded to all of [Philip Morris's] premium brands, e.g., Parliament and Virginia Slims. *Williamson Oil Co., 346 F.3d at 1293*. Philip Morris also "lowered the wholesale price of its discount cigarettes and raised the wholesale **[****11]** price of its deep discount brands by 10 cents per pack," thereby consolidating discount and deep discount cigarettes into a single price tier. *Id.* Philip Morris's rivals promptly followed Philip Morris's lead, consolidating their own discount and deep discount cigarettes into a single price tier. *Id.* Next, R.J. Reynolds announced that it was consolidating regular length and extra long premium cigarettes into a single price tier. *Id.* Philip Morris, Brown & Williamson, and Lorillard "quickly followed suit." *Id.* As a result of these maneuvers, a cigarette market that previously had included ten price tiers had been reduced to two. *Id.*

[11]** On November 8, 1993, R.J. Reynolds announced an increase of 4 cents per pack for both premium and discount cigarettes. By November 22, 1993, Philip Morris, Brown & Williamson, and Lorillard had matched the increases. *Id. at 1294*. These initial in-tandem increases in the prices of premium and discount cigarettes were followed by eleven more in-tandem increases in the prices of discount and premium cigarettes during the class period. *Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1264 (N.D. Ga 2002)*. During the class period, **[****12]** the market shares of the premium-intensive manufacturers such as Philip Morris rose significantly; the market shares of R.J. Reynolds and Brown & Williamson, who had focused on developing the discount market segment, declined. *Williamson Oil Co., 346 F.3d at 1295*.

ANALYSIS

Summary Judgment Standards

[12]** ***HN1***[↑] Rule 1-056(C) NMRA, states that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." An issue of fact is "genuine" if the evidence before the court considering a motion for summary judgment would allow a hypothetical fair-minded factfinder to return a verdict favorable to the non-movant on that particular issue of fact. *Goradia v. Hahn Co., 111 N.M. 779, 782, 810 P.2d 798, 801 (1991)*. An issue of fact is "material" if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute. *See Farmington Police Officers Ass'n v. City of Farmington, 2006 NMCA 77, P 17, 139 N.M. 750, 137 P.3d 1204* (discussing materiality in the context of a dispute over the interpretation of a collective bargaining agreement).

[13]** In urging **[****13]** us to affirm the district court, Defendants emphasize the fact that Plaintiffs' allegations of an industry-wide price-fixing conspiracy previously were the subject of an unsuccessful lawsuit brought in the United States District Court for the Northern District of Georgia in which the plaintiffs, wholesalers and distributors of cigarettes, sued Philip Morris, Brown & Williamson, R.J. Reynolds, and Lorillard, alleging that the defendants had engaged in price fixing in violation of the Sherman Antitrust Act. In that case, the trial court granted summary judgment in the defendants' favor on the plaintiffs' federal price-fixing claim, *Holiday Wholesale Grocery Co., 231 F. Supp.2d at 1253*, and the Eleventh Circuit Court of Appeals affirmed, *Williamson Oil Co., 346 F.3d at 1291*. Defendants point out that we have previously observed that "federal and our own state's constructions of summary judgment do not differ substantively." *Wolford v. Lasater, 1999 NMCA 24, P 11, 126 N.M. 614, 973 P.2d 866*. Without formally invoking res judicata, Defendants invite us to rely on the reasoning of the Eleventh Circuit Court of Appeals. Plaintiffs, citing *Bartlett v. Mirabal, 2000 NMCA 36, 128 N.M. 830, 999 P.2d 1062*, **[****14]** argue that federal courts apply a less rigorous standard in granting summary judgment than do New Mexico courts and argue that the district court erred by following the reasoning of the Eleventh Circuit Court of Appeals, which necessarily incorporated a less rigorous federal summary judgment standard.

[14]** "Prior to 1986, the [United States] Supreme Court sent mixed messages about the availability of the [summary judgment] **[***879]** **[*664]** motion. Consequently, most commentators viewed [federal] courts during the 1938-1986 period as excessively reluctant to grant summary judgment." 11 James Wm. Moore, *Moore's Federal Practice* P 56.03[1] (3d ed. 2007). There appears to be general agreement that within the federal court system the now well-known trio of Supreme Court summary judgment opinions, *Matsushita Elect. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*, and *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*, "substantially increased the availability of summary judgment and encouraged greater use of the motion by trial courts. In addition to establishing doctrine favoring greater use of summary judgment, each case gave strong rhetorical support **[****15]** to summary judgment as a means of case management and resolution." Moore et al., *supra,* P 56.03[1]; *see also* 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2727 at 467-68 (1998).

[15]** ***HN2***[] Rule 1-056(C) derives from the corresponding provision of the Federal Rules of Civil Procedure. NMSA 1953, § 21-1-1(56)(c), Compiler's Note (1954). Several reported New Mexico appellate decisions have cited *Anderson or Celotex. McElhannon v. Ford, 2003 NMCA 91, P 7, 134 N.M. 124, 73 P.3d 827* (applying Celotex in determining the sufficiency of the movant's prima facie showing in support of motion for summary judgment); *Bartlett, 2000 NMCA 36, PP 41-45, 128 N.M. 830, 999 P.2d 1062* (Alarid, J., specially concurring) (collecting cases). Our Supreme Court relied on *Matsushita* in upholding a grant of summary judgment in favor of an anti-trust defendant. *Clough v. Adventist Health Sys., Inc., 108 N.M. 801, 804, 780 P.2d 627, 630 (1989)* (citing and quoting *Matsushita* for the proposition that "if [the alleged conspirators] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy" (internal quotation **[****16]** marks omitted)). However, nothing in *Clough* suggests that the Supreme Court believed that it was departing from New Mexico's traditional summary judgment standards. We at one time expressed the opinion that "federal and our own state's constructions of summary judgment do not differ substantively," *Wolford, 1999 NMCA 24, P 11, 126 N.M. 614, 973 P.2d 866*, but we subsequently undermined that generalization in *Bartlett* by expressly rejecting *Anderson's* principal holding that a court in ruling on a defendant's motion for summary judgment must take into account the heightened burden of proof the plaintiff non-movant must satisfy at trial. *Bartlett, 2000 NMCA 36, P 39, 128 N.M. 830, 999 P.2d 1062*. Although New Mexico courts have continued to assume a general correspondence (except for the specific exception recognized in *Bartlett*) between federal and New Mexico summary judgment standards subsequent to *Matsushita, Anderson,* and *Celotex,* New Mexico appellate decisions have not relaxed the traditional stringent standard that a movant must meet in order to satisfy a New Mexico court that a dispute as to a material fact is not genuine, *e.g. Ocana v. American Furniture Co., 2004 NMSC 18, P 22, 135 N.M. 539, 91 P.3d 58*, and unlike their federal counterparts, **[****17]** New Mexico courts continue to view summary judgment with disfavor, *compare Handmaker v. Henney, 1999 NMSC 43, P 21, 128 N.M. 328, 992 P.2d 879* (noting "the policy in New Mexico disfavoring summary judgment"), *with Armstrong v. City of Dallas, 997 F.2d 62, 66 (5th Cir. 1993)* (observing that "[t]he once frequently repeated characterization of summary judgment as a disfavored procedural shortcut no longer appertains" (footnote omitted)). Thus, notwithstanding the correspondence between the operative language of Rule 1-056(C) and *Federal Rule 56(c)*, the ethos of New Mexico courts is less favorable to disposing of cases through summary judgment than that of federal courts in the period following *Matsushita, Anderson* and *Celotex.* Accordingly, we recognize that there may be cases where a New Mexico court will allow a case to go to trial on the same record on **[***880]** **[*665]** which a federal court would grant summary judgment.

[16]** ***HN3***[] In reviewing a grant of summary judgment, "we step into the shoes of the district court, reviewing the motion, the supporting papers, and the non-movant's response as if we were ruling on the motion in the first instance." *Farmington Police Officers Ass'n, 2006 NMCA 77, P 13, 139 N.M. 750, 137 P.3d 1204*. This **[****18]** standard requires us to engage in our own independent review of the record, and we are not relieved of this responsibility merely because some other court has granted summary judgment, or upheld a grant of summary judgment, applying analogous substantive law to a similar record. Therefore, although we have read with considerable interest the decisions of the federal courts in *Holiday Wholesale Grocery Co.* and *Williamson Oil Co.,* our decision in this case represents this Court's de novo analysis of the record in this case.

[17]** ***HN4***[] The principles we apply in conducting our de novo analysis are well settled. "We view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Ocana, 2004 NMSC 18, P 12, 135 N.M. 539, 91 P.3d 58* (quoting *Rummel v. Lexington Ins. Co., 1997 NMSC 41, P 18, 123 N.M. 752, 945 P.2d 970*) (internal quotation marks and brackets omitted). "Judges should not make credibility determinations or weigh circumstantial evidence at the summary judgment stage." *Juneau v. Intel Corp., 2006 NMSC 2, P 23, 139 N.M. 12, 127 P.3d 548*.

Applicable Principles of *Antitrust Law*

[18]** ***HN5***[] *Section 1 of the New Mexico Antitrust Act (NMAA)* **[****19]** provides as follows:

> Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful.

NMSA 1978, § 57-1-1 (1987). As our Supreme Court has observed, this language is patterned after *Section 1* of the Sherman Antitrust Act. *Smith Machinery Corp. v. Hesston, Inc., 102 N.M 245, 249, 694 P.2d 501, 505 (1985)*. The close relationship between the NMAA and the Sherman Act is reinforced by *Section 15 of the NMAA*, which directs us to construe the NMAA "in harmony with judicial interpretations of the federal antitrust laws." *NMSA 1978, § 57-1-15* (1979). Accordingly, we draw upon federal case law interpreting *Section 1* of the Sherman Act for substantive rules defining the scope of liability under *NMAA Section 1*.

[19]** ***HN6***[] *Section 1* of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1 (2000)*. "*[Section] 1* of the Sherman Act does not prohibit [all] unreasonable restraints of trade . . . *but only restraints effected by a contract,* ***[****20]*** *combination, or conspiracy.*" *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, ___, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (alteration in original; internal quotation marks and citation omitted; emphasis added)). As a leading authority on federal ***antitrust law*** has observed, "[t]he several statutory terms for combined action are usually treated interchangeably." VI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application,* P1400 at 1 (2d ed. 2003). In construing *Section 1 of the NMAA*, we likewise will treat the several statutory terms, "contract, agreement, combination or conspiracy," as interchangeable; and, for the sake of convenience, we will use the term "conspiracy" to encapsulate the concerted action among Defendants required to establish liability under *Section 1* of the Sherman Act and *Section 1 of the NMAA*.

[20]** Defendants argue that they are entitled to summary judgment because Plaintiffs' evidence does not create a genuine issue of fact as to the material element of a conspiracy to fix prices. Each Defendant's CEO denied having any knowledge of any conspiracy, combination, or agreement among Defendants to fix prices. Although a jury would **[****21]** be free to disbelieve the denials of Defendants' officers,***HN7***[] "[a] plaintiff cannot make his case just by asking the jury to disbelieve the defendant's witnesses." *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655* ***[*666]*** *(7th Cir. 2002)* ***[***881]***. Plaintiffs have not directed our attention to any direct evidence of a conspiracy such as testimony by a witness who was present when representatives of Defendants discussed setting prices. *Cf. City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 557-59, 568 (11th Cir. 1998)* (holding inculpatory statements by an officer of alleged conspirator admissible against his employer-principal; observing that the trier of fact could find in favor of the plaintiffs and against the employer based on the admissions of the officer alone).

[21]** The absence of eyewitness testimony or smoking-gun documents does not mean that Plaintiffs' case necessarily fails. Modern-day antitrust plaintiffs often find direct evidence of a conspiracy hard to come by:

> Judicial decisions that established the Sherman Act's application to written and spoken price-fixing arrangements altered firm behavior . . . . *[S]ection 1* drove many cartels underground by forcing participants **[****22]** to take precautions to avoid detection and curtail the generation of evidence of direct communications that might be used to establish the common course of action. The Sherman Act gave firms an incentive to avoid formal contracts or other written instruments in favor of spoken assurances in secret meetings or covert conversations involving industry members. Thus, for prospective cartel participants, the Sherman Act placed a premium on avoiding the generation of evidence (such as written records) from which a factfinder readily could determine that an agreement existed.

William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws,* 38 Antitrust Bull. 5, 17 (1993). ***HN8***[] It is well established that antitrust conspiracies, like other conspiracies, may be proved circumstantially: "Because direct proof of an illegal agreement is rarely available, an antitrust conspiracy may be proved through the use of circumstantial evidence alone." *Bldg. Indus. Fund v. Local Union No. 3., Int'l Bhd. of Elec. Workers, 992 F. Supp. 162, 181 (E.D. N.Y. 1996), aff'd on other grounds by, 141 F.3d 1151 (2d Cir. 1998)* (unpublished opinion). Plaintiffs may establish their claim by **[****23]** presenting circumstantial evidence from which a reasonable factfinder could infer the existence of a conspiracy to fix prices notwithstanding Defendants' denials and the absence of direct evidence of a conspiracy. *In re High Fructose Corn Syrup, 295 F.3d at 654-55*.

[22]** ***HN9***[] Inferring an antitrust conspiracy from circumstantial evidence is complicated by a judge-made antitrust doctrine variously known as "conscious parallelism" or "tacit collusion." *Brooke Group, 509 U.S. at 227*. "Since early in the nineteenth century economists have argued that firms in concentrated markets can increase their prices above the competitive level without expressly communicating with one another, and certainly without the need for anything resembling a 'conspiracy' or agreement among the parties." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 4.2 at 157 (2d ed. 1999). "[C]ourts and commentators have debated for decades whether parallel price changes by oligopolists who recognize their interdependence provide a sufficient basis for a court to infer an unlawful horizontal agreement under *Sherman Act § 1*, and if not what additional circumstantial evidence is required to **[****24]** prove a conspiracy." Johnathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory,* 38 Antitrust Bull. 143, 144 (1993). In a highly influential law review article, Professor Donald F. Turner [3] maintained that

> oligopolists who take into account the probable reactions of competitors in setting their basic prices, without more in the way of 'agreement' than is found in 'conscious parallelism,' should not be held unlawful conspirators under the Sherman **[***882]** **[*667]** Act, even though, as in *American Tobacco [Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)]*, they refrain from competing in price.

Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 671 (1962). Turner's influence is reflected in statements such as the following:

> ***HN10***[] Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their **[****25]** interdependence with respect to price and output decisions.

Brooke Group, 509 U.S. at 227. "Since *Matsushita,* the courts have essentially settled on Turner's approach. . . ." William H. Page, *Communication and Concerted Action, 38 Loy. U. Chi. L.J. 405, 413 (2007)*. ***HN11***[] "The courts are nearly unanimous is saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by *Sherman Act § 1*." VI Areeda & Hovenkamp, *supra,* P 1433a at 236. Following the lead of

---

[3] "Turner, who had a Ph.D. in economics from Harvard as well as a law degree from Yale, taught for many years at Harvard Law School and was head of the Justice Department's antitrust division for several years during the 1960s. He was the nation's foremost antitrust scholar from the mid-1950s to the late 1970s and one of the first to make economic analysis the lodestar of his approach to ***antitrust law***." Richard A. Posner, ***Antitrust Law*** 55 n.4 (2d. ed. 2001).

federal courts as required by *NMAA Section 15*, we likewise hold that behavior of market participants characterizable as mere conscious parallelism does not satisfy the conspiracy element requirement of *NMAA Section 1*.

[23]** The current general **[****26]** acceptance by federal courts of the doctrine of conscious parallelism as a substantive principle of ***antitrust law*** has important procedural consequences in a case in which the defendants are oligopolists. Such cases present a risk that the factfinder--typically a jury composed of laypersons unfamiliar with prevailing economic theory and antitrust doctrine--may erroneously attribute the presence of supracompetitive parallelism to a conspiracy, when in fact the parallelism proved by the plaintiff is merely the parallelism inherent in the structure of an oligopoly. Imposing antitrust liability in such circumstances would violate substantive ***antitrust law*** creating a safe harbor for conscious parallelism. ***HN12***[] Under federal ***antitrust law***, a court may not allow a *Sherman Act Section 1* case to go to trial unless the court is persuaded that the evidence, viewed in the light most favorable to the plaintiff, would allow a reasonable factfinder to rule out legitimate conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff: "To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1 [of the Sherman Act]* must present evidence **[****27]** 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*.

[24]** ***HN13***[] Federal courts typically characterize the evidence required by *Matsushita* as "plus factors." VI Areeda & Hovenkamp, *supra,* P 1434 at 241. Unfortunately, the federal plus factor approach has proven to be more a complication than an analytical tool:

> First, [federal] courts rarely attempt to rank plus factors according to their probative value or to specify the minimum critical mass of plus factors that must be established to sustain an inference that the observed market behavior resulted from concerted conduct rather than from "consciously parallel" choices. Nor have courts generally devoted extensive effort to evaluating the likely competitive effect of each plus factor. This condition makes judgments about the disposition of future cases unpredictable and imparts an impressionistic quality to judicial decision making in agreement-related disputes. . . .
>
> Second, ***HN14***[] the variation in judicial analysis of plus factors suggests that the outcome in many cases depends upon the court's unarticulated **[****28]** intuition about the likely cause of observed parallel behavior. Judges appear to vary in their acceptance of the proposition . . . that conscious parallelism does not necessarily bespeak concerted behavior. Judges who regard pricing uniformity as a sign of collaboration and market failure will give lip service to [the principle that conscious parallelism does not bespeak concerted behavior] but will expand the range and reduce the **[***883]** **[*668]** quantum of conduct that, when added to parallel behavior, can support a finding of agreement. Thus, some decisions go to great lengths to characterize proof as hinting of collective activity.
>
> On the other hand, judges who see parallelism as a desirable, natural manifestation of rivalry implicitly will hold the plaintiff to more rigorous standards of proof. Where these judges control the panel or court in question, their decisions are likely to display a greater reluctance to give effect to asserted plus factors and a greater willingness to entertain [the] defendants' explanations about why such plus factors implicate conduct that is either procompetitive or essentially benign.

Kovcic, *supra,* at 35-37 (footnotes omitted). In our view,***HN15***[] the plus factor approach **[****29]** adds an additional layer of labels without materially advancing the analysis required by *Matsushita.* Rather than deferring to federal precedent accepting or rejecting a given circumstance as a plus factor, we think the sounder approach for a New Mexico court is to engage in an independent and rigorous evaluation of the evidence in deciding whether or not the plaintiff's evidence tends to suggest a degree of coordination that exceeds the parallelism that could be accomplished through lawful conscious parallelism. *See, e.g.,* VI Areeda & Hovenkamp, *supra,* P 1434c at 243-244 (critically examining commonly-cited plus factors of "conspiratorial motivation" and "acts against self-interest").

[25]** We summarize our understanding of conscious parallelism as follows: ***HN16***[] federal courts, drawing on economic theory, assume that some background level of supracompetitive parallelism in prices is inherent in an oligopoly such as the tobacco industry even in the absence of express coordination of prices. The non-existence of conscious parallelism is not a separate element of the plaintiff's case; rather, the doctrine of conscious parallelism merely supports an alternative, exculpatory inference that may **[****30]** be drawn from the parallelism proved by the plaintiff: i.e., the parallelism proved by the plaintiff is nothing more than the parallelism resulting from lawful conscious parallelism. If the plaintiff comes forward with evidence that would allow a reasonable factfinder to exclude lawful conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff, then the plaintiff has made out a prima facie case that would defeat summary judgment. At trial, then, the burden of negating the exculpatory inference of lawful conscious parallelism simply merges into the plaintiff's ultimate burden of convincing the factfinder that the parallelism proved by the plaintiff was more likely than not the result of a conspiracy.

[26]** We set out below Plaintiffs' theory of their case as stated in their brief in opposition to summary judgment filed in the district court:

> [I]t is important to keep in mind that [P]laintiffs have not alleged a textbook functioning collusion that eliminated all competition in the market, and they have not alleged a simple market sharing or price fixing cartel. Rather the alleged conspiracy concerns the actions taken by the industry to control the competition **[****31]** that arose in the discount segment of the market in order to extend the "oligopolistic coordination" of the premium segment to the discount segments. This could only be done on an industry-wide basis and it required a major restructuring in the established ways of pricing product.

[27]** Consistent with our obligation to view the record in the light most favorable to Plaintiffs' theory of their case, we conclude that a factfinder could reason as follows: Marlboro Friday and the industry-wide price reductions that occurred afterward represented the triumph of competition over oligopolistic price coordination. As the result of competitive pressure from the discount segment, the list prices of premium cigarettes substantially declined for the first time in decades. Oligopolistic coordination, which previously had allowed Defendants to increase prices irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand, had broken down under the pressure of competition.

[28]** Defendants were desperate to regain the enormous profits previously generated by premium cigarettes sold at the highly supracompetive prices in effect prior to Marlboro **[***884]** **[*669]** Friday. Philip Morris, **[****32]** the instigator of Marlboro Friday, was itself experiencing a staggering reduction in operating income as a consequence of the post-Marlboro Friday depression in the prices of premium cigarettes. However, no Defendant could raise the prices of its premium cigarettes without losing market share unless the remaining Defendants, including Philip Morris, joined in the increase. Philip Morris could not be expected to raise prices of its premium cigarettes unless it could do so without losing further market share to non-premium cigarettes.

[29]** Relying on oligopolistic coordination to restore market stability and supracompetive profits would have required Defendants to accept an indeterminate period of depressed profits. Moreover, because Defendants had divergent interests and because Defendants had limited information about each other's intentions, it would not have been clear to Defendants that lawful oligopolistic coordination would promptly lead to a global solution acceptable to the major manufacturers. Marlboro Friday was itself a demonstration of how badly the oligopolistic coordination that had characterized the industry prior to the introduction of generics had failed in containing **[****33]** the generic segment. Defendants began exchanging signals, possibly supplemented by clandestine communications, knowing and intending that these signals and communications would shape the market, resulting in conditions that would allow prices to immediately begin rising back to pre-Marlboro Friday levels: Philip Morris would relax its stranglehold on the prices of premium cigarettes and allow prices to gradually return to pre-Marlboro Friday supracompetitive levels; and, in return, each of the remaining Defendants--most crucially Brown & Williamson and R.J. Reynolds--would significantly reduce the competition from generic cigarettes, which would reverse the cannibalization of the premium cigarette segment. Defendants settled upon the following method to carry out their anticompetitive scheme: each increase in the prices of premium cigarettes would be matched by a corresponding increase in the prices of discount cigarettes; increases would be spread out over several years to minimize consumer resistance; [4] as prices of discount and premium cigarettes serially rose in tandem, discount cigarettes' sole competitive advantage--proportionally lower prices--gradually would be reduced; [5] and **[****34]** as discount cigarettes gradually lost their competitive advantage, the cannibalization of the premium segment would be reversed.

[30]** The terms of this hypothetical agreement were not necessarily the product of free assent and did not **[****35]** necessarily impose equal burdens on the conspirators. Philip Morris, as the largest and economically most powerful manufacturer, insisted on terms that favored manufacturers with a large presence in the premium segment, such as Philip Morris itself, who would regain market share primarily at the expense of manufacturers heavily invested in the discount segment. Even so, this hypothetical agreement would not have been a lose-lose proposition from the standpoint of any conspirator. First, a conspiracy allowed immediate relief from the depression in the prices of premium cigarettes. Second, because a conspiracy would result in higher prices for discount cigarettes, not just premium cigarettes, losses in the discount market segment would be offset by higher profits per pack on both discount and premium cigarettes. [6] The alleged conspiracy **[***885]** **[*670]** was in place by November 1993, when the first in-tandem increase in the prices of premium and discount cigarettes occurred.

[31]** **[****36]** Bearing in mind our obligation to view the evidence in the light most favorable to the non-movant and to allow the non-movant the benefit of any reasonable inferences supported by the evidence, we conclude that Plaintiffs' theory of their case is economically plausible. It accounts for the in-tandem increases in the prices of generic and premium cigarettes beginning in November 1993, as well as the shifts in market share that occurred as the competitive advantage enjoyed by discount cigarettes eroded over time. It explains why those Defendants who were heavily invested in the discount market segment acted against their apparent interest in agreeing to a scheme that reduced their respective market shares. Further, it does not depend on a showing that there was no competition at all within the cigarette industry. [7]

[32]** We next consider whether Plaintiffs have come forward with evidence that would permit a reasonable factfinder to rule out conscious parallelism as the most likely explanation for the parallelism **[****37]** exhibited by the tobacco industry subsequent to Marlboro Friday. As previously noted, the judicial doctrine of conscious parallelism is grounded in economic theory about the functioning of concentrated markets. Testimony by a qualified economics expert that the character or degree of parallelism actually exhibited by prices exceeds the parallelism that economic theory predicts would result from independent competitive behavior is precisely the type of evidence that tends to exclude the possibility that the defendants acted independently; and in our view, it constitutes an extremely forceful "plus factor" because, as evidence derived from economics, it directly engages the assumptions on which the judicial doctrine of conscious parallelism depends. In the present case, Plaintiffs' expert, Keith Leffler, Ph.D., stated in his opinion that "[t]he economic evidence indicates that it is highly unlikely that independent competitive behavior explains the price restructuring and price changes for cigarettes during the alleged conspiracy period." Dr. Leffler's opinion is backed up by his detailed analysis of the cigarette industry. Dr. Leffler's opinion testimony, if believed, would permit a **[****38]** reasonable factfinder to exclude lawful parallelism as the most likely

---

[4] Our understanding of Plaintiffs' theory of the case does not necessarily require that each subsequent increase have been expressly coordinated by the conspirators. Once an agreement to raise prices of discount and premium cigarettes in tandem was in place, the decision to implement subsequent increases could be left to traditional price leadership.

[5] Assume, by way of example, that discount cigarettes sell at retail for $ 1.00 per pack and that premium cigarettes sell for $ 2.00 per pack. At this point, a pack of discount cigarettes has a two to one price advantage over a pack of premiums. Assume that the industry adopts a $ .50 increase in the price of each type of cigarette and that discount cigarettes now sell at retail for $ 1.50 per pack and that premium cigarettes sell for $ 2.50 per pack. The *absolute* price difference between discount and premium cigarettes remains $ 1.00, but the *proportional* price advantage of discount cigarettes has been reduced.

[6] Because the conspiracy contemplated supracompetitive profits from *both* premium and generic cigarettes, pre-Marlboro Friday profits would be realized even before the prices of premium cigarettes reached pre-Marlboro Friday levels.

[7] In other words, the competition that occurred in the course of the conspiracy was among products all of which were priced supracompetitively as a consequence of the conspiracy.

explanation for the parallelism demonstrated by cigarette prices during the class period. We hold that Dr. Leffler's testimony is sufficient to meet Plaintiffs' burden of production under *Matsushita.*

[33]** Furthermore, Dr. Leffler's conclusion is supported by existing Supreme Court precedent. Although the United States Supreme Court appears to have accepted conscious parallelism as a plausible explanation for the simple parallelism in prices demonstrated by premium cigarettes in the post-World War II era prior to the introduction of discount cigarettes, *Brooke Group, 509 U.S. at 213* (implying that the Court did not view lockstep, twice-yearly increases in prices of premium cigarettes in the decades prior to the introduction of generic cigarettes as the product of unlawful price fixing), the Supreme Court clearly was much less willing to accept conscious parallelism as a plausible explanation for more complex, "multi-variable," parallel pricing scenarios, *id. at 239* (observing that "the inherent limitations of tacit collusion suggest that such multi-variable coordination is improbable").

[34]** In *Brooke Group,* Liggett **[****39]** did not allege a conspiracy, as Plaintiffs have done in the present case. Rather, Liggett alleged that Brown & Williamson had "cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy [cigarette] segment" *Id. at 212*. In order to prove its theory, Liggett had to demonstrate that **[***886]** **[*671]** there was a likelihood that the predatory scheme would result in Brown & Williamson's being able to recoup the losses it incurred in implementing the scheme. *Id. at 225*. Liggett theorized that Brown & Williamson sought to recoup by preserving supracompetitive profits on premium cigarettes by way of conscious parallelism. *Id. at 227*. In other words, Brown & Williamson relied on the idea that all cigarette manufacturers would independently decide to follow Brown & Williamson's lead in pricing and that the ultimate result would be preservation of supracompetitive pricing.

[35]** The Supreme Court concluded that such conscious parallelism would have been "unmanageable" in light of the large number of cigarette types and pricing variables that existed in the industry at **[****40]** the time. *Id. at 238-39*.

> The Court expressed great skepticism about [Liggett's] claim of a complex chain of causes and effects under which [Brown & Williamson] would first enter the market with its generic in competition with Liggett at the same list prices but with large rebates, thereby realizing net prices below its costs; Liggett would offer similar rebates, suffer serious losses, and yield to this predation by raising its list prices; *thereafter, all firms producing generics would reach tacit consensus on price; the price gap between branded cigarettes and generics would then decrease, and both would stabilize at oligopoly levels.*

III Areeda & Hovenkamp, *supra,* P 726 at 316 (emphasis added). As *Brooke Group* demonstrates, there are limits to the Supreme Court's willingness to accept conscious parallelism as a plausible explanation for complex types of parallelism. Although conscious parallelism in *Brooke Group* was part of the plaintiff's theory in that case, while it is Defendants' primary defense theory in the present case, the Supreme Court's analysis is equally applicable in both cases: conscious parallelism in a complex, multi-variable industry is "improbable." *509 U.S. at 239*.

[36]** **[****41]** Defendants' theory of the present case seems to us to be easily as complex as the recoupment theory rejected in *Brooke Group.* The lesson we draw from *Brooke Group* is that the exculpatory inference arising from the doctrine of conscious parallelism becomes weaker as the chain of causes and effects it is offered to explain becomes more complex and as the economic interests of the participants in the market diverge. *Id. at 239-40*. Indeed, Defendants' reliance on conscious parallelism to explain the extraordinary parallelism exhibited by the cigarette prices following Marlboro Friday is reminiscent of the "alignment of interest" theory, *Liggett Group, 748 F. Supp. at 357*, unsuccessfully advanced by Liggett in *Liggett Group* and *Brooke Group.*

[37]** Further, we have the benefit of several years of history subsequent to the events recounted in *Brooke Group.* As noted in *Brooke Group,* during the latter half of the 1980s, list prices of generics began to mimic the lockstep, twice-a-year price increases of premium cigarettes, *509 U.S. at 218*, a pattern suggesting that the price competition from generic cigarettes had been co-opted by oligopolistic price coordination. However, Liggett once again stepped **[****42]** into the competitive breach, this time introducing "subgeneric"(also called "deep discount") cigarettes, priced even lower than generic cigarettes. *Id. at 236*. Deep discount cigarettes provided an important competitive check on the prices of premium cigarettes. Most notably, a decrease in the wholesale prices of deep discount cigarettes in February to June 1992 was followed by a corresponding decrease in the wholesale prices of discount cigarettes beginning in June 1992. *Structure of American Industry,* Fig. 3-6 at 59. The decrease in the prices of discount cigarettes broke the previously established pattern of in-tandem increases in the prices of discount and premium cigarettes, reopening the price gap between discount and premium cigarettes. *Id.* Competition--this time in the form of deep discount cigarettes--trumped oligopolistic price coordination. Further, when Philip Morris attempted to lead increases in the prices of discount cigarettes in 1992 and 1993, Brown & Williamson and R.J. Reynolds did not follow its lead and Philip Morris was **[***887]** **[*672]** forced to retract each of the increases. *Id.* This evidence reinforces Dr. Leffler's opinion that by itself, lawful oligopolistic coordination was **[****43]** incapable of containing the competition from non-premium cigarettes.

[38]** Although we are not bound by the Eleventh Circuit Court of Appeals' decision, we believe that it will be helpful to the parties, and to the readers of this opinion, if we explain some of the major points of departure between our reasoning and that of the federal courts in *Holiday Wholesale Grocery Co.* and *Williamson Oil Co.*

[39]** First, and most significantly, we have Dr. Leffler's opinion. Dr. Leffler's report was not in the record before the federal courts. We are not inclined to appoint ourselves amateur economists and attempt to second guess Dr. Leffler's reasoning, nor are we inclined to engage in a sua sponte evaluation of the admissibility under *Rule 11-702 NMRA* of Dr. Leffler's opinions. [8] *See* *Chavez v. Ronquillo, 94 N.M. 442, 445, 612 P.2d 234, 237 (Ct. App. 1980)* (observing that ***HN17***[] party objecting to trial court's consideration of evidence in ruling on motion for summary judgment bears the burden of moving to exclude such evidence; in the absence of an objection, the trial court may consider such evidence in ruling on a summary judgment motion).

[40]** Second, our reading of *Brooke Group* indicates to us that we should be cautious in accepting conscious parallelism as an explanation for complex, multi-variable, multi-price-tier parallelism. The federal courts in *Holiday Wholesale Grocery Co.* and *Williamson Oil Co.* may have fallen into the error of giving the Supreme Court's dicta--i.e., "[t]acit collusion . . . describes the process, not in itself unlawful"--which comes handily packaged in quotable form, more consideration than the Supreme Court's actual analysis of the likelihood that tacit collusion could result in industrywide, in-tandem increases in the prices of both generic and premium cigarettes. *Brooke Group, 509 U.S. at 227*. The present case does not involve the type of simple price leadership in a single-tier market that characterized the tobacco industry prior to the introduction of generic cigarettes.

[41]** Third, we have some concern that the Eleventh Circuit Court of Appeals misinterpreted *Matsushita* so as to place an undue burden on antitrust plaintiffs alleging horizontal price fixing. *Williamson Oil Co., 346 F.3d at 1300*. ***HN18***[] When the **[****45]** Supreme Court in *Matsushita* referred to the costs of "mistaken inferences" that "chill the very conduct the antitrust laws are designed to protect," *475 U.S. at 594*, it was speaking in the specific context of allegations of predatory pricing, which requires the factfinder to find an anticompetitive conspiracy in the face of evidence that the defendants set prices *below* a competitive level. A mistaken inference of conspiracy in such a case punishes the defendants for engaging in cut-to-the-bone competition--truly the very type of behavior that antitrust laws are designed to protect. *See* *In re Flat Glass Antitrust Litigation, 385 F.3d 350, 357 (3d Cir. 2004)* (distinguishing *Matsushita*). The conduct at issue in the present case--supracompetitive pricing--is conduct that at best is tolerated by ***antitrust law***. "[W]hile predatory pricing threats like the one in *Matsushita* always risk chilling procompetitive behavior, no comparable policy reasons justif[y] reluctance about going after a naked price fixing conspiracy," such as the conspiracy alleged in the present case. II Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application P 308 **[****46]** at 147 (3d ed. 2006). We therefore have the same concern--no more, no less--that we have for any other class of defendants in protecting Defendants from mistaken inferences of culpable conduct.

[8] Indeed, at this point it is not entirely clear whether Dr. Leffler's **[****44]** opinions are being offered as scientific or as non-scientific expert opinion evidence.

[42]** Moreover, the predatory pricing claim in *Matsushita* was economically implausible on its face: ***HN19***[] "*Matsushita* spoke in the context of an alleged highly implausible decades-long predatory pricing conspiracy and found a severe proof requirement in such cases." II Areeda & Hovenkamp, *supra,* P 308c3 at 137-38. Where a claim is plausible and does not implicate facially procompetitive **[***888]** **[*673]** behavior, "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *In re Flat Glass Antitrust Litigation, 385 F.3d at 358* (quoting *Petruzzi's IGA v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. 1993)* (internal quotation marks omitted). "[I]n a case in which conspiracy is deemed quite plausible, perhaps by virtue of the industry's structure and past attempts at collusion, then a broader range of inferences can be drawn from ambiguous evidence." II Areeda & Hovenkamp, *supra,* 308c3 at 139. In the present **[****47]** case, the alleged conspiracy among Defendants is plausible, especially given the improbability that the pricing that occurred was the result of conscious parallelism. *See* *Brooke Group, 509 U.S. at 239* (observing that "the inherent limitations of tacit collusion suggest that such multivariable coordination is improbable").

[43]** Lastly, consistent with New Mexico summary judgment standards, we have taken seriously our obligation to construe the record in the light most favorable to Plaintiffs and to allow Plaintiffs the benefit of any reasonable inferences. Thus, for example, we have recognized that certain Defendants may have been reluctant participants, joining in the conspiracy because they lacked the financial resources to resist Philip Morris. *See* VI Areeda & Hovenkamp (2d ed. 2003), *supra,* P 1408c at 46-47 (concluding that a competitor who reluctantly participates in a cartel under economic duress may be held liable as a conspirator). Similarly, we have viewed changes in market share during the class period as consistent with a conspiracy in which Philip Morris, as the most powerful conspirator, insisted on terms favorable to manufacturers of premium brands such as Philip Morris **[****48]** itself. We have been mindful of Plaintiffs' theory of their case, which does not involve an allegation that Defendants conspired to eliminate all competition; rather, Defendants were willing to compete as long as they were competing over supracompetitive profits.

CONCLUSION

[44]** To summarize, Plaintiffs have come forward with evidence that during the class period the tobacco industry exhibited an unprecedented degree of parallelism, beginning with the July 1993 consolidation of what had previously been ten price tiers into two price tiers, and continuing through twelve in-tandem increases in the prices of both premium and discount cigarettes. This multi-variable, multi-price-tier parallelism goes well beyond the price leadership within a single-tier market demonstrated by the cigarette industry prior to the introduction of generic cigarettes. Further, the parallelism in the present case involves parallelism among market tiers which formerly had been in vigorous competition, resulting in a significant differential between the list prices of the cheapest cigarettes and the most expensive cigarettes. Attempts by Philip Morris in 1992 and 1993 to lead increases in the prices of non-premium **[****49]** cigarettes failed. The spectacular growth curve of the non-premium segment suggests that the demand among consumers for competitively priced cigarettes had not peaked as of Marlboro Friday. Indeed, as previously noted, Marlboro Friday represents the triumph of competition over oligopolistic price coordination, suggesting that as of Marlboro Friday, competition was thriving within the tobacco industry. Applying *Brooke Group,* and relying on the opinions of Dr. Leffler, we think that a reasonable factfinder could view conscious parallelism as a relatively implausible explanation for the anticompetitive scenario that played out following Marlboro Friday.

[45]** We certainly do not mean to suggest that Plaintiffs' evidence *requires* a reasonable factfinder to accept unlawful concerted action as the most likely explanation for the parallelism demonstrated by cigarette prices: a reasonable factfinder might reject Dr. Leffler's opinions or accept as truthful the testimony of Defendants' CEOs denying participation in a conspiracy. We hold merely that Plaintiffs' evidence *allows* a reasonable factfinder to reject conscious parallelism as a plausible explanation, thereby leaving the competing inference **[****50]** of conspiracy as the most likely explanation for the parallelism proven by Plaintiffs.

[*889]** **[*674]** **Lorillard & Liggett**

[46]** In its answer brief, Lorillard points out that Plaintiffs' expert, Dr. Leffler, testified during his deposition that he was unaware of any conduct by Lorillard during the class period that was not "completely consistent with conscious parallelism." In their reply brief, Plaintiffs have not addressed this crucial point. Plaintiffs' case against Liggett suffers from the same deficiency as their case against Lorillard: Dr. Leffler testified that he is unaware of any conduct by Liggett that is not either procompetitive or consistent with conscious parallelism. In view of Dr. Leffler's concessions, we conclude that Plaintiffs have not satisfied their burden under *Matsushita* of coming forward with evidence that would allow a reasonable juror to exclude lawful conscious parallelism as the most likely explanation for Lorillard's and Liggett's adoption of parallel price increases. Accordingly, we affirm the grant of summary judgment as to these two Defendants. We reverse the summary judgment in favor of Defendants Philip Morris, Brown & Williamson, and R.J. Reynolds.

[47] IT [****51] IS SO ORDERED.**

A. JOSEPH ALARID, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Lykes Bros., Inc. v. Aaction Mulch, Inc.

United States District Court for the Middle District of Florida, Tampa Division

November 19, 2008, Decided; November 19, 2008, Filed

Case No. 2:08-cv-399-FTM-34-SPC

Reporter
2008 U.S. Dist. LEXIS 126781 *

LYKES BROS., INC., Plaintiff, -vs- AACTION MULCH, INC., Defendant.

Subsequent History: Motion granted by, Motion denied by, Costs and fees proceeding at *Lykes Bros. Inc. v. Aaction Mulch, Inc., 2009 U.S. Dist. LEXIS 135449 (M.D. Fla., Jan. 29, 2009)*

Motion granted by *Lykes Bros. Inc. v. Aaction Mulch, Inc., 2009 U.S. Dist. LEXIS 135451 (M.D. Fla., Sept. 22, 2009)*

Motion granted by, in part *Lykes Bros. Inc. v. Aaction Mulch, Inc., 2009 U.S. Dist. LEXIS 135452 (M.D. Fla., Oct. 1, 2009)*

Core Terms

state court, declaratory, monopolization, declaratory judgment, present suit, Sherman Act, anti trust law, federal court

Counsel: **[*1]** For Lykes Bros. Inc., a Florida corporation, Plaintiff, Counter Defendant: Brian L. Josias, LEAD ATTORNEY, Schiff Hardin, LLP, Chicago, IL USA; David Thomas Knight, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL USA.

For Aaction Mulch, Inc., a Florida corporation, Defendant, Counter Claimant: Guy Austin Rasco, LEAD ATTORNEY, Sabrina Smulevich, Devine, Goodman, Rasco Watts-Fitzgerald, LLP, Coral Gables, FL USA.

Judges: SUSAN C. BUCKLEW, United States District Judge.

Opinion by: SUSAN C. BUCKLEW

Opinion

ORDER

This cause comes before the Court on Defendant's motion to dismiss or to stay the case pending the outcome of a state trial between the parties (Doc. 10). Plaintiff opposes this motion. (Doc. 12.)

INTRODUCTION

Plaintiff is suing for a declaratory judgment that Plaintiff's interactions with Defendant did not violate certain state and federal statutes. After the present suit was filed, Defendant sued Plaintiff in state court for several violations of state law. Defendant then filed this motion to dismiss or stay the present suit pending the resolution of the state case.

BACKGROUND

Plaintiff is a grower of eucalyptus trees, the harvesting rights of which it used to sell to various companies who would then transform **[*2]** the trees and market the end product. (Compl. ¶¶ 8-9.) Defendant was a regular customer of Plaintiff, who transformed the eucalyptus trees into mulch for sale. (Id. ¶ 9.) In 2006, Plaintiff decided to take a more holistic approach to the tree business and incorporate the harvest and sale of its trees into its own business model. (Id. ¶¶ 17-18.) After exploring different ways that Plaintiff could still partner with Defendant under this new arrangement, negotiations broke down and Plaintiff decided to end its business relationship with Defendant. (Id. ¶¶ 17, 20, 26-29.)

After the termination of the parties' business relationship, Defendant sent Plaintiff a letter stating that, should Plaintiff not resume sales to Defendant, Defendant would sue Plaintiff. (Doc. 10-2; Compl. ¶ 30.) The letter referenced Plaintiff's potential liability under both the Florida and Federal antitrust laws. (Doc. 10-2.) Less than three weeks after Plaintiff received the letter, it filed the present suit seeking a declaratory judgment that Plaintiff was not guilty of monopolization under the Sherman Act, attempted monopolization under the Sherman Act, breach of contract, fraud, breach of fiduciary duty, failure **[*3]** to act in good faith, misappropriation of trade secrets, or unfair competition. (Compl.) Forty days later, when Defendant's response to the Complaint was due, Defendant filed suit against Plaintiff in state court as well as a Motion in the present suit to stay or dismiss the present case pending resolution of the state court judgment. Defendant's state court complaint charged Plaintiff with breach of contract, misappropriation of trade secrets, unfair competition, fraudulent inducement, monopolization, and attempted monopolization under Florida law. (Doc. 10, p. 2.) While the present motion was pending, the state court issued a stay in Defendant's suit pending the outcome of the present case in federal court. (Doc. 32-3.)

DISCUSSION

Pursuant to the Declaratory Judgment Act, *28 U.S.C. § 2201(a)*, a district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The Declaratory Judgment Act "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*. The discretion given to the Court over whether to invoke jurisdiction based on the Declaratory Judgment **[*4]** Act is generous. *Id. at 286-88*.

Defendant claims that the Court may not grant declaratory judgment in this case because (1) Defendant did not bring any federal claims in its state court suit, mooting those claims in the present case and thereby depriving the Court of federal question subject matter jurisdiction; and (2) the facts of this case warrant the Court's use of discretion to withhold extending its jurisdiction, as the state court is best suited to hear the case.

1. ***Declaratory Claims not Brought By Declaratory Defendant in State Court***

The Declaratory Judgement Act "allow[s] parties to precipitate suits that otherwise might need to wait for the declaratory relief defendant to bring a coercive action." *Household Bank v. JFS Group, 320 F.3d 1249, 1253 (11th Cir. 2003)* (quoting *Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1467 (11th Cir. 1987))*. The federal courts have jurisdiction to grant declaratory relief regarding any non-frivolous claims that the declaratory—judgment defendant *might potentially bring* based on the facts alleged, regardless of whether the declaratory defendant ever actually brings all of the claims. *Id. at 1251*. A declaratory defendant cannot obviate a declaratory case, or the claims therein, simply by choosing to delay bringing certain coercive claims arising out of the allegedly offending behavior. Otherwise, the relief **[*5]** offered to the declaratory plaintiff would be illusory, since the proverbial sword of Damocles threatened by a declaratory defendant would merely be dulled, not removed by such partial relief.

Here, Defendant wrote a letter to Plaintiff which alleged violations of both federal and state antitrust laws. It not only mentioned the federal Sherman Act by name, but included extensive discussion of federal case law construing the Sherman Act. (Doc. 10-2 at 3-4.) The fact that Defendant has brought a suit in state court against Plaintiff alleging only claims of monopolization and attempted monopolization under Florida law does not belie Plaintiff's concern that Defendant might have brought, or still may bring, Federal law claims as well. It is notable that Florida ***antitrust law*** is designed and construed after its Federal counterpart, the Sherman Act. *Fla. Stat. § 542.32* ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes"). In fact, *Sections 542.18* and *542.19* of Florida's antitrust act "are the carbon copy of *Sections 1* and *2* of the Sherman Act." *In re Jet 1 Ctr., Inc. 322 B.R. 182, 197 (M.D. Fla. 2005)*. Furthermore, Florida cases **[*6]** construing the state antitrust laws lean almost entirely on federal case law. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. DCA 2d. 1984)* ("the Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act.").

Accordingly, the Court finds that it does have subject matter jurisdiction to determine the legal relationship between the parties with regard to the federal monopolization and attempted monopolization claims. This is both because Defendant specifically referenced the Federal Sherman Act in its letter and because the similar potential for action under the state and federal antitrust laws demonstrates the possibility that Defendant might have brought non-frivolous federal claims against Plaintiff. For these reasons, Defendant's argument that the Court lacks subject matter jurisdiction in the present suit fails.

2. ***Circumstances Affecting the Court's Discretion to Extend Jurisdiction***

The Declaratory Judgment Act gives the Court discretion in extending its jurisdiction. The first-filed rule does so as well. According to the first-filed rule, where parallel suits are filed in state and federal court, the court initially seized of the controversy is the one that **[*7]** should decide the case, absent compelling circumstances. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982)*.

Here, the Court finds no compelling circumstances that would require it to abdicate the hearing of this case. There is no geographical disadvantage to Defendant associated with the federal forum, as the state case was filed within the Middle District of Florida. There are Federal claims at issue, and state law claims which look to the interpretation of federal law. The resolution of the federal case would put to rest the state case, as it encompasses the claims made in the state suit; the state case if resolved, in contrast, would leave issues to be resolved here. Finally, the state court seems to agree that the present suit should go forward before its state counterpart, as the state court has already stayed its suit pending an outcome here. (Doc. 32-3.) The Court finds no compelling reason not to exercise its jurisdiction in hearing the present suit.

CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED that Defendant's Motion to dismiss or stay (Doc. 10) is DENIED.

DONE AND ORDERED this 19th day of November, 2008.

/s/ Susan C. Bucklew

SUSAN C. BUCKLEW

United States District Judge

End of Document

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.

United States District Court for the Eastern District of New York

November 25, 2008, Decided; November 25, 2008, Filed

05-MD-1720 (JG) (JO)

Reporter

2008 U.S. Dist. LEXIS 104439 *; 2008-2 Trade Cas. (CCH) P76,401

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

Notice: FOR ELECTRONIC PUBLICATION ONLY

Subsequent History: Motion denied by *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 2010 U.S. Dist. LEXIS 89275 (E.D.N.Y., Aug. 27, 2010)*

Prior History: *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 562 F. Supp. 2d 392, 2008 U.S. Dist. LEXIS 104299 (E.D.N.Y., 2008)*

Core Terms

stock, Banks, acquisition, acquire, shares, cards, merchants, interchange, anticompetitive, plaintiffs', antitrust, Clayton Act, transactions, entity, member bank, rights, supplemental complaint, Sherman Act, recommended, billboards, post-IPO, anti trust law, issuing bank, allegations, network, lessen, report and recommendation, challenged transaction, fraudulent conveyance, shareholders

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

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

HN1[] **Antitrust & Trade Law**

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*. However, a plaintiff must also amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. Antitrust claims generally require such amplification.

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

HN2[] **Sherman Act, Scope**

15 U.S.C.S. § 1 bars every contract, combination or conspiracy, in restraint of trade or commerce.

Antitrust & Trade Law > Clayton Act > Scope

HN3[] Antitrust & Trade Law, Clayton Act

See 15 U.S.C.S. § 18.

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

Antitrust & Trade Law > Clayton Act > Scope

HN4[] Sherman Act, Scope

While § 1 (15 U.S.C.S. § 1) of the Sherman Act regulates agreements and § 7 (15 U.S.C.S. § 18) of the Clayton Act regulates acquisitions, both focus on the potentially anticompetitive effects of the challenged conduct. However, § 1 of the Sherman Act requires actual "restraint," while § 7 of the Clayton Act requires only the possibility of an anticompetitive effect. It is therefore generally assumed that if a plaintiff's claim under § 7 of the Clayton Act cannot survive a motion to dismiss, its claim under § 1 of the Sherman Act will fail as well.

Antitrust & Trade Law > Clayton Act > Scope

HN5[] Antitrust & Trade Law, Clayton Act

Using the admittedly formal dictionary definition of "acquire" (i.e., "gain") to interpret § 7 (15 U.S.C.S. § 18) of the Clayton Act preserves the independent significance of its language regarding anticompetitive "effect," and is therefore consistent with the U.S. Supreme Court's admonition to read § 7 of the Act in the light of the overriding congressional purpose to control corporate concentrations tending to monopoly.

Antitrust & Trade Law > Clayton Act > Scope

HN6[] Antitrust & Trade Law, Clayton Act

In the context of 15 U.S.C.S. § 18, an acquisition of stock is also an acquisition of assets, under the plain meaning of that term. The term "assets" refers broadly to any tangible or intangible thing of value.

Antitrust & Trade Law > Clayton Act > Scope

HN7[] Antitrust & Trade Law, Clayton Act

In Philadelphia National Bank, the U.S. Supreme Court noted that mergers and consolidations could not be readily classified as either "pure stock acquisitions" or "pure assets acquisitions"; they fit neither category neatly. After canvassing the legislative history of § 7 (15 U.S.C.S. § 18) of the Clayton Act, the Court concluded that Congress intended to bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7, and that the two provisions, when read together, covered mergers and consolidations.

Antitrust & Trade Law > Clayton Act > Scope

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

In the context of 15 U.S.C.S. § 18, the prohibition on stock acquisitions applies to "any person," while the broader prohibition on asset acquisitions applies only to persons subject to the jurisdiction of the Federal Trade Commission. 15 U.S.C.S. § 18.

Business & Corporate Law > ... > Meetings & Voting > Annual Meetings > Director Elections & Removals

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

HN9[] **Annual Meetings, Director Elections & Removals**

The right to vote for a board of directors is different from the right to exercise its powers.

Civil Procedure > Judicial Officers > Magistrates > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN10[] **Judicial Officers, Magistrates**

A party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point.

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

HN11[] **Amendment of Pleadings, Leave of Court**

Leave to replead is to be liberally granted.

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

HN12[] **Standing, Requirements**

To demonstrate antitrust standing, a plaintiff must first show that he suffered an antitrust injury, which is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A court must also consider other factors relevant to standing (sometimes called the "efficient enforcer" factors), including: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Civil Procedure > Judicial Officers > Magistrates > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN13[] **Judicial Officers, Magistrates**

The interests of justice are ill served by allowing a party to subsequently press an argument it failed to raise before the magistrate judge. Failure to present an argument to the magistrate judge handicaps the deliberations of both the district judge and the magistrate judge. Indeed, several circuits have squarely held that the failure to raise an argument before the magistrate judge results in its waiver. However, the issue appears to be an open question in the Second Circuit.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN14[] **Standing, Clayton Act**

The fact that the structure of the antitrust laws contributes to plaintiffs' alleged injury does not, by itself, deprive them of antitrust standing--indeed, one purpose of § 7 (*15 U.S.C.S. § 18*) of the Clayton Act is to prevent combinations that will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Intent

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

HN15[] **Fraudulent Transfers, Intent**

In the context of *N.Y. Debt. & Cred. Law § 276*, it is not necessary for plaintiffs to plead that the challenged transaction will actually hinder or delay them, they must only plead that the transaction was undertaken with the intent to do so.

Counsel: **[*1]** For Class Plaintiffs: K. Craig Wildfang, ROBINS, KAPLAN, MILLER & CIRESI LLP, Minneapolis, MN.

For Class Plaintiffs: Bonny E. Sweeney, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Diego, CA.

For Class Plaintiffs: H. Laddie Montague, Merrill G. Davidoff, Bart Cohen, BERGER & MONTAGUE, PC, Philadelphia, PA.

For Defendants MasterCard Inc. and MasterCard Int'l Inc.: Kenneth A. Gallo, Danielle M. Aguirre, Bruce Birenboim, Andrew C. Finch, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, Washington, DC.

For Defendants MasterCard Inc. and MasterCard Int'l Inc.: Keila D. Ravelo, Wesley R. Powell, HUNTON & WILLIAMS LLP, New York, NY.

For Defendants Bank of America, N.A., BA Merchant Services LLC (f/k/a National Processing, Inc.), Bank of America Corp., and MBNA America Bank, N.A.: Mark P. Ladner, Michael B. Miller, MORRISON & FOERSTER, LLP, New York, NY.

For Defendants Capital One Bank, Capital One F.S.B., and Capital One Financial Corp.: Andrew J. Frackman, Edward D. Hassi, Richard G. Parker, O'MELVENY & MYERS LLP, New York, NY.

For Defendants JPMorgan Chase & Co. and Chase Bank USA, N.A.: Peter E. Greene, Cyrus Amir-Mokri, Peter S. Julian, Boris Bershteyn, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, **[*2]** New York, NY.

For Defendants Citigroup Inc., Citicorp, and Citibank, N.A.: Benjamin R. Nagin, David F. Graham, Eric H. Grush, SIDLEY AUSTIN LLP, New York, NY.

For Defendants HSBC Finance Corp. and HSBC North American Holdings Inc.: Christopher R. Lipsett, David S. Lesser, William J. Kolasky, A. Douglas Melamed, Ali M. Stoeppelwerth, WILMERHALE, New York, NY.

Judges: JOHN GLEESON, United States District Judge.

Opinion by: JOHN GLEESON

Opinion

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

In May 2006, the plaintiffs in the above-captioned putative class actions filed a supplemental complaint alleging that the then-pending initial public offering ("IPO") of MasterCard stock violated both federal ***antitrust law*** and state fraudulent conveyance law. Defendants MasterCard International Incorporated and MasterCard Incorporated (collectively, "MasterCard") and Bank of America, Capital One, JPMorgan Chase, Citigroup, and HSBC (collectively, the "Banks") filed various motions to dismiss the supplemental complaint. I referred these motions to Magistrate Judge James Orenstein. On February 12, 2008, he issued a Report and Recommendation ("R&R") recommending that I dismiss the state law claim, dismiss the Clayton **[*3]** Act claim against the Banks with leave to amend, and deny the motions as to the remaining federal antitrust claims. For the reasons stated below, I grant the motions to dismiss plaintiffs' amended complaint in their entirety with leave to amend.

BACKGROUND

A. *The First Amended Complaint*

As most people know, merchants may accept a "payment card," such as a credit card or a debit card, as payment for goods and services. The resolution of this motion requires a detailed understanding of how these payment card transactions work.

MasterCard runs a payment card network. It provides the infrastructure through which a customer's payment makes its way to a merchant. The Banks participate in payment card transactions as an acquiring bank, an issuing bank, or both. An issuing bank issues MasterCard-branded payment cards to customers. An acquiring bank "acquires payment transactions from merchants and acts as a liaison" between the merchant and the issuing bank. First Consolidated Amended Class Action Compl. ("AC") P 8(a). The Banks compete with each other to issue payment cards and "acquire" merchant transactions. AC P 8(a), (n). The Banks also take part in the management of MasterCard, which, prior **[*4]** to May 2006, was organized as a joint venture among more than 23,000 member banks. AC P 54.

In a standard credit card transaction, the customer/cardholder presents her MasterCard to a merchant who has contracted to accept such cards. The merchant sends the transaction data to an acquiring bank, which forwards it to the cardholder's issuing bank. The issuing bank then authorizes or denies the transaction. Following authorization, the merchant submits a payment request to the acquiring bank, which again forwards it to the issuing bank. The issuing bank pays the acquiring bank the purchase price minus a fee (the "interchange fee"). The acquiring bank then pays the merchant but also deducts a fee (the "merchant-discount fee"). MasterCard relays the communications between the acquiring and issuing banks, and its board of directors sets the amount of interchange fees charged on MasterCard's network. AC P 8(l). Visa's network processes transactions and sets fees in an analogous manner. AC P 8(l).

In April 2006 the plaintiffs, merchants who accept Visa and MasterCard payment cards, filed their first amended complaint in this action. They alleged that the Banks, by virtue of their control over **[*5]** the boards of directors of

MasterCard and Visa, dictate the amount charged as interchange fees for each network. Further, because so many banks are members of both boards, they "ensure that the Interchange Fees of Visa and MasterCard increase in parallel and stair-step fashion, rather than decreasing in response to competition from each other." AC 9 135. The plaintiffs also challenged the networks' "Anti-Steering Restraints," AC P8(c), a group of rules promulgated by both Visa and MasterCard which allegedly prevent merchants from encouraging customers to use less expensive forms of payment. AC PP 234-247. They further allege that Visa has engaged in monopolization in violation of Section 2 of the Sherman Act, *id*. at PP 248-54, and that both MasterCard and Visa have engaged in prohibited tying and exclusive dealing arrangements. *Id*. at PP 255-71, 272-88, 288-93, and 294-99. Only the allegations regarding interchanges fees are relevant to the disposition of the instant motions to dismiss.

B. *The Supplemental Complaint*

In May 2006, one month after plaintiffs filed their first amended complaint, MasterCard announced its IPO, in which it proposed to sell approximately 60 million shares of **[*6]** MasterCard Class A common stock to the public. To effectuate this offering, MasterCard first redeemed and reclassified all of its outstanding common stock, approximately 100 million shares, then held by its member banks. Each former shareholder received 1.35 shares of MasterCard Class B common stock for each share of old stock it held. All former shareholders also received a single share of Class M stock. MasterCard Incorporated, Amendment No. 8 to Form S-1 Registration, filed May 23, 2006. [1]

The three new classes of MasterCard stock convey different control rights. Class A shares have standard voting rights. These shares may not be held by MasterCard's member banks, and no individual entity may own more than 15% of the outstanding Class A stock. Class B shares have no voting rights. They may be transferred among member banks and sold to outside investors, in which case they convert to Class A shares. However, Class B shareholders **[*7]** have a right of first refusal over the sale of Class B shares to outside investors. Class Pls.' First Supplemental Class Action Complaint ("SC") P 82. Class M shareholders may vote to elect up to three members of MasterCard's board of directors, but no more than one quarter of all directors. Class M shareholders, collectively, also have the power to veto "1) any sale of all, or substantially all, of the company's assets; 2) any merger or consolidation of the company; 3) any waiver of beneficial ownership limitations in the certificate of incorporation; and 4) any discontinuation of the core payments business." *Id*. at P 83.

On May 22, 2006, the plaintiffs filed the supplemental complaint at issue here. It alleges four causes of action arising from the agreements and transactions underpinning MasterCard's IPO. They assert that the IPO is a pretext, and that the various "Ownership and Control Restrictions" it entails, specifically the 15% limit on ownership of Class A stock and the voting rights of the Class M stock, operate to preserve the Banks' control of MasterCard. SC PP 10, 100. MasterCard's purported transformation from a joint venture to a "single entity," plaintiffs allege, will **[*8]** insulate its internal actions from the prohibitions of *Section 1 of the Sherman Act*, which regulates agreements between joint venturers but does not reach the unilateral actions of individual corporations. With effective control of the post-IPO MasterCard enterprise, the Banks will be free to impose or continue the operation of allegedly anticompetitive restraints. Specifically, plaintiffs allege that MasterCard will continue to impose and increase the uniform interchange fees challenged in plaintiffs' first amended complaint and will reinstate the exclusivity arrangements found unlawful in *United States v. Visa U.S.A., 163 F. Supp. 2d 322 (S.D.N.Y. 2001)*, *aff'd* *344 F.3d 229 (2d Cir. 2003)*, whereby merchants who wish to accept MasterCard-branded cards must agree to accept only MasterCard and Visa cards and decline to accept American Express or Discover cards. SC P 114. Because these restraints will decrease competition in the relevant market, plaintiffs allege that the agreements leading to the IPO constitute a conspiracy in restraint of trade in violation of *Section 1 of the Sherman Act*, and that the stock transfers by which the IPO is effected violate *Section 7* of the Clayton Act. **[*9]** The plaintiffs also argue that MasterCard did not receive adequate consideration for its release of "its right to assess its Member Banks for liability expenses," (its

---

[1] A copy of the relevant filing is attached as Exhibit A to the Memorandum of Law of Defendants MasterCard International Incorporated and MasterCard Incorporated in Support of Their Motion to Dismiss Class Plaintiffs' First Supplemental Class Action Complaint.

"assessment right") and that the release was therefore a fraudulent conveyance under New York law. SC PP 145, 147.

C. *Judge Orenstein's Report and Recommendation*

In the report and recommendation, Judge Orenstein recommended that I grant the motion in part and deny it in part. As to the antitrust claims, he rejected defendants' contentions that they did not "acquire" stocks or "assets" under *Section 7* of the Clayton Act. R&R 14-23. And he concluded, based on the barriers to entry in the relevant market and the ownership restrictions that would prevent an outsider from acquiring control of MasterCard, that the supplemental complaint sufficiently pleaded "that the agreements leading to the IPO will probably result in a substantial lessening of competition," and therefore stated a claim under the Clayton Act. R&R 28. As to the Sherman Act claims, Judge Orenstein noted that the parties had argued the motion "exclusively by reference to the standard relevant under *Section 7*" of the Clayton Act. *Id*. at 29. Taking this conduct **[*10]** as an indication that the parties agreed "that the Sherman Act claims stand or fall together with those under the Clayton Act," he also concluded that plaintiffs had properly pleaded their Sherman Act claims. *Id*. However, Judge Orenstein concluded that the plaintiffs had failed to plead with particularity that MasterCard acted with fraudulent intent or received inadequate consideration in exchange for relinquishing its assessment right, and therefore recommended that I dismiss plaintiffs' fraudulent conveyance claim. *Id*. at 36. MasterCard and the Banks filed objections to the report and recommendation, alleging that Judge Orenstein erred in determining that the Clayton Act applied to the challenged transactions and that plaintiffs had adequately pleaded their anticompetitive effect. *See* MasterCard's Objections to the February 12, 2008 Report and Recommendation Denying in Part Its Motion to Dismiss Class Pls.' Supplemental Compl. Directed to the MasterCard IPO ("MC's Obj."); Bank Defs.' Objections to the Report and Recommendation Regarding Bank Defs.' Mot. to Dismiss Class Pls.' First Supplemental Class Action Compl. ("Banks' Obj."). Plaintiffs responded to these arguments but filed **[*11]** no objections of their own. *See* Class Pls.' Reply to the Apr. 4, 2008 Objections of MasterCard, Bank of America, Capital One, JPMorgan Chase, Citigroup and HSBC to the Court's Feb. 12, 2008 Report and Recommendation ("Pls.' Reply").

DISCUSSION

A. *Standard of Decision*

HN1[] A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. However, a plaintiff must also "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*. Second Circuit precedent applying the Supreme Court's decision in *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, makes clear that antitrust claims generally require such amplification. *See* *In re Elevator Antitrust Litig., 502 F.3d 47, 50 & nn.3-4 (2d Cir. 2007)*.

B. *The Antitrust Claims*

Section 1 of the Sherman Act ("Section 1") ***HN2***[] bars "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." *15 U.S.C. § 1*. *Section 7* of the Clayton Act ("*Section 7*") provides, in relevant part, that

> ***HN3***[] [n]o person engaged in commerce or in any activity affecting **[*12]** commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission [("FTC")] shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18. Thus, ***HN4***[] while Section 1 regulates agreements and *Section 7* regulates acquisitions, both focus on the potentially anticompetitive effects of the challenged conduct. However, *Section 1* requires actual "restraint," while *Section 7* requires only the possibility of an anticompetitive effect. *See* *Brown Shoe Co. v. United*

States, 370 U.S. 294, 328-29, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). It is therefore generally assumed that if a plaintiff's Section 7 claim cannot survive a motion to dismiss, its Section 1 claim will fail as well. Accordingly, the parties in this case have focused their arguments on whether the plaintiffs have stated a claim under the less demanding standard of Section 7.

To **[*13]** effect MasterCard's IPO, the Banks transferred their old MasterCard stock to MasterCard, and MasterCard then transferred new Class B and M shares to the Banks. The plaintiffs allege that MasterCard thereby "acquir[ed] from the Member Banks the right to set Interchange Fees charged to merchants" in the IPO. SC P 95. Plaintiffs allege that these transactions create the appearance, but not the reality, of an independent MasterCard, and therefore enable MasterCard and the Banks to continue and reimpose various anticompetitive practices.

The defendants first argue that Section 7 does not reach the transactions challenged in the supplemental complaint. MasterCard contends that it merely redeemed its own stock, rather than acquiring the stock or assets of another person. The Banks claim that they did not acquire any stock or assets because the net effect of the IPO was, for them, a divestment of their controlling stake in MasterCard. Thus, for different reasons, both MasterCard and the Banks argue that they did not "acquire . . .any part of the stock or other share capital . . . [or] any part of the assets of another person" in the course of the MasterCard IPO. 15 U.S.C. § 18. They also contend **[*14]** that, even if Section 7 does govern the challenged transactions, the plaintiffs have failed to adequately plead that the effect of these acquisitions "may be substantially to lessen competition." *Id*. I address each argument in turn.

1. *The Banks' Acquisition of Stock*

In addressing whether the Banks' role in the IPO implicated Section 7, Judge Orenstein first addressed a technical defect in the supplemental complaint. R&R 14. He noted that while the operative portion of plaintiffs' Section 7 claim alleged that both the Banks and MasterCard had acquired "the assets of another person," the clause of Section 7 governing the acquisition of assets covers only entities "subject to the jurisdiction of the [FTC]." 15 U.S.C. § 18. Because banks are not subject to the FTC's jurisdiction, 15 U.S.C. § 45(a)(2), he concluded that plaintiffs could not "seek relief from the Banks under Section 7 based on any acquisition of assets." R&R 14. [2] However, because he concluded that the complaint could allege a viable theory of liability based on the Banks' acquisition of "stock or other share capital" of the post-IPO MasterCard, he recommended that I grant the plaintiffs leave to amend to allege such a theory. **[*15]** R&R 15.

The Banks dispute Judge Orenstein's conclusion that they acquired stock as a result of the MasterCard IPO. The issue is whether a party "acquire[s] . . . the stock or share capital . . . of another person" under Section 7 when it exchanges existing shares of a reorganizing corporation for the shares of the restructured corporation, and the question appears to be one of first impression. Judge Orenstein concluded that under the "plain and unambiguous text of Section 7," an acquisition had occurred. R&R 15 ("By virtue of the IPO (and the agreements pursuant to which it was effected), the Banks have acquired shares in a company that did not previously exist, and that they therefore did not previously possess.").

While there is reason to doubt the description of the post-IPO MasterCard as a company "that did not previously exist," the Class B and M shares the banks received did not themselves exist prior to the IPO, and this fact renders the Banks' receipt of these shares an acquisition. As the Banks point out, the dictionary meaning of "acquire" is "gain," Banks' Obj. 21, **[*16]** and the Banks indisputably gained shares of Class B and Class M stock in MasterCard as a result of the IPO.

The Banks' contention that they also *surrendered* stock in the transaction does not alter this conclusion. They ask me to hold that they did not "acquire" stock because they "gained no greater voting control or economic interest during MasterCard's IPO than they previously possessed." Banks' Obj. 21. But this "purposive and pragmatic" interpretation of "acquire," Banks' Obj. 24, makes no semantic sense. Suppose I sell 100 shares of X Corp. on Monday and then buy 100 shares of X Corp. on Tuesday. Although I have the same equity stake and voting rights on Tuesday evening that I had on Monday morning, it seems odd to argue that I did not "acquire" stock on Tuesday

[2] The plaintiffs do not object to this conclusion, and I agree with Judge Orenstein's reasoning on this point.

based on this fact, just as it would be odd to say that I therefore did not "sell" stock on Monday. At the very least, the substantive similarity between my starting and ending positions certainly wouldn't convince a broker to waive his commission on these transactions.

Furthermore, this "substantive" interpretation of "acquire," Banks' Obj. 24, appears unworkable and threatens to render other language in Section 7 superfluous. **[*17]** The Banks suggest that, before I find that a party has acquired stock, I first determine whether the transacting party previously held a stake in the target company (or a predecessor company), and, if so, whether the transaction results in a net increase or decrease of their stake in that company. But how far back must I look, and how do I determine whether a party has increased or decreased its stake when, as here, the party initially holds one class of stock in a company and subsequently holds different classes of stock in a restructured (and possibly "new") incarnation of that company? Even if this interpretive framework could be applied coherently, it would inappropriately import into the "acquire[] . . . stock" element of a Section 7 claim the considerations that relate to whether the challenged transaction may have the effect of lessening competition. ***HN5***[] Using the (admittedly formal) dictionary definition of "acquire" to interpret *Section 7* preserves the independent significance of its language regarding anticompetitive "effect," and is therefore consistent with the Supreme Court's admonition to read *Section 7* "in the light of the overriding congressional purpose to control corporate **[*18]** concentrations tending to monopoly." *United States v. Phila. Nat. Bank, 374 U.S. 321, 338, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

The fact that the Banks' argument conflates the separate elements of a Section 7 claim is underscored by their reliance on (*Record Club of Am., Inc. v. Capitol Records, Inc., 70-CV-3315 HRT), 1971 U.S. Dist. LEXIS 11738, 1971 WL 558 (S.D.N.Y. Sept. 8, 1971)*. In that case, defendants Capitol Records and Longines operated a number of different businesses, and were competitors in the record club market. In the challenged transaction, Capitol sold its record club assets to Longines in exchange for five percent of the stock of the "Longines Symphonette Corporation," which it subsequently exchanged for a smaller stake in the "Longines-Wittnauer Watch Company." *1971 U.S. Dist. LEXIS 11738, [WL] at *5*. The plaintiff, the operator of a rival record club, claimed that this transaction substantially lessened competition in the record club market in violation of the Clayton Act. The district court granted summary judgment as to Capitol, holding that it was "convinced by the plain language of *section 7* of the Clayton Act that a seller in a challenged transaction is not meant to be included in the statutory proscription." *1971 U.S. Dist. LEXIS 11738, [WL] at *6*.

The Banks interpret *Record **[*19]** Club* as holding that Capitol did not "acquire" Longines stock, as that term is used in *Section 7*. Banks' Obj. 22 ("The district court dismissed the Section 7 claim against the seller because the seller did not 'acquire' anything."). If this is an accurate description of the holding of *Record Club*, I cannot fathom its rationale. The district court was clearly correct to award summary judgment to Capitol, because its acquisition of Longines stock had no anticompetitive effect: "plaintiff has understandably failed to produce any factual support for its theory that Capitol's receipt of a 2.6 percent stock interest in Longines in some way restrained competition in the record club market." *Record Club, 1971 U.S. Dist. LEXIS 11738, 1971 WL 558, at *6*. However, this is the result of Section 7's "effect" language, not its use of the term "acquires." Although Capitol's receipt of stock in a watch company would not affect competition in the record club market (only Longines's acquisition of record club assets would do so), I cannot see how this fact proves that Capitol did not "acquire" any stock. To the extent that *Record Club* implicitly holds that a defendant only "acquires" stock under *Section 7* when its acquisition has **[*20]** an anticompetitive effect, I decline to follow it because it renders the "effect" language of that section superfluous.

The Banks also rely, to no avail, on the Clayton Act's legislative history. Observing that Congress originally intended *Section 7* to govern stock acquisitions by holding companies, they argue that if Congress intended to govern "holding companies' *reductions* of their economic stakes in other business," it would have said so unambiguously. Banks' Obj. at 23. As a threshold matter, because the "literal terms" of *Section 7*, specifically the term "acquires," resolve this issue, consulting the statute's legislative history is unnecessary. *See* *Phila. Nat. Bank, 374 U.S. at 337*. In addition, the Supreme Court's Clayton Act jurisprudence emphatically demonstrates that *Section 7*, particularly after its 1950 amendment, can and should cover transactions not expressly contemplated by the drafters of the 1914 Act. *See* *id. at 337-38*. More fundamentally, however, the Banks' appeal to the legislative history misrepresents plaintiffs' theory of liability -- plaintiffs do not argue that the Banks violated *Section 7* by disposing of their old MasterCard shares, but by acquiring the new **[*21]** Class B and M shares. In sum, I agree with Judge Orenstein's conclusion that the Banks "acquire[d]" stock as that term is used in *Section 7*.

2. *MasterCard's Acquisition of Stock or Assets*

a. *Acquisition of MasterCard Stock*

Section 7 provides that no party "shall acquire" the "stock or other share capital . . . of another person" if that acquisition may have an anticompetitive effect. *15 U.S.C. § 18*. Judge Orenstein concluded that the language "of another person," in this context, refers to stock *in* a separate entity; it does not include the acquirer's own corporate stock, even if that stock is *held* by a separate entity. Therefore, because MasterCard acquired only its own stock from the Banks, it did not acquire the stock "of another person." R&R 18.

The problem with this interpretation is that it arguably requires the phrase "of another person," which appears only once in *Section 7* and it is used to modify both "stock or other share capital" and "assets," *15 U.S.C. § 18*, to simultaneously convey two different meanings. The phrase "of another person" is capable of at least two meanings when it modifies "stock or share capital": it could refer to the stock *in* another person, or to stock *held* ***[*22]*** *by* that person. Used to modify "assets," only the second meaning makes sense. Thus, under MasterCard's proposed reading of *Section 7*, "of another person" would have one meaning with regard to "stock or other share capital," and a second, distinct meaning with regard to "assets." I need not endorse or reject this reading, however, because I conclude that MasterCard's redemption of its shares constitutes an acquisition of the "assets of another person."

MasterCard argues that the language of the statute, which was amended in 1950 to add the prohibition of certain asset acquisitions, draws a sharp distinction between stock acquisitions and asset acquisitions, making it erroneous to interpret the former as a subset of the latter. The first problem with MasterCard's argument is that ***HN6***[] an acquisition of stock is also an acquisition of assets, under the plain meaning of that term. Judge Orenstein correctly concluded that the term "assets" refers "broadly to any tangible or intangible thing of value." R&R 20. Accordingly, when the Banks possess Class B shares of MasterCard, those shares are simultaneously the stock of MasterCard and the assets of the Banks. MasterCard notes that it has "found **[*23]** no case that has read the term so expansively as to include stock," MC's Obj. 17, but they have similarly found no case endorsing a contrary reading. "Assets" is a capacious term, and the proposition that it is typically read to include stock is sufficiently uncontroversial that the apparent lack of litigation on the point is unsurprising. [3]

Furthermore, MasterCard's contention that Congress intended asset acquisitions and stock acquisitions to be mutually exclusive categories was rejected by the Supreme Court ***HN7***[] in *Philadelphia National Bank*. In that case, the Supreme Court noted that mergers and consolidations could not be readily **[*24]** classified as either "pure stock acquisition[s]" or "pure assets acquisition[s]"; they "fit neither category neatly." *Phila. Nat. Bank, 374 U.S. at 336-37*. After canvassing the legislative history of *Section 7*, the Court concluded that Congress intended to "bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of s 7," and that the two provisions, when "read together," covered mergers and consolidations. *Id. at 342*. This conclusion cannot be reconciled with MasterCard's contention that the 1950 amendment of *Section 7* is intended to draw a sharp distinction between stock acquisitions and assets acquisitions.

MasterCard also argues that characterizing a stock acquisition as an asset acquisition renders *Section 7*'s stock acquisition language superfluous. If a stock acquisition is also an asset acquisition, it contends, the portion of the *Section 7* prohibiting stock acquisitions is superfluous. This argument fails, as it overlooks the fact that ***HN8***[] the prohibition on stock acquisitions applies to "any person," while the broader prohibition on asset acquisitions applies

[3] MasterCard correctly observes that regulations implementing the Hart-Scott-Rodino amendments to the Clayton Act provide that securities are not considered assets of another person when valuing an asset acquisition to determine whether it triggers certain notification requirements. MC's Obj. 11 n.8 (citing *16 C.F.R. § 801.21(b)*). But this regulation also underscores the proposition that stock would normally constitute an asset -- the regulation merely serves to identify a specific situation in which the conventional meaning of the "assets" should not control.

only to persons "subject to the jurisdiction of the **[*25]** Federal Trade Commission." *15 U.S.C. § 18*. Accordingly, the interpretation recommended by Judge Orenstein does not result in the asset acquisition provision swallowing the stock acquisition provision.

In essence, MasterCard urges a "purposive" definition of "assets," just as the Banks urge a purposive definition of "acquire." They contend that Congress could not have intended Section 7's asset acquisition language to apply to a company's purchase of its own stock because such purchase "could not in any event result in the type of concentration that Congress intended *Section 7* to address." MC's Obj. 16. Thus, although *Philadelphia National Bank* teaches that the Clayton Act reaches all corporate amalgamations, regardless of the form they take, MasterCard argues that the transaction here is no amalgamation at all. If this contention is correct, MasterCard will be able to demonstrate that the "effect" of its transaction is not "substantially to lessen competition, or to tend to create a monopoly," and there is no need to introduce formal exceptions to the term "assets" on a case-by-case basis.

b. *Acquisition of Rights*

Judge Orenstein also determined that the plaintiffs have plausibly alleged **[*26]** an acquisition of assets by alleging that "MasterCard obtained from the Banks a bundle of three valuable rights that previously belonged exclusively to the Banks: the right to issue MasterCard-branded payment cards . . .; the right to acquire merchants . . . ; and the right to set the level of interchange fees for transactions involving MasterCard-branded cards." R&R 19. I respectfully disagree.

Although plaintiffs allege that MasterCard "acquir[ed] from the Member Banks the right to set Interchange Fees charged to merchants," SC P 95, I find this allegation implausible. It is contradicted by plaintiffs' assertion (in which the defendants concur) that interchange fees, both before and after the IPO, are set by MasterCard's board of directors. AC P 8(1). Thus, at all relevant times, the right to set interchange fees rested with MasterCard; it did not acquire this right by virtue of the IPO. Plaintiffs suggest that the IPO shifted the right to elect the board from the Banks to MasterCard's shareholders, and by doing so it also shifted the right to set interchange fees. Pls.' Reply 23. This argument is unpersuasive. ***HN9***[] The right to vote for a board of directors is different from the right **[*27]** to exercise its powers, and the plaintiffs' own allegations establish that MasterCard at all times possessed the power to set interchange fees.

As to the rights to acquire merchants and issue cards, the complaint does suggest that these rights are transferred from the Banks to MasterCard when it states that "[t]o the extent that this IPO is a fundamental change in the MasterCard network, it operates as an acquisition by the New MasterCard of portions of the card-issuing and merchant-acquiring functions of each member bank." SC P 113. But there is neither an allegation nor a basis to infer that MasterCard did not have the right to issue cards or acquire merchants before the IPO. Nor do the plaintiffs allege that the IPO somehow diminishes the Banks' independent ability to issue cards or acquire merchants. Instead, the complaint suggests that, after the IPO, the Banks will continue to issue cards as before. SC P 13 (arguing that the post-IPO MasterCard "will be highly dependent upon the current Member Banks' continued willingness to issue" MasterCard-branded cards).

Even if the complaint could be read as plausibly alleging that MasterCard has somehow acquired the right to issue cards and **[*28]** acquire merchants in the IPO, I can discern no plausible connection between possession of these rights and the competitive harms plaintiffs allege. These harms stem only from the imposition of interchange fees and other allegedly anticompetitive restrictions on access to the MasterCard network. I see nothing in the complaint to suggest that MasterCard's ability to impose these restraints, or the Banks' ability to control MasterCard's imposition of these restraints, somehow depends on MasterCard having the right to issue cards or acquire merchants.

3. *Allegations of Anticompetitive Effect*

Plaintiffs' theory of anticompetitive effect proceeds as follows. The imposition of uniform interchange fees and other merchant restraints (such as the exclusivity rules that were found to violate the Sherman Act in the *Visa U.S.A.* case) is anti-competitive. The Banks profit from these restraints and will impose or continue them if they are able to do so. MasterCard's pre-IPO structure prevented it from imposing these restraints, but its post-IPO structure will allow it to impose such restraints without violating the antitrust laws. Post-IPO, MasterCard will impose or continue these restraints because **[*29]** it is still effectively controlled by the Banks. Because the challenged restraints will be imposed with impunity in a post-IPO regime but would be struck down in a pre-IPO regime, the effect of the IPO is to substantially lessen competition.

The defendants allege that plaintiffs have failed to adequately plead that the Banks will "retain effective control" over the post-IPO MasterCard. SC P 13. The Banks contend that "control" over MasterCard means "the power to elect a majority of the board of directors," Banks' Obj. 13, a power the Banks surrendered in the IPO. Neither the plaintiffs nor Judge Orenstein's report and recommendation offer a contrary definition of control, nor do they suggest *how* the Banks will nevertheless be able to control the board of directors, and thereby assure the continued imposition of the allegedly supracompetitive interchange fees.

Judge Orenstein concluded that the plaintiffs successfully pleaded that the "banks retain *enough* ownership and control to allow them -- effectively unmediated by outside influence -- to take unfair advantage of the greater freedom to act that MasterCard's new status as a single entity creates." R&R 28. I respectfully disagree, and **[*30]** conclude that the plaintiffs' allegations, and the reasonable inferences they create, actually demonstrate that the Banks do not retain sufficient control to allow them, for example, to continue to impose supracompetitive interchange fees.

Plaintiffs allege that "[t]he MasterCard Network could function efficiently without collectively-fixed Interchange Fees." SC P 67. They also contend that "[w]hen the Member Banks collectively set Interchange Fees, they attempt to maximize their own profits rather than those of MasterCard." *Id*. at P 49. Thus, the complaint suggests that a uniform interchange fee is not a profit-maximizing measure for MasterCard itself; rather, it only allows the Banks to charge monopolistic fees. Taking these allegations as true, I can only infer that an independent corporate director, one who seeks to maximize MasterCard's revenues, would therefore oppose such fees, while a corporate director controlled by the Banks would support them. Furthermore, plaintiffs' complaint compels the inference, supported by MasterCard's public filings relating to the IPO, that three-quarters of MasterCard's directors will be independent of the Banks and selected by the Class A shareholders. **[*31]** Given this state of affairs, plaintiffs cannot plausibly allege that MasterCard will continue to impose supracompetitive interchange fees following its IPO, because its board would not be controlled by the Banks. Rather, a majority of the board would consist of independent directors who would theoretically oppose any efforts to enrich the Banks at MasterCard's expense.

In sum, the plaintiffs' arguments overlook a middle ground between effective control of MasterCard by the Banks and effective control of MasterCard by some hypothetical outsider -- an independent MasterCard, run by directors and managers with a fiduciary duty to act in MasterCard's best interests, rather than in the interests of its customers or competitors. Plaintiffs have put forth no reason to believe that the takeover will not result in such an entity, or that this entity will continue or impose the restraints plaintiffs fear. Thus, by plaintiffs' own allegations, a takeover by some trust-busting white knight (which plaintiffs allege is impossible due to the 15% limit on ownership of Class A shares) is not required to prevent the imposition or continuation of MasterCard's allegedly anticompetitive practices. Accordingly, **[*32]** they have failed to plead that the "effect" of the IPO may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. *A fortiori*, they have also failed to plead the actual anticompetitive effects necessary to sustain a claim under *Section 1* of the Sherman Act. *See, e.g., Paycom Billing Servs., Inc. v. MasterCard Int'l, 467 F.3d 283, 289-90*.

C. *The Fraudulent Conveyance Claim*

The plaintiffs allege that MasterCard's release of its right to assess its member banks for liabilities arising from litigation constitutes a fraudulent conveyance under *New York Debtor and Creditor Law §§ 275* and *276*. *Section 276* prohibits actual fraud; it deems fraudulent "[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud present or future creditors." *N.Y. Debt. & Cred. Law § 276*. *Section 275* prohibits constructive fraud; i.e., any "conveyance made . . . without fair consideration when the person making the conveyance . . . intends or believes that he will incur debts beyond his ability to pay as they mature . . . ." *Id*. *§ 275*. Judge Orenstein rejected both theories of fraud, finding that the plaintiffs had insufficiently alleged the existence of **[*33]** actual fraudulent intent and had failed to make any allegation whatsoever regarding MasterCard's intent or belief regarding its ability to pay its debts. In light of the plaintiffs' failure to object to this portion of Judge Orenstein's report and recommendation, *see* Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003) (**HN10**[] "[A] party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point."), I grant the motion to dismiss with respect to the fraudulent conveyance claim.

D. *Leave to Amend*

HN11[] "Leave to replead is to be liberally granted." Slayton v. Am. Express Co., 460 F.3d 215, 230 (2d Cir. 2006). While plaintiffs have failed to adequately plead fraud, or to plausibly allege that the Banks will retain control of the post-IPO MasterCard in ways that may have an anticompetitive effect, it does not appear that they would be categorically unable to do so, and Judge Orenstein recommended granting leave to amend the supplemental complaint. Defendants' papers suggest three reasons why leave to replead should not be granted. Each lacks merit.

1. *The Antitrust Claims and Antitrust Standing*

As to the antitrust claims, the Banks argue **[*34]** that plaintiffs should be denied leave to replead because they cannot demonstrate that the Banks "acquired" stock as Section 7 defines that term, Banks' Obj. 20, an argument I have already rejected. The Banks also argue that plaintiffs cannot establish antitrust standing as a matter of law. This contention requires a more in-depth discussion.

The Second Circuit has recently advised that **HN12**[] to demonstrate antitrust standing, a plaintiff must first

> show that he suffered an antitrust injury, which is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. A court must also consider other factors relevant to standing (sometimes called the "efficient enforcer" factors), including: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Ross v. Bank of Am., N.A., 524 F. 3d 217, 222 n.1 (2d Cir. 2008) **[*35]** (internal citations and quotation marks omitted).

The Banks advance two arguments that plaintiffs have failed to plead antitrust standing. First, in the memorandum supporting their motion to dismiss, they argue that the plaintiffs have not demonstrated antitrust injury because they "simply seek for themselves the benefit of a transaction engaged in by others." Mem. in Support of Bank Defs.' Mot. to Dismiss Class Pls.' First Supplemental Class Action Compl. ("Banks' Mem. in Support") 19. This argument misapprehends plaintiffs' theory of injury. The plaintiffs' theory, according to the Banks, is that the agreements structuring the IPO violate ***antitrust law*** because they prevent a hypothetical "consortium of merchants," *id*. at 19, "from acquiring control of MasterCard." *Id*. at 18. However, as discussed above, plaintiffs complain that the agreements ensure that the Banks retain control of MasterCard, not just that they prevent the plaintiffs from obtaining control of it. Thus, the injury pleaded by the banks is the harm they suffer from the anticompetitive restraints that only a Bank-controlled MasterCard would seek to continue or impose.

Viewed in this way, the plaintiffs' injury is readily **[*36]** distinguishable from the injuries deemed insufficient in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) and Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984). [4] According to plaintiffs, if the Banks continued to operate

[4] In *Brunswick Corp*., the operators of several bowling centers alleged antitrust **[*37]** injury based on the acquisition of rival, financially distressed bowling centers by a leading manufacturer of bowling equipment. 429 U.S. at 479-80. Their alleged injury was the "loss of income that would have accrued had the acquired centers gone bankrupt" and ceased operations. Id. at 487. The Supreme Court observed that plaintiffs "would have suffered the identical 'loss' but no compensable injury had the acquired

MasterCard as a joint venture, plaintiffs would suffer no injury because MasterCard's challenged practices would be struck down under *Section 1* of the Sherman Act as the product of an agreement in restraint of trade. And if the Banks actually surrendered control of MasterCard to any other entity, the restraints would be lifted because they only serve to benefit the Banks. In *Brunswick* and *Bayou Bottling*, the plaintiffs would have suffered the injuries they alleged even if the businesses in question had continued under their current management or been transferred to a stranger to the litigation. By contrast, the injury pleaded here will only occur if the agreements, which allegedly violate the Sherman and Clayton Acts, are not set aside. Accordingly, this is an injury "of the type the antitrust laws were intended to prevent." *Brunswick, 429 U.S. at 489*.

The Banks also contend, in their objections to the report and recommendation, that "where an antitrust plaintiff's alleged injury is caused by operation of applicable law, " that plaintiff cannot establish antitrust standing. Banks' Obj. 18. They base this argument on *RSA Media, Inc. v. AK Media Group, Inc., 260 F.3d 10 (1st Cir. 2001)*, a First Circuit case exploring the requisite causal connection between the alleged injury and the challenged conduct. Because this argument challenges whether plaintiff's injury "flows from" defendant's conduct, *Brunswick, 429 U.S. at 489*, and not whether the injury is "of the type the antitrust laws were intended to prevent," *id*., it is distinct from the standing argument raised in the Banks' initial **[*39]** memorandum. As a result, the plaintiffs argue that the Banks have waived this argument by failing to present it to the magistrate judge.

I agree. As I have observed elsewhere, ***HN13***[] the interests of justice are ill served by allowing a party to subsequently press an argument it failed to raise before the magistrate judge. Order at *2, *Meehan v. Gristede's Supermarkets, Inc*, No. 95-CV-2104 (JG), 1997 WL 1097751 (Sept. 25, 1997) (noting that failure to present an argument to the magistrate judge "handicap[s]" the deliberations of both the district judge and the magistrate judge). Indeed, several circuits have squarely held that the failure to raise an argument before the magistrate judge results in its waiver. *Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996)*; *Greenhow v. Sec'y of Health & Human Servs., 863 F.2d 633, 638 (9th Cir. 1988)*, *overruled on other grounds by* *United States v. Hardesty, 977 F.2d 1347 (9th Cir. 1992)* (en banc); *Borden v. Sec'y of Health and Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)* (per curiam). [5]

In any event, the argument lacks merit. The plaintiffs' claimed injury does result, in part, from the operation of the antitrust laws, because they allege that MasterCard's new status as a single entity will allow it to impose or continue anticompetitive practices that a joint venture could not legally utilize. But the Banks have failed to demonstrate that this fact renders the nexus between the challenged transactions and the plaintiffs' injury too remote to furnish antitrust standing.

As mentioned, the Banks rely primarily on *RSA Media*, in which AK Media controlled 92% of the billboards in the Greater Boston market. *260 F.3d at 12*. In addition, a stringent state regulatory scheme "ma[de] it impossible, or at least nearly impossible" to obtain a permit to build a new billboard. *Id*. Plaintiff RSA wished to enter this market, but could **[*41]** not persuade landlords who owned the land on which AK Media's billboards were located to lease that

---

centers instead obtained refinancing or been purchased by 'shallow pocket' parents . . . ." *Id*. Because this loss bore "no relationship to the size of either the acquiring company or its competitors," the Court held that plaintiffs' injury "was not of the type that the statute was intended to forestall." *Id. at 487-88* (internal quotation marks omitted).

In *Bayou Bottling*, plaintiff Bayou Bottling, which sold Pepsi-Cola products, sought to acquire the franchise rights to distribute Dr. Pepper products from Wilcox, a franchisee who was retiring. *725 F.2d at 302*. Defendant Dr. Pepper, for unexplained "business reasons," urged Wilcox to sell his franchise to a bottler of Coca-Cola products, and he did so. *Id*. Plaintiff claimed that it suffered antitrust injury as a result of **[*38]** Dr. Pepper's conduct "because it was prevented from acquiring Wilcox's franchise, an acquisition which would have improved its business position and increased its profits." *Id. at 304*. Because plaintiff "would have suffered the identical loss of sales, and economies of scale if Wilcox had retained his operation or if he had sold to a third party," the Fifth Circuit held that this theory of antitrust injury was "foreclosed by the holding in *Brunswick*." *Id*.

[5] However, the issue appears to be an open question in the Second Circuit, and there is dicta from that court, in a case decided after my order in *Meehan*, suggesting **[*40]** that an argument may not be waived for appellate review unless a party fails to raise it before both the magistrate and the district judge. *See* *Grace v. Rosenstock, 228 F.3d 40, 54 (2d Cir. 2000)* (finding waiver only after noting that plaintiffs failed to raise issue both before the magistrate judge *and* in their objections to his report and recommendation).

land to RSA instead. It claimed that AK Media caused the landlords' reluctance by "drilling" them -- telling them that if they decided to lease to RSA, AK Media would tear down its billboard on the leased land, and RSA would be unable to receive a license to build a replacement. *Id. at 13*. On a motion for summary judgment, the district court found that RSA failed to raise a genuine issue of material fact as to whether its injury -- its inability to enter the billboard market -- was caused by AK Media's allegedly anticompetitive conduct. The First Circuit affirmed, agreeing that

RSA was not excluded from the market for outdoor billboards because of AK's threats; it was excluded because of the Massachusetts regulatory scheme that prevents new billboards from being built. In short, AK's representations to landlords did not prevent those landlords from leasing their land to RSA. Even if the landlords had, foolishly perhaps, leased their land to RSA, RSA would not have been able to erect new billboards on those properties. Any injury suffered by RSA is therefore unrelated to AK's allegedly **[*42]** exclusionary conduct, and RSA lacks antitrust standing.

Id. at 15.

As this language makes clear, the fatal defect in RSA's complaint was its failure to demonstrate that AK Media's conduct was a "cause-in-fact" of its alleged antitrust injury -- the court concluded that, had AK Media simply remained passive, RSA's injury would still occur, either because the landlords would rationally refuse to negotiate a lease, or because RSA would be unable to obtain the licensure to operate billboards on the leased land. In this case, by contrast, the defendants' conduct and the applicable law are *both* "but for" causes of the alleged injury -- if the Banks were not inclined to impose anticompetitive restraints, or if *Section 1* of the Sherman Act reached the internal conduct of single entities, the injury plaintiffs allege would not come to pass. ***HN14***[] The fact that the structure of the antitrust laws contributes to plaintiffs' alleged injury does not, by itself, deprive them of antitrust standing -- indeed, one purpose of *Section 7* of the Clayton Act is to prevent combinations that "will make it easier for leading members of the industry to collude on price and output without committing a detectable violation **[*43]** of *Section 1* of the Sherman Act." *FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989)*. Accordingly, plaintiffs have sufficiently pleaded that their injury "flows from that which makes defendants' acts unlawful." *Brunswick, 429 U. S. at 489*. The fundamental defect in their complaint is their failure to plausibly allege that this injury will in fact result from defendants' challenged actions, a defect they may attempt to address in an amended complaint.

2. The Fraudulent Conveyance Claim

As to the fraudulent conveyance claim, MasterCard argues that "Class Plaintiffs cannot allege any manner in which termination of MasterCard's special assessment right might plausibly hinder or delay Class Plaintiffs, as five large Bank Defendants as to whom this assessment right was allegedly held are Defendants in this action, and Class Plaintiffs would be able to satisfy any judgment against these Defendants directly." Reply Mem. of Law in Further Support of MasterCard's Mot. to Dismiss Class Pls.' First Supplemental Class Action Compl. 2. In effect, MasterCard argues that because the alleged fraud is legally impossible (because the Banks are directly liable for the antitrust violations asserted **[*44]** by plaintiffs), plaintiffs cannot demonstrate fraudulent intent. This argument distorts the language of *Section 276*. ***HN15***[] It is not necessary for the plaintiffs to plead that the challenged transaction will actually hinder or delay them, they must only plead that the transaction was undertaken with the intent to do so.

CONCLUSION

For the reasons stated above, the motion to dismiss plaintiffs' supplemental complaint is granted in its entirety. Plaintiffs, however, may amend their complaint to address the defects noted in this opinion.

So ordered.

JOHN GLEESON, U.S.D.J.

Dated: Brooklyn, New York

November 25, 2008

Research in Motion Ltd. v. Motorola, Inc.

United States District Court for the Northern District of Texas, Dallas Division

December 11, 2008, Decided; December 11, 2008, Filed

CIVIL ACTION NO. 3:08-CV-0284-G; 3:08-CV-0317-G

Reporter

644 F. Supp. 2d 788 *; 2008 U.S. Dist. LEXIS 101241 **; 2009-2 Trade Cas. (CCH) P76,852

RESEARCH IN MOTION LIMITED, ET AL., Plaintiffs, VS. MOTOROLA, INC., Defendant. MOTOROLA, INC., Plaintiff, VS. RESEARCH IN MOTION LIMITED, ET AL., Defendants.

Subsequent History: Stay granted by *Research in Motion v. Motorola, Inc., 2009 U.S. Dist. LEXIS 147784 (N.D. Tex., June 15, 2009)*

Core Terms

patents, license, motion to dismiss, terms, argues, technology, antitrust, contract claim, monopoly power, anti trust law, Sherman Act, allegations, negotiate, anticompetitive conduct, antitrust claim, manufactured, bifurcate, products, wireless, parties, promise, district court, market power, anti-competitive, eliminated, breached, contends, pled, declaratory judgment, steel company

LexisNexis® Headnotes

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

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

To survive a *Fed. R. Civ. P. 12(b)(6)* motion, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact). The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.

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

Antitrust & Trade Law > Sherman Act > Claims

HN2[] **Actual Monopolization, Claims**

To establish a violation of § 2 of the Sherman Act, a plaintiff must prove two elements: (1) possession of monopoly power in the relevant market, and (2) that the monopolist achieved or is maintaining monopoly power through anticompetitive conduct.

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

HN3[] **Inequitable Conduct, Anticompetitive Conduct**

In a antitrust context, a patent's value is significantly enhanced after the patent is incorporated in a standard.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN4[] **Remedies, Damages**

When a private plaintiff seeks damages under § 4 of the Clayton Act, that plaintiff must show not only injury to its business or property, but also that the injury is an antitrust injury. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent. In other words, the injury should reflect the anticompetitive effect of the violation.

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

HN5[] **Sherman Act, Scope**

The antitrust laws such as the Sherman Act are designed to protect competition, not competitors.

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

HN6[] **Regulated Practices, Monopolies & Monopolization**

In a antitrust context, typical anticompetitive effects include increased prices and decreased output.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN7[] **Regulated Industries, Communications**

In a antitrust context, telecommunication industry standards, without the proper safeguards, are inherently anticompetitive. It follows that when an entity side-steps such safeguards in an effort to return the standard to its natural anticompetitive state, anticompetitive effects are inevitable.

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

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Actual Monopolization, Claims**

The mere possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful, it is an important element of the free-market system. As a result, the Sherman Act only makes possession of monopoly power illegal if it is accompanied by an element of anticompetitive conduct. For the harm to competition to be actionable, Sherman Act plaintiff must show that it was brought about by anticompetitive conduct, as opposed to growth or development as a consequence of a superior product, business acumen, or historic accident.

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

HN9[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss, the law merely requires that a factual allegation be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Counsel: **[**1]** For Research In Motion Limited, Research in Motion Corporation, Plaintiffs: John R Emerson, LEAD ATTORNEY, George W Bramblett, Jr, Phillip Brett Philbin, Haynes & Boone LLP, Dallas, TX; Dominic E Massa, Gregory P Teran, Jared C Miller, John J Regan, Joseph J Mueller, Michael J Summersgill, Michelle D Miller, William F Lee, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA; Patricia Smink Rogowski, Connolly Bove Lodge & Hutz, Wilmington, DE; William J Bohler, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA.

For Motorola Inc, Defendant: Eric W Pinker, LEAD ATTORNEY, Angela V Colmenero, Mark E Turk, Lynn Tillotson & Pinker, Dallas, TX; Jesse J Jenner, Steven Pepe, PRO HAC VICE, Ropes & Gray LLP, New York, NY; Nicole M Jantzi, PRO HAC VICE, Ropes & Gray LLP, Washington, DC; Norman H Beamer, PRO HAC VICE, Ropes & Gray LLP, Palo Alto, CA.

Judges: A. JOE FISH, Senior United States District Judge.

Opinion by: A. JOE FISH

Opinion

[*790] **MEMORANDUM OPINION AND ORDER**

Before the court are various motions of the defendant Motorola, Inc. ("Motorola" or "the defendant"). Motorola moves to dismiss all of the claims brought by the plaintiffs, Research in Motion Limited and Research in Motion Corporation **[**2]** (collectively, "the plaintiffs" or "RIM"). Motorola also moves, in the alternative, to bifurcate and stay RIM's antitrust and contract claims. Finally, Motorola seeks to dismiss, stay, or transfer RIM's declaratory judgment actions. For the reasons discussed below, all of the motions are denied.

I. BACKGROUND

A. Factual Background

This is an action brought by RIM against Motorola for patent infringement, breach of contract, and violations of the antitrust laws. *See generally* Complaint. Both Motorola and RIM are in the business of developing and marketing mobile wireless communication devices. To work properly, these devices must connect to a network provided by a mobile wireless carrier. Complaint P 15. These carriers enable consumers to place and receive telephone calls, send and receive e-mails, and connect to the Internet through mobile wireless handsets. *Id*. New wireless technologies are constantly in development. But before they can be broadly commercialized, service providers and device manufacturers must agree on common technology specifications. In other words, standards must be set. *Id*. P 16.

Standards are important for several reasons. First, they facilitate the adoption and **[**3]** advancement of technology as well as the development of products that can interoperate with one another. *Id*. P 20. Standards also lower costs by increasing product manufacturing volume, and they increase price competition by eliminating "switching costs" for consumers who desire to switch from products manufactured by one firm to those manufactured by another. *Id*. P 21. They also lead to earlier adoption of new technology. *Id*. There is, however, one downside to standards: they create "essential patents." See *id*. P 23. The term "essential patents" refers to patents that are essential to a standard -- *i.e*., patents that claim technologies selected by a standards development organization ("SDO"). *Id*. P 1. Once a patent becomes an essential patent, it gains undue significance as a result. *Id*. P 5. Companies that produce products governed by a standard become "locked in" to the technologies **[*791]** included in the standard. *Id*. P 23. Customers have no practical choice other than to buy products that comply with the standard. Thus, the owners of essential patents gain market power.

In order to reduce the likelihood that owners of essential patents will abuse their market power, SDOs have adopted **[**4]** rules, policies, and procedures that control the disclosure and licensing of essential patents. *Id*. P 25. These rules, policies, and procedures are known as intellectual property rights policies ("IPR policies"). *Id*. IPR policies usually require owners of essential patents to commit to license those patents on fair, reasonable, and nondiscriminatory ("FRAND") terms. *Id*. PP 1, 27. These "FRAND commitments" are intended to prevent owners of essential patents from acquiring too much of the market power that would otherwise be inherent in owning an essential patent. *Id*. P 28.

RIM and Motorola both produce wireless communication devices. RIM offers the well-known BlackBerry(R) device, with built in Wi-Fi capabilities. *Id*. PP 8, 29, 35. Motorola offers similar devices. *Id*. P 10. As a result, the two companies are in direct competition. *Id*. PP 34-35. Motorola, however, is the owner of several essential patents. Its patents have been incorporated into standards set by the European Telecommunications Standards Institute ("ETSI"), and the Institute of Electrical and Electronics Engineers ("IEEE"). See *id*. PP 42, 48, 59-80. Both ETSI and IEEE require all patent owners to promise that they will **[**5]** license any patents incorporated into their standards on FRAND terms. *Id*. PP 60, 61, 76. Motorola's agreements with ETSI and IEEE require it to license its essential patents on FRAND terms. See *id*.

In 2003, Motorola licensed several of its essential and non-essential patents to RIM. *Id*. PP 84-86. Motorola and RIM entered into a Cellular Essential Properties Cross License Agreement ("Cross License Agreement"). *Id*. This agreement gave RIM a license to use Motorola's essential patents for five years, and provided that in 2007, the parties would begin good faith negotiations to extend the contract. *Id*. When the license expired at the end of 2007, RIM sought to enter negotiations to extend the contract. *Id*. P 88. RIM avers that Motorola refused to negotiate reasonably and will not re-license the patents at a FRAND price. *Id*. PP 88-89.

RIM contends that Motorola's refusal to negotiate in good faith constitutes a breach of both the Cross License Agreement and the commitments Motorola made to IEEE and ETSI to license its essential patents on FRAND terms. *Id*. PP 162-67, 175-79. RIM also asserts a claim against Motorola under a theory of promissory estoppel. *Id*. PP 168-74. RIM maintains that Motorola **[**6]** promised potential licensees, via its commitments to IEEE and ETSI, that it would license its essential patents on FRAND terms. *Id*. P 169. Motorola insists that because other wireless device companies, like RIM, foreseeably relied on this promise, Motorola is estopped to deny it. *Id*. PP 170-72.

RIM brings two other causes of action against Motorola. Based on Motorola's alleged failure to license its patents on FRAND terms, RIM brings a claim for violation of *Section 2* of the Sherman Act. *Id*. PP 180-85. Finally, RIM asserts that Motorola has willfully infringed nine of RIM's patents. *Id*. PP 115-61.

B. Procedural Background

RIM filed this suit against Motorola on February 16, 2008. Only minutes later, on the same day, Motorola filed suit against RIM in the United States District Court for the Eastern District of Texas. Plaintiff Research in Motion's Notice of Supplemental Authority in Opposition to Motorola's **[*792]** Motion to Dismiss, Stay or Transfer ("Notice of

Supplemental Authority") at 1. RIM moved to transfer Motorola's suit to the Northern District of Texas. *Id*. Judge T. John Ward of the Eastern District granted this motion on October 17, 2008. Appendix in Support of Plaintiff Research **[**7]** in Motion's Notice of Supplemental Authority in Opposition to Motorola's Motion to Dismiss, Stay or Transfer ("Appendix to Notice of Supplemental Authority") at 1. His decision rested on the "first-filed" rule, holding that, although RIM filed its suit only minutes earlier than Motorola, the rule still applied. *Id*. RIM states that it will seek to consolidate Motorola's case with this one as soon as it is transferred to the Northern District of Texas. Notice of Supplemental Authority at 1.

II. ANALYSIS

A. The Motions to Dismiss

1. 12(b)(6) Standard

HN1[] "To survive a *Rule 12(b)(6)* motion, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation, 495 F.3d 191, 205 (5th Cir. 2007)* (quoting *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1964-65* (citations, **[**8]** quotations marks, and brackets omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal, 495 F.3d at 205* (quoting *Twombly, 127 S.Ct. at 1965*). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (internal quotation marks omitted) (quoting *Martin K. Eby Construction Company v. Dallas Area Rapid Transit, 369 F.3d 464 (5th Cir. 2004))*.

2. The Motion to Dismiss the Antitrust Claim

RIM's antitrust claim alleges that Motorola violated *Section 2* of the Sherman Act. Complaint PP 180-85. ***HN2***[] To establish such a violation, RIM must prove two elements: (1) possession of monopoly power in the relevant market, and (2) that the monopolist achieved or is maintaining monopoly power through anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Motorola moves to dismiss RIM's antitrust claim under *Rule 12(b)(6)* on three separate grounds. First, Motorola argues that it does not have monopoly power in the relevant market. Defendant **[**9]** Motorola, Inc.'s Brief in Support of its Motion to Dismiss or Stay Plaintiffs' Antitrust and Contract Claims; And to Dismiss, Stay or Transfer Plaintiffs' Declaratory Judgment Patent Claims ("Motion to Dismiss") at 11. Second, Motorola argues that RIM has not pled that Motorola engaged in anticompetitive conduct. *Id*. Finally, Motorola asserts that RIM has not pled that the injury it suffered was an antitrust injury. *Id*. These grounds are discussed separately below.

a. *Does Motorola Have Monopoly Power?*

It is not clear that Motorola intends its alleged lack of monopoly power to be a ground for dismissal. Motorola's Motion to Dismiss merely references this argument obliquely in a footnote. The court will nevertheless address it briefly.

[*793] Motorola's sole argument on this point is that its mere ownership of essential patents does not per se bestow market power. Motion to Dismiss at 15 n. 18. Motorola's support for this contention comes from *Illinois Tool Works Inc. v. Independent Ink, Inc*., which states that the Federal Trade Commission should not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. *547 U.S. 28, 45-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. RIM, however, correctly **[**10]** points out that this statement merely sets forth the uncontroversial proposition that "a patent does not necessarily confer market power upon the patentee." *Id. at 45*. *Independent Ink* does not address holders of *essential* patents, that is, patents that are incorporated into a standard. Essential patents are very different from normal patents, as the Third Circuit explains in *Broadcom Corporation v. Qualcomm Incorporated, 501 F.3d 297, 314 (3rd Cir. 2007)*. *Broadcom* states that non-essential patents do not confer monopoly power upon the owner because the value of a patent "is limited when alternative technologies exist." *Id*. A standard, however, by definition, eliminates alternative technologies. *Id*. As a result, ***HN3***[] a patent's value is "significantly enhanced . . . after the patent is incorporated in a standard." *Id*. Motorola's off-hand argument that it does not have a monopoly just because it has a patent is therefore unpersuasive. The argument fails to address the key fact that Motorola owns an *essential* patent. For these reasons, the court denies Motorola's motion to dismiss RIM's antitrust claim on this ground.

b. *Has RIM Suffered an Antitrust Injury?*

Next, Motorola argues that RIM has **[**11]** not pled that it suffered an antitrust injury. Motion to Dismiss at 11. RIM seeks treble damages under *Section 4* of the Clayton Act for Motorola's alleged violation of *Section 2* of the Sherman Act. Plaintiff Research in Motion's Opposition to Defendant Motorola, Inc.'s Motion to Dismiss or Stay Plaintiff's Antitrust and Contract Claims and to Dismiss, Stay or Transfer Plaintiffs' Declaratory Judgment Patent Claims ("Response") at 25. ***HN4***[] When a private plaintiff seeks damages under *Section 4* of the Clayton Act, that plaintiff must show not only injury to its business or property, but also that the injury is an antitrust injury. *Norris v. Hearst Trust, 500 F.3d 454, 465 (5th Cir. 2007)*. The Court in *Norris* defined an antitrust injury as an "injury of the type the antitrust laws were intended to prevent." *Id*. In other words, the injury "should reflect the anticompetitive effect . . . of the violation." *Id*.

RIM claims it has suffered the following injuries as a result of Motorola's conduct:

a) The threat of being forced to pay supracompetitive royalties;

b) The uncertainty created by Motorola's refusal to recognize the FRAND license and negotiate a FRAND rate;

c) The inability to obtain licenses **[**12]** to Motorola's essential patents on FRAND terms, and

d) Injury to its business and property, specifically, the threat of imminent loss of profits, loss of current and potential customers, and loss of goodwill and product image.

Response at 25-27. This list of injuries all stem from the same complaint: that Motorola has refused to honor its promise to offer its patents on FRAND terms. RIM claims this refusal has left it in a Catch-22. On the one hand, RIM could acquiesce to Motorola's non-FRAND terms. On the other hand, if it refuses to do so, its products (such as the Blackberry(R)) will no longer meet the SDOs' standards and RIM will be at a major competitive disadvantage. **[*794]** RIM argues that antitrust laws were designed to prevent just this sort of situation, and that it has therefore suffered an antitrust injury. Response at 26.

Assuming, as the court must at this stage of the proceedings, that all these facts are true, it is clear that RIM has suffered injuries as a result of Motorola's conduct. To qualify as *antitrust* injuries, however, they must be "of the type the antitrust laws were intended to prevent." *Norris, 500 F.3d at 465*. It is axiomatic that ***HN5***[] the antitrust laws were designed **[**13]** to protect "competition[,] not competitors." *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. This means that RIM must plead more than just the injuries it has sustained; it must also show that Motorola's conduct negatively affects competition. *Id*.

RIM argues that Motorola's conduct has harmed competition. In fact, it asserts that Motorola's conduct has "***eliminated*** -- let alone injured -- competition in the relevant upstream technologies markets." Response at 24 (emphasis in original). In essence, RIM argues, Motorola's possession of an essential patent has turned Motorola into a gatekeeper. See *id*. Any company wishing to compete with Motorola has to have its permission, giving it the power to eliminate all competition, should it so desire. RIM argues that the danger for abuse inherent in Motorola's position is the very reason IEEE and ETSI required Motorola to promise it would allow competitors to "pass through the gates" on FRAND terms. Complaint PP 23-28. The court agrees. Even if Motorola's conduct does not eliminate competition entirely, it has the power to harm it. If Motorola licenses only at exorbitant rates, it will force its competitors to increase **[**14]** prices in the downstream market in order to make a profit. This increase in prices for all products except Motorola's will harm competition. See *Anago, Inc. v. Tecnol Medical Products, Inc., 976 F.2d 248, 249 (5th Cir. 1992)* (holding that ***HN6***[] "[t]ypical anticompetitive effects include increased prices and decreased output"), *cert. dismissed*, *510 U.S. 985, 114 S. Ct. 491, 126 L. Ed. 2d 441 (1993)*.

There are several cases supporting RIM's contention that Motorola's behavior is harmful to competition. The United States Supreme Court, as well as several circuit courts, have held that this type of gate-keeping causes exactly the kind of harm antitrust laws are designed to prevent. In *Allied Tube & Conduit Corporation v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*, the Supreme Court addressed both the risks and benefits of standard-setting. The case involved a steel manufacturing corporation that set out to convince an SDO not to change its standards in a way that would negatively affect steel manufacturers. *Id. at 495-97*. The standards-setting organization, the National Fire Protection Association, published the National Electric Code each year. Until 1981, the Code had approved only steel as an electrical conduit. When a new material **[**15]** suitable for use as an electrical conduit became available, the steel company rounded up everyone it could to vote against incorporating this new material into the code as another viable material for electrical conduits. *Id*. (stating the facts). The issue in the case was whether this behavior violated *Section 1* of the Sherman Act by unreasonably restraining trade or whether the steel company was immune from such liability because it was merely lobbying a legislative body for the result it desired. *Id. at 495* (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* (providing antitrust immunity for individuals who **[*795]** petition the government to adopt a rule or law that would restrain trade)).

The Court held that the steel company did not enjoy any such immunity. *Id. at 509-10*. The Court noted the benefits of standards, stating that they "can have significant procompetitive advantages" when they are "based on the merits of objective expert judgments. " *Id. at 501*. But the Court was quick to point out that in order for any procompetitive advantages to come out of the existence of standards, the standards-setting organizations must have "procedures that **[**16]** prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Id*. Otherwise, a standard is nothing more than an implicit "agreement not to manufacture, distribute, or purchase certain types of products." *Id*. The Court held that the steel company, which had a clear economic interest in stifling competition from this new material, was biasing the process. It therefore refused to grant the steel company antitrust immunity. *Id. at 509-10*.

Although the issue in *Allied Tube* was very different than the issue here, the case highlights the importance of keeping biased entities out of the standard-setting process. The opinion implies that, without safeguards against bias, the very existence of standards is inherently anti-competitive. *Id. at 501*. In 2007, the Third Circuit applied the holding of *Allied Tube* to a set of facts remarkably similar to those at hand. *Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007)*, involved two mobile wireless telephone companies, Broadcom Corporation ("Broadcom") and Qualcomm, Inc. ("Qualcomm"). Broadcom filed suit against Qualcomm, alleging that Qualcomm, a member of ETSI, had convinced ETSI **[**17]** to incorporate its technology into its standards "in reliance on . . . Qualcomm's commitment to license that technology on FRAND terms." *Id. at 304*. Broadcom argued that Qualcomm had later gone back on its word, and was "withholding favorable pricing" in order to obtain a bigger market share. *Id*. Based on these factual allegations, the complaint asserted a claim under *Section 2* of the Sherman Act. *Id. at 305*.

Qualcomm brought a *Rule 12(b)(6)* motion to dismiss in the district court. The district court granted the motion. The opinion reasoned that, although Qualcomm may have tricked ETSI into incorporating its technology into the standard, this was "of no moment under ***antitrust law*** . . . because no matter which company's patented technology ultimately was chosen, the adoption of a standard would have eliminated competition." *Id. at 305*. In other words, the district court believed that standards inevitably eliminated competition, and that FRAND commitments were powerless to stop it. The Third Circuit reversed. The Circuit opinion criticized the lower court for failing to realize the importance of the FRAND commitments. The court stated that the district court failed to even consider that **[**18]** "the FRAND commitments that SDOs required of vendors were intended as a bulwark against unlawful monopoly." *Id*. Alternatively, the court stated, the "SDOs might have chosen nonproprietary technologies for inclusion in the standard." *Id*. In short, the court pointed out, there were several ways the SDOs might have prevented the use of standards from automatically granting monopoly power to essential patent holders. *Broadcom* held that FRAND commitments are one such method. *Id*. This court finds the reasoning in *Broadcom* persuasive and joins the Third Circuit in concluding that these FRAND commitments are intended as a "bulwark" against the unlawful accumulation of monopoly power that antitrust laws are designed **[*796]** to prevent. Thus, Motorola's efforts to side-step this bulwark, as alleged in this case, are harmful not only to RIM but to competition in general.

In order for RIM to properly plead that it has suffered an antitrust injury, it must show not only injury to itself but injury to competition as well. *Brunswick, 429 U.S. at 489*. RIM has sufficiently alleged harm to competition. Both the Third Circuit, in *Broadcom*, and the Supreme Court, in *Allied Tube*, have stated that ***HN7***[] standards, without **[**19]** the proper safeguards, are inherently anticompetitive. It follows that when an entity side-steps these safeguards in an effort to return the standard to its natural anti-competitive state, anti-competitive effects are inevitable. Motorola's breach of the commitments to IEEE and ETSI, as a result, is harmful to competition. RIM has properly pled harm to both itself and to competition. Motorola's motion to dismiss on this ground is denied.

c. *Was Motorola Engaged in Anticompetitive Conduct?*

Motorola's final argument in support of its motion to dismiss the antitrust claim is that Motorola was not engaged in anticompetitive conduct. Motion to Dismiss at 11. The court has already concluded that, according to the allegations in the complaint, Motorola's conduct is harmful to competition. Motorola's role as a gatekeeper gives it the power to eliminate, and thus to harm, competition. If, as RIM pleads, Motorola has abused this position, such conduct will harm or eliminate competition. Harm or elimination of competition, however, is *not* unlawful under the Sherman Act. See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. In fact, the law encourages **[**20]** attainment of monopoly by squeezing out competitors. As the United States Supreme Court observed recently, ***HN8***[] "The mere possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful, it is an important element of the free-market system." *Id*. As a result, the Sherman Act only makes possession of monopoly power illegal if it is "accompanied by an element of anticompetitive *conduct*." *Id*. Here, although it is easy to see how Motorola's role as "gatekeeper" gives it monopoly power that could easily harm competition, the law requires more than this before liability may be imposed under the Sherman Act. *Id*. For the harm to competition to be actionable, RIM must show that it was brought about by anticompetitive conduct, as opposed to "growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corporation, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

RIM pleads that IEEE and ETSI did not incorporate Motorola's technology into their standards because of Motorola's business acumen or because its technology was superior. Instead, RIM asserts, IEEE and ETSI relied on Motorola's false promises that it would **[**21]** license its patents on FRAND terms. Response at 15. ***HN9***[] To survive a motion to dismiss, the law merely requires that a factual allegation "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal, 495 F.3d at 205* (internal quotation marks omitted) (quoting *Twombly, 127 S.Ct. at 1965*). As a result, this court must accept as true the allegation that Motorola obtained its position of power in the market not as a consequence of a superior product, business acumen or historic accident, but by misrepresenting its intentions. Motorola's motion to dismiss RIM's antitrust claim on the grounds that Motorola did not **[*797]** engage in anticompetitive conduct is therefore denied.

3. The Motion to Dismiss RIM's Contract Claims

RIM argues that Motorola has breached two separate contracts. First, RIM argues that Motorola has breached the contracts it made with IEEE and ETSI to license its patents on FRAND terms. Complaint P 83. Next, RIM argues that Motorola breached the contract it made with RIM in March of 2003. *Id*. P 84. On March 28, 2003, Motorola and RIM entered into the Cross License Agreement. **[**22]** This agreement gave RIM license to use Motorola's essential patents for five years, and provided that in 2007, the parties would begin good faith negotiations to extend the contract. *Id*. P 85. During the course of this five years, RIM's share of handset sales grew, while Motorola's shrank. *Id*. P 87. RIM argues that Motorola sought to regain its place in the market by demanding non-FRAND royalties with respect to its essential patents. *Id*. P 88. RIM contends that such conduct breaches the Cross License Agreement and the agreements Motorola made with IEEE and ETSI.

Motorola argues that these breach of contract claims should be dismissed. First, it contends that RIM has not adequately pled that Motorola breached its obligation to license the essential patents on FRAND terms. Motion to Dismiss at 20. All RIM can prove, it contends, is that the two parties have not yet agreed to FRAND terms. *Id*. at 16.

Motorola points out that just because the parties have not yet settled on FRAND terms does not mean Motorola is unwilling to license the patent on FRAND terms. *Id*.

This argument fails. RIM's complaint alleges that Motorola "has refused to extend FRAND . . . licensing terms to RIM for any of **[**23]** Motorola's purportedly essential patents . . . and has instead demanded of RIM terms that are unfair, unreasonable, and, on information and belief, discriminatory." Complaint P 83. Motorola's argument merely contradicts the factual accuracy of this statement. At this stage of the case, the court takes RIM's pleadings as true. RIM has adequately pled that Motorola did not honor its promise to license on FRAND terms. Motorola's contention otherwise is entitled to no weight on a *Rule 12(b)(6)* motion.

Motorola's second argument in support of dismissing the contract claims is that RIM has not suffered any damages. Motion to Dismiss at 20. The defendant contends that even if it has breached its agreements with RIM or the SDOs, eventually RIM will receive a FRAND license; either this court will determine FRAND terms or the parties will settle on FRAND terms on their own. *Id*. at 20-21. Either way, it contends, RIM will incur no injury.

This argument is inherently flawed. Motorola argues that RIM has two paths before it, both of which lead to fair licensing terms. One of these paths is this court; the other is negotiation outside the court. RIM pleads -- and the court must accept as true at the **[**24]** *Rule 12(b)(6)* stage -- that Motorola has already refused to negotiate fair terms outside this court. Motorola has blocked that path. Now, Motorola argues, the court should block the only other available path by dismissing this case. Motorola is correct that, in the end, RIM will receive fair licensing terms. But if those terms must be dictated by this court, it cannot dismiss the action before it has a chance to do so. The court will not dismiss RIM's breach of contract claims on the ground that it has suffered no injury.

B. <u>The Motion to Bifurcate and Stay the Antitrust and Contract Claims</u>

Motorola argues that if the court does not dismiss RIM's contract and antitrust **[*798]** claims, it should bifurcate those claims from the patent infringement claims pursuant to *Federal Rule of Civil Procedure 42(b)*. Motion to Dismiss at 23. It also urges the court to stay those claims pending resolution of the patent claims. Motorola argues that bifurcating and staying these claims will achieve judicial economy and efficiency. *Id*.

Motorola's desire to have the claims bifurcated appears to arise from its desire to try the patent claims in the United States District Court for the Eastern District of Texas. Motorola **[**25]** originally filed its patent infringement claims against RIM in the Eastern District. Notice of Supplemental Authority at 1. When RIM moved to transfer that case to the Northern District of Texas for possible consolidation with this case, Motorola vigorously opposed the motion and fought to keep the case in the Eastern District. Ultimately, Motorola lost that fight. Judge T. John Ward in the Eastern District transferred Motorola's suit against RIM to the Northern District of Texas on October 17, 2008. Appendix to Notice of Supplemental Authority at 1. Motorola filed the briefs supporting the instant motion before Judge Ward granted RIM's motion to transfer. As a result, Motorola's argument assumes that its case against RIM is still pending in the Eastern District. It argues that both parties have been involved in patent lawsuits in the Eastern District and that the court there is "already very familiar with the parties, their products, and the technological background common to the Motorola and RIM patent actions." Defendant Motorola, Inc.'s Reply Brief in Support of its Motion to Dismiss or Stay Plaintiffs' Antitrust and Contract Claims; and to Dismiss, Stay or Transfer Plaintiffs' **[**26]** Declaratory Judgment Patent Claims at 17. In short, Motorola argues that this court is equipped to handle its antitrust and contract claims, but that the Eastern District is better equipped to decide the patent infringement claims. This case, however, no longer has any connection with the Eastern District of Texas. Judge Ward transferred Motorola's suit against RIM to the Northern District of Texas. Notice of Supplemental Authority at 1-2. Therefore, the court will not bifurcate the patent claims from the antitrust and contract claims so that the patent claims may be tried in the Eastern District.

C. <u>The Motion to Dismiss or Transfer RIM's Declaratory Judgment Claims</u>

Motorola's final request is that the court dismiss, stay, or transfer RIM's declaratory judgment patent claims in favor of Motorola's Eastern District of Texas action. Motion to Dismiss at 29-30. RIM filed a declaratory judgment action that Motorola claims is the "mirror image" of its claims against RIM filed in the Eastern District of Texas. *Id*. at 29. In the alternative, Motorola requests that the court stay the declaratory judgment actions pending resolution of the claims in the Eastern District, or transfer the claims **[**27]** to the Eastern District for consolidation. *Id*. As discussed above, Judge Ward of the Eastern District has already transferred Motorola's suit against RIM to the Northern District of Texas. Appendix to Notice of Supplemental Authority at 1-2. Motorola's request that the court dismiss stay or transfer RIM's claims in favor of the Eastern District case is denied as moot.

III. CONCLUSION

For the reasons discussed above, Motorola's motions to dismiss, bifurcate, stay, or transfer RIM's claims are **DENIED**.

SO ORDERED.

December 11, 2008.

/s/ A. Joe Fish

A. JOE FISH

Senior United States District Judge

Champagne Metals v. Ken-Mac Metals, Inc.

United States District Court for the Western District of Oklahoma

December 12, 2008, Decided; December 11, 2008, Filed

NO. CIV-02-0528-HE

Reporter

2008 U.S. Dist. LEXIS 100216 *; 2008-2 Trade Cas. (CCH) P76,419; 78 Fed. R. Evid. Serv. (Callaghan) 80

CHAMPAGNE METALS, an Oklahoma limited liability company, Plaintiff, v. KEN-MAC METALS, INC., an Ohio corporation, ET AL., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Partial summary judgment denied by, Motion denied by *Champagne Metals v. Ken-Mac Metals, Inc., 2009 U.S. Dist. LEXIS 134594 (W.D. Okla., Feb. 25, 2009)*

Prior History: *Champagne Metals v. Ken-Mac Metals, Inc., 2007 U.S. Dist. LEXIS 88773 (W.D. Okla., July 27, 2007)*

Core Terms

Metals, sales, conspiracy, distributors, damages, prices, service center, estimates, aluminum, lost profits, defendants', factors, volume, lost sales, antitrust, circumstances, reliability, court concludes, threats, coconspirator, competitors, projections, purchases, steel, limitations period, plaintiff's claim, summary judgment, Sherman Act, scientific, proffered

LexisNexis® Headnotes

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > ... > Exemptions > Statements by Coconspirators > Statements During Conspiracy

Evidence > ... > Exemptions > Statements by Coconspirators > Statements Furthering Conspiracy

HN1[] **Burdens of Proof, Preponderance of Evidence**

Fed. R. Evid. 801(d)(2)(E) permits the admission of an out-of-court statement by a coconspirator of a party during the course and in furtherance of the conspiracy. For a statement to be admissible, a plaintiff must establish by a preponderance of the evidence that a conspiracy existed, that the declarant and defendant against whom the statement is offered were members of the conspiracy, and that the statement was made in the course of and in furtherance of the conspiracy. In making the determination of whether a conspiracy has been established, the court considered the testimony and exhibits offered at the hearing, as well as plaintiff's proffer and defendants' responses.

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

Evidence > Inferences & Presumptions > Inferences

HN2[] Sherman Act, Scope

It has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy. However, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a case under *§ 1* (*15 U.S.C.S. § 1*) of the Act. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. A plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently, and, if the factual context renders the plaintiff's claim implausible--if the claim is one that simply makes no economic sense--the plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary.

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

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN3[] Sherman Act, Scope

While circumstantial evidence may support the existence of an illegal agreement under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, the acceptable inferences that may be drawn from it vary with the plausibility of the plaintiff's theory and the danger associated with such inferences. Consciously parallel behavior may contribute to a finding of antitrust conspiracy, but it is insufficient, standing alone, to prove conspiracy. Such parallel behavior may, however, support the existence of an illegal agreement when augmented by additional evidence from which an understanding among the parties may be inferred. The required additional evidence may include a showing that the parties are acting against their own individual business interests, or that there is motivation to enter into an agreement requiring parallel behavior. Courts traditionally have found concerted action even where one of the alleged conspirators may have been coerced to participate in an illegal scheme.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

HN4[] Exemptions, Statements by Coconspirators

In determining whether, for purposes of the co-conspirator hearsay exception, the evidence makes the existence of a conspiracy more likely than not, a court may consider both hearsay and independent evidence. Under Bourjaily, there need only be some independent evidence linking the defendant to the conspiracy. Such independent evidence may be sufficient even when it is not substantial. Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. A piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.

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

HN5[] Sherman Act, Scope

Independent action is not proscribed, and a mill of course has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. Something more than evidence of complaints is needed, or mere acquiescence to a competitor's complaints about a price-cutter be present to infer a conspiracy.

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

Evidence > Inferences & Presumptions > Inferences

HN6[] **Sherman Act, Scope**

An inference of antitrust conspiracy may be based on response to complaints, when coupled with evidence of "plus" factors, such as threats or coercion.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN7[] **Expert Witnesses, Daubert Standard**

In accord with *Fed. R. Evid. 702*, the U.S. Supreme Court has determined that the trial judge must ensure that any and all scientific testimony or evidence is not only relevant, but reliable. This gatekeeper function applies to all expert testimony, not merely to that deemed to be scientific in nature.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN8[] **Expert Witnesses, Daubert Standard**

See *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN9[] **Expert Witnesses, Daubert Standard**

In determining the admissibility of expert testimony, a court initially must decide whether the proposed expert is qualified to offer an opinion on the issues involved in the particular case. A qualified expert must possess the necessary knowledge, skill, experience, training or education relevant to the facts at issue. The court then must conduct a two-part inquiry to fulfill its Daubert gatekeeping role, determining first if the expert's proffered testimony has a reliable basis in the knowledge and experience of his or her discipline. In making this determination, the district court must decide whether the reasoning or methodology underlying the testimony is scientifically valid.

Second, the district court must inquire into whether proposed testimony is sufficiently relevant to the task at hand. Is there an appropriate fit between the evidence offered and the material issue to which it is directed?

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN10[] Expert Witnesses, Daubert Standard

In determining whether an expert's testimony meets Fed. R. Evid. 702's reliability standard, Daubert and Rule 702 provide a non-exclusive list of factors which a court should consider if they are applicable. As Fed. R. Evid. 702 cmt. (2000 Amendments) notes: The specific factors explicated by Daubert are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Evidence > Admissibility > Expert Witnesses

HN11[] Admissibility, Expert Witnesses

Fed. R. Evid. 702 cmt. (2000 Amendments) identifies a number of factors which may, in a proper case, be relevant to the determination of whether expert testimony is sufficiently reliable. These include: (1) whether the expert proposes to testify about matters growing naturally and directly out of research he/she has conducted independent of the litigation, or whether the opinion was developed expressly for the purpose of testifying, (2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, (3) whether the expert has adequately accounted for obvious alternative explanations, (4) whether the expert is being as careful in his/her litigation consulting work as he or she would in their regular professional work, and (5) whether the particular field of expertise claimed by the expert is one known to reach reliable results for the type of opinion sought to be given.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Evidence > Types of Evidence > Circumstantial Evidence

HN12[] Remedies, Damages

Where a wrongdoer's own acts prevent a more precise ascertainment of damages, it must bear the risk of that uncertainty. Violators of the antitrust laws rarely leave a clear paper trail or other evidence by which their collective actions might readily be separated from their individual actions. The necessary reliance on circumstantial evidence will often preclude any meaningful basis for apportionment.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN13[] Remedies, Damages

There is, in general, nothing objectionable about a damages expert assuming a plaintiff can establish liability.

Evidence > Types of Evidence > Testimony > General Overview

HN14[] Types of Evidence, Testimony

Counsel's argument is not evidence.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN15[] Expert Witnesses, Daubert Standard

The factors referenced in Daubert are non-exclusive and not a checklist.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN16[] Remedies, Damages

Regarding the notion that damages in an antitrust context may be shown only through the testimony of an expert witness, while undoubtedly that is the common manner of establishing the extent of claimed damages, it is not a legal requirement.

Counsel: **[*1]** For Champagne Metals, an Oklahoma Limited Liability Company, Plaintiff: Clyde A Muchmore, D Kent Meyers, Mack J Morgan, III, Mark S Grossman, Crowe & Dunlevy-OKC, Oklahoma City, OK; Jennifer A Dutton, Crowe & Dunlevy-NORMAN, Norman, OK; Michael Burrage, Whitten Burrage Priest Fulmer Anderson & Eisel, Oklahoma City, OK.

For Ken-Mac Metals Inc, an Ohio corporation, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; David A Ettinger, Honigman Miller Schwartz & Cohn-DETROIT, Detroit, MI; Laurence M Huffman, M Richard Mullins, McAfee & Taft, Oklahoma City, OK; Murray E Abowitz, Abowitz Timberlake & Dahnke PC, Oklahoma City, OK.

For Samuel Son & Co Ltd, an Ontario, Canada corporation, Samuel Specialty Metals Inc, a New Jersey corporation, Defendants: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; George W Dahnke, Mary B Scott, Murray E Abowitz, Abowitz Timberlake & Dahnke PC, Oklahoma City, OK; William J O'Shaughnessy, McCarter & English LLP, Newark, NJ.

For Metalwest LLC, an Alabama limited liability company, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; Mark J Mathews, Timothy R Beyer, Brownstein **[*2]** Hyatt Farber Schreck PC, Denver, CO; Michael A Rubenstein, Rubenstein Bryan McCormick & Pitts PLLC, Edmond, OK; Richard B Benenson, Brownstein Hyatt & Farber PC, Denver, CO.

For Integris Metals Inc, a New York corporation, Defendant: Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma City, OK; David L Hashmall, Felhaber Law Firm, Minneapolis, MN; Glen D Huff, Steven J Johnson, Foliart Huff Ottaway & Bottom, Oklahoma City, OK.

For Earle M Jorgensen Company, a Delaware corporation, Defendant: Allan B Goldman, Katten Muchin Zavis Rosenman-LOS ANGELES, Los Angeles, CA; Charles E Geister, III, Hartzog Conger Cason & Neville, Oklahoma

City, OK; Fred A Leibrock, Jennifer Miller Ventura, Phillips Murrah PC, Oklahoma City, OK; Jennifer M Kirkpatrick, Elias Books Brown & Nelson PC, Oklahoma City, OK.

For Ryerson Tull Inc, an Illinois corporation, Defendant: Jacquelyn V Clark, Bernard J Rothbaum, Jr, Charles E Geister, III, Drew Neville, Jr, Hartzog Conger Cason & Neville, Oklahoma City, OK; Mark McLaughlin, Mayer Brown Rowe & Maw LLP-CHICAGO, Chicago, IL.

Judges: JOE HEATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOE HEATON

Opinion

ORDER

Plaintiff Champagne Metals, an aluminum distributor or "service center," **[*3]** filed this antitrust action against seven other service centers -- Ken-Mac Metals, Inc. ("Ken-Mac"), Samuel, Son & Co., Ltd., Samuel Specialty Metals, Inc. (collectively "Samuel"), Metalwest, LLC, Integris Metals, Inc. ("Integris"), Earle M. Jorgensen Co. ("EMJ"), and Ryerson Tull, Inc. ("Ryerson") (collectively the "Established Distributors"). Plaintiff claims defendants violated Section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*, by engaging in a horizontal group boycott, violated the Oklahoma Antitrust Reform Act, *79 Okla. Stat. § 203*, by unreasonably restraining trade, and tortiously interfered with its business and contractual relationships. Summary judgment was previously entered in defendants' favor on all claims, but that decision was reversed in part on appeal. *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006)*.

As the Tenth Circuit opinion gives a detailed summary of the dispute, the court will not repeat the facts here except as necessary to explain its conclusions. Briefly summarized, plaintiff claims the Established Distributors conspired "to attempt to keep a new, aggressive entrant out of the market," *Champagne Metals, 458 F.3d at 1086*, by threatening **[*4]** to move their business from the mills that sold them aluminum, if those mills dealt with Champagne Metals.

A James [1] hearing was held the weeks of November 10 and 17, 2008, to determine the admissibility of various coconspirator hearsay statements, most of which plaintiff claims were made by representatives of the mills which supplied aluminum to the distributors. A Daubert hearing also was held to determine the admissibility of the testimony of Steve L. Wilsey, plaintiff's damages expert. The court's rulings pertaining to the James hearing, as well as its disposition of defendants' objection to the Wilsey testimony and defendants' renewed motion for summary judgment, are addressed below.

I. Admissibility of Coconspirator Hearsay

HN1[] *Fed. R. Evid. 801(d)(2)(E)* permits the admission of an out-of-court statement "by a coconspirator of a party during the course and in furtherance of the conspiracy." For a statement to be admissible, plaintiff must establish by a preponderance of the evidence that a conspiracy existed, that the declarant and defendant against whom the statement is offered were members of the conspiracy, and that **[*5]** the statement was made in the course of and in furtherance of the conspiracy. *United States v. Lopez-Gutierrez, 83 F.3d 1235, 1242 (10th Cir. 1996)*. In making the determination of whether a conspiracy has been established, the court considered the testimony and exhibits offered at the hearing, as well as plaintiff's proffer and defendants' responses.

[1] See generally *United States v. James, 590 F.2d 575 (5th Cir.1979)*.

The court initially must decide whether plaintiff has shown by a preponderance of the evidence that a conspiracy existed. [2] The applicable legal principles are well established. ***HN2***[] "[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy ...." *United States v. General Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Esco Corp. v. United States, 340 F.2d 1000, 1008 (9th Cir. 1965)* ("Mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy .... An exchange of words is not required.") (internal citation omitted). However, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[*6]** "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently," *id.* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*, and, "if the factual context renders [the plaintiff's] claim implausible-if the claim is one that simply makes no economic sense-[the plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id. at 587*.

HN3[] While "circumstantial evidence may support the existence of an illegal § 1 agreement," *Mitchael v. Intracorp. Inc., 179 F.3d 847, 858 (10th Cir. 1999)*, the acceptable inferences that may be drawn from it "'vary **[*7]** with the plausibility of the plaintiff['s] theory and the danger associated with such inferences.'" *Id.* (quoting *In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999)*. "[C]onsciously parallel behavior may contribute to a finding of antitrust conspiracy, [but] it is insufficient, standing alone, to prove conspiracy. Such parallel behavior may, however, support the existence of an illegal agreement when augmented by additional evidence from which an understanding among the parties may be inferred." *Id at 859* (internal citation and quotations omitted). The required additional evidence "may include a showing that the parties 'are acting against their own individual business interests, or that there is motivation to enter into an agreement requiring parallel behavior.'" *Id.* (quoting *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n of Kansas, 891 F.2d 1473, 1481 (10th Cir. 1989)*. Courts traditionally have found concerted action even where one of the alleged conspirators may have been coerced to participate in an illegal scheme. *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973-74 (7th Cir. 1995)*; *see Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 221 (5th Cir. 2001)* **[*8]** ("Conspirators who are not competitors of the victim may have no interest in curtailing competition in a market in which they do not compete; nevertheless, when they have been enticed or coerced to share in an anticompetitive scheme, there is still a combination within the meaning of the Sherman Act."); *Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1145 (10th Cir. 1997)* (coerced action satisfies the "concerted action element of *section 1* of the Sherman Act" in antitrust action alleging a tying arrangement).

HN4[] In determining "whether, for purposes of the co-conspirator hearsay exception, the evidence makes the existence of a conspiracy more likely than not," the court may consider both hearsay and independent evidence. *Champagne Metals, 458 F.3d at 1081* & n.6. "[U]nder Bourjaily, 'there need only be some independent evidence linking the defendant to the conspiracy.' *United States v. Martinez, 825 F.2d 1451, 1453 (10th Cir.1987)*. Such independent evidence may be sufficient even when it is not 'substantial.'" *United States v. Lopez-Gutierrez, 83 F.3d 1235, 1242 (10th Cir. 1996)*. "[I]individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove **[*9]** it. The sum of an evidentiary presentation may well be greater than its constituent parts.... [A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." *Champagne Metals, 458 F.3d at 1081 n.6* (quoting *Bourjaily v. United States, 483 U.S. 171, 179-80, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987))*.

[2] The court previously concluded that plaintiff had demonstrated the existence of a genuine issue of material fact as to whether the Established Distributors entered into a conspiracy, a different question than that which must be decided now. July 27, 2007, Order, p. 6.

The court starts from the premise that plaintiff has advanced a very credible economic theory [3] for the alleged conspiracy [4] and offered some direct evidence of collusive action. [5] Building on that is circumstantial evidence, [6] which the court finds suffices to demonstrate by a preponderance of the evidence the existence of at least a tacit agreement [7] among all defendants and the mills [8] to take collective action to exclude new entrants from the market, in this case Champagne Metals, an aggressive, price-cutting, potential competitor. [9] *See e.g.,* James P-Exhibit 53 ("Champagne covets a number of Samuel accounts."). [10] Simply put, the mills, at least in part due to pressure and threats from the defendant service centers, refused to supply plaintiff with the products it needed to compete in the aluminum industry and which they otherwise would have supplied in the absence of the **[*10]** concerted pressure. *See* *General Motors Corp., 384 U.S. at 140* ("We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers ...."); *Interstate Circuit v. United States Paramount Pictures Distrib. Co., 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939)* ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."); *Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 764-72 (8th Cir. 2004)*; *Spectators' Commc'n Network, 253 F.3d at 215, 221*; *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 456-79 (3d Cir. 1998)*; *see*

---

[3] *Champagne Metals, 458 F.3d at 1087*.

[4] The Tenth Circuit concluded that "Champagne's theory makes sense-it is certainly economically rational for a group of established firms to attempt to keep an aggressive competitor out of the market, whether they are doing so to protect profits or simply to guard market share." *Champagne Metals, 458 F.3d at 1087*.

[5] The Circuit found that the statement by Phil Wiley of AFCO to Matt Zundel of Commonwealth that "'himself and other potential customers ... would cause other' service centers to remove their business from Commonwealth if Commonwealth continued selling to Champagne," viewed in the light most favorable to Champagne Metals, constituted direct evidence of "an agreement among service centers to take collective action." *Champagne Metals, 458 F.3d at 1083-84*. However, the court also concluded that a reasonable jury could not find defendants had entered into an illegal agreement on the basis of Wiley's statement, alone. *Id. at 1084*. The court recognizes that plaintiff is not entitled, in conjunction with the James hearing, to the same deferential summary judgment standard of review, but finds **[*12]** nonetheless that the cited statement amounts to direct evidence of collusive action.

[6] As "the alleged conspiracy is economically rational, ... restrictions on the inferences drawn from Champagne's circumstantial evidence are not warranted." *Champagne Metals, 458 F.3d at 1085*.

[7] *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* ("'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*.

[8] The court finds that, at least with respect to plaintiff, the conspiracy began in 1996 and continued if not to date, close to a decade. Commonwealth's participation was brief, limited essentially to the time period surrounding its refusal to honor its initial contracts with the plaintiff.

[9] While the court generally found Mike Champagne and most of plaintiff's other witnesses to be credible, it was not persuaded by the testimony of several defense witnesses. For example, the testimony of the Samuel's representative purporting to explain his email suggesting that Samuel's president contact the president of Ormet **[*13]** was not credible. Similarly, the testimony of Debbie Veale, which recounted with complete assurance and certainty what she did not say during a conversation that occurred several years previously, appeared rehearsed and less than persuasive. In addition, the testimony of one of the defendant's CEO's to the effect that not only had he not discussed whether a mill should sell to Champagne Metals with another service center, but that no one in his organization had done so, struck the court as going beyond what any CEO would plausibly know about the acts of lower level employees in these large and sometimes far-flung corporations.

[10] The evidence, though disputed, persuaded the court that Samuel had attempted to buy Champagne Metals for a million dollars before the company was even established. This evidences the industry's view of plaintiff's potential impact on the marketplace.

generally MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d at 972-75 (allegations that two exhibition contractors refused to rent equipment from plaintiff because of threats of labor disruption and damage to property made by "a union official in cahoots with the would-be monopolist" or competitor **[*11]** sufficed to state a claim under § 1 of the Sherman Act).

In reaching this conclusion the court recognizes that **HN5**[] "[i]ndependent action is not proscribed," and that "[a] [mill] of course has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Monsanto, 465 U.S. at 761. It also realizes that "something more than evidence of complaints **[*14]** is needed," id. at 764, or "mere acquiescence to a competitor's complaints about a price-cutter be present to infer a conspiracy." Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1262 (10th Cir. 2006). However, viewing the circumstantial evidence "through the lens of a highly plausible economic theory," Champagne Metals, 458 F.3d at 1087, the court concludes plaintiff has established that the defendant service centers and mills "'had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, 637 F.2d 105, 111 (3d Cir. 1980)).

This is one of those situations where consciously parallel behavior is sufficiently "augmented by additional evidence from which an understanding among the parties may be inferred." Mitchael, 179 F.3d at 859 (internal citation omitted). Here, for reasons discussed subsequently, there was both "motivation [for the service centers] to enter into an agreement requiring parallel behavior," and "a showing that the [mills were] acting against their own individual business interests," when they refused to sell aluminum to plaintiff. *Id. See* Abraham, 461 F.3d at 1263 (**HN6**[] inference **[*15]** of antitrust conspiracy may be based on response to complaints, when coupled with evidence of "plus" factors, such as threats or coercion).

Plaintiff established that Mike Champagne, a knowledgeable, competent businessman, started Champagne Metals with an established customer base (horse trailer industry) and a reasonable belief that he had the equipment (a cut-to-length line) [11] and suppliers (mills) needed to establish a successful aluminum service center. However, as soon as he launched the business, Champagne Metals was confronted with a series of obstacles and events unlikely to have occurred in the absence of concerted effort by the other service centers and the acquiescence of several mills.

Different **[*16]** pieces of evidence in combination suffice to establish the predicate conspiracy. Among them was Commonwealth's conduct in its initial sales negotiations with plaintiff. The mill had agreed to recognize plaintiff, actual orders had been placed, James P-Exhibits 16, 17 ("the pounds have been secured"), 18-20, [12] and credit approval was assured. James Tr., p.65-66. Commonwealth then reneged on its agreement due to pressure from major distributors, *e.g.* James Tr., p.619, combined with EMJ's refusal to sell plaintiff the cut-to-length line. The refusal to fill plaintiff's metal orders was against Commonwealth's economic interests. The business Champagne Metals was bringing was profitable business Commonwealth had developed with Mike Champagne while he was with EMJ, James Tr., p.596-601, with significant potential -- by June 2000, Champagne Metals was "the largest supplier to the $ 1 billion horse trailer market." James P-Exhibit 1, ALC 0020. The refusal also exposed the company to potential litigation and demonstrated that EMJ had been in contact with Commonwealth, informing Commonwealth that it would not sell plaintiff its cut-to length line, which plaintiff had to have to be recognized **[*17]** by Commonwealth or any other mill. [13]

---

[11] Mike Champagne had worked in the aluminum industry for approximately 13 years before he started Champagne Metals. While employed at EMJ, Champagne had discussions with management about forming a company which essentially would take over EMJ's horse trailer business, as it appeared EMJ was not interested in continuing that part of its operations. Champagne had proposed buying the equipment needed, a cut-to-length line, from EMJ and been virtually assured EMJ would sell it to him..

[12] References to the James hearing transcript will be to "James Tr., p. __." References to the James Hearing Exhibits will be "James Exhibit P-__" (plaintiff's) and "James Exhibit D-__" (defendants'). References to exhibits submitted with plaintiff's proffer will be to "Proffer Exhibit" and to exhibits submitted with defendants' response to the proffer will be to "Response Exhibit."

[13] The distributorships clearly did not operate in a vacuum, but were cognizant of their competitor's activities. E.g., James Exhibit P-63 (in an email he sent to Samuel's president, Paul Sutcliffe, a sales vice president for the company, wrote that "[r]umour has it that Mike Champagne contacted Emmett Boyle directly trying to secure a distributorship."); James Tr., pp. 179-80 (RASCO

The continued refusal of other mills, such as Ravenswood and Kaiser, to sell Champagne Metals the same pounds they had previously supplied EMJ, [14] or, as in the case of Ormet, to sell pounds it previously had sought to sell EMJ, **[*18]** makes little sense unless it was to avoid, "what happened to Commonwealth." James Hearing Tr., p. 115. [15] There was no evidence that Champagne Metals was financially unsound, produced inferior products, [16] had an inadequate facility or machinery or failed to satisfy its customers. The evidence was to the contrary. See James Tr., pp.1104-05; James Exhibits P-42, 43. The business Champagne Metals offered, though small in volume, was consistent, a significant consideration for a rolling mill, James Tr. pp. 598-99, and consisted in part of desirable "value-added products," which had a higher profit margin. *Id.*

Similarly unlikely, absent coercion, was Ravenswood's refusal to sell to plaintiff, once it was acquired by Pechiney, plaintiff's foreign supplier, or Ormet's backtracking after it had essentially committed to sell to plaintiff. *See* James Exhibits P-44 (email assigning Champagne Metals a customer code); 52 (email dated 12/7/01 regarding final approval visit for Champagne Metals); 50 (email dated 12/20/01 referring to "Exploratory Visit" to Champagne Metals). [17] The record contains persuasive evidence of continued pressure imposed by the service centers on the various mills to compel them not to recognize plaintiff, *e.g.* James Exhibits P-10, 25, 50; James Tr., p. 1146; evidence that the threats to pull pounds if a mill sold aluminum to Champagne Metal were taken seriously, *e.g.,* James Exhibit P-25, 28; Keith Forniss video depo.; *see* James Exhibit P-29 (Recorded statement by Ravenswood salesman that "[the mills] were essentially at the **[*20]** mercy of the Integrises and the Samuels and the Ryersons of the world."); James Tr., pp.1146-48 (Sneigle of Ormet told Champagne Metal's employee Borgelt that Ormet could not sell metal to plaintiff directly, as Ormet would be punished by several distributors, but suggested selling the metal through a third party); *see* Proffer Exhibit 4, P8; and evidence that Commonwealth lost business due to its sales to Champagne Metals. James Tr., pp.996-99. Even Alcoa, one of the principal, if not the premier, mills, expressed concern about recognizing Champagne Metals because "[r]elative to market coverage, they do compete with Ryerson, Rasco, VMG and we risk losing more than we would gain." James Exhibit P-1. After Commonwealth recognized plaintiff there still was incentive for the distributors to discourage other mills from selling it metal as plaintiff, with access to only one domestic mill, was at a pricing disadvantage. James Tr. pp. 641, 1051-53; 1125; and 402-04 in conjunction with James Exhibit P-75. [18]

---

and Ryerson employees were found in plaintiff's buildings); Response Exhibit 11, pp. 67-68. Employees also moved within the industry from competitor to competitor.

[14] Once EMJ was no longer in the horse trailer business, these mills would not, by selling the same metal to Champagne Metals that it had sold to EMJ for the same customers, be taking pounds away from another distributorship. Proffer Exhibit 1, P16.

[15] Despite its desire to reenter the horse trailer business, Kaiser refused to sell extrusions to plaintiff, not wanting to"get in between [Champagne Metals] and EMJ." James Tr., p. 135. Ormet also refused to sell to plaintiff even when it needed the business. James Tr., pp. 177-79. See id., p. 137 (Ormet called on Mike Champagne monthly **[*19]** when he worked at EMJ, trying to sell it metal).

[16] See James P-Exhibit 1, ALC 0020, (In a memo summarizing a visit to Champagne Metals in June, 2000, John Guest wrote that the company "ha[s] an excellent reputation for the processing of aluminum coil.").

[17] In this email from Keith Forniss, an Ormet salesman to Harry Sneigle, Ormet's sales manager, Forniss states that Ormet "must thoroughly assess the long-term ramifications against anticipated **[*21]** or projected dividend of recognizing this account. Brenda [Mcinnis], Regional VP of Purchasing [of Samuels] has been quite candid and clear in expressing concerns with Ormet selling this account. In past as well as during recent conversations that included Mr. Champagne she was most emphatic that our selling this account would be looked at negatively by the Samuels .... In no way am I suggesting that we allow Samuels Specialty or anyone dictate our marketing efforts, however I am only suggesting we weigh the significant tonnage generated by the Texas facilities and Ms. McInnis consistent support of Ormet against expectations of significant business from this account." James Exhibit P-50. See generally James Exhibit P-27(When asked if increasing the pounds purchased from one-half to one million would persuade Ormet to sell to Champagne Metals, Sneigle responded: "10 million pounds wouldn't help.").

[18] The higher prices paid by plaintiff were due, in part, to cost reductions and rebates "Tier 3" distributors received because of the volume of their purchases. *James Tr., pp. 674-77.*

Conceivably, the service centers could have been acting independently. However, as each distributor was recognized **[*22]** by some, but not all the mills, absent coordinated action a single distributor could not cut off all of Champagne Metals' sources of supply. Also, without knowledge that other service centers were simultaneously putting pressure on the same mill, a distributor, by threatening to move its business elsewhere, risked losing one of its suppliers. Statements such as Phil Wiley's to the effect that, as long as Commonwealth was doing business with Champagne Metals, its ability to do business with AFCO, as well as others in the geographic region [19] would be limited, James Tr. pp. 990-92, substantiate plaintiff's claim of concerted action among defendants. [20]

The arguments that defendants were acting independently and were too competitive to ever collaborate become less persuasive in light of the testimony that a "greenfield startup" was virtually unheard of in the industry. *See* Proffer Exhibit 10, pp. 127-28. Others before plaintiff -- Professional Metals, Orion, and MetalWest -- had tried, unsuccessfully, to become aluminum distributors. Tr. pp. 437- 443. For decades the number of service centers in the aluminum industry had not increased and the evidence demonstrated that defendants were motivated by their interest in maintaining stable prices [21] and their existing market share. [22] Although the aluminum distribution industry **[*24]** is a competitive, if not cutthroat, business, the service centers had, in the past, collaborated on prices. *See* James Tr., pp.171-72, pp. 917-18. [23] They also, through the industry practice of incumbency, continue to attempt to control their market share. [24] However aggressive the service centers were in competing among themselves, they had a shared, common interest in excluding new entrants from the market.

The evidence, however, is far from conclusive and the court views the question addressed here as close. [25] Defendants' conduct could be characterized, at least in part, as mere complaints, which were often made to employees who were not in a position to control a mill's selling decisions, James Exhibit P-28, CM 19407, CM

---

[19] Matthew Zundel testified that the reference to "others in that geographic region" was generally understood to be "the Rascos and the Vincent Metal Goods, and the Ryersons, and the other people in that general geographic region." James Tr., pp. 991-92.

[20] Zundel assumed, based on his conversation with Phil Wiley and other customers within that geographic region, that, while the distributors were not in direct communication with each other, that the "others understood … how the game is played … that there are … written and, quote, unwritten **[*23]** rules of how you should be going to market, and who you should be selling as a mill supplier to distribution … [and that Commonwealth] would be punished by the industry as a result of doing business with Champagne at that time." James Tr., pp., 992-93. For obvious reasons, particularly when dealing with sophisticated businessmen or women acquainted with the antitrust laws, the proof in an anti-trust case usually is circumstantial. See James P-Exhibit 28, CM 19412 (Commonwealth employees were trained on antitrust).

[21] Plaintiff established that defendants believed Champagne Metals had disrupted the marketplace, see e.g. James Tr., pp. 793, 795 and had or would negatively affect prices. See id. at pp. 793; 990-91; 1019.

[22] Garry Pierce, a Commonwealth sales representative testified that, while other service centers might be upset for a month or two when Commonwealth (or its predecessor) recognized a new distributor, the negative reactions to Commonwealth's recognition of Champagne Metals five years out were unique. James Tr., pp. 796-97. An obvious distinction for the lingering anger with respect to Champagne Metals was it was a new, versus an already existing, competitor/service center.

[23] See *Standard Roofing, 156 F.3d at 469*("Evidence that plaintiff's competitors/defendants] had actively considered **[*25]** fixing prices and allocating customers" prior to alleged conspiracy "to boycott and exclude [the plaintiff] from the market" was "sufficient to permit the inference that [the competitors] may have had a long-standing intent to stabilize prices in the roofing distribution business.")

[24] The comments of John Guest, an Alcoa manager, that "[r]elative to market coverage, [Champagne Metals] do[es] compete with Ryerson, Rasco, VMG and we risk losing more than we would gain" and that Champagne Metals "would be a location to recognize, if one of our existing distributors acquired them," James Exhibit P-1, evidence the mills' recognition of the distributors' desire to retain their market share.

[25] Evaluation of the testimony in this case is complicated by the fact that virtually every witness is potentially affected by self-interest. A current employee of plaintiff or a service center has an obvious interest in not jeopardizing his or her employment. Mill representatives may, due to concern with preserving service center or other client relationships, shade their testimony.

19411, and as efforts to protect incumbency. [26] Plaintiff's lack of recognition by the mills was likely influenced, at least in part, by reasons other than pressure and threats from the **[*26]** other service centers, including the mills' preference for large distributors who purchase large amounts of metal and service a large number of customers. Plaintiff also has been successful, has expanded, James Exhibit D-1, and, even with limited mill recognition, occasionally obtained pricing concessions. James Exhibit D-2; James Tr., pp.1014-16. Also, after it recognized Champagne Metals, Commonwealth's sales to many of the service centers increased, rather than decreased. *E.g.,* James Exhibits P-32, 33.

In light of this evidence, **[*27]** a different factfinder could reach a contrary conclusion as to the existence of a conspiracy and the identities of the coconspirators. However, the court concludes plaintiff has met its burden of establishing by a preponderance of the evidence that an antitrust conspiracy was formed and that all defendants and mills were members. [27] The court is not, at this time, determining the ultimate admissibility of the various statements the plaintiff seeks to introduce as coconspirator hearsay. Whether a particular statement will be admissible will depend on the circumstances in which the statement was made, including whether it was made in the course of and in furtherance of the conspiracy, and the nature of the statement.

II. Daubert Challenge to Wilsey Testimony

Defendants have moved to exclude the testimony of Steve L. Wilsey on Daubert grounds, [28] arguing that his estimate of plaintiff's claimed damages fails to meet the standards now set out in *Fed. R. Evid. 702*. [29] The court conducted a hearing on the motion on October 29 and 30, 2008, [30] and has considered **[*28]** the briefs submitted by the parties. [31] The court has also had the benefit of the evidence offered at the James hearing referenced above, which has been helpful as to context and background.

HN7[] "In accord with [*Rule 702*], the Supreme Court has determined that the [trial judge] 'must ensure that any and all scientific testimony or evidence is not only relevant, but reliable.'" *Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1232 (10th Cir. 2004)* (quoting *Daubert, 509 U.S. at 589*), *cert. denied, 546 U.S. 926, 126 S. Ct. 395, 163 L. Ed. 2d 274 (2005)*. This gatekeeper function applies to all expert testimony, not merely to that deemed to be "scientific" in nature. *Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. **[*29]** *Rule 702* provides:

> ***HN8***[] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

HN9[] In determining the admissibility of expert testimony, the court initially must decide whether the proposed expert is qualified to offer an opinion on the issues involved in the particular case. *Ralston v. Smith & Nephew*

---

[26] In light of the absence of any objection to it by any party, the court assumes, without deciding, the industry practice of "incumbency," which protects in most circumstances a service center's relationship with a mill as to a particular customer, is unobjectionable in and of itself.

[27] As noted above, Commonwealth initially was a member, but withdrew at some point, as indicated by its conduct relative to plaintiff.

[28] *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

[29] *Rule 702* now substantially incorporates the principles set out in Daubert, which interpreted an earlier version of *Rule 702*.

[30] Transcript references to testimony at the hearing are identified as "Daubert Tr., p. __".

[31] Plaintiff has sought leave to submit a post-hearing surreply brief [Doc. # 631]. However, as the court does not view the submissions at the hearing as materially changing the issues already joined, the court concludes further briefing is unnecessary.

Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001). A qualified expert must possess the necessary knowledge, skill, experience, training or education relevant to the facts at issue. *Id.* The court then must conduct a two-part inquiry to fulfill its Daubert gatekeeping role, determining first if the expert's proffered testimony has "'a reliable basis in the knowledge and experience of his [or her] discipline.'" Bitler, 400 F.3d at 1232-33 (quoting **[*30]** Daubert, 509 U.S. at 592). In making this determination, the district court must decide whether the reasoning or methodology underlying the testimony is scientifically valid. Id. at 1233. Second, the district court must inquire "into whether proposed testimony is sufficiently 'relevant to the task at hand.'" Id. at 1234 (quoting Daubert, 509 U.S. at 597). Is there an appropriate "fit" between the evidence offered and the material issue to which it is directed?

Plaintiff offers Mr. Wilsey as an expert on the amount of plaintiff's damages. His opinions are directed to the amount of lost profits plaintiff has allegedly experienced by reason of the claimed illegal agreement or conspiracy among the defendants. As noted above, plaintiff's theory of the case, broadly stated, is that defendants tacitly or explicitly agreed to pressure the domestic aluminum mills, and did so, so as to cause the mills to deny recognition to plaintiff or to otherwise limit its access to product at competitive prices. Mr. Wilsey concludes, assuming the establishment of the necessary agreement in restraint of trade, that plaintiff has sustained total lost profits of $ 12,780,000 to $ 13,994,000 by reason of the **[*31]** illegal agreement. He concludes plaintiff's damages are of two types: (1) lost profits in the amount of $ 8,844,000 from lost sales due to its inability to secure product from domestic mills at competitive prices, and (2) lost profits due to the higher prices plaintiff paid, relative to other distributors, for the product it did acquire. Mr. Wilsey estimates this latter type of damages to total between $ 3,936,000 and $ 5,150,000. [32]

Defendants have objected to Mr. Wilsey's testimony on a variety of grounds. While some of defendants' objections are unpersuasive or would, in any event, go to weight rather than admissibility, the court nonetheless concludes, for the reasons set out below, that Mr. Wilsey's opinions do not meet the Daubert/702 standards for reliability and that they must therefore be excluded. [33]

Qualifications of Mr. Wilsey

Defendants do not attack Mr. Wilsey's qualifications to address, **[*32]** in general, the issue of lost profits or damages. The evidence indicates he is a Certified Public Accountant with extensive experience in business valuations. He is recognized by the American Institute of Certified Public Accountants as an accredited business valuator (ABV). He has done over 300 business evaluations in connection with mergers and acquisitions, allocations of purchase price, shareholder disputes, and other commercial disputes. These valuations have often involved projections or estimates of future earnings for particular entities. He has testified in numerous court proceedings as to damages issues in a variety of contexts and has some limited experience with antitrust claims. [34] Although Mr. Wilsey appears to have no prior experience or involvement with the aluminum distribution or metals industry, [35] the court nonetheless concludes that he has, in general, the necessary knowledge, skill and experience to address questions of lost profits and their calculation.

Reliability of Mr. Wilsey's opinions

[32] Report of Steve L. Wilsey dated April 22, 2008 (the "Wilsey Report"), p. 16.

[33] It may be that there are certain data compilations or other matters to which Mr. Wilsey might properly testify notwithstanding this order. However, his opinions as to the amount of lost profits must be excluded.

[34] His curriculum vitae identifies two cases in this court in which he has performed a damages analysis in connection with antitrust or similar claims. Wilsey Report, Appendix 10.

[35] Mr. Wilsey's c.v. lists a variety **[*33]** of businesses which he has dealt with in his business valuation or accounting practice; none reference the aluminum or metals industry specifically. Wilsey Report, Appendix 10, p. 1. He does indicate he has undertaken substantial efforts to acquaint himself with the aluminum distribution industry for purposes of this case and the court is persuaded he has done so.

The overall thrust of defendants' objection to Mr. Wilsey's proffered testimony is that his conclusions are based on methodology which does not, for various reasons, meet the standards of *Rule 702*. ***HN10***[] In determining whether an expert's testimony meets the Rule's reliability standard, Daubert and *Rule 702* provide a non-exclusive list of factors which the court should consider if they are applicable. As the Comment to *Rule 702* (2000 Amendments) notes:

> The specific factors explicated by the *Daubert* court are (1) whether the expert's technique or theory can be or has been tested -- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique **[*34]** or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

HN11[] The Comment also identifies a number of other factors which may, in a proper case, be relevant to the determination of whether expert testimony is sufficiently reliable. These include: (1) whether the expert proposes to testify about matters growing naturally and directly out of research he/she has conducted independent of the litigation, or whether the opinion was developed expressly for the purpose of testifying, (2) whether the expert has "unjustifiably extrapolated from an accepted premise to an unfounded conclusion," (3) whether the expert has adequately accounted for obvious alternative explanations, (4) whether the expert is being as careful in his/her litigation consulting work as he or she would in their regular professional work, and (5) whether the particular field of expertise claimed by the expert is one known to reach reliable results for the type of opinion sought to be given. **[*35]** *Id.* Several of these factors are pertinent to the opinions sought to be offered by Mr. Wilsey.

As an initial matter, the court addresses several of defendants' objections which are not sufficient to warrant exclusion of Wilsey's testimony. Defendants object to Wilsey's failure to apportion his damages estimate between legal and illegal conduct. In part, they argue that he fails to identify those damages attributable to overt acts occurring before the limitations period (roughly April of 1998) versus those occurring after that date. They rely on references to the issue in the previous decision of the Court of Appeals. *See Champagne Metals, 458 F.3d at 1090*. This court doubts whether the Court of Appeals' opinion, or the law generally, requires the sort of apportionment that defendants apparently seek. In the circumstances existing here, where various acts (at least some of which are within the limitations period) are alleged to have contributed to a continuing conspiracy allegedly resulting in the mills' multiple refusals to deal with plaintiff on various occasions during the entire limitations period, it is difficult to see how any apportionment based on the timing of particular overt **[*36]** acts could even theoretically occur. [36] If the proof establishes that, based on the cumulative effect of multiple threats or other acts by defendants over a period of years, both prior to and within the limitations period, a mill refused to deal with plaintiff during the limitations period causing losses, how would a fact finder (or any expert purporting to assist the fact finder) effect an apportionment based on the overt acts? Would the jury add up the pre-limitation and post-limitation threats/acts and somehow allocate on that basis? Would it assess the ferocity of pre-limitation and post-limitation threats and try to figure out which acts really caused a particular mill to act in a particular way at a particular time? In light of the disposition on other grounds of the challenge to Mr. Wilsey's testimony, it is unnecessary to resolve the matter here. However, the court notes the seeming implausibility of the standard suggested by defendants and declines to rely on it as a basis for excluding Mr. Wilsey's testimony.

Defendants **[*37]** also suggest that Wilsey's opinions are irrelevant or unreliable due to his failure to apportion damages between defendants' unilateral conduct, which is not actionable in these circumstances, and their collective action, which is. The court finds persuasive the reasoning of the Third Circuit in *LePage's Inc. v. 3M, 324 F.3d 141, 166 (3d Cir. 2003)*, where the court concluded that if the defendant's actions, taken as a whole, were found to violate the Sherman Act, it would be "unnecessary, if not impossible" to establish the sort of apportionment between legal and illegal conduct such as defendants seek in this case. This court is also mindful of the Supreme Court's guidance in *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946)* that

---

[36] The evidence does not suggest (or at least there is a factual question as to whether) any mill gave plaintiff a "final" refusal to deal in the sense discussed in *Kaw Valley Elec. Coop. Co. Inc. v. Kansas Elec. Power Coop. Inc., 872 F.2d 931 (10th Cir. 1989)*.

HN12[] where a wrongdoer's own acts prevent a more precise ascertainment of damages, it must bear the risk of that uncertainty. *Id. at 264-65*. Violators of the antitrust laws rarely leave a clear paper trail or other evidence by which their collective actions might readily be separated from their individual actions. The necessary reliance on circumstantial evidence will often preclude any meaningful basis for apportionment. [37] In the circumstances of this **[*38]** case, the proffered opinions are not rendered irrelevant or unreliable by reason of their non-apportionment of damages between individual and collective conduct.

Defendants have also objected to Mr. Wilsey's testimony on the basis that he improperly and/or uncritically based his opinions on plaintiff's version of the facts or view of the case. Mr. Wilsey is offered as a damages expert and **HN13**[] there is, in general, nothing objectionable about a damages expert assuming a plaintiff can establish liability. *See Champagne Metals, 458 F.3d at 1080 n.4*. He necessarily made certain assumptions as to the nature of plaintiff's case and circumstances and, to the extent he relied on factual information or projections from plaintiff's personnel, the court concludes he made sufficient inquiry and investigation of the information to avoid excluding his opinions on that basis alone. [38] It is true that Mr. Wilsey's report is subject to **[*39]** some of the same criticisms that previously resulted in the exclusion of the testimony and report of Dr. Murry. *See Champagne Metals, 458 F.3d at 1080 n. 4* (referencing Judge Cauthron's order excluding the Murry testimony). With respect to some of the statements in his report, it is unclear whether he is reciting facts relayed by his client, which he assumed to be accurate, or whether he is confirming facts based on his own investigation. However, these deficiencies in the report, in and of themselves, are not sufficient to warrant the exclusion of Mr. Wilsey's testimony.

Those rejected criticisms aside, the basis for the court's conclusion that Mr. Wilsey's testimony must be excluded under *Rule 702* is, at least in part, different **[*40]** for the two categories of damages which Mr. Wilsey has identified: lost sales and price differential.

Lost Profits Due to Lost Sales

Mr. Wilsey concluded that plaintiff has experienced $ 8,844,000 in lost profits due to lost sales. He computed this number for the limitations period (part of 1998 through 2007) by beginning with plaintiff's actual 1997 sales numbers and then adding to plaintiff's actual sales experience in later years additional estimated sales based on various factors. These estimated additions resulted in percentage increases in the growth of sales, over and above plaintiff's actual experience, of 10% for 1998, 33% for 1999 and 13% for 2000. [39] His estimates of sales in later years (2001 and after) corresponded, on a percentage basis, to the growth rates actually experienced by plaintiff in those years, but the rates were applied against the enhanced base due to the additions in, and compounding effect of, prior years. [40] Those increased sales figures, coupled with Wilsey's analysis of plaintiff's cost structure and profit margin, then resulted in the lost profits computation attributable to lost sales. [41]

---

[37] As noted in *Craftsmen Limousine Inc. v. Ford Motor Co., 363 F.3d 761, 771 (8th Cir. 2004)*: "Because defendants typically cannot be relied on to confess that they have entered into an unlawful agreement, conspiracy cases usually must be proved by circumstantial evidence."

[38] The evidence indicated that, among other things, Mr. Wilsey interviewed some customers of plaintiff, completed an intensive review of plaintiff's financial and other information, and tested the accuracy of certain of the information given to him by comparing it to actual facts as they later became known. Under the circumstances, this was a sufficient effort to verify the accuracy of the information provided so as to warrant his using it in forming his opinions.

[39] Wilsey Report, Schedule A-1.

[40] Wilsey made some offsetting adjustments **[*41]** in later years. In years 2004 through 2007, Wilsey reduced the projected sales otherwise indicated for those years by adjusting for what he termed "catch up sales" in the years when plaintiff had more extensive mill access. Wilsey Report, Schedule A-1.

[41] Wilsey Report, Schedules A (lost profits due to sales) and F (profit margin calculations).

The court concludes Mr. Wilsey's lost sales analysis is defective -- and fatally so as against *Rule 702*'s standards -- on two grounds.

First, Mr. Wilsey's calculation of plaintiff's lost sales is based not only on lost aluminum sales -- the focus of the alleged antitrust violation here -- but also on plaintiff's sale of steel during the various years, which, it appears, make up 75% of plaintiff's sales. [42] Mr. Wilsey testified as follows (Daubert Tr., pp. 69-70):

> Q. Now, your lost sales are calculated by looking at the increased growth rate you project and applying it to Champagne's actual sales in the first year, and that projected sales in later years, correct?
> A. Yes, that's correct.
> Q. And those sales that you utilized are Champagne's total sales, including aluminum sales --
> A. Yes.
> Q. -- and carbon steel sales, correct?
>
> A. Yes, sir. I did that on **[*42]** purpose.

Mr. Wilsey may have done it on purpose, but that purpose is not disclosed by his testimony. It is not explained (or even mentioned) in his report, nor is there, so far as the court can determine, any other evidence which explains or justifies the inclusion of steel sales in an analysis of lost aluminum sales. Plaintiff's counsel sought to explain inclusion of the steel sales numbers on the basis of "the familiar answer that sales are linked" and his assertion that persons buying aluminum "are also in the same transaction going to buy certain non-aluminum things." (Daubert Tr., p. 213). ***HN14***[] Counsel's argument is not evidence, of course, and even if it was it would fall short, without more, of a persuasive explanation as to how lost aluminum sales necessarily lead to lost steel sales at some level or of what the relationship between them is. It may be that there is some consistent, predictable relationship between aluminum sales and steel sales in this business such as would justify steel inclusion in the lost sales computation here. However, it was not disclosed by Mr. Wilsey's testimony at the hearing, his report, or other evidence in the case. *Rule 702*'s requirement of "sufficient **[*43]** facts and data" precludes simply assuming a connection in the present circumstances.

The second and more significant problem, in the court's view, with Mr. Wilsey's lost profits analysis is the fact that his estimate of lost sales is not based on any discernible, identifiable theory or technique. Rather, it is based on his consideration of multiple factors, weighed and evaluated by him as a matter of professional judgment, but not otherwise disclosed. His report indicates he considered 19 different factors in estimating lost sales. Wilsey Report, P 57. With respect to the widely varying estimates of growth for particular years, he narrows the considerations somewhat, but still fails to articulate any identifiable theory or technique to explain how he came up with particular results. [43] He acknowledged there was no formula or particular principle or principles which guided his analysis, though he did test **[*44]** his assumption or estimates in various ways. [44]

---

[42] Though somewhat unclear from the context, it appears from Mr. Wilsey's testimony that non-aluminum sales constitute the bulk of plaintiff's sales. Daubert Tr., p. 70. If that is the case, the inclusion of steel sales in the calculation plainly has a major impact on the projections.

[43] For example, paragraph 58 of the Wilsey Report states, in part: "I have estimated projected sales for Champagne Metals. The projection begins with 10% higher sales in 1998. This estimate is primarily due to the lost customers list, pricing, limited alloy breadth, and Commonwealth incumbency. The next year 1999, I project 50% growth (up from Champagne's actual 17% growth or approximately $ 7mm in lost sales) based upon Champagne's actual growth, pricing, lost sales, MetalWest's performance, the incumbency of Commonwealth, limited alloy breadth, and Champagne's history of success later when having the ability to sell from multiple domestic mills."

[44] Daubert Tr., pp. 43-44. Mr. Wiley explained how he tested his estimates of annual percentage increases this way (at 44): "I looked at several different sets of data that told me that this is in the ballpark, that my projection is in the ballpark, and it's reasonable. I compared it to Champagne's own projections, and we spoke earlier about that, that were made in 1997. I compared it to Champagne's later experience, the experience that Champagne had from '04 through '07."

Evaluating Mr. Wilsey's **[*45]** approach against the *Rule 702* standards articulated in Daubert, it clearly does not pass muster. There is no way that Mr. Wilsey's method or technique can be or has been tested by others. There is no way it can be challenged in any objective sense, as it is simply his subjective judgment about how various factors fit together. [45] There is no identifiable theory or technique to submit to review by others. There is no real basis for estimating an error rate to his approach. There are no standards of any kind that have been identified as supporting it. At base, Mr. Wilsey's methodology boils down to this: "I started with Champagne's sales estimates, considered 19 factors, tested my estimates in various ways, and, based on my professional judgment, arrived at X." The way in which those factors were put together and the conclusions that he drew are classic examples of opinion evidence that is "connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*.

Of the various factors identified for consideration in Daubert, [46] the only one that arguably supports admission of Mr. Wilsey's opinions is whether the technique or theory has been generally accepted in the scientific community (i.e. the pertinent community of expertise). Plaintiff argues that Wilsey's approach is like that routinely used in various settings in making projections of profits. Of course, the problem is that Mr. Wilsey's "technique or theory" or multiple techniques or theories are never identified beyond saying he exercised professional judgment. [47] However acceptable such a basis for opinions or estimates may be in other contexts (or might have been in a pre-Daubert world), it falls short of meeting the standard of reliability and helpfulness to the jury which guides a *Rule 702* determination.

The court's conclusion in this regard is buttressed by the fact that there are several recognized ways in which lost profits may be established in an antitrust context. [48] None are necessarily applicable or useful in all circumstances, and the court does not suggest that, in circumstances like those existing here, a lost profits determination can or should be reduced to a purely mathematical exercise. They do, however, have the merit of suggesting at least some basis or starting point for an analysis and of identifying approaches which can be used and, if necessary, adjusted. [49] Mr. Wilsey's approach, which is essentially subjective, does not. [50]

---

[45] As was suggested at the hearing, a jury would have little or no way to determine whether an estimate by Mr. Wilsey of, say, 60% growth in a particular year was more or less reliable **[*46]** than a competing expert's estimate of, hypothetically, 20% explained or justified in the same way.

[46] ***HN15***[] The factors referenced in Daubert are non-exclusive and not a checklist, but are helpful to varying degrees in assessing the testimony at issue here.

[47] If intoning "professional judgment" was enough to otherwise justify an opinion in this context, the fact that Mr. Wilsey's familiarity **[*47]** with the aluminum distribution industry was acquired for purposes of this case and that he lacks prior experience with it would be more problematic. However, the 702 standards require more in any event.

[48] The various authorities recognize at least three common approaches to measuring antitrust damages: (1) the before and after approach, (2) a yardstick or benchmark approach, and (3) regression analysis. See generally, *Conwood Co. L.P. v. U.S. Tobacco Co., 290 F.3d 768, 793 (6th Cir. 2002)*. Mr. Wilsey's analysis most closely approximates the "before **[*48]** and after" approach.

[49] The evidence suggests Mr. Wilsey initially used the experience of MetalWest as a basis for comparison, but later concluded it was not a useful "benchmark." The retreat may have been unwise. Though differences no doubt exist between the Champagne and MetalWest experiences, a more systematic comparison to MetalWest might have at least provided an identifiable baseline from which adjustments could be made.

[50] The failure to use or consider other recognized methods of analysis cuts against plaintiff's suggestion that Bigelow requires allowing the proffered testimony. Although the wide variety of market factors and other considerations present here make the application of any theory or method complex and difficult, there is no apparent reason to assume that application of one or more of them would be any more difficult than in other antitrust cases or that any difficulty was specially attributable to the acts of defendants.

In sum, Mr. Wilsey's estimate of Champagne's lost profits attributable to lost sales fails to meet the standards of Rule 702 and must be excluded.

Lost Profits Due to Additional Product Cost

Mr. Wilsey concluded that plaintiff has experienced lost profits **[*49]** of between $ 3,936,000 and $ 5,150,000 because of higher prices it paid, due to limited mill availability, for product it did acquire. As with the lost sales projections, defendants attack the admissibility of the opinion on multiple grounds.

Unlike his analysis of lost sales, Mr. Wilsey's estimates as to higher product prices are based on an identifiable technique or method. He undertook an extensive comparison of prices paid by plaintiff for various types of product at various times and compared those to prices paid by other defendant service centers in similar circumstances. Based on these comparisons, [51] he estimated the additional product cost incurred by plaintiff during the pertinent periods and, based on a range of price differentials, a resulting range of estimated lost profits. [52]

Certain of defendants' objections, such as their arguments based on the number of times Mr. Wilsey **[*50]** used a particular Champagne contract as a basis for comparison in his calculations or the potential impact of external market forces, the court views as going to the weight potentially to be accorded the opinion, rather than to its admissibility. However, defendants' objections based on Mr. Wilsey's alleged failure to account for alternative explanations of the damages he claims occurred raise more serious issues.

Defendants argue that Mr. Wilsey failed to take into account the limited mill access that plaintiff would have had even in the absence of the alleged conspiracy. Mr. Wilsey acknowledged that a service center such as Champagne does not automatically become entitled to recognition by one or more mills simply by opening its doors and that mills may deny access for reasons unrelated to pressure from other service centers. [53] There was considerable evidence offered at the James hearing to the effect that mills base their distributor recognition decisions, at least in part, on considerations of creditworthiness and the track record of the distributor in dealing with the ultimate purchasers of product. [54] More pertinent to the circumstances here, [55] they also consider the number **[*51]** of distributors in particular areas and the number of dealer relationships they want to maintain. In short, it is clear that mills do not automatically recognize all service centers and that service centers, including some or all of the defendants, routinely have access to less than all of the domestic mills. The result is that, even in the absence of actionable pressure by competitors, a service center is not guaranteed access to the most favorable pricing of a product or to other benefits that customarily accompany being recognized by one or more mills. [56]

Mr. Wilsey acknowledges that his model does not take this factor into account in any specific way. Rather, he states that he accounted for this by assuming that plaintiff would have sufficient mill access to cover or account for the differing price projections he otherwise came up with. In effect, he has assumed that whatever unfavorable price differentials plaintiff experienced were due to the alleged conspiracy. Plaintiff urges that it is reasonable for Mr.

---

[51] The comparisons involved differences both in the per pound price paid by plaintiff for product and in the "adders" for width and gauge (additional amounts sometimes charged by mills depending on the width or gauge of the aluminum purchased.)

[52] Wilsey Report, P 69; Schedule B and supporting schedules.

[53] Daubert Tr., pp. 15, 91-93. At 91: "Q …You also agree, don't you, that mills often decline to add service centers without any acts or pressure, correct? A. I'm sure that's true."

[54] Dealer recognition ordinarily involves an agreement for extension of a limited amount of short term credit.

[55] There appears to have been no question as to Champagne's creditworthiness or as to the quality of its work (i.e. processing of the metal and the like). Its overall service to customers appears to have been exceptional.

[56] Recognition also gives heightened access to depot stock (product maintained in inventory by the mill and hence more readily available **[*52]** to the distributor, without the distributor having to bear the capital cost of maintaining the inventory) and to price rebates.

Wilsey to make such an assumption and that it would be up to plaintiff to establish at trial the reasonableness of that assumption. While that may be so, in the face of clear evidence that mill recognition is not automatic and that no service center has access to all mills or products, it strikes the court as highly unlikely that plaintiff could ever prove that, but for defendants, it would have had sufficient access to achieve the most favorable pricing on every transaction or -- more to the point here -- whether it could count on pricing which, on average, equals that of larger and more established service **[*53]** centers. At the very least, the failure of Mr. Wilsey's model to account for this factor in some fashion renders its reliability suspect.

If the matter of limitations on mill access even in the absence of distributor pressure was the only alternative explanation not sufficiently accounted for by Mr. Wilsey, the court might well conclude the omission, while significant, was not sufficient to bar admission of his opinion on cost damages. However, it is not the only omission. The far more significant omission is the failure of Mr. Wilsey's analysis to take into account, in any explicit sense, the impact of volume on pricing in the industry.

The evidence clearly established, and Mr. Wilsey does not dispute, [57] the volume of a mill's sales to a particular distributor affects the price at which the mill is willing to sell. It is equally clear that Mr. Wilsey's model did not take volume into account:

> Q. And you said just a few minutes ago that you would expect a larger volume purchaser to get a better price, correct?
> A. Yes, sir.
> Q. And, in fact, you made no adjustment in your purchase price calculations to account for the total effect of volume difference, did you?
>
> A. I explained that. That's **[*54]** correct. And I explained it too.

Daubert Tr., p. 72.

One explanation Mr. Wilsey offered essentially was that Champagne, even though a new company, would have had purchases in sufficient volume to get the most favorable pricing. He relied on a statement from Bill Thomas, a former mill representative and current employee of plaintiff, who explained in his deposition that it was industry practice for mills to take volume into account for pricing based on a three-tiered classification of distributors, with distributors who purchased the most product ("Tier 3" distributors) getting the most favorable prices. [58] At the hearing, Mr. Wilsey initially suggested the projected levels of purchasing by plaintiff would have entitled it to Tier 3 status, based on Mr. Thomas' description of Tier 3 status as involving purchases of at least $ 30-40 million per year by the distributor. However, Mr. Wilsey later acknowledged that the indicated purchasing level was not based on a **[*55]** distributor's total purchases from all mills, but was instead applied on a per mill basis. And he appeared to concede that plaintiff would not have achieved that level with respect to any particular mill in the pertinent time frame. [59] If Mr. Wilsey's non-treatment of the volume issue was due to his assumption that Champagne would have qualified for Tier 3 treatment, it is clear there was no basis for such an assumption. [60]

---

[57] "The obvious issue is that Champagne is a small purchaser. And I take -- you take an Integris is buying several hundred million pounds, you obviously would expect some price differential." Daubert Tr., p. 58 (Wilsey testimony).

[58] Daubert Tr., pp. 131-135, recounting various portion of Mr. Thomas' 2008 deposition.

[59] Under Mr. Wilsey's sales projections, Champagne's purchases in total would not have exceeded $ 30 million until 2004. Wilsey Report, Schedule A-1. Thus, even if its purchases were grouped with a single mill (an assumption somewhat inconsistent with those underlying the sales projections), Champagne could not have achieved Tier 3 status with any mill until 2004. (It is unclear to what extent the inclusion of steel sales in overall sales numbers might impact this comparison.)

[60] It is reasonably clear that the entire reference to Mr. Thomas' "tier" testimony reflected an after-the-fact scramble by Mr. Wilsey to solve a problem (the impact of volume) insufficiently addressed in his **[*56]** earlier work. The deposition testimony of Mr. Thomas discussing the tier system occurred after Mr. Wilsey prepared his report. Daubert Tr., p. 74.

Mr. Wilsey also sought to discount the impact of volume on pricing by suggesting that it was just one of many factors that affected pricing or a mill's interest in a particular distributor or that its impact was offset by other factors. [61] No doubt there are factors other than volume which might affect a mill's pricing decisions, but there was no evidence offered to suggest that volume was unimportant. Indeed, the evidence was clearly to the contrary.

The bottom line is that in failing to address the impact of volume on the prices being charged to Champagne for product, Mr. Wilsey failed to account for a significant and relatively obvious alternative explanation for the pricing differentials he found to exist as to plaintiff. There are means by which he could have done so, but he did not pursue them. [62] The potential significance of volume is clear. Indeed, Mr. Wilsey could not foreclose the possibility that virtually all of the price differentials he relied on could be explained based on volume differences alone. [63]

In these circumstances, the court concludes Mr. Wilsey's opinion as to lost profits based on increased prices fails to meet the standards of *Rule 702* and must be excluded.

In light of the court's prior conclusions as to the viability of plaintiff's case on the merits, and in light of the very substantial efforts Mr. Wilsey has obviously undertaken in connection with his report and related work, not to mention its considerable cost **[*58]** to plaintiff, the court reaches its decision as to the admissibility of Mr. Wilsey's opinions with considerable reluctance. However, for the reasons stated, the court concludes that a fair application of *Rule 702* requires their exclusion and that defendants' motion to exclude the opinions and report of Mr. Wilsey [Doc. # 518] must be granted.

III. Defendants' Renewed Motion for Summary Judgment on Damages

Defendants have moved for entry of summary judgment on the basis that Mr. Wilsey's testimony is inadmissible and that, without it, plaintiff cannot prevail as to damages. They also argue, in light of the evidence that multiple mills now recognize plaintiff, that there is no basis for injunctive relief.

As to damages, defendants essentially contend that damages cannot be shown in this case without expert testimony. They cite no authority supporting ***HN16***[] the notion that damages in an antitrust context may be shown only through the testimony of an expert witness. While undoubtedly that is the common manner of establishing the extent of claimed damages, it is not a legal requirement. Here, the court has previously determined there is evidence sufficient to create justiciable issues as to all **[*59]** elements of plaintiff's case. While the exclusion of Mr. Wilsey's testimony will no doubt impact plaintiff's ability to establish meaningful damages to some extent, it does not necessarily negate the possibility that plaintiff can establish some damages.

As to plaintiff's claim for injunctive relief, the court has considerable doubt whether plaintiff can ultimately establish a basis for such relief in the circumstances existing here. [64] However, reaching that conclusion as a matter of law is premature.

The court concludes defendants' renewed motion for summary judgment [Doc. # 519] should be denied.

---

[61] Daubert Tr., pp. 74-75.

[62] Daubert **[*57]** Tr., pp. 77-78: "Q. Now, if, in fact -- there are statistical methods whereby you can look at purchase price differences, you could look at volumes and you could try to account for volume in determining the purchase prices difference after adjusting for volume, aren't there? A. Yes. Q. And you did not investigate those methods, did you? A. I felt like it was inappropriate, because like I say, there are numerous other factors that affect pricing by a mill, volume is one of them."

[63] Daubert Tr., p. 73, referencing Wilsey's 2008 deposition testimony: "Q. So it's fair to say that with the one exception of Metalwest, if we look at every single price comparison in your price damages, as far as you know it might be entirely due to volume differences? A. I don't know."

[64] While the parties appear to differ as to how quickly Champagne's fortunes changed once it received recognition from additional mills, it appears reasonably clear that plaintiff now has mill access to a degree comparable with other service centers.

Conclusion

For the reasons stated, the court concludes that, for purposes of the admission of coconspirator hearsay, plaintiff has established that an antitrust conspiracy was formed and that all defendants and mills were members of it. Defendants' motion to exclude the testimony of Roger Wilsey [Doc. # 518] is GRANTED. Plaintiff's motion to submit **[*60]** a supplemental brief [Doc. # 631] is DENIED. Defendants' motion for summary judgment [Doc. 519] is DENIED.

IT IS SO ORDERED.

Dated this 12th day of December, 2008.

/s/ Joe Heaton

JOE HEATON

UNITED STATES DISTRICT JUDGE

Commercial St. Express LLC v. Sara Lee Corp.

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

December 18, 2008, Decided; December 18, 2008, Filed

Case No. 08 C 1179

Reporter
2008 U.S. Dist. LEXIS 102298 *; 2008-2 Trade Cas. (CCH) P76,436

COMMERCIAL STREET EXPRESS LLC, NICOLE VANDER MUELEN, SHASTA BURZYNSKI, and KATHLEEN COULLARD, Plaintiff, v. SARA LEE CORPORATION, COLGATE-PALMOLIVE COMPANY, HENKEL CHEMIE VERWALTUNGSGESELLSCHAFT MBH, HENKEL CORP., UNILEVER N.V., UNILEVER PLC, and UNILEVER UNITED STATES INC, Defendants.

Core Terms

Defendants', products, commerce, home care, conspiracy, sales, euro, subject matter jurisdiction, Sherman Act, billion, prices, original jurisdiction, foreign nation, antitrust, exceeds

Counsel: **[*1]** For Commercial Street Express LLC, Nicole Vander Muelen, Shasta Burzynski, Kathleen Coullard, on behalf of themselves and all others similarly situated, Plaintiffs: Marvin Alan Miller, LEAD ATTORNEY, Lori Ann Fanning, Matthew E Van Tine, Miller Law LLC, Chicago, IL.

For Sara Lee Corporation, Defendant: Craig Christopher Martin, LEAD ATTORNEY, Eric Andrew Sacks, John F. Kinney, Sarah Elizabeth Crane, Jenner & Block LLP, Chicago, IL.

For Colgate-Palmolive Company, Defendant: Steven Douglas McCormick, LEAD ATTORNEY, David Kenneth Callahan, Kirkland & Ellis LLP (Chicago), Chicago, IL; Marimichael Skubel, PRO HAC VICE, Kirkland & Ellis LLP, Washington, DC; Mark L. Kovner, Micah N. Hildenbrand, PRO HAC VICE, Kirkland & Ellis, LLP (DC), Washington, DC; Samantha A Gingold, Kirkland & Ellis LLP, Washington, DC.

For Henkel Corp., Defendant: John W. Treece, Richard D. Raskin, LEAD ATTORNEYS, Sidley Austin LLP, Chicago, IL; David I Gelfand, PRO HAC VICE, Cleary, Gottlieb, Steen & Hamilton, Washington, DC; Steven J. Kaiser, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Unilever N. V., Defendant: Elizabeth L Grayer, Ronald S. Rolfe, LEAD ATTORNEYS, Cravath, Swaine & Moore LLP, **[*2]** New York, NY; Britt Marie Miller, Sheila Marie Finnegan, Mayer Brown LLP, Chicago, IL.

For Uniliver PLC, Defendant: Britt Marie Miller, Sheila Marie Finnegan, Mayer Brown LLP, Chicago, IL.

For Unilever United States Inc., Defendant: Britt Marie Miller, Sheila Marie Finnegan, Mayer Brown LLP, Chicago, IL; Elizabeth L Grayer, Ronald S. Rolfe, Cravath, Swaine & Moore LLP, New York, NY.

Judges: Virginia M. Kendall, United States District Judge.

Opinion by: Virginia M. Kendall

Opinion

MEMORANDUM OPINION AND ORDER

Plaintiffs Commercial Street Express LLC ("Commercial"), Nicole Vander Muelen ("Muelen"), Shasta Burzynski ("Burzynski"), and Kathleen Coullard ("Coullard") (collectively, "Plaintiffs") filed a class action suit against Sara Lee Corporation ("Sara Lee"), Colgate-Palmolive Company ("Colgate"), Henkel Chemie Verwaltungsgesellschaft MBH and Henkel Corp. (collectively, "Henkel"), Unilever N.V., Unilever PLC, and Unilever United States Inc. (collectively, "Unilever") (collectively, "Defendants"). Count I of Plaintiffs' Amended Complaint alleges a violation of Section 1 of the Sherman Anti-Trust Act ("Sherman Act"), *15 U.S.C. § 1*, while the remaining three counts allege violations of various state laws. Defendants moved **[*3]** to dismiss Count I of Plaintiffs' Amended Complaint for lack of subject matter jurisdiction. [1] For the reasons stated, Defendants' Motion to Dismiss Count I of Plaintiffs' Amended Complaint is granted. Moreover, this Court finds that it lacks original jurisdiction over Plaintiffs' remaining state law claims under *28 U.S.C. § 1332(d)(2)* and declines to exercise supplemental jurisdiction over Plaintiffs' state law claims pursuant to *28 U.S.C. § 1367(c)(3)*.

STATEMENT OF FACTS

Plaintiffs allege that Defendants entered into a conspiracy to artificially raise prices of oral, personal and home care products in the U.S., and that Plaintiffs paid higher prices for oral, personal and home care products than they would have paid in the absence of Defendants' alleged illegal conduct. Am. Compl. P 32, 35. Plaintiffs allege that Defendants' are global companies that manufacture and **[*4]** sell oral, personal and home care products. Am. Compl. P P 11-16. On February 20, 2008, the German Federal Cartel Office ("FCO") issued a press release stating that it fined Defendants, for price fixing in Germany and for illegally passing on information on price talks with retailers in an attempt to influence the market behavior of competitors and remove the uncertainty of competitive conditions in Germany. Am. Compl. P P 25-26. The FCO stated that Defendants, in early 2006, agreed to hike up the price of Pril and Palmolive dish detergents, Fa, Duschdas and Palmolive shower gels and Signal, Dentagard and Colgate toothpaste brands. These products are made by Henkel, Sara Lee, Unilever and Colgate. Am. Compl. P 25. The Defendants' alleged anticompetitive behavior in Germany came to light after Colgate "spilled the beans" to the German competition authorities. Am. Compl. P 26. Plaintiffs allege that a spokesperson for Henkel stated, "We made mistakes. We accept the fine of [euro] 21.6." Am. Compl. P 27. Plaintiffs allege that "Defendants' price-fixing conspiracy in Germany dramatically increased the profitability of the Defendants which included the United States market." Am. Compl. **[*5]** P 29. Henkel, in 2006, reported record revenues and profits in its Home Care business of more then [euro] 4.1 billion and an operating profit of [euro] 449 million, a 3.7% increase compared to 2005. Am. Compl. P 29. Henkel explained the increase in profit by stating,

> Market growth was more price-driven than in previous years because-unlike in 2005-it became possible to pass on raw material cost increases by raising products prices. As a consequence, the decline of the last few years encountered in our largest market, Western Europe, was reversed to product gratifying growth. In North America, too, there was a tangible price-driven upswing in the market dynamics, with a considerable expansion in sales. In North America, the successfully implemented price increases and good performance of our air freshener business contributed to strong growth in organic sales.

Am. Compl. P 29. Plaintiffs claim that the oral, personal and home care products market is large. Am. Compl. P 30. In 2006 Unilever's global sales were [euro] 18.297 billion and U.S. sales were more then [euro] 3 billion. In 2006 Henkel's U.S. sales were more then [euro] 1 billion and Colgate's U.S. sales were [euro] 2.211 billion. **[*6]** Am. Compl. P 30. Sara Lee's global sales for the fiscal year ending in 2007 were more then $ 2 billion. Am. Compl. P 30. Plaintiffs allege that Defendants' conspiracy to fix prices in Germany has: (1) suppressed, restrained and eliminated price competition in the oral, personal and home care industry in the U.S.; (2) raised, fixed, maintained and stabilized the prices of oral, personal and home care products at artificial and non-competitive levels throughout the U.S.; and (3) deprived consumers of free and open competition in the oral, personal and home care products market. Am. Compl. P P 31, 37.

---

[1] Each Defendant filed its own motion to dismiss, except for Colgate and Henkel who submitted a joint motion. Each Defendant raised various arguments in support of its motion to dismiss; however, since this Court finds that it lacks subject matter jurisdiction, it does not address the remaining arguments made by Defendants.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for lack of subject matter jurisdiction. *Fed.R.Civ.P. 12(b)(1)*; *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003)*. "If subject matter jurisdiction is . . . not evident on the face of the complaint, the motion to dismiss . . . would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However, as here, if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, **[*7]** the movant may use affidavits and other material to support the motion." *United Phosphorus, 322 F.3d at 946*; *Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993)* *citing* *Grafon Corp. v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979)*. The party asserting jurisdiction must establish it by "competent proof." *U.S. Phosphorus, 322 F.3d at 946*; *NFIC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995)* *citing* *McNutt v. Gen. Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*. This means that jurisdiction must be established by a preponderance of the evidence or "proof to a reasonable probability." *NFIC, 45 F.3d at 237*, *citing* *Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993)*.

DISCUSSION

I. Count I (The Sherman Act)

Defendants' move this Court to dismiss Count I of Plaintiffs' Complaint for lack of subject matter jurisdiction. Count I of Plaintiffs' Complaint alleges a violation of the Sherman Act. The Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. In 1982, the Foreign Trade **[*8]** Antitrust Improvements Act ("FTAIA") amended the Sherman Act, stating:

> The Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect-
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> (2) such effect gives rise to a claim under the provisions of this Act other than this section.

15 U.S.C. §§ 6a (1), *(2)*. [2] The language of the FTAIA lays down a general rule placing all activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, that is, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic commerce, and (2) has an effect of a kind that ***antitrust law*** considers harmful, that is, the "effect" must "giv[e] rise to a [Sherman Act] claim." **[*9]** *§ 6a(1)*, *(2)*; *F. Hoffmann-La Roche Ltd. et al. v. Empagran S.A. et al., 542 U.S. 155, 162, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*.

The FTAIA intends to make clear to American firms doing business abroad (and to American exporters) that the Sherman Act does not prevent them from entering into a business arrangement, however anticompetitive, as long as those arrangements adversely affect only foreign markets. *F. Hoffmann-La Roche Ltd. et al., 542 U.S. at 161*. It does so by removing from the Sherman Act's reach commercial activities taking place abroad, unless those activities "meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*.

---

[2] The FTAIA establishes limits on the subject matter jurisdiction of the district courts. *See* *United Phosphorus, Ltd., v. Angus Chemical Company, 322 F.3d 942 (7th Cir. 2003)* (en banc).

Here, Plaintiffs have failed to allege any facts demonstrating that the Defendants' foreign conduct "meant to produce and did in fact produce some substantial effect in the United States." *See Id.* In fact, Plaintiffs have not set forth any facts to show that the Defendants alleged antitrust violations in Germany had **[*10]** any effect on the U.S. market. There are no factual allegations in Plaintiffs' Complaint that any Defendant agreed in Germany, or anywhere else, to restrict competition in the United States. Merely stating that the Defendants' are global companies that sell products in the United States is insufficient. Further, simply alleging that there have been price increases on some of Defendants' products in the United States is inadequate. Plaintiffs have failed to allege any facts demonstrating a causal connection between Defendants' conduct in Germany and the alleged price increase in the U.S. *See Eurim-Pharm GmbH. v. Pfizer Inc., 593 F.Supp. 1102, 1104-07 (S.D.N.Y. 1984)* (finding no subject matter jurisdiction under the Sherman Act where plaintiffs alleged a worldwide conspiracy but did not allege any facts demonstrating a causal connection between defendants' conduct in Europe and a U.S. price increase).

Plaintiffs allege that Defendants entered into "a continuing agreement, understanding, and conspiracy in restraint of trade to artificially raise, fix and or stabilize prices of oral, personal and home care products in the United States"; however, Plaintiffs provide no factual allegations **[*11]** to support this conclusory assertion. Am. Compl. P 35. Plaintiffs' Complaint only mentions Defendants' alleged illegal antitrust behavior in Germany and creates no causal connection between the Defendants' German price-fixing conspiracy and the alleged increase in price of Defendants' products in the U.S. The Plaintiffs also allege that the class members affected by the conspiracy are "all persons or entities who acquired in the United States oral, personal and home care products manufactured and or distributed by one or more of the Defendants"; however, Plaintiffs do not show how Defendants' alleged price-fixing conspiracy in Germany caused Plaintiffs to be injured in the U.S. by acquiring Defendants' products in the U.S. and do not set forth any facts in their Complaint to support that Defendants engaged in an anti-competitive conspiracy to effect the price of products in the U.S. Am. Compl. P 17. *See Empagran S.A. v. Hoffmann-Laroche, Ltd., 368 U.S. App. D.C. 18, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005)* (finding plaintiffs "must satisfy the FTAIA's requirement that the U.S. effects of the conduct [at issue] give rise to their claims"). Count I of Plaintiffs' Complaint does not allege sufficient facts to **[*12]** demonstrate that Defendants' foreign conduct "meant to produce and did in fact produce some substantial effect in the United States." Therefore, this Court finds that it lacks subject matter jurisdiction over Count I of Plaintiffs' Complaint.

II. Jurisdiction under 28 U.S.C. § 1332(d)(2)

Plaintiffs assert that this Court has original jurisdiction pursuant to *28 U.S.C. § 1332(d)(2)*. In relevant part, under *§ 1332(d)(2)*, a district court has original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interests and costs and is a class action. *28 U.S.C. § 1332(d)(2)*. The proponent of federal jurisdiction bears the burden of describing how the controversy exceeds $ 5 million. *Spivey v. Vertrue Inc., 528 F.3d 982, 986 (7th Cir. 2008)*. This is a pleading requirement. *Id.* Only after the proponent of federal jurisdiction has explained *plausibly* how the stakes exceed $ 5 million does the case belong in federal court, unless it is legally impossible for the plaintiff to recover that much. *Id.; See also Bell Atlantic Corp. V. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938)*; *Normand v. Orkin Exterminating Co., 193 F.3d 908 (7th Cir. 1999)*; **[*13]** *Gardynski-Leschuck v. Ford Motor Co., 142 F.3d 955 (7th Cir. 1998)*.

Here, not only do Plaintiffs not explain *plausibly* how the amount in controversy exceeds $ 5 million, they provide no explanation at all. Plaintiffs do not allege any facts upon which this Court can determine that the amount in controversy exceeds $ 5 million. They simply assert jurisdiction under *28 U.S.C. § 1332(d)(2)* which provides for federal jurisdiction if the amount in controversy exceeds $ 5 million. This is insufficient to establish federal jurisdiction under *28 U.S.C. § 1332(d)(2)*. *See Spivey v. Vertrue Inc., 528 F.3d 982 (7th Cir. 2008)*; *see also Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005)* (holding that amount in controversy was sufficiently plead where party asserting jurisdiction under *§ 1332(d)(2)* set forth that 3,800 faxes were sent and statute provides up to $ 500 recovery per fax). Therefore, this Court finds that it does not have original jurisdiction over Plaintiffs' claims under *28 U.S.C. § 1332(d)(2)*.

III. Supplemental jurisdiction 28 U.S.C. § 1367(c)(3)

Under *28 U.S.C. § 1367(a)*, district courts are granted supplemental jurisdiction over pendant state law claims; however, if **[*14]** all federal law claims drop out before trial, the district court may dismiss the state law claims. *28 U.S.C. § 1367(c)(3)*. Because this Court has dismissed all causes of action arising under federal law and does not have original jurisdiction under *28 U.S.C. § 1332(d)(2)*, it declines to exercise supplemental jurisdiction over Plaintiffs' remaining causes of action arising under state law.

CONCLUSION AND ORDER

Therefore, for the reasons stated, Plaintiffs' Complaint is dismissed for lack of subject matter jurisdiction.

So ordered.

/s/ Virginia M. Kendall

Virginia M. Kendall, United States District Judge

Northern District of Illinois

Date: 12-18-08

End of Document

Haw. Children's Blood & Cancer Group v. Haw. Pac. Health

United States District Court for the District of Hawaii

December 19, 2008, Decided; December 22, 2008, Filed

CIVIL NO. 03-00708 SOM-LEK

Reporter
2008 U.S. Dist. LEXIS 136232 *

HAWAII CHILDREN'S BLOOD & CANCER GROUP, Plaintiff, vs. HAWAII PACIFIC HEALTH, ET AL., Defendant.

Subsequent History: Summary judgment denied by, Stay granted by *Haw. Children's Blood & Cancer Group v. Haw. Pac. Health, 2009 U.S. Dist. LEXIS 1026 (D. Haw., Jan. 8, 2009)*

Core Terms

summary judgment motion, discovery, patients, argues, hem-onc, bone marrow, transplant, referrals, dissolve, summary judgment, merits, issue preclusion, interrogatories, declaration, oppose, district judge, final judgment, allegations, deposition, deadline, diverted, supplemental brief, conduct discovery, new patient, continuance, antitrust, pediatric, believes, depose

Counsel: **[*1]** For Hawaii Children's Blood and Cancer Group, Plaintiff: Arleen D. Jouxson, LEAD ATTORNEY, Jouxson-Meyers & Del Castillo LLLC, Wahiawa, HI; Rafael G. del Castillo, LEAD ATTORNEY, Jouxson-Meyers & Del Castillo LLLC, Honolulu, HI.

For Hawaii Pacific Health, Kapiolani Medical Specialists, Kapiolani Medical Center For Women And Children, Defendants: Douglas C. Ross, LEAD ATTORNEY, Davis Wright Tremaine LLP, Seattle, WA; Kenneth S. Robbins, LEAD ATTORNEY, Robbins & Associates, Honolulu, HI.

Judges: Leslie E. Kobayashi, United States Magistrate Judge.

Opinion by: Leslie E. Kobayashi

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISSOLVE STAY AND CONTINUE JANUARY 5, 2009 HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO *RULE 56(f)*

Before the Court is Plaintiff Hawaii Children's Blood and Cancer Group ("HCBCG") Motion to Dissolve Stay and Continue January 5, 2009 Hearing on Defendants' Motion for Summary Judgment Pursuant to *Rule 56(f)* ("Motion"), filed on December 4, 2008. Pursuant to an order of this Court, HCBCG filed a supplemental brief on December 12, 2008. Defendants Hawaii Pacific Health ("HPH"), Kapiolani Medical Specialists ("KMS"), and Kapiolani Medical Center for Women and Children ("KMCWC", **[*2]** all collectively "Defendants") filed their memorandum in opposition on December 15, 2008. The Court finds this matter suitable for disposition without a hearing pursuant to Rule *LR7.2(d)* of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"). After careful consideration of the Motion, supporting and opposing memoranda, and the relevant legal authority, HCBCG's Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set forth below.

BACKGROUND

On December 29, 2003, HCBCG[1] filed the instant action alleging antitrust claims under the Sherman Act and a claim under the Lanham Act ("Federal Action"). HCBCG filed its First Amended Complaint on June 21, 2004.[2] The Federal Action arises from Defendants' alleged efforts to secure a monopoly of clinical pediatric hematology-oncology ("hem-onc") physician services in Hawaii by, *inter alia*, excluding HCBCG physicians from that market.

In January 2002, Kelley Woodruff, M.D., filed an action in state court alleging, *inter alia*, state antitrust claims, defamation, retaliatory discharge, breach of contract, and tortious interference ("State Action"). Dr. Woodruff later amended her complaint in the **[*3]** State Action to add HCBCG as a plaintiff. The Second Amended Complaint in the State Action,[3] filed on February 17, 2005, purportedly consolidated the complaint in the State Action with the complaint in the Federal Action. [Defs' CSOF, Exh. I at ¶ 1.]

On October 22, 2004, the district judge in the Federal Action issued an Order Denying Defendants' Motion to Dismiss and Granting Defendants' Alternative Motion to Stay Proceedings Pending Resolution of the Concurrent State of Hawaii Circuit Court Case ("Stay Order").[4] The district judge found that the facts and issues to be determined in the Federal Action were identical to those in the State Action. The district judge therefore stayed the Federal Action pending the outcome of the State Action, but carved out an exception for any discovery that may be taken in the State Action which would also be relevant to the Federal Action.

On July 3, 2008, Defendants moved to amend this Court's December 14, 2007 *Rule 16* Scheduling Order. Defendants stated that, on March 18, 2008, the judge in the State Action, the Honorable Bert Ayabe, issued the last of a series of summary judgment orders and that all claims were resolved in Defendants' favor. The plaintiffs **[*4]** in the State Action moved to reconsider the summary judgment orders. Judge Ayabe issued an order denying the motion for reconsideration on July 1, 2008. Defendants argued that these orders collectively constituted a final judgment in the State Action. Defendants therefore sought an amendment of the dispositive motions deadline in the Federal Action. This Court granted Defendants' motion and vacated the trial date and all unexpired deadlines.

This Court's September 10, 2008 Amended *Rule 16* Scheduling Order set an August 4, 2009 trial date. The dispositive motions deadline is March 4, 2009 and the discovery deadline is June 5, 2009.

Defendants filed a Motion for Summary Judgment on October 31, 2008. Defendants argue that claim and issue preclusion bar the litigation of the issues in the Federal Action. In the alternative, Defendants argue that they are entitled to summary judgment on the merits of HCBCG's claims. HCBCG filed its memorandum in opposition to Defendants' Motion for Summary Judgment on December 5, 2008. The Motion for Summary Judgment is currently set for hearing before the district judge on January 9, 2009.

In the instant Motion, HCBCG asks the Court to dissolve the stay and to continue **[*5]** the hearing on Defendants' Motion for Summary Judgment for approximately eight weeks so that HCBCG can conduct discovery. With regard to the stay, the state court entered final judgment in the State Action on October 6, 2008. [Exh. 1 to Motion.]

---

[1] HCBCG is an unincorporated medical group consisting of Kelley Woodruff, M.D., and Robert Wilkinson, M.D., both of whom are pediatric hematology-oncology physicians.

[2] The First Amended Complaint in the Federal Action is attached to Defendants' Concise Statement of Facts, filed October 31, 2008 ("CSOF"), as Exhibit J.

[3] The Second Amended Complaint in the State Action is attached to Defendants' CSOF as Exhibit I.

[4] The district judge's Stay Order is attached to Defendants' CSOF as Exhibit H.

HCBCG argues that the State Action is now completed and there is no further reason to maintain the stay in the Federal Action.

With regard to the continuance, HCBCG emphasizes that there was no discovery in the State Action after the April 6, 2006 discovery deadline and that the state court did not have jurisdiction to hear HCBCG's Sherman Act claims. HCBCG therefore argues that it did not have the opportunity to conduct discovery that is essential to its opposition to Defendants' Motion for Summary Judgment, which addresses the merits of HCBCG's claims in the Federal Action.

HCBCG argues that, if allowed to conduct further discovery, it will be able to prove that: Defendants excluded HCBCG's physicians from the pediatric hem-onc physician market, and from hem-onc medical education and research; Defendants interfered with and diverted new patient referrals; Defendants lost their Children's Oncology Group certification for bone marrow transplants **[*6]** and are not likely to be accredited soon; and Defendants have a monopoly. HCBCG alleges that Defendants' loss of their certification was a result of their exclusion of HCBCG physicians from the provision of bone marrow transplant services. HCBCG argues that this forces Hawaii patients to seek bone marrow transplant services at mainland centers.

HCBCG also alleges that Defendants' refusal to work with HCBCG interfered with the elevation of the Cancer Research Center of Hawaii ("CRCH") to Comprehensive Cancer Center status. HCBCG claims that as a result, CRCH's director and associate director left the organization and Hawaii lost potential millions of dollars in research funds and a substantial number of new pediatric hem-onc clinicians. HCBCG therefore argues that Defendants' actions adversely affected interstate commerce.

HCBCG states that it can subpoena witnesses with first-hand knowledge that Defendants diverted referrals and that they excluded HCBCG from faculty and research appointments. HCBCG argues that there is sufficient time for the district judge to hear Defendants' Motion for Summary Judgment after HCBCG has conducted discovery because the dispositive motions deadline is **[*7]** not until March 4, 2009 and trial is not until August 4, 2009.

This Court directed HCBCG to file a supplemental brief specifying exactly what discovery was necessary for it to oppose Defendants' Motion for Summary Judgment. The Court also instructed HCBCG to provide an offer of proof as to how the evidence could be obtained.

In its supplemental brief, HCBCG primarily points to a July 14, 2008 declaration by Lawrence Wu, Ph.D., Defendants' economist, "which was attached as an unreferenced exhibit to Defendants' Concise Statement". [Pltf's Suppl. Brief at 2; see also Decl. of Rafael del Castillo at ¶ 7.] HCBCG states that a table included in Dr. Wu's July 14, 2008 declaration is materially different from the corresponding table included in his February 18, 2008 declaration, which Defendants submitted with their motion for summary judgment in the State Action.[5] HCBCG argues that it has not had a fair opportunity to conduct discovery as to why Dr. Wu reached identical conclusions based on different data. [Pltf's Suppl. Brief at 2.] HCBCG argues that this indicates that Dr. Wu's "'opinion' was ends-means based". [Id. at 9.] HCBCG also seeks "discovery of financial data, documents, witnesses, and answers **[*8]** to interrogatories that would provided [sic] direct and indirect evidence of the arguments and material issues on which Plaintiff has or can rely in opposing Defendants' Motion for Summary Judgment." [Id. at 3.] HCBCG argues that it needs to obtain Dr. Stephen Feig's report and needs to conduct discovery as to "the conduct that persuaded CRCH and Queen's to refuse to deal with Plaintiff, and ultimately led to the diminution of CRCH's role in the community[.]" [Id. at 9.] HCBCG argues that the requested discovery is relevant and that Defendants are clearly in control of this evidence.

According to Mr. del Castillo's declaration, the financial data that Defendants have already produced shows that Defendants diverted patient referrals who presented at KMCWC without a hem-onc diagnosis. HCBCG received 15 of 32 new patients in 2006, 3 of 5 in January 2007, 1 of 4 in February 2007, 0 of 5 in March 2007, 0 of 3 in April 2007, 4 of 7 in May through June 2007, 4 of 7 in August 2007, and 1 of 11 in September through December 2007. HCBCG believes that, if Defendants are required to produce the 2008 data, it will show that HCBCG's share before

[5] Dr. Wu's declarations, with the conflicting tables, are attached to HCBCG's Supplemental Brief as Exhibit 3.

the termination of its practice was less than half of its 2007 share **[*9]** and that Defendants' share is 10 to 15 times greater than Dr. Wilkinson's and Dr. Woodruff's combined cases. [Pltf's Suppl. Brief, Decl. of Rafael del Castillo at ¶¶ 8-9.] In contrast, HCBCG's expert, David Eisenstadt, surveyed the years 2003 through 2005 and found that no more than one-third of Defendant KMS's patients were from direct referrals and one-third of the new patients had no diagnosis when they presented at the hospital. HCBCG argues that the 2006 and 2007 data supports Dr. Eisenstadt's projection that an increasing percentage of patients would be referred to KMS because Defendants controlled access to physician services for these patients. [Id. at ¶¶ 10-11.]

HCBCG argues that it needs Defendants' claims data because HCBCG believes the data will show that Defendants cherry-picked the patients who had the best insurance coverage. [Id. at ¶ 13.] HCBCG also claims to have evidence that Defendants gave KMS physicians heavy subsidies in 2002 and 2003 to assist Defendants in excluding HCBCG from the market. HCBCG argues that additional discovery will show that the subsidy continued into 2007 and 2008. HCBCG argues that this will disprove Defendants' argument that they merely engaged **[*10]** in legitimate head-to-head competition with HCBCG. [Id. at ¶ 14.]

HCBCG identifies the following witnesses who it needs to depose in order to oppose Defendant's Motion for Summary Judgment: Dr. Sarah Fryberger; Dr. Stephen Feig; Dr. Robert Cooney, CRCH; and Dr. Randal Wada.

Dr. Fryberger worked for Defendants from August 2004 to December 2007. She protested Defendants' conduct toward HCBCG and warned Defendants' administrators that this conduct would threaten the quality of care. Dr. Fryberger was the founder and medical director of a pediatric hem-onc program in Portland that competed with a university faculty medical group. HCBCG therefore argues that she can testify as to Defendants' head-to-head competition argument. HCBCG also claims that Dr. Fryberger can testify regarding diverted referrals. [Id. at ¶ 18.]

According to HCBCG, Dr. Feig submitted a report to Defendants regarding problems with their bone marrow transplant program. He would like this to serve as his testimony. Defendants, however, refuse to produce the report. HCBCG believes that Dr. Feig recommended, *inter alia*, that Defendants' team include the HCBCG physicians. HCBCG believes that Dr. Feig's deposition, as well **[*11]** as the deposition of new witnesses identified during Dr. Feig's deposition, will show that Defendants did not follow his advice and that Defendants' exclusion of HCBCG has been detrimental to the bone marrow transplant program. [Id. at ¶ 19.]

HCBCG states that Dr. Cooney would testify about the recent developments at CRCH which led to the resignation of its executive director and associate director. The executive director, Dr. Carl Vogel, initiated CRCH's plan to form a joint venture with HCBCG, which would have resulted in a clinical expansion. Dr. Cooney previously testified that HPH's Executive Vice President said that HPH would consider it an unfriendly act if CRCH went forward with the joint venture. Plaintiff believes that Dr. Cooney has more information about how Defendants discouraged CRCH from entering into the joint venture. He can also testify about how Defendants' exclusion of HCBCG and its blocking of the joint venture adversely impacted the area. [Id. at ¶ 20.]

Dr. Wada is the Medical Director of KMS's Bone Marrow Transplant Program. He would testify that Defendants are no longer certified for bone marrow transplants. His testimony, and that of other bone marrow program **[*12]** directors (who HCBCG does not name) will establish that Hawaii's program has deteriorated to such a point that it is unlikely to be reaccredited without a major investment. He would also corroborate Dr. Wilkinson's testimony that bone marrow/stem cell transplants are becoming an increasing part of the Children's Oncology Group's clinical trials. Thus, Hawaii patients will have to go to the mainland for such treatment. [Id. at ¶ 21.]

HCBCG also states that other medical directors of pediatric cancer centers (who HCBCG does not name) would testify about how appropriate head-to-head competition would benefit the market. [Id. at ¶ 22.]

Finally, HCBCG states that it would seek answers to the following interrogatories:

a. Whether there existed a credible reasonable, competitive business reason for refusing to continue team care;

b. Whether there existed a credible reasonable, competitive business reason for refusing to share information about the patients on rounds or cross cover;

c. Whether there existed a credible reasonable, competitive business reason for refusing to distribute patients who were referred to the hospital without a hem-onc diagnosis equally to HCBCG and KMS; and

d. Whether there **[*13]** are any efficiency justifications for vertically integrating the hospital and the specialist physicians that acceptably offset the exclusionary effects.

[Id. at ¶ 23.]

On December 12, 2008, HCBCG also filed a declaration by Dr. Woodruff, who stated that she confirmed and agreed with the statements in the Supplemental Brief and Mr. del Castillo's declaration. She also attested to having personal knowledge of certain facts alleged therein.

In their memorandum in opposition, Defendants primarily argue is that no discovery is needed to address whether the decision in the State Action precludes litigation of the claims presented in the Federal Action. HCBCG's argument that discovery is necessary goes entirely to Defendants' alternative argument that it is entitled to summary judgment on the merits of HCBCG's claims.

Defendants note that discovery in the State Action was exhaustive. There were fifty-three depositions, thirty-two of which HCBCG noticed. Defendants argue that HCBCG has failed to prove that it is necessary to dissolve the stay or to continue the hearing on Defendants' Motion for Summary Judgment.

Defendants argue that claim preclusion bars Plaintiff from litigating its Lanham Act **[*14]** claim in the Federal Action and that issue preclusion bars Plaintiff from litigating its Sherman claims. Defendants contend that their claim and issue preclusion arguments are ripe for decision now.

With regard to the merits of HCBCG's claims, Defendants state that the arguments the Motion for Summary Judgment raises are identical to those presented in the State Action. Further, HCBCG has not proposed any discovery on the Lanham Act claim and therefore the merits of that claim are ripe for decision now. Defendants also argue that the discovery that HCBCG has proposed is not relevant to its antitrust claims. HCBCG's claims are based on the allegations that KMS physicians will not practice with Dr. Woodruff and that hospital physicians refer all new patients to KMS hem-onc physicians instead of referring some to HCBCG's physicians. Defendants argue that such conduct does not amount to an antitrust violation. Defendants assert that further discovery is not necessary because they have essentially stipulated that they do not cooperate with Dr. Woodruff and will not refer patients to her.

Defendants also argue that none of the specific discovery that HCBCG identified is material to the Motion **[*15]** for Summary Judgment. Defendants state that the difference between Dr. Wu's two tables is explained in his report. The second table is based on new data that he received after his first report. Further, the difference is not material because, although some figures for individual physicians changed, the relative market shares for KMS and HCBCG were the same for outpatient encounters and only slightly different for inpatient admissions. Defendants also emphasize that their Motion for Summary Judgment does not rely on this particular data. Defendants also point out that the parties had agreed that HCBCG could depose Dr. Wu on March 4, 2008, but HCBCG's counsel cancelled the deposition on March 3.

Defendants argue that the referral data for 2008 is irrelevant to the Motion for Summary Judgment because they contend that they have no duty to refer patients to HCBCG. Further, because Defendants presume, for purposes of the Motion for Summary Judgment, that KMS physicians refer all patients to their KMS hem-onc colleagues, any evidence concerning the alleged subsidy is irrelevant. Defendants also argue that HCBCG's position that economic head-to-head competition is inappropriate in the hem-onc **[*16]** industry is contrary to ***antitrust law***.

Defendants point out that HCBCG deposed Dr. Fryberger on December 19, 2005. It is not necessary to depose her again regarding patient referrals because this is not in dispute in the Motion for Summary Judgment. Defendants also argue that HCBCG's counsel did not contact Dr. Fryberger to learn what else she would testify to and this violated the Court's order directing HCBCG to file a supplemental brief.

Defendants argue that, even if Dr. Feig would testify that he recommended that Defendants' bone marrow transplant team include HCBCG's physicians, this is irrelevant to the Motion for Summary Judgment. Similarly, Dr. Wada's testimony regarding the alleged decline in the quality of the bone marrow transplant program since HCBCG ceased services is also irrelevant. Defendants stress that Dr. Cooney has already been deposed twice and HCBCG gives no basis for its belief that he has further information that would be relevant to the Motion for Summary Judgment.

Finally, Defendants argue that they do not need to respond to HCBCG's four interrogatories because HCBCG could have asked all of them during the State action, but never did. Moreover, Dr. Wu's declaration **[*17]** addresses these issues.

DISCUSSION

I. Stay

At the July 26, 2007 hearing on HCBCG's Motion to Dissolve Stay, the district judge instructed the parties that they had to proceed to final judgment in the State Action before coming back to her to dissolve the stay. [Trans. 7/26/07, filed 8/9/07 (dkt. no. 122), at 15.] Insofar as final judgment has been entered in the State Action, there is no further reason for the stay. HCBCG's Motion is therefore GRANTED as to its request to dissolve the stay.

II. Continuance

HCBCG seeks a continuance of the January 9, 2009 hearing on Defendants' Motion for Summary Judgment, arguing that HCBCG needs to conduct discovery to oppose Defendants' motion. *Federal Rule of Civil Procedure 56(f)* states, in pertinent part:

> If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> . . . .
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
> (3) issue any other just order.

Thus, a party requesting a *Rule 56(f)* continuance must

> show[] that, without *Rule 56* assistance, it cannot present facts necessary to justify its claims. The requesting **[*18]** party must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment. Failure to comply with these requirements is a proper ground for denying discovery and proceeding to summary judgment.

Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008) (citations and quotation marks omitted). In addition, the request must be timely and the information sought must be relevant. See *Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1129 (9th Cir. 2004)*. Discovery is not essential to the party's opposition if it is only "generically relevant". See *Family Home, 525 F.3d at 827*. The requesting party bears the burden of showing that the additional facts would prevent summary judgment. See *Employers Teamsters, 353 F.3d at 1129-30*.

A. Claim and Issue Preclusion

Defendants' primary argument in their Motion for Summary Judgment is that HCBCG is barred from litigating the claims in the Federal Action under the principles of claim preclusion and issue preclusion. Hawaii law controls as to the preclusive effect of the judgment in the State Action. See *28 U.S.C. § 1738*. Under Hawaii law, claim preclusion applies if "(1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original **[*19]** suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question." *Tortorello v. Tortorello, 113 Haw. 432, 439, 153 P.3d 1117, 1124 (2007)* (citation, emphasis, and block quote format omitted). In order to establish that issue preclusion prevents HCBCG from relitigating issues in the State Action, Defendants must prove that:

> (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008) (citation and quotation marks omitted). None of the factors in either analysis require consideration of events that took place after the close of discovery in the State Action. The Court therefore finds that no discovery is necessary for HCBCG to oppose Defendants' claim and issue preclusion arguments.

B. Merits

In the alternative, Defendants argue that they are entitled to summary judgment because HCBCG's claims fail on the merits. HCBCG's Lanham Act claim alleges that "Defendants provided false and misleading information and allegations **[*20]** to patients and physicians concerning the HCBCG physicians" and that HCBCG suffered injury as a result of the publication of these statements. [First Amended Complaint at ¶¶ 70-71.] None of HCBCG's proposed discovery relates to the Defendants' alleged publication of false and misleading statements. HCBCG has failed to establish that discovery is necessary to oppose Defendants' Motion for Summary Judgment as to the Lanham Act claim.

All of HCBCG's proposed discovery relates to its Sherman Act claims. The discovery deals with: 1) whether Defendants increasingly diverted referrals away from HCBCG; 2) how they accomplished the diversion; and 3) how the Defendants' refusal to work with HCBCG has affected the industry. HCBCG asserts that, when patients who have not already been referred to a specific hem-onc physician arrive at KMCWC's Emergency Department, almost of them are referred to KMS hem-onc physicians and away from HCBCG. In their Motion for Summary Judgment, Defendants state: "For purposes of this motion only, Defendants accept these allegations as true. . . . ***But as a matter of law there is nothing anticompetitive, and hence nothing unlawful, about HPH refusing to refer to HCBCG [*21]*** ." [Mem. in Supp. of Defs' Motion for Summary Judgment at 21 (emphasis in original).] Thus, insofar as Defendants essentially concede, for purposes of the Motion for Summary Judgment, that they refer the majority of new patients to KMS hem-onc physicians, the Court finds that HCBCG's proposed discovery regarding whether and how Defendants divert referrals away from HCBCG is not necessary for its opposition.

Further, the effect of Defendants' alleged exclusion of HCBCG's physicians is not relevant to Defendants' argument that, as a matter of law, their referral practice is not anticompetitive. Finally, with regard to HCBCG's proposed request for answers to interrogatories, there is no indication that these interrogatories address matters that arose after the close of discovery in the State Action. HCBCG could have presented these interrogatories in the State Action, but apparently did not. A party will not be entitled to 56(f) relief if it was not diligent in pursuing discovery before summary judgment. See *Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524 (9th Cir. 1989)*. HCBCG therefore cannot obtain 56(f) relief in order to serve the proposed interrogatories.

This Court finds that HCBCG has failed to establish that it "cannot present facts essential **[*22]** to justify its opposition" to Defendants' Motion for Summary Judgment without further discovery. HCBCG's Motion is therefore DENIED as to the request to continue the January 9, 2009 hearing on Defendants' Motion for Summary Judgment.

CONCLUSION

On the basis of the foregoing, HCBCG's Motion to Dissolve Stay and Continue January 5, 2009 Hearing on Defendants' Motion for Summary Judgment Pursuant to *Rule 56(f)*, filed December 4, 2008, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED as to HCBCG's request to dissolve the stay and DENIED as to HCBCG's request to continue the hearing on Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 19, 2008.

/s/ Leslie E. Kobayashi

Leslie E. Kobayashi

United States Magistrate Judge

[Dist. 1199P Health & Welfare Plan v. Janssen, L.P.]

United States District Court for the District of New Jersey

December 23, 2008, Decided; December 23, 2008, Filed

Civil Action No. 06-3044 (FLW); Civil Action No. 07-2224 (FLW); Civil Action No. 07-2608 (JAP); Civil Action No. 07-2860 (GEB)

Reporter
2008 U.S. Dist. LEXIS 103526 *

DISTRICT 1199P HEALTH AND WELFARE PLAN, individually and on behalf of all others similarly situated, Plaintiff, v. JANSSEN, L.P., et al., Defendants. IRONWORKERS LOCAL NO. 399 AND PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUNDS, on behalf of itself and all others similarly situated, Plaintiff, v. JANSSEN, L.P., et al., Defendants. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98, on behalf of itself and all others similarly situated, Plaintiff, v. JANSSEN, L.P., et al., Defendants. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, on behalf of itself and all others similarly situated, Plaintiff, v. JANSSEN, L.P., et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Complaint dismissed at *Dist. 1199P Health & Welfare Plan v. Janssen, L.P., 784 F. Supp. 2d 508, 2011 U.S. Dist. LEXIS 28629 (D.N.J., Mar. 21, 2011)*

Core Terms

Plaintiffs', Defendants', allegations, off-label, conspire, conspiracy, enterprise, effective, marketing, inferior, predicate act, employees, mail, disorder, financial loss, particularity, wholly owned subsidiary, cognizable, motion to dismiss, wire fraud, subsidiaries, overpayment, causation, concrete, entity, prescriptions, heightened, courts, wire, pattern of racketeering activity

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN1[] **Racketeer Influenced & Corrupt Organizations, Claims**

First-party reliance is not an element in civil RICO claims.

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

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

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

When reviewing a motion to dismiss on the pleadings, courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. In Bell Atlantic Corporation v. Twombly, the United States Supreme Court clarified the *Fed. R. Civ. P. 12(b)(6)* standard. Specifically, the Supreme Court retired the language that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The Supreme Court's Twombly formulation of the pleading standard can be summed up thus: stating a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN3[] **Racketeer Influenced & Corrupt Organizations, Claims**

To properly plead under RICO, a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity as well as an injury resulting from the conduct constituting a violation. RICO provides for liability in civil suits brought by any person injured in his business or property by a RICO violation, with a compulsory award of treble damages, costs, and attorneys fees and makes it unlawful for any person who is employed by or associated with any enterprise affecting interstate commerce to participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity *18 U.S.C.S. §§ 1962(c)*, *1964(c)*. The United States Court of Appeals for the Third Circuit has articulated that *18 U.S.C.S. § 1964(c)* requires a RICO plaintiff to make two related but analytically distinct threshold showings : (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of *18 U.S.C.S. § 1962*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN4[] **Racketeer Influenced & Corrupt Organizations, Claims**

A RICO plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation of RICO. The New Jersey Supreme Court believes the New Jersey RICO statute was and should be consistent with the federal RICO statute. *N.J. Stat. Ann. § 2C:41-4(c)*. While the United States Supreme Court has generally stated that RICO is to be read broadly, the United States Court of Appeals for the Third Circuit has held that *18 U.S.C.S. § 1964(c)*'s standing limitation assures that not every plaintiff has a federal cause of action arising under RICO. A showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN5[] **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiff's loss causation theories of injury are not cognizable under RICO. the loss of value model is designed to award plaintiffs damages based on the benefit of their bargain. Such damages are generally unavailable in RICO suits where the statute compensates only for injury to business or property. Moreover, the defendants' misrepresentation could in no way have reduced the value of the product that plaintiffs actually purchased, but rather the defendants simply could have induced plaintiffs to buy the product over other products. This alleged injury does not satisfy the requisite pleading of concrete financial loss for RICO claims.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN6[] **Racketeer Influenced & Corrupt Organizations, Claims**

Some sort of damage model, yet to be presented, does not substitute for adequately pleading an injury or causation for a RICO claim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN7[] **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiffs' injury theory based on financial losses of overpayment that plaintiffs purportedly sustained by paying for an inferior drug is inadequate for sustaining a RICO injury, absent allegations that defendants' drug was on some level inferior and therefore "worth less" than what plaintiffs paid for it.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN8[] **Racketeer Influenced & Corrupt Organizations, Claims**

Merely stating that a drug is equally effective, no more effective, or neither more effective nor safer, all of which imply that it is no less effective or safe, is not a sufficient pleading of inferiority to sustain plaintiffs' RICO injury.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

Where no additional pleading of injury is alleged, a plaintiff's allegations that there are more cost-effective alternatives do not meet the required pleading of overpayment as a concrete financial loss for a RICO claim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN10[] Racketeer Influenced & Corrupt Organizations, Claims

Where there are no allegations in a complaint to the effect a RICO plaintiff has received inadequate care, suffered medical injuries, or have been denied medically necessary care, the fair inference to be drawn from the complaint is that none of those events have occurred.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN11[] Racketeer Influenced & Corrupt Organizations, Claims

Without alleging that a product failed to perform as advertised, a plaintiff has received the benefit of his bargain and has no basis to recover purchase costs under RICO.

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

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

HN12[] Claims, Fraud

A RICO plaintiff need not plead and prove that it relied on the defendant's alleged misrepresentations. None of this is to say that a RICO plaintiff who alleges injury "by reason of" a pattern of mail fraud can prevail without showing that someone relied on the defendant's misrepresentations. Therefore, as the United States Supreme Court said, it will be unlikely that plaintiffs will be able to establish even but-for causation if no one relied on the misrepresentation and the complete absence of reliance may prevent the plaintiff from establishing proximate cause. Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN13[] Racketeer Influenced & Corrupt Organizations, Claims

An inflated price theory of causation is not recognized in the RICO context, and thus, not a viable theory in a RICO action.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN14[] Racketeer Influenced & Corrupt Organizations, Claims

An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*. A RICO enterprise is an entity made up of a group of persons associated together for the common purpose of engaging in a course of conduct. To establish the existence of an enterprise, a plaintiff must prove that (1) the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; (2) the members of the enterprise function as a continuing unit with established duties; and (3) the enterprise must be separate and apart from the pattern of activity in which it engages. However, as the rules of pleading require nothing more at the motion to dismiss stage than a bare allegation, where a plaintiff identifies the entities it believed were the enterprises that had been marshalled against it, a plaintiff sufficiently alleges the existence of an enterprise.

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

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

HN15[] Claims, Fraud

To allege a RICO violation, a plaintiff must articulate a pattern of racketeering activity, i.e., predicate acts. The claim must include the allegation of at least two racketeering acts. When fraud is the predicate act, a plaintiff must satisfy the heightened pleading standard of *Fed. R. Civ. P. 9(b)*. Specifically, R. 9(b) states a party must state with particularity the circumstances constituting fraud or mistake. The United States Court of Appeals for the Third Circuit qualified what information must be alleged to satisfy the heightened pleading standard of R. 9(b)

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

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

HN16[] Claims, Fraud

Pursuant to *Fed. R. Civ. P. 9(b)*, a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which it is charged. To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.

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

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

HN17[] Claims, Fraud

To set out a prima facie showing of a civil RICO violation under *18 U.S.C.S. § 1964(c)*, a plaintiff must have been injured by "racketeering activity," *18 U.S.C.S. § 1962(c)-(d)*. "Racketeering activity" is defined as a violation of certain enumerated statutes - commonly known as "predicate acts" - in *18 U.S.C.S. § 1961(1)*. The term "racketeering activity" is defined in *§ 1961(1)* to include a long list of state and federal crimes, among them the wire fraud. The United States Court of Appeals for the Third Circuit permits federal common law or garden variety fraud, including mail and wire fraud.

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

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

HN18[] **Claims, Fraud**

General allegations, such as fraud and theft, will not satisfy the pleading standard for a RICO claim as they are not included as specifically listed racketeering activities pursuant to *18 U.S.C.S. § 1961(1)*. Instead, plaintiffs, more specifically, attempt to allege that the predicate acts are mail and wire fraud. Where acts of mail and wire fraud constitute the alleged predicate racketeering acts, those acts are subject to the heightened pleading requirement of *Fed. R. Civ. P. 9(b)*.

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

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

HN19[] **Claims, Fraud**

There are two elements of a mail or wire fraud charge: a scheme to defraud, and a mailing or wire in furtherance of that scheme. Wholly intrastate use of the mails for fraud violates the mail fraud statute. In contrast, the federal wire fraud statute requires interstate use of the wire. The statute requires that the wire communication cross state lines. The wire fraud statute, *18 U.S.C.S. § 1343*, criminalizes a scheme to defraud that is transmitted by wire in interstate or foreign commerce; thus, a complaint must allege interstate use of the wire for each predicate act. Moreover, when asserting mail fraud allegations, a RICO plaintiff must identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentations. In other words, the plaintiff's pleading must contain the who, what, when and where details of the alleged fraud.

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

HN20[] **Claims, Fraud**

The court will only consider as predicate racketeering acts those wire frauds which have been alleged to have been transmitted by wire in interstate or foreign commerce and those mail frauds that are alleged to have made use of the United States Postal Service.

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

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

HN21[] **Claims, Fraud**

Where mail and wire frauds were not properly plead, the court will not consider them as "predicate acts" for a RICO claim.

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

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

HN22[] **Claims, Fraud**

The court will only consider as predicate racketeering acts those mail and wire frauds alleged with the specificity required by the heightened pleading standard of *Fed. R. Civ. P. 9(b)*.

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

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

HN23[] **Claims, Fraud**

Particularly in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs. Thus, courts have relaxed the (particularity) rule when factual information is peculiarly within the defendant's knowledge or control. At the very least plaintiffs must allege that the necessary information lies within defendant's control. Even if the complaint contains boilerplate allegations that the necessary information was within the defendant's exclusive control, *Fed. R. Civ. P. 9(b)* would still not be satisfied. Rather, under this more relaxed application of the rule, plaintiffs must accompany such an allegation with a statement of facts upon which their allegation is based. More specifically, a complaint must delineate at least the nature and the scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity.

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

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

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

HN24[] **Claims, Fraud**

While bribery does not invoke the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, plaintiffs must satisfy the more liberal pleading requirements of *Fed. R. Civ. P. 8(a)* to adequately plead bribery as a predicate act for a RICO claim.

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

HN25[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A "pattern of racketeering activity means" at least two predicate acts that are related and that amount to or pose a threat of continued criminal activity.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN26[] **Racketeer Influenced & Corrupt Organizations, Claims**

A corporation cannot conspire with its agents and/or employees under *§ 1962(d)* of RICO.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN27[] Racketeer Influenced & Corrupt Organizations, Claims

Conspiracy cannot lie against a corporate entity for the concerted action of its employees who violate RICO on its behalf.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN28[] Racketeer Influenced & Corrupt Organizations, Claims

Parents and subsidiaries can conspire in violation of RICO no more than they can for antitrust purposes.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN29[] Racketeer Influenced & Corrupt Organizations, Claims

An alleged intra-corporate conspiracy comprised solely of a corporation acting in concert with its officers and employees should not be considered as involving separate actors conspiring under the law.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN30[] Racketeer Influenced & Corrupt Organizations, Claims

The decision that a RICO conspiracy claim cannot stand where a corporation is alleged essentially to have done nothing more than act in concert with its officers and employees, stems from the premise that a corporation, legally conceived, is only one person under RICO. An exception to the rule against intra-corporate conspiracies exists where the employees act in pursuit of their own interests and not for the benefit of the corporation. Thus, only where the plaintiff alleges something more than a corporation acting in concert with its officers and employees, can a RICO conspiracy claim proceed.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN31[] Racketeer Influenced & Corrupt Organizations, Claims

The inquiry of whether a parent corporation is capable of conspiring with its wholly owned subsidiary for purposes of violating *§ 1962(d)* of RICO is similar to that of whether a parent can conspire with its subsidiaries under § 1 of the Sherman Act or whether a corporation can conspire with its agents and/or employees under *§ 1962(d)* of RICO. In all three scenarios, where an intra-corporate conspiracy is alleged, the two conspiring entities are but one. The parent and its wholly owned subsidiary share a complete unity of interest, with common objectives. Similarly, a corporation typically acts in concert with its officers and employees, as one legal person, with similar goals. Thus, a parent corporation cannot conspire with its wholly owned subsidiary to violate *§ 1962(d)* of RICO because the two entities always have a unity of purpose or a common design. There is a recognized exception in the case where a plaintiff alleges that the employees acted in pursuit of their own interests and not for the benefit of the corporation, or there is an allegation that entities no longer act as one and thus may be considered separate actors under the law.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN32[] **Racketeer Influenced & Corrupt Organizations, Claims**

To state a claim under *18 U.S.C.S. § 1962(d)*, where a parent corporation has allegedly conspired with its wholly owned subsidiary, there must be some additional allegation, e.g., that the subsidiary was fraudulently created to accomplish the racketeering activity. Where plaintiffs allege that defendants, a parent corporation and its wholly owned subsidiary, conspired with each other and with other (unnamed) members of the alleged enterprise in violation of *§ 1962(d)*, this is not sufficient.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN33[] **Racketeer Influenced & Corrupt Organizations, Claims**

A claim under *§ 1962(d)* of RICO is required to include: (1) agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate *§ 1962(a)*, *(b)*, or *(c)*. Allegations of conspiracy are not measured under the *Fed. R. Civ. P. 9(b)* standard, which requires greater particularity of allegation of fraud, but are measured under the more liberal (*Fed. R. Civ. P. 8(a)*) pleading standard. A conspiracy claim must also contain supportive factual allegations. The allegations must be sufficient to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN34[] **Racketeer Influenced & Corrupt Organizations, Claims**

Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose are sufficient to state a RICO conspiracy claim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Securities Law > ... > Elements of Proof > Pattern > Conspiracy

HN35[] Racketeer Influenced & Corrupt Organizations, Claims

Any claim under 18 U.S.C.S. § 1962(d) based on conspiracy to violate the other subsections of § 1962 necessarily must fail if the substantive claims are themselves deficient.

Counsel: **[*1]** For DISTRICT 1199P HEALTH AND WELFARE PLAN, individually and on behalf of all others similarly situated (3:06-cv-03044-FLW-JJH), Plaintiff: SCOTT A. GEORGE, LEAD ATTORNEY, SEEGER WEISS, LLP, NEWARK, NJ; BRIAN J. MCCORMICK, JR., SHELLER, PC, PHILADELPHIA, PA.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, on behalf of itself and all others similarly situationed. (CIVIL 07-2860(GEB)) (3:06-cv-03044-FLW-JJH), Consol Plaintiff: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; JOSEPH H MELTZER, LEAD ATTORNEY, BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP, RADNOR, PA; BRIAN J. MCCORMICK, JR., SHELLER, PC, PHILADELPHIA, PA.

For IRONWORKERS LOCAL NO.399 AND PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUNDS, on behalf of itself and all others similarly situated. (Civil 07-2224(FLW)) (3:06-cv-03044-FLW-JJH), Consol Plaintiff: BRIAN J. MCCORMICK, JR., LEAD ATTORNEY, SHELLER, PC, PHILADELPHIA, PA.

For INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98, on behalf of itself and all others similarly situated (Civil 07-2608 (JAP)) (3:06-cv-03044-FLW-JJH), Consol Plaintiff: BENJAMIN F. JOHNS, JOSEPH G. SAUDER, LEAD ATTORNEYS, CHIMICLES & TIKELLIS, LLP, HAVERFORD, **[*2]** PA; BRIAN J. MCCORMICK, JR., SHELLER, PC, PHILADELPHIA, PA.

For JANSSEN PHARMACUETICAL PRODUCTS, LP, a New Jersey Corporation, JOHNSON & JOHNSON, a New Jersey Corporation (3:06-cv-03044-FLW-JJH), Defendants: DAVID J. ANTCZAK, LEAD ATTORNEY, DRINKER BIDDLE & REATH, LLP, PHILADELPHIA, PA; SUSAN M. SHARKO, THOMAS F. CAMPION, JR., LEAD ATTORNEYS, HEIDI E. HILGENDORFF, DRINKER, BIDDLE & REATH, LLP, FLORHAM PARK, NJ.

For JANSSEN PHARMACEUTICA, INC., CIVIL 07-2860(GEB), JANSSEN-ORTHO, LLC., CIVIL 07-2860 (GEB), JANSSEN, L.P., Civil 07-2860(GEB), 07-2283(JAP), 07-2224 (FLW) & 07-2608 (JAP) (3:06-cv-03044-FLW-JJH), Consol Defendants: DAVID J. ANTCZAK, LEAD ATTORNEY, DRINKER BIDDLE & REATH, LLP, PHILADELPHIA, PA; THOMAS F. CAMPION, JR., LEAD ATTORNEY, DRINKER, BIDDLE & REATH, LLP, FLORHAM PARK, NJ.

For IRONWORKERS LOCAL NO.399 AND PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUNDS, on behalf of itself and all others similarly situated (3:07-cv-02224-FLW-JJH), Plaintiff: BRIAN J. MCCORMICK, JR., LEAD ATTORNEY, SHELLER, PC, PHILADELPHIA, PA.

For JANSSEN, LLP., formerly JANSSEN PHARMACEUTICA PRODUCTS, INC. a New Jersey Corporation, JOHNSON & JOHNSON, a New Jersey Corporation (3:07-cv-02224-FLW-JJH), **[*3]** Defendants: DAVID J. ANTCZAK, LEAD ATTORNEY, DRINKER BIDDLE & REATH, LLP, PHILADELPHIA, PA; THOMAS F. CAMPION, JR., LEAD ATTORNEY, DRINKER, BIDDLE & REATH, LLP, FLORHAM PARK, NJ.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, on behalf of itself and all others similarly situated (3:07-cv-02860-GEB-JJH), Plaintiff: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; JOSEPH H MELTZER, LEAD ATTORNEY, BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP, RADNOR, PA.

For JANSSEN, L.P., JANSSEN PHARMACEUTICA, INC., JANSSEN-ORTHO, LLC., JOHNSON & JOHNSON, INC. (3:07-cv-02860-GEB-JJH), Defendants: DAVID J. ANTCZAK, LEAD ATTORNEY, DRINKER BIDDLE & REATH, LLP, PHILADELPHIA, PA; THOMAS F. CAMPION, JR., LEAD ATTORNEY, DRINKER, BIDDLE & REATH, LLP, FLORHAM PARK, NJ.

Judges: Honorable Freda L. Wolfson, United States District Judge.

Opinion by: Freda L. Wolfson

Opinion

WOLFSON, United States District Judge:

Presently before the Court is a motion by defendants, Janssen, L.P. and Johnson & Johnson (collectively, "Defendants"), to dismiss Counts I-III of the Consolidated Amended Class Action Complaint ("Complaint"), pursuant to *Fed. R. Civ. P. 12(b)(6)*. This putative class action involves Defendants' **[*4]** alleged off-label sale and marketing of the prescription drug, Risperdal(R), which is approved for the treatment of schizophrenia, bipolar mania, and autistic disorder. Plaintiffs, District 1199P Health and Welfare Plan, Ironworkers Local Union No. 399 and Participating Employers Health and Welfare Funds, International Brotherhood of Electrical Workers Local 98, and Southeastern Pennsylvania Transportation Authority (collectively, "Plaintiffs"), are third-party payors that allegedly paid for Risperdal(R) on behalf of their beneficiaries, insured, or employees. Plaintiffs, individually and on behalf of all others similarly situated, in Counts I-III, allege that Defendants by engaging in improper off-label promotion of Risperdal(R) violated: (1) the RICO Act, *18 U.S.C. § 1961, et seq.;* (2) RICO conspiracy, *18 U.S.C. § 1962(d)*, by conspiring to violate *18 U.S.C. § 1962(c)*; and (3) the New Jersey RICO Act, *N.J.S.A. 2C:41-1 et seq.,* ("NJRICO"). [1] **[*5]** Defendants deny any improper marketing, but even if true, contend that Plaintiffs have failed to adequately plead RICO violations. For the reasons that follow, the Court grants Defendants' Motion to Dismiss Counts I-III of Plaintiffs' Complaint.

I. Background and Procedural History

Since Defendants move to dismiss Plaintiffs' RICO claims pursuant to *Fed. R. Civ. P. 12(b)(6)*, the following version of events assumes Plaintiffs' allegations to be true. The Court will only recount facts that are relevant for the purposes of deciding this Motion.

In their Complaint, filed on February 29, 2008, Plaintiffs allege, *inter alia,* [2] that Defendants perpetrated a carefully orchestrated scheme to illegally market and promote, resperidone, sold under the brand name Risperdal(R) ("Risperdal"), for "off-label" uses, meaning uses not approved by the Food and Drug Administration ("FDA") and the safety and efficacy of the drug for these uses have not been established. Compl. **[*6]** PP 2, 5.

Risperdal is now sold and marketed by Ortho-McNeil-Janssen Pharmaceuticals, Inc., formerly known as Janssen Pharmaceutia Inc., the general partner of Janssen, L.P. and a wholly-owned subsidiary **[*7]** of Johnson & Johnson. *Id.* P 17; *see* Df. Mot. at 1. Johnson & Johnson is one of the world's largest manufacturers of health care products for consumer and pharmaceutical markets. Compl. P 18. Risperdal is a second generation atypical antipsychotic prescription medication that is FDA approved for: (1) long-term treatment of acute manic or mixed episodes of bipolar I disorder in adults; (2) monotherapy for the short-term treatment of acute manic or mixed episodes of bipolar I disorder in adults; (3) a combination therapy, with Lithium or Valproate, for the short-term treatment of acute manic or mixed episodes associated with bipolar I disorder in adults; (4) the treatment of irritability associated

---

[1] Plaintiffs also claim that Defendants' alleged off-label promotion of Risperdal was tortious and violated the consumer protection laws of nearly every state in the country in Counts IV-X. These claims are not at issue in this motion.

[2] In this class action lawsuit, four separate complaints were filed and then consolidated into this action, including District 1199P Health and Welfare Plan, Civil Action No. 06-3044; Ironworkers Local Union No. 399 and Participating Employers Health and Welfare Funds, Civil Action No. 07-2224; International Brotherhood of Electrical Workers Local 98, Civil Action No. 07-2608; and Southeastern Pennsylvania Transportation Authority, Civil Action No. 07-2860.

District 1199P is a jointly trusteed employee benefit trust fund and an employee welfare benefit plan providing benefits for approximately 2,600 participants. Compl. P 13. Ironworkers Local Union No. 399 is a health and welfare fund. *Id.* P 14. IBEW Local 98 is an employee welfare benefit plan and employee benefit plan that pays for medical benefits and prescription drugs for approximately 3,000 participants. *Id.* P 15. SEPTA employs a work force of approximately 9,000 people and provides medical benefits for eligible employees. *Id.* P 16.

with autistic disorder in children and adolescents (between the ages of 5 and 16); (5) the treatment of schizophrenia in adolescents ages 13-17 years; and (6) the short-term treatment of bipolar I disorder in children and adolescents ages 10-17 years. *Id.* P 4.

Plaintiffs allege that Defendants, fully aware of the federal laws that prohibit "off-label" marketing and promotion of pharmaceuticals, nonetheless illegally marketed and promoted Risperal for unapproved or "off-label" uses, including **[*8]** uses in children and adolescents as well as in the elderly population. *Id.* P 5. Congress and the FDA have promulgated laws designed to regulate two of the most prevalent indirect promotional strategies: (1) manufacturer dissemination of medical and scientific publications concerning the off-label uses of their products, and (2) manufacturer support for Continuing Medical Education ("CME") programs that advocate off-label uses of their drugs. *Id.* P 31. Plaintiffs allege that Defendants illegally conspired to aggressively market Risperdal through a nationwide, uniform marketing campaign to "misrepresent[] the comparative safety, efficacy and superiority of Risperdal over other traditional/typical or atypical antipsychotics to the health care community, consumers, third-party payors, and others, with the common goal to increase sales of Risperdal and the Defendants' profits," which has led to approximately 66% of Risperdal sales stemming from off-label uses. *Id.* PP 6, 55.

Plaintiffs claim that Defendants "overstat[ed] the drug's uses, while understating (if not outright concealing) Risperdal's side effects and even life threatening medical conditions" in a deliberate and calculated campaign **[*9]** designed to increase the sales of the drug by misleading physicians to write off-label prescriptions of Risperdal. *Id.* PP 50, 68, 71. Despite Defendants' alleged promotion of Risperdal's "superior safety and effectiveness," Plaintiffs assert that Risperdal and other atypical antipsychotics are "neither more effective nor safer than older, less expensive, typical antipyschotics." *Id.* PP 51, 67. Targets of Defendants' alleged scheme were health assistance programs; children who suffer from insomnia, attention deficit disorder or display behavior problems; elderly who experience Alzheimer's disease and dementia; and patients who experience depressive or mood disorders; and patients who experience the symptoms of generalized anxiety disorder, post traumatic stress disorder and substance abuse. *Id.* PP 74. Defendants allegedly committed numerous predicate acts of racketeering, specifically, multiple instances of bribery, in violation of state statutes; mail fraud, in violation of *18 U.S.C. § 1341*; and wire fraud, in violation of *18 U.S.C. § 1343*, including acts of sending illegal marketing, advertising, sale, and promotional material relating to Risperdal. *Id.* PP 9, 212. [3]

Defendants allegedly created and used a "Marketing Firms Enterprise" ("the enterprise"), comprised of Defendants and "seemingly-independent research organizations and marketing and public relations firms," who all shared "the common goals of illegally marketing, advertising, promoting and selling Risperdal in order to increase profits by increasing the off-label use of Risperdal," and acted as the "vehicle or tool to effectuate the Defendants' pattern of racketeering activity." *Id.* PP 10, 207-08. Defendants' alleged illegal scheme consisted of a campaign combining their own significant personnel and financial resources with a discreet and identifiable number of medical marketing firms, peer physicians, public officials, and purported independent charities and social programs to market and promote Risperdal's off-label use. *Id.* P 73. [4]

Defendants allegedly used the enterprise to organize and direct the publication of articles and statements in studies **[*11]** to promote Risperdal's off-label use. *Id.* P 97. This enterprise allegedly hosted CMEs, which are typically independently-sponsored educational programs, but it is alleged here, that at these CMEs, physicians, compensated by Defendants, relayed misleading information to encourage other physicians to prescribe Risperdal for off-label uses. *Id.* PP 84-96. According to Plaintiffs, Defendants were successful in influencing the off-label promotion because they hand-picked peer-sellers and key physicians as leaders to speak favorably about the drug [5] and induced attendee physicians to listen to their off-label marketing pitch, to prescribe Risperdal for off-label use,

---

[3] Plaintiffs allege **[*10]** in conclusory fashion that Defendants engaged in an ongoing, open-ended pattern of racketeering using interstate mail and wire communications. *Id.* PP 160, 211-218.

[4] Plaintiffs do not identify the number or the names of any of these entities.

[5] For example, Plaintiffs allege "Dr. Charles Nemeroff, the presenter for the 2007 CME presentation entitled *Add On Atypical Antipsychotics Efficacious in Short Term for Unipolar Depression,* references the ARISE-RD study, which was an attempt to

and to recommend off-label use of Risperdal to other physicians. *Id.* PP 90-93, 136-37. In exchange, Defendants allegedly provided financial incentives, including expensive dinners and vacations at "lavish" accommodations, disguised grants, and paid drug trials. *Id.* PP 136-37.

Defendants allegedly omitted or misrepresented information about Risperdal's off-label uses when they marketed it to physicians, inflating the number of prescriptions written and filled and causing Plaintiffs to overpay for the drug. *Id.* PP 12, 146, 160, 182, 187. Defendants allegedly published only favorable, and suppressed unfavorable, results about the adverse effects of the Rispersal drug, such as, *inter alia,* increased risk of death, and made false and misleading claims regarding its efficacy, including that it has a low incidence of movement disorders, sedation, and anticholinergic effects (variety of movement disorders). *Id.* PP 108, 121, 133. Plaintiffs **[*13]** acknowledge that "[p]hysicians are free to prescribe approved drugs for their patients as they see fit to adequately treat any condition or symptom." *Id.* P 56. Plaintiffs claim, however, that Defendants' alleged scheme and deceptive conduct directly and proximately caused economic loss to Plaintiffs because they unnecessarily paid for Risperdal off-label use prescriptions for their members or beneficiaries because of the misinformation disseminated by Defendants, which fraudulently increased the demand and sale of Risperdal and deprived Plaintiffs of cheaper alternatives and/or resulted in inflated prices. *Id.* PP 11-12, 36, 193.

Plaintiffs allege that they were injured by their "economic loss," which is "unaffected by whether any given patient ingested Risperdal or suffered adverse side effects." *Id.* P 11. Plaintiffs assert that they, as third-party payors, had to pay for Risperdal in situations where it was not approved as safe and effective by the FDA, after it had been placed on the formulary for on-label use by the Pharmacy Benefit Managers ("PBMs"). *Id.* PP 189, 191. For example, according to Plaintiffs, "[p]hysicians have been misled by Defendants' scheme to believe that Risperdal **[*14]** is superior in its effectiveness and safety to other lower-costing and equally effective antipsychotic drugs," and thus, Risperdal's sales increased. *Id.* P 67. Plaintiffs claim that "Dr. Rosenheck reported that Trilafon [is more cost-effective than the newer drugs in terms of their 'human benefit' because it] cost[s] between $ 300 and $ 600 less per month, compared to Risperdal. Trilafon is no less effective and substantially less expensive -- by between $ 3,600 and $ 7,000 a year." *Id.* P 62. As a result of the foregoing, Plaintiffs allege that they were fraudulently denied comparably safe and effective, cheaper alternatives to Risperdal and overpaid hundreds of millions of dollars for doses of Risperdal that were prescribed by physicians because of Defendants' off-label marketing scheme. *Id.* PP 12, 67, 71, 193.

On March 31, 2008, Defendants filed their motion to dismiss Counts I-III of Plaintiffs' Complaint with prejudice for failure to state a claim upon which relief may be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*. Defendants argue that Plaintiffs' RICO and NJRICO claims are substantively flawed because (1) Plaintiffs did not suffer a cognizable RICO injury, (2) Plaintiffs' theory **[*15]** of causation is too attenuated and speculative as the physicians exercised independent medical judgment on an individual patient basis and Plaintiffs did not rely on Defendants' alleged misrepresentations, [6] and (3) Plaintiffs do not sufficiently allege predicate acts, including mail or wire fraud, necessary to adequately plead RICO. Therefore, Defendants argue, Plaintiffs' RICO conspiracy claim cannot be sustained as a matter of law. On April 30, 2008, Plaintiffs filed their opposition asserting that they adequately allege a cognizable injury, that Defendants' conduct proximately caused their injury, and that they sufficiently plead RICO predicate acts and conspiracy to violate RICO. On May 15, 2008, Defendants filed their reply. Thereafter, both parties submitted supplemental authority and briefing therewith. The Court grants Defendants' Motion for the reasons that follow.

demonstrate **[*12]** the efficacy of Risperdal for depression. . . . Dr. Nemeroff claimed that a peer-reviewed study showed Risperdal improved sexual functioning, when the effects of treatment on sexual functioning were not mentioned in the ARISE-RD study. Additionally, Dr. Nemeroff claimed that the study showed Risperdal demonstrates efficacy over placebo, which the ARISE-RD study in fact did not. . . . Dr. Nemeroff has been a long time key opinion leader for Defendants and has participated in a Janssen-financed journal supplement in 2005." *Id.* P 96.

[6] In *Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S.Ct. 2131, 2139, 170 L. Ed. 2d 1012 (2008)*, the Supreme Court recently determined that ***HN1***[] first-party reliance is not an element in civil RICO claims. *See* Part III.A.2., *infra.*

This Court has subject matter jurisdiction over this federal RICO action pursuant to 28 U.S.C. § 1331 and has supplemental **[*16]** jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

II. Standard of Review

HN2[] When reviewing a motion to dismiss on the pleadings, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)* (citation and quotations omitted). Recently, in *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court "retired" the language contained in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id. at 1968* (quoting *Conley, 355 U.S. at 45-46*). Instead, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Id. at 1965*. As the Third Circuit has stated, "[t]he Supreme Court's *Twombly* formulation of the pleading **[*17]** standard can be summed up thus: 'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips, 515 F.3d at 234* (quoting *Twombly, 127 S.Ct. at 1965*).

III. Discussion

A. Plaintiffs' RICO and NJRICO Claims

HN3[] To properly plead under RICO, a Plaintiff must allege "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity' as well as an injury resulting from the conduct constituting a violation." *Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc., 87 Fed. Appx. 227, 231 (3d Cir. 2003)* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*. The Act "provides for liability in civil suits brought by any person injured 'in his business or property' by a RICO violation, with a compulsory award of treble damages, costs, and attorneys fees . . . [and] makes it unlawful for 'any person' who is employed by or associated with 'any enterprise' affecting interstate commerce to 'participate, **[*18]** directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.'" *Genty v. Resolution Trust Corp., 937 F.2d 899, 906 (3d Cir. 1991)* (citing 18 U.S.C. §§ 1962(c), 1964(c)). The Third Circuit has articulated that Section 1964(c) requires "a RICO plaintiff to make two related but analytically distinct threshold showings . . .: (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962." *Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000)*. The Court will address these standing requirements below.

1. Injury

Defendants argue that Plaintiffs did not suffer a cognizable RICO injury because Plaintiffs seek recovery solely for alleged economic loss, which Defendants argue are mere allegations of "overpayment" or "diminished value" for a safe and effective drug that is plainly speculative and not a "concrete financial loss" cognizable under RICO. Plaintiffs, however, assert that they plead a cognizable injury, past and present, in the form of a financial loss from overpayment, sufficient to confer standing.

The Supreme Court has stated **[*19]** that HN4[] a plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation [of RICO]." *Sedima, 473 U.S. at 496*; *see* 18 U.S.C. § 1964; *Genty, 937 F.2d at 906*; *see also* *Cetel v. Cmmw. Life Ins. Co.,* 460 F.3d 494, 510 (3d Cir. 2006) ("[T]he New Jersey Supreme Court believe[s] the New Jersey RICO statute was and should be consistent with the federal RICO statute."); N.J.S.A. 2C:41-4(c). [7] While the Supreme Court has generally stated that RICO is to be read broadly, the Third Circuit has held that § 1964(c)'s standing limitation assures that not every plaintiff has a federal cause of action arising under RICO. *See* Maio, 221 F.3d at 483 (internal citations and quotations omitted). "[A] showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest." *Id.* (internal citations and quotations omitted).

Plaintiffs allege that they suffered economic **[*20]** loss as third-party payors because Defendants' scheme "depriv[ed them] of cheaper alternatives and/or result[ed] in higher prices for [Risperdal] than otherwise would have existed." Compl. P 12. Plaintiffs argue that their Complaint sufficiently alleges a concrete financial loss for amounts they overpaid for Risperdal due to Defendants' illegal or deceptive marketing practice, which inflated the number of prescriptions written and filled and led to higher co-payments and out-of-pocket costs. Compl. PP 187, 192-193. To support their claim of a cognizable injury sufficient to confer standing, Plaintiffs cite to a number of cases, all of which are distinguishable from the instant action. *Cf.* Sedima, 473 U.S. at 484, 494 (finding the plaintiff properly pled an injury under RICO when he allegedly paid falsified bills that the defendant created and presented); P & P Marketing, Inc. v. Ditton, 746 F. Supp. 1354, 1358, 1361 (N.D. Ill. 1999) (finding the plaintiff sufficiently pled a RICO injury by alleging he paid overcharges where defendants caused submission of falsified invoices).

For example, Plaintiffs cite In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004), in which the **[*21]** Third Circuit held that "[third-party payors], like individual consumers, suffered direct economic harm when, as a result of [the pharmaceutical companies'] alleged misrepresentations, they paid supracompetitive prices for [the brand drug] instead of purchasing lower-priced generic [drug]," but no RICO claims were alleged. Plaintiffs also direct the Court to the Second Circuit's recognition of the right of health benefit providers to recover from drug companies amounts that were overpaid due to illegal or deceptive marketing practices. Desiano v. Warner-Lambert Co., 326 F.3d 339, 349-50 (2d Cir. 2003). In In re Warfarin and Desiano, however, the plaintiffs sought relief under federal antitrust laws and consumer fraud claims, which are distinct from the RICO allegations brought here. Similarly, Plaintiffs cite Blue Cross & Blue Shield United v. Marshfield Clinic of Wis., 65 F.3d 1406, 1414-16 (7th Cir. 1995), another antitrust case in which no RICO claims were alleged, and the plaintiffs allegedly paid supracompetitive charges directly to the monopolist. Moreover, in a subsequent Seventh Circuit case, the court limited the Marshfield Clinic reasoning and applicability in RICO cases. **[*22]** Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 826-27 (7th Cir. 1999).

Plaintiffs also direct the Court to In re Zyprexa Prods. Liab. Lit., 493 F. Supp. 2d 571, 576 (E.D.N.Y. 2007), where RICO claims were alleged and survived a motion to dismiss, but which relied on *Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006)*, *rev'd sub nom.* McLaughlin v. American Tobacco Co., 522 F.3d 215, 228 (2d Cir. 2008). In overturning *Schwab,* the Second Circuit found that **HN5**[] plaintiffs' theories of injury -- loss causation -- were not cognizable under RICO. *See* McLaughlin, 522 F.3d at 228. The court held that the "loss of value model is designed to award plaintiffs damages based on the benefit of their bargain. Such damages are generally unavailable in RICO suits . . . [where the statute] compensates only for injury to 'business or property.'" *Id.* (internal citations omitted). Moreover, the defendants' misrepresentation "could in no way have reduced the value of the [product] that plaintiffs actually purchased," but rather the defendants "simply could have induced plaintiffs to buy [the product over other products]." Id. at 229. The **[*23]** Second Circuit determined that this alleged injury did not satisfy the requisite pleading of concrete financial loss for RICO claims. *See* Id. at 228-29. Thus, Plaintiffs' reliance on these cases is misplaced. [8]

---

[7] As the facts alleged apply to both the RICO and NJRICO claims and the RICO and NJRICO statutes are intended to have the same reach, the Court addresses these claims together under the RICO analysis.

[8] In Plaintiffs' causation argument, they also allege that damage models will demonstrate the effect of Defendants' scheme, contending that they have pled a cognizable injury and that Defendants were the cause of the injury. Pl. Opp. at 17. In that connection, the Court notes that this is not a viable approach. Plaintiffs essentially concede that they cannot identify any ascertainable concrete injury, since they assert that Defendants' "arguments [that Plaintiffs lack a cognizable injury or that they were the cause] are especially inappropriate at this early stage of the litigation, when the damage models that Plaintiffs will use

Defendants assert that Plaintiffs' allegations of "overpayment" are insufficient to constitute a RICO injury, where Plaintiffs seek recovery solely for an alleged economic loss, on the theory that alternative medications *might have been* at least as effective and cheaper than Risperdal. Defendants argue that Plaintiffs fail to allege that their beneficiaries, insured, or employees received an ineffective medication or that Risperdal physically harmed them, but rather concede that Risperdal was safe and effective. Thus, according to Defendants, Plaintiffs' purported injury, based on paying too much for a safe and effective medication, is plainly speculative and not a "concrete financial loss" cognizable under RICO. *See* *Maio, 221 F.3d at 483-84*. Indeed, in *Maio,* a case on which Defendants rely, the Third Circuit found that the plaintiffs failed to allege the facts necessary to support their assertion that they suffered a cognizable injury to business or property due to the alleged inferiority of the product received **[*25]** as compared to the product the defendants promised to deliver because the plaintiffs did not allege that they suffered any medical injuries, received inadequate or inferior care, or sought but were denied necessary care as a consequence of the defendants' plan. *Id. at 501*.

In response, Plaintiffs assert that their injury is "strikingly *dissimilar*" to those alleged by the plaintiffs in *Maio* because the property interest at stake in that case was in the nature of a contractual right to receive a certain level (quantity or quality) of health care benefits from the defendants, rather than a tangible property right. Pl. Opp. at 7. Plaintiffs also assert that, in *Maio,* the plaintiffs' injury was predicated on the conclusion that the alleged economic value of the product purchased was reduced because of the *possibility* that the alleged inferiority of the product would manifest itself at some point in the future. [9] *Id.* at 8. Although *Maio* did deal with an health insurance "product," Plaintiffs' attempt to distinguish themselves is unconvincing, as they assert a substantially similar "overpayment" argument as that made by the unsuccessful plaintiffs in *Maio. 221 F.3d at 487-88, 492-94*.

The plaintiffs in *Maio* argued that their RICO injury was based on each member of the nationwide class paying too much in premiums for an "inferior" health care product. *Id. at 484*. [10] In *Maio,* the plaintiffs' RICO injury theory was grounded in the argument that they paid too much in premiums for a health insurance plan of lesser value, namely the product received was inferior to the product the defendants promised to deliver. *Id. at 484 n. 11, 486*. There, the plaintiffs categorized their "concrete financial loss" as the "difference in value between the health insurance promised and the [allegedly 'inferior' and less valuable] health insurance actually received." *Id. at 486*. The Circuit Court rejected the plaintiffs' injury theory based on financial losses of overpayment that the plaintiffs purportedly sustained by enrolling in this inferior plan, since the plaintiffs did not plead that the enrolled "individuals were denied medically necessary benefits, received inadequate, inferior or delayed medical treatment, or even worse, suffered personal injuries as a result of [the defendants' conduct]." *Id. at 488*.

---

to demonstrate the effect of Defendants' scheme have yet to be presented, let alone tested." Pl. Opp. at 17. ***HN6***[] Some sort of damage model, yet to be presented, does not substitute for adequately pleading an injury or causation. See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 929 (3d Cir. 1999)* (rejecting the use of **[*24]** "aggregation and statistical modeling" to satisfy burden of pleading causation). Thus, Plaintiffs' only identified injury is their alleged economic loss from "overpayment."

[9] The *Maio* **[*26]** court, in analyzing the plaintiffs' claim that "they need not plead and prove allegations concerning the level of care that they received to establish the fact of damage," which was their RICO injury to property theory, determined that the plaintiffs did not have standing. *Maio, 221 F.3d at 494*. It was under this analysis that the court found that insofar as the plaintiffs' argument was predicated "exclusively on the possibility that future events might occur [and that the quality of care administered may suffer in some undefined way], rather than on the actual occurrence of those events and their present effect on the value of the health insurance" received, the plaintiffs' theory of present economic loss was too speculative and was insufficient to support a cause of action under RICO. *Id. at 494-95*. Thus, in this case, Plaintiffs plead past and present injury due to the alleged injury of overpaying for the "inferior" product they purchased. But similarly, here, Plaintiffs do not identify any present injury to their insured or beneficiaries. *Maio's* analysis of injury based on the economic loss of the product allegedly marketed and that an inferior product was allegedly received is **[*27]** pertinent.

[10] The Third Circuit noted that if the product "simply was *different* **[*28]** than that which was promised to appellants, then there would be no factual basis for an argument that they overpaid, inasmuch as a 'different' but equally good health insurance package would have an equivalent economic value." *Id. at 484 n. 11* (emphasis in original). The court determined that the defendants' health insurance "could not be characterized as 'worth less' in monetary value unless it was inferior in some respect" to the product that had been contracted for. *Id.*

Similar to *Maio*, in the instant case, Plaintiffs categorize their "concrete financial loss" as overpaying for Risperdal for off-label uses due to Defendants' allegedly fraudulent and deceptive marketing practices, which inflated the number of prescriptions of Risperdal written and filled and increased Plaintiffs' co-payments and out-of-pocket costs. Compl. PP 187, 192-93; Pl. Opp. at 5. Plaintiffs plead that they overpaid for Risperdal because it was "neither more effective nor safer than older typical antipyschotics." Compl. P 51. In addition, Plaintiffs plead that "the efficacy of all [second generation antipyschotics] is similar" and that none of the second generation antipyschotics are superior in efficacy to **[*29]** the cheaper older typical antipyschotics. Id. In that regard, Plaintiffs plead that they were injured by their "economic loss," which is "unaffected by whether any given patient ingested Risperdal or suffered adverse side effects." Id. P 11. This is substantially similar to the *Maio* plaintiffs' argument of overpayment; in that, the "difference in value between the [drug] promised and the [allegedly "inferior" and less valuable drug] actually received." *Maio, 221 F.3d at 486*. Yet, according to Third Circuit precedent, ***HN7***[] Plaintiffs' injury theory based on financial losses of overpayment that Plaintiffs purportedly sustained by paying for this "inferior" drug is inadequate for sustaining a RICO injury, absent allegations that Defendants' drug was on some level "inferior and therefore 'worth less' than what [Plaintiffs] paid for it." *Id. at 488*.

Plaintiffs here allege that Defendants "admitted that [they] omitted material information about Risperdal, minimized potentially fatal risks, and made misleading claims suggesting superior safety in comparison to other atypical antipsychotics without adequate substantiation." Compl. P 131. Further, Plaintiffs allege that treating behavioral disorders **[*30]** in elderly patients with dementia with atypical (second generation) antipyschotic medications, like Risperdal, is associated with increased mortality. *Id. P 132*. However, nowhere do Plaintiffs allege that any beneficiaries, insured, or employees taking Risperdal "received [an] inadequate[or] inferior [drug] or even worse, suffered personal injuries as a result of" Defendants' alleged misrepresentations. *Maio, 221 F.3d at 488*.

Furthermore, Plaintiffs do not plead that Risperdal is inferior to competitor drugs, i.e., that Risperdal is less effective and/or less safe than, or that the side effects of Risperdal are also not associated with, other comparable drugs. Plaintiffs assert that "[r]esearch and studies have illustrated that physicians can prescribe lower-cost and equally effective alternatives to treat the conditions for which Defendants have promoted the off-label use of Risperdal." Compl. P 56. For example, Plaintiffs assert that Trilafon is more cost-effective than the newer drugs, like Risperdal, in terms of their "human benefit" because it is no less effective and substantially less expensive, by between $ 3,600 and $ 7,000 a year. *Id.* P 62. Applying *Maio,* however, ***HN8***[] merely stating **[*31]** that Risperdal is "equally effective," "no . . . more effective," or "neither more effective nor safer," all of which imply that it is no less effective or safe, is not a sufficient pleading of inferiority to sustain Plaintiffs' RICO injury. *See* *221 F.3d at 488* (finding that without pleading denial of benefits, inadequate, inferior or delayed treatment, or actual injury, "there is no factual basis for appellants' conclusory allegation that they have been injured in their 'property' because the health insurance they actually received was inferior and therefore 'worth less' than what they paid for it"); Compl. PP 51, 56, 59. In addition, ***HN9***[] where no additional pleading of injury is alleged, Plaintiffs' allegations that there are more "cost-effective" alternatives do not meet the required pleading of overpayment as a concrete financial loss. *See* *Maio, 221 F.3d at 488*.

HN10[] "Inasmuch as there are no allegations in the complaint to the effect that appellants have received inadequate care, suffered medical injuries, or have been denied medically necessary care, the fair inference to be drawn from the complaint . . . is that none of those events have occurred." *Maio, 221 F.3d at 500*. Similarly, Plaintiffs **[*32]** allege that Defendants' fraud is their misrepresentation of the safety and efficacy of Risperdal for off-label uses and that it is worth less than what they paid for it, without alleging that the drug harmed the beneficiaries in any way or that the drug lacked safety or efficacy; as such, the Court must infer that the drug did not harm the beneficiaries. ***HN11***[] "Without alleging that a product failed to perform as advertised, a Plaintiff has received the benefit of his bargain and has no basis to recover purchase costs." *Williams v. Purdue Pharma Co., 297 F. Supp. 2d 171, 176 (D.D.C. 2003)* (citation omitted). Therefore, Plaintiffs do not plead a concrete financial loss in the form of overpayment, absent allegations that the drug was inferior on some level and worth less than what they paid for it. Because Plaintiffs fail to sufficiently allege a cognizable RICO injury under federal or New Jersey law, they lack standing to bring such claims.

2. Causation

Defendants argue that Plaintiffs also lack standing to bring Counts I and III of their Complaint because Plaintiffs' theory of causation is too attenuated and speculative. In their supplemental filing, dated June 11, 2008, Defendants concede **[*33]** that the Supreme Court, in *Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S.Ct. 2131, 170 L. Ed. 2d 1012 (2008)*, held that ***HN12***[] a plaintiff need not plead and prove that it relied on the defendant's alleged misrepresentations. While Defendants concede that first-party, or here, third-party payor, reliance is no longer an issue, [11] they press their other independent bases for dismissal on causation grounds. Plaintiffs counter that their Complaint adequately alleges that Defendants' conduct proximately caused their alleged injury. [12] However, as Plaintiffs fail to adequately plead a cognizable RICO or NJRICO injury, they fail to assert that Defendants' conduct proximately caused their injury.

Notwithstanding Plaintiffs' failure **[*35]** to properly plead an injury, the Court also has a substantial question as to whether Plaintiffs could ever properly plead proximate causation, as required by *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, or if the independent and individualized decision-making of physicians prescribing Risperdal breaks any chain of causation between Defendants' alleged misconduct and Plaintiffs' payment for the medication. *See, e.g., Mazur v. Merck & Co., Inc., 964 F.2d 1348, 1355 (3d Cir. 1992)*; *Heindel v. Pfizer, Inc., 381 F. Supp. 2d 364, 382 (D.N.J. 2004)*. In addition, in a recent, substantially similar action, in which the plaintiffs were represented by many of the same counsel as in this case, the court determined that the plaintiff third-party payors' claims were "too remote" to satisfy civil RICO's proximate causation requirement. *Ironworkers Local Union No. 68 & Participating Employers Health & Welfare Funds, et al. v. Astrazeneca Pharms. LP, et al., No. 07-5000, 585 F. Supp. 2d 1339, 2008 U.S. Dist. LEXIS 92687, 2008 WL 4832659, at *4 (M.D. Fla. Nov. 3, 2008)*. Nevertheless, because Plaintiffs do not sufficiently allege an injury under federal or New Jersey law, they lack standing to bring RICO and NJRICO claims, and the Court **[*36]** need not address causation more fully.

3. Enterprise

Although Defendants have not briefed the issue or disputed the adequacy of Plaintiffs' allegations regarding enterprise, the Court will briefly address whether Plaintiffs' allegations are sufficient to survive a motion to dismiss. ***HN14***[] An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. A RICO enterprise is "an entity [made up of] a group of persons associated together for the common purpose of engaging in a course of conduct." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. To

---

[11] Defendants also note, and this Court agrees, that the Supreme Court, in *Bridge,* stated that "none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." *128 S.Ct. at 2144* (internal citations omitted) (emphasis in original). Therefore, as the Supreme Court said, it will be unlikely that Plaintiffs will be able "to establish even but-for causation if no one relied on the misrepresentation" and "the **[*34]** complete absence of reliance may prevent the plaintiff from establishing proximate cause." *Id.* "Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation." *Id.*

[12] Defendants argue that Plaintiffs' "inflated price" theory of causation is "a quintessential fraud-on-the-market theory" of causation. Plaintiffs assert they do not allege such a theory. Pl. Opp. 9 n. 3. The Court notes, however, that if indeed that is what Plaintiffs are pleading, ***HN13***[] this theory is not recognized in the RICO context, and thus, not a viable theory here. See, e.g., *McLaughlin, 522 F.3d at 228*; *Sikes v. Teleline, Inc., 281 F.3d 1350, 1362-63 (11th Cir. 2002)*, abrogated on other grounds, *Bridge v. Phoenix & Indem. Co., 553 U.S. 639, 128 S.Ct. 2131, 170 L. Ed. 2d 1012 (2008)*; *Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 561 & n. 24 (5th Cir. 2000)*; *In re Rezulin Prods. Liab. Litig., 524 F. Supp. 2d 436, 441 (S.D.N.Y. 2007)* ; *Heindel v. Pfizer, Inc., 381 F. Supp. 2d 364, 380 (D.N.J. 2004)* ; *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., 192 N.J. 372, 392, 929 A.2d 1076 (2007)*.

establish the existence of an enterprise, a plaintiff must prove that (1) the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; (2) the members of the enterprise function as a continuing unit with established duties; and (3) the enterprise must be separate and apart from the pattern of activity in which it engages. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789-90 (3d Cir. 1984)*. However, as the rules of pleading **[*37]** require nothing more at this early juncture than a bare allegation, where a plaintiff identifies the "entities it believed were the enterprises that had been marshalled against it," a plaintiff sufficiently alleges the existence of an enterprise. *Id. at 790*.

Plaintiffs allege that Defendants created and used a "Marketing Firms Enterprise," comprised of Defendants and "seemingly-independent research organizations and marketing and public relations firms," as the "vehicle or tool to effectuate the Defendants' pattern of racketeering activity" in its alleged "scheme to market Risperdal for off-label use." Compl. PP 10, 207-08. Plaintiffs further allege that this uniform marketing scheme devised by Defendants was designed to mislead physicians and resulted in increased sales of Risperdal, thus depriving Plaintiffs of cheaper alternatives and/or resulting in higher prices for the drug than otherwise would have existed. *Id.* P 12. Plaintiffs allege that Defendants, through the enterprise, hosted CMEs, at which physicians, compensated by Defendants, relayed misleading information to encourage other physicians to prescribe Risperdal for off-label uses. *Id.* PP 84-96, 136-38. Based on these allegations **[*38]** and Defendants' failure to contest the enterprise component, the Court finds that Plaintiffs have sufficiently alleged that an enterprise existed.

4. Racketeering Activity

HN15[] To allege a RICO violation, a plaintiff must articulate a pattern of racketeering activity, *i.e.*, predicate acts. [13] *See* *Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc., 87 Fed. Appx. 227, 231 (3d Cir. 2003)* (citations omitted). The claim "must include the allegation of at least two (2) racketeering acts." *Zellner v. Monroe County Mun. Waste Mgmt. Auth., No. 07-1976, 2008 U.S. Dist. LEXIS 57769, at *20 (M.D. Pa. July 28, 2008)*. When fraud is the predicate act, a plaintiff must satisfy the heightened pleading standard of *Federal Rule of Civil Procedure 9(b)*. *See* *Warden v. McLelland, 288 F.3d 105, 114 (3d Cir. 2002)*. Specifically, *Rule 9(b)* states "a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. In *Frederico v. Home Depot, 507 F.3d 188 (3d Cir. 2007)*, the Third Circuit qualified what information must be alleged to satisfy the heightened pleading standard of *Rule 9(b)*:

> ***HN16***[] Pursuant to *Rule 9(b)*, a plaintiff alleging fraud must state the circumstances of **[*39]** the alleged fraud with sufficient particularity to place the defendant on notice of the "precise misconduct with which [it is] charged." *Lum v. Bank of America, 361 F.3d 217, 223-224 (3d Cir. 2004)*. To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation. *See* *Id. at 224*.

Frederico, 507 F.3d at 200; *see also* *Seville Indus. Mach. Corp., 742 F.2d at 791*.

HN18[] General allegations, such as fraud and theft, will not satisfy the pleading standard as they are "not included as [specifically listed] racketeering activit[ies] pursuant to *18 U.S.C. § 1961(1)*." *Zellner, 2008 U.S. Dist. LEXIS 57769 at *23*. Instead, Plaintiffs, more specifically, attempt to allege that the predicate acts are mail and wire fraud. [14] "Where acts of mail and wire fraud constitute the alleged predicate racketeering acts, those acts are

[13] ***HN17***[] "To set out a prima facie showing of a civil RICO violation under *18 U.S.C. § 1964(c)*, a plaintiff must have been injured by 'racketeering activity,' *18 U.S.C. § 1962(c)-(d)*. 'Racketeering activity' is defined as a violation of certain enumerated statutes - commonly known as 'predicate acts' - in *18 U.S.C. § 1961(1)*." *Breslin v. Brainard, 128 Fed. Appx. 237, 240 (3d Cir. 2005)*; *see also* *Anderson v. Ayling, 396 F.3d 265, 269 (3d Cir. 2005)* ("The term 'racketeering activity' is defined in *18 U.S.C. § 1961(1)* to include a long list of state and federal crimes, among them the wire fraud alleged here."); *see generally* *18 U.S.C. §§ 1341*, *1343*. The Third Circuit permits federal common law or "garden variety" **[*40]** fraud, including mail and wire fraud. *Tabas v. Tabas, 47 F.3d 1280, 1290 (3d Cir.)*, *cert. denied,* ***515 U.S. 1118, 115 S. Ct. 2269, 132 L. Ed. 2d 275 (1995)***.

subject to the heightened pleading requirement of Rule 9(b)." Warden, 288 F.3d at 105 (citing Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 657-58 (3d Cir.1998)). The Third Circuit in *Annulli v. Panikkar* addressed the differential pleading nature of mail and wire fraud:

> **HN19**[] There are two elements of a mail or wire fraud charge: "(a) a scheme to defraud, and (2) a mailing or wire in furtherance of that scheme." Greenberg v. Brewster, 816 F. Supp. 1039, 1049 (E.D. Pa. 1993). Wholly intrastate use of the mails for fraud violates the mail fraud statute. *See, e.g.,* In re Burzynski, 989 F.2d 733, 742 (5th Cir. 1993). **[*41]** In contrast, the federal wire fraud statute requires interstate use of the wire. *See, e.g.,* Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988) ("As several courts have recognized, the statute requires that the wire communication cross state lines.").

200 F.3d 189, 200 n. 9 (3d Cir. 1999); *see also* Zellner, 2008 U.S. Dist. LEXIS 57769 at *22-23 (citing Stanley v. Int'l Bhd. of Elec. Workers, AFL-CIO CLC, 207 Fed. Appx. 185, 189 (3d Cir. 2006)) (internal quotations omitted) ("[T]he wire fraud statute, 18 U.S.C. § 1343, 'criminalizes a scheme to defraud that is transmitted by wire 'in interstate or foreign commerce'; thus, a complaint must allege interstate use of the wire for each predicate act."). Moreover, when asserting mail fraud allegations, a plaintiff must "identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentations." Annulli, 200 F.3d at 201 n. 10. In other words, the plaintiff's pleading must contain the "who, what, when and where details of the alleged fraud." Bonavitacola, 87 Fed. Appx. at 231 (quoting Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network, No. 99-4653, 2001 U.S. Dist. LEXIS 284, 2001 WL 41143 (E.D. Pa. Jan. 18, 2001)).

Accordingly, **HN20**[] this Court will only consider as predicate racketeering acts those wire frauds which have been alleged to have been transmitted by wire "in interstate or foreign commerce" and those mail frauds that are alleged to have made use of the United States Postal Service. *See* Zellner, 2008 U.S. Dist. LEXIS 57769 at *23 (**HN21**[] "As these . . . frauds were not properly plead, the Court will not consider them as 'predicate acts.'"). Further, **HN22**[] this Court will only consider as predicate racketeering acts those mail and wire frauds alleged with the specificity required by the heightened pleading standard of Rule 9(b). Upon a liberal construction of Plaintiffs' Complaint, this Court cannot discern a communication that arguably rises to the level of specificity needed to satisfy 9(b)'s heightened pleading requirement. *See* Bonavitacola, 87 Fed. Appx. at 231. It is impossible for this Court to discern the "date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation" of the communications between Defendants. *See* Frederico, 507 F.3d at 200. Thus, Plaintiffs have failed **[*43]** to plead the level of specificity required by the heightened pleading standard of Rule 9(b).

In the instant case, Plaintiffs respond to Defendants' assertion that Plaintiffs' Complaint lacks particularity as "simply unfounded," citing the seventy pages of their Complaint to show their "ample specificity to meet the pleading requirements." Pl. Opp. at 17. Plaintiffs argue that they "have marshaled, even at this pre-discovery phase, abundant substance and specificity." *Id.* at 18. Plaintiffs direct the Court to note, for example, their detailing of "Risperdal's global sales, volume, percentage and total revenue in off-label prescription market segments including the fact that sales of Risperdal and Risperdal Consta accounted for approximately 8% and 6%, respectively, of [Johnson & Johnson's] total revenue for the 2006 fiscal year, and Risperdal was used off-label 66% of the time." *Id.;* Compl. P 49. Yet, even upon a liberal construction of the Complaint, Plaintiffs essentially concede that they "do not indicate the date, time, or place of any misrepresentations" nor do they otherwise inject precision or some measure of substantiation into a fraud allegation to discern a communication that **[*44]** arguably rises to the level of specificity needed to satisfy 9(b)'s heightened pleading requirement. Lum, 361 F.3d at 224; *see* Bonavitacola, 87 Fed. Appx. at 231.

In their Opposition, Plaintiffs argue that the Court should apply the Third Circuit's more relaxed standard for pleadings under Rule 9(b) in the case of corporate fraud. *See* Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284-85 (3d

---

[14] Plaintiffs **[*42]** also allege bribery as a predicate act. *See* Part III.A.4, *infra.*

Cir. 1992) (**HN23**[] "Particularly in cases of corporate fraud, plaintiffs cannot be expected to have personal knowledge of the details of corporate internal affairs. Thus, courts have relaxed the (particularity) rule when factual information is peculiarly within the defendant's knowledge or control.") (citing Craftmatic Sec. Lit. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)). In *Shapiro,* the Third Circuit reiterated "at the very least plaintiffs must allege that the necessary information lies within defendants' control." *Id.* (internal citations and quotations omitted). In reviewing the district court's dismissal of the plaintiffs' allegations for failure to allege the defendants had exclusive control over the information required to satisfy particularity, the Circuit Court noted that the complaint did not specifically **[*45]** allege that the defendants had exclusive control of the information the plaintiffs needed, but rather "allege[d] only that defendants had access -- but not exclusive access -- to company information when the alleged misrepresentations and omissions occurred." Id. at 285 n. 13. Further, the Third Circuit found that even if the complaint contained boilerplate allegations that the necessary information was within the defendant's exclusive control, Rule 9(b) would still not be satisfied. *See* Id. at 285. Rather, under this more relaxed application of the rule, "plaintiffs must accompany such an allegation with a statement of facts upon which their allegation is based." Id. (internal citations omitted). More specifically, "a complaint must delineate at least the nature and the scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity." *Id.*

Plaintiffs assert that they have sufficiently plead with particularity because "the internal corporate mechanisms and activities engaged in by the Defendants in furtherance of their fraudulent scheme are within the exclusive knowledge and understanding of Defendants," citing to *Craftmatic* and **[*46]** *Shapiro,* among others. Pl. Opp. at 17-18. Plaintiffs, however, do not make these allegations in their Complaint. As Plaintiffs do not even allege an insufficient boilerplate allegation that the information they require is within the Defendants' control, they certainly fail to meet even the more relaxed application of the Rule that they argue applies. This application still requires Plaintiffs' allegations to include at least the nature and the scope of Plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity. *See* Shapiro, 964 F.2d at 285. Thus, even if the more relaxed standard of Rule 9(b) were applicable, which it is not, Plaintiffs fail to meet the pleading of particularity required for mail and wire fraud as predicate RICO acts.

Plaintiffs also appear to allege bribery as a predicate act. Compl. PP 9, 212. Even though Defendants do not raise the sufficiency of Plaintiffs' pleading with respect to this specific predicate act, Defendants have argued an overall failure to plead the alleged predicate acts with particularity, and the Court finds that Plaintiffs have not sufficiently alleged that Defendants engaged in bribery as a predicate **[*47]** RICO act. **HN24**[] While bribery does not invoke the heightened pleading requirements of Rule 9(b), Plaintiffs must satisfy the more liberal pleading requirements of Rule 8(a) to adequately plead bribery as a predicate act, and they do not. Plaintiffs make no effort to delineate the elements of bribery nor do they cite to any statute which does so, and thus, Plaintiffs have failed to put Defendants on notice as to what laws they are alleged to have violated. *See generally* Lockheed Martin Corp. v. Boeing Co., 357 F. Supp. 2d 1350, 1374-75 (M.D. Fla. 2005).

HN25[] "A 'pattern of racketeering activity means' at least two predicate acts that 'are related and that amount to or pose a threat of continued criminal activity.'" Bonavitacola, 87 Fed. Appx. at 231 (*quoting* H. J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)). Plaintiffs fail to sufficiently allege even one predicate act as required by RICO, as discussed herein. Accordingly, Plaintiffs have not sufficiently plead their RICO claims under federal or New Jersey law, and the Court grants Defendants' motion to dismiss Counts I and III of Plaintiffs' Complaint pursuant to Rule 12(b)(6).

B. Plaintiffs' Allegation of Defendants' Conspiracy to Commit [*48] RICO

In Count II of their Complaint, Plaintiffs allege that Defendants conspired to violate RICO, 18 U.S.C. § 1962(d). As preliminary matter, Defendants argue that Plaintiffs' RICO conspiracy theory is substantively deficient because it is based on the alleged conspiracy between and among Defendants and their corporate agents. Df. Mot. at 19. More specifically, Defendants argue that Janssen and Johnson & Johnson are subsidiary and parent, respectively, and a corporation is incapable of conspiring with itself, its corporate officers, its subsidiaries or its agents. *See Id.* In response, Plaintiffs claim that the Third Circuit has recognized a claim for intra-corporate conspiracies under RICO in *Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1164, 1166-67 (3d Cir. 1989)*, *abrogated on other grounds, Beck v. Prupis, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000)*.

Neither the Supreme Court nor the Third Circuit has expressly decided whether *RICO, § 1964(d)*, permits claims of intra-corporate conspiracy, or whether a corporation may conspire with its wholly owned subsidiaries. Federal courts within this Circuit disagree about whether the Third Circuit, in *Shearin,* held that a corporation could conspire with its wholly **[*49]** owned subsidiaries under *§ 1962(d)* to violate *§ 1962(c) of RICO*. [15] *Compare Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1990)* (finding that, in *Shearin,* the Third Circuit "concluded that a corporation could conspire with its wholly owned subsidiaries under *§ 1962(d)*"), [16] *with Albert Einstein Med. Ctr. v. Physicians Clinical Servs., Ltd., No. 90-3387, 1991 U.S. Dist. LEXIS 18705, 1991 WL 280274, at *5-6 (E.D. Pa. Dec. 20, 1991)* (stating that *Shearin* did not address the issue of whether a corporation and its subsidiaries may conspire to commit a violation of *§ 1962(d) of RICO*, finding that *Curley* misinterpreted the Third Circuit's holding in *Shearin,* and determining that Third Circuit precedent does not allow corporations who were innocent victims of a conspiracy among employees to be exposed to RICO liability). This Court finds that *Shearin* did not address the issue of whether a corporation and its subsidiaries may conspire to commit a violation of *§ 1962(d) of RICO and* that it remains an open issue in this Circuit.

Other federal circuit courts **[*52]** also disagree about whether RICO permits intra-corporate conspiracies. *See Fogie v. THORN Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999)*; [17] *Webster v. Omnitrition International, Inc., 79*

---

[15] Defendants argue that even if *Shearin* could be read as permitting a finding that a corporation and its subsidiaries may conspire under RICO, it would only be actionable **[*50]** if "the relationship between the parent corporation and its subsidiaries were established *solely for the purpose* of committing fraud." Def. Reply at 13 (citing *Glessner v. Kenny, 952 F.2d 702, 714 (3d Cir. 1991)*, *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995))*. This, however, was not the finding in *Glessner* or *Shearin.* First, *Shearin* did permit a RICO conspiracy where the facts disclosed an intra-corporate relationship, nonetheless, *Shearin* did not address whether a corporation could conspire with its wholly owned subsidiaries under *§ 1962(d)* to violate *§ 1962(c) of RICO*. See *885 F.2d at 1166-67*. Second, in *Glessner,* the Third Circuit merely reiterated that RICO conspiracy claims must allege an "agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity." *952 F.2d at 714*. The court then pointed out that, since the plaintiffs in *Shearin* pled that the relationship between the parent corporation and its subsidiaries was established solely for the purpose of committing fraud, the plaintiffs adequately pled the required inference that the defendant companies allegedly agreed to commit **[*51]** predicate acts and knew that they were part of a pattern of racketeering activity. *Glessner, 952 F.2d at 714*. *Glessner* did not hold that this fraudulent creation of a subsidiary is a necessary requirement for pleading RICO conspiracy, as Defendants appear to assert, but rather *Glessner* used the *Shearin* facts to distinguish *Shearin* from the case before the court and to explain why the plaintiffs in *Glessner* failed to provide a similar reasonable inference of adequately pleading RICO in their complaint. *Id.*

[16] In *Curley,* the District Court stated that Third Circuit's ruling in *Shearin* on "intra-corporate conspiracies is more faithful to the broad remedial purpose of RICO than a narrow reading which is model[ed] on ***antitrust law***." *Curley, 728 F. Supp. 1123, 1135 (D.N.J. 1990)* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. The *Curley* court also stated that "while ***antitrust law*** seeks to encourage inter-corporate competition even at a cost to intra-corporate competition, RICO seeks to eliminate all racketeering activity, both intercorporate and intra-corporate." *Id.* (citing *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*.

[17] The Eighth Circuit determined where the plaintiffs alleged that the only participants in the conspiracy were the parent corporation and its wholly owned subsidiaries, the plaintiffs "fail[ed] to allege a conspiracy, because as a matter of law a parent corporation and its wholly owned subsidiaries are legally incapable of forming a conspiracy with one another." *Fogie v. Thorn Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999)*. Applying *Copperweld's* principle that "[i]n any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit," *467 U.S. at 769*, the *Fogie* court found that the identical conclusion was required when it is applied to alleged parent-subsidiary RICO civil conspiracies. *Fogie, 190 F.3d at 898*. In *Fogie,* the court stated that an alleged conspiracy between a parent and a subsidiary lacks this crucial element because these entities "have a complete unity of interest." *Id.* The Eighth Circuit criticized the Seventh and Ninth Circuits for failing "to **[*54]** explain why, when two entities are under common control and there is no distinctiveness or independence of action, an agreement or understanding between them creates any of the special dangers *§ 1962(d)* targets." *Id.*

F.3d 776, 787 (9th Cir.), *cert. denied, 519 U.S. 865, 117 S. Ct. 174, 136 L. Ed. 2d 115 (1996)*; [18] Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989). [19] Since the law in this area of RICO is unsettled, district courts have looked to antitrust cases for guidance. *See, e.g., In re National Mortgage Equity Corp. Mortgage Pool Cert. Sec. Litig., 636 F. Supp. 1138, 1156 (C.D. Cal. 1986)*. The Supreme Court has clearly held that under the Sherman Act, 15 U.S.C. § 1, a parent company and its wholly owned subsidiary are incapable of conspiring with each other. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776-77, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). In *Copperweld,* the Court determined that "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." Id. at 771. As the parent and subsidiary always have a "unity of purpose or a common design," *Id.,* the Court held that **[*53]** parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. Id. at 777.

The majority of courts within this Circuit agree that ***HN26***[] a corporation cannot conspire with its agents **[*56]** and/or employees under § 1962(d) of RICO. *See, e.g.,* Castle v. Crouse, No. 03-5252, 2004 U.S. Dist. LEXIS 2123, 2004 WL 257389, at *6 (E.D. Pa. Feb. 11, 2004) (concluding that a corporate entity cannot conspire with its employees); Hughes v. Technology Licensing Consultants, Inc., 815 F. Supp. 847, 851 (W.D. Pa. 1992) ("The majority rule is that ***HN27***[] conspiracy cannot lie against the corporate entity for the concerted action of its employees who violate RICO on its behalf."); Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 405 n. 23 (D. Del. 1986) (finding ***HN28***[] parents and subsidiaries "can conspire in violation of RICO no more than they [can] for antitrust purposes"). *Contra* Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., No. 95-1698, 1996 U.S. Dist. LEXIS 3427, 1996 WL 135336, *5 (E.D. Pa. Mar. 19, 1996) ("a RICO conspiracy can exist between a corporation and its agents or employees"); Curley, 728 F. Supp. at 1135 (recognizing intra-corporate conspiracies under RICO). ***HN29***[] An alleged intra-corporate conspiracy comprised solely of a corporation acting in concert with its officers and employees should not be considered as involving separate actors conspiring under the law. *See* Emcore Corp. v. PricewaterhouseCoopers LLP, 102 F. Supp. 2d 237, 266 (D.N.J. 2000). **[*57]** ***HN30***[] The decision that a RICO conspiracy claim cannot stand where a corporation is alleged essentially to have done nothing more than act in concert with its officers and employees, stems from the premise that "[a] corporation, legally conceived, is only one person" under RICO. *See Id.* These courts generally agree that an exception to the rule against intra-corporate conspiracies exists where the employees act in pursuit of their own interests and not for the benefit of the corporation. *See* Castle, 2004 U.S. Dist. LEXIS 2123, 2004 WL 257389, at *6 (internal citations omitted). Thus, only where the plaintiff alleges something more than a corporation acting in concert with its officers and employees, can a RICO conspiracy claim proceed.

---

[18] The Ninth Circuit, relying on the Seventh Circuit's decision in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), extended § 1962(d) liability to a wholly intra-corporate conspiracy. *See* Webster v. Omnitrition International, Inc., 79 F.3d 776, 787 (9th Cir.), *cert. denied,* **519 U.S. 865, 117 S. Ct. 174, 136 L. Ed. 2d 115 (1996)**.

[19] The Seventh Circuit distinguished the Supreme Court's holding that a parent corporation could not conspire with its wholly-owned subsidiary for purposes of § 1 of the Sherman Act, as a barrier for relief in RICO claims "because the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.'" Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago, 747 F.2d 384, 403 n. 22 (7th Cir. 1984) (citing Copperweld, 104 S.Ct. at 2740-44), *cert. granted,* ***469 U.S. 1157, 105 S. Ct. 902, 83 L. Ed. 2d 917 (1985)***, *aff'd on other grounds,* 473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985). Further, in *Haroco,* the court stated that **[*55]** "[t]he policy considerations discussed in *Copperweld*[] therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity." *Id.* The Seventh Circuit determined that the Sherman Act's theoretical "community of interest" that causes a parent and subsidiary to pose "no threat to the goals of ***antitrust law***-protecting competition" differs from RICO conspiracies because "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits." Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (citing Russello v. United States, 464 U.S. 16, 26-28, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). The Eighth Circuit criticized the Seventh Circuit's findings because its "recent decisions regarding intracorporate liability under § 1962(c) . . . appear to undercut the conclusions it reached in *Ashland Oil." Fogie, 190 F.3d at 897 n. 4* (noting that "[m]ore recently . . . the Seventh Circuit has indicated that related business entities may not serve as both the person and enterprise).

HN31[] The inquiry of whether a parent corporation is capable of conspiring with its wholly owned subsidiary for purposes of violating § 1962(d) of RICO is similar to that of whether a parent can conspire with its subsidiaries under § 1 of the Sherman Act or whether a corporation can conspire with its agents and/or employees under § 1962(d) of RICO. In all three scenarios, where an intracorporate conspiracy is alleged, the two conspiring entities are but one. The parent and its wholly owned **[*58]** subsidiary share a complete unity of interest, with common objectives. *See* Copperweld, 467 U.S. at 771. Similarly, a corporation typically acts in concert with its officers and employees, as one legal person, with similar goals. *See* Emcore, 102 F. Supp. 2d at 266. Thus, a parent corporation cannot conspire with its wholly owned subsidiary to violate § 1962(d) of RICO because the two entities always have a "unity of purpose or a common design." Copperweld, 467 U.S. at 777. There is a recognized exception, as pointed out above, in the case where a plaintiff alleges that the employees acted in pursuit of their own interests and not for the benefit of the corporation, or there is an allegation that entities no longer act as one and thus may be considered separate actors under the law. *See Id.;* Castle, 2004 U.S. Dist. LEXIS 2123, 2004 WL 257389, at *6. Therefore, HN32[] to state a claim under § 1962(d), where a parent corporation has allegedly conspired with its wholly owned subsidiary, there must be some additional allegation, e.g., that the subsidiary was fraudulently created to accomplish the racketeering activity. See, e.g., Shearin, 885 F.2d at 1166-67. That has not been done here. In this case, Plaintiffs allege, albeit **[*59]** inadequately, that Defendants, a parent corporation and its wholly owned subsidiary, conspired with each other and with the other (unnamed) members of the alleged enterprise in violation of § 1962(d). Compl. P 225-226. This is not sufficient.

Furthermore, Plaintiffs fail to adequately plead a RICO conspiracy claim, according to the Third Circuit precedent with requires HN33[] a claim under § 1962(d) of RICO to include:

> "(1) agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate section 1962(a), (b), or (c)." Odesser v. Continental Bank, 676 F. Supp. 1305, 1312 (E.D.Pa.1987). "(A)llegations of conspiracy are not measured under the . . . [Fed.R.Civ.P.] 9(b) standard, which requires greater particularity of allegation of fraud, but are measured under the more liberal . . . (Fed.R.Civ.P. 8(a)) pleading standard." . . . A conspiracy claim must also contain supportive factual allegations. *Black & Yates, Inc. v. Mahogany Ass'n, Inc., 129 F.2d 227, 231-32 (3d Cir.)*, *cert. denied, 317 U.S. 672, 63 S. Ct. 76, 87 L. Ed. 539 (1942)*. The allegations must be sufficient to "describe the general **[*60]** composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy." Alfaro, 606 F. Supp. at 1117-18.

Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989). Plaintiffs fail to set forth the period of this supposed RICO conspiracy or the actions Defendants allegedly took in support of it. *See Id.* (HN34[] recognizing "only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose" as sufficient). Plaintiffs also fail show how all of the alleged conspirators knew that their acts were part of a pattern of racketeering activity.

In any event, Plaintiffs' allegations that Defendants violated § 1962(d) by conspiring to violate § 1962(c) in this case fail as a matter of law because Plaintiffs have not sufficiently plead a federal RICO claim under § 1962(c). *See* Part III.A, *supra.* HN35[] "Any claim under section 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient." Lum, 361 F.3d at 227 n. 5 (internal citations **[*61]** and quotations omitted). Thus, the Court grants also Defendants' motion to dismiss Count II of Plaintiffs' Complaint, the RICO conspiracy claim.

IV. Conclusion

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss Count I-III of Plaintiffs' Complaint.

Dated December 23, 2008

/s/ Freda L. Wolfson

Honorable Freda L. Wolfson

United States District Judge

Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.

United States District Court for the District of New Jersey

December 30, 2008, Decided; December 30, 2008, Filed

Civ. No. 05-4376 (GEB)

Reporter

596 F. Supp. 2d 842 *; 2008 U.S. Dist. LEXIS 107311 **; 2009-1 Trade Cas. (CCH) P76,672

ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs, v. CHINA NATIONAL METALS & MINERALS IMPORT & EXPORT CORPORATION, et al., Defendants.

Subsequent History: Complaint dismissed at, Application denied by, Motion denied by, Reserved by *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 2010 U.S. Dist. LEXIS 35243 (D.N.J., Apr. 1, 2010)*

Core Terms

magnesite, Plaintiffs', imports, prices, Defendants', Export, allegations, conspiracy, minerals, cartel, Sherman Act, Processed, percent, producers, commerce, products, http, magnesium, entities, commodity, default, antitrust, domestic, markets, trade and commerce, asserting, subject matter jurisdiction, anticompetitive, costs, usgs

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

HN1[] **Judges, Discretionary Powers**

Default is governed by *Fed. R. Civ. P. 55*. Pursuant to *Rule 55(a)*, a plaintiff can request the clerk's entry of default against a party against whom a judgment for affirmative relief is sought that has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise. Thereafter, the plaintiff may seek the court's entry of default judgment under either *Rule 55(b)*. The district court has the discretion to enter default judgment, although entry of default judgments is disfavored as decisions on the merits are preferred. In other words, district courts must remain mindful that, like dismissal with prejudice, default is a sanction of last resort, and district courts must resolve all doubt in favor of proceeding on the merits.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

HN2[] **Pretrial Judgments, Default & Default Judgments**

Before imposing the extreme sanction of default, district courts must make explicit factual findings as to: (1) whether the party subject to default has a meritorious defense, (2) the prejudice suffered by the party seeking default, and

(3) the culpability of the party subject to default. Hence, a litigant's failure to state a claim upon which relief may be granted, e.g., an assertion of a claim over which the court lacks jurisdiction, prevents the presiding court from entering a default judgment, since, under *Fed. R. Civ. P. 55(b)(2)*, the litigant is not entitled to a default judgment unless (s)he establishes that the essential elements of the pleaded claims are present and states factual allegations in support of these elements.

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Pleadings > Service of Process > General Overview

HN3[] **Default Judgments, Entry of Default Judgments**

Entry of a default judgment is an inappropriate use of judicial discretion where there has been insufficient service. Thus, if there is a challenge to the adequacy of service, the party who seeks default judgment and, allegedly, served the complaint bears the burden of establishing its validity when a challenge to its effectiveness is made.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

HN4[] **Pretrial Judgments, Default & Default Judgments**

If default is entered against some defendants in a multi-defendant case, the preferred practice is for the court to withhold granting default judgment until the action is resolved on its merits against non-defaulting defendants: if plaintiff loses on merits, the complaint should then be dismissed against both defaulting and non-defaulting defendants.

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

HN5[] **Default Judgments, Entry of Default Judgments**

Prior to entering default judgment, the court must ensure that its has proper jurisdiction over the action, just as the court must determine that plaintiffs, at the very least, sufficiently stated their claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN6[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

The failure of a party to address the issue of subject matter jurisdiction neither waives nor disposes of the issue.

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

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

HN7[] **Motions to Dismiss, Failure to State Claim**

Federal courts are courts of limited jurisdiction. Thus, a federal court shall presume lack of jurisdiction, and the party seeking to invoke the court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. While the court is obligated to test subject matter jurisdiction sua sponte, *Fed. R. Civ. P. 12(b)(1)* also authorizes a party to move to dismiss a claim for lack of subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*. A party challenging the court's jurisdiction under *Rule 12(b)(1)* may do so by raising either a facial attack or a factual attack. In contrast, a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* tests only the legal sufficiency of a claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN8[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Deficiencies as to the subject matter jurisdiction may be either "facial" or "factual." Assessing a factual deficiency, the court: (1) must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings; and (2) can look beyond the pleadings to decide factual matters relating to jurisdiction.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN9[] **Sherman Act, Jurisdiction**

The United States Court of Appeals for the Third Circuit clarified that, in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim, hence, requiring the party invoking the court's jurisdiction to produce sufficient evidential proof. Defining the sufficiency of such proof, the Court of Appeals observed that it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

HN10[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Facial attacks to subject matter jurisdiction contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true. However, the U.S. Supreme Court elaborated on the requirements a pleading must meet to withstand a facial attack. The pleading must provide enough factual matter to suggest that the alleged event took place. While the Supreme Court left it to the district courts to determine, on a case-by-case basis, how much factual matter is "enough," the Court unambiguously indicated that represented litigants cannot satisfy the pleading requirements by invoking the overly lenient regime of "pure notice."

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

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

HN11[] Motions to Dismiss, Failure to State Claim

A plaintiff's complaint will survive facial dismissal only if it contains enough factual heft establishing the plaintiff's claims rather than plaintiff's conjecture, or self-serving interpretations of actual events, or mere labels and conclusions, and a formulaic recitation of the elements of a cause of action.

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

HN12[] Pleadings, Rule Application & Interpretation

A litigant's claims cannot be based on a source containing unverifiable and, in addition, mutually exclusive data.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN13[] Sherman Act, Claims

The Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. 15 U.S.C.S. § 1. To establish a violation of § 1, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. A related statute, the Clayton Act, provides a litigant with the right of private action to vindicate violations of the Sherman Act.

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

HN14[] Per Se Rule & Rule of Reason, Sherman Act

To determine whether a particular action unreasonably restrains trade, courts apply either the "per se" analysis or the "rule of reason." Under the per se rule, certain types of restraints are presumed to be unreasonable, hence enabling the court to avoid an elaborate economic effect inquiry. If a restraint is per se illegal, further examination of the practice's impact on the market is unnecessary for finding that it produced adverse, anticompetitive effects within relevant product and geographic markets. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Examples of agreements which implicate the per se rule include horizontal price-fixing arrangements, market allocation, group boycotts and some "tying" arrangements.

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

HN15[] Per Se Rule & Rule of Reason, Sherman Act

The rule of reason, which is the prevailing standard, ordinarily requires the court to engage in a detailed analysis of the effect that the restraint had or is having on competition in a relevant market. Typical examples of the conduct subject to the rule of reason analysis are agreements to exchange pricing information, certain "tying" arrangements, vertical non-price restraints, customer rebates and discount programs, promotional allowances to dealers and cooperative advertising programs, exclusive distributorships, etc.

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

HN16[ ] **Per Se Rule & Rule of Reason, Sherman Act**

The issue of whether the court should assess the allegedly illegal conduct under the per se rule or the rule of reason does not depend on the litigants' positions as to which rule should apply, nor does it depend on the labels utilized in the complaint: only the plaintiff's factual assertions allow the court to utilize the curtailed per se analysis.

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

HN17[ ] **Sherman Act, Scope**

As a matter of substantive ***antitrust law***, it has long been established that defendants' mere parallel conduct, even if it is consciously parallel, does not violate *§ 1* of the Sherman Act. Indeed, such conduct is commonplace and often efficient. Of course, parallel conduct can result from an agreement between competitors, and such an agreement could violate *§ 1*. But an allegation of agreement under *§ 1* must rest on something more than allegations of parallel conduct, lest commonplace and efficient economic behavior provide a sufficient basis for costly litigation over largely groundless claims. Nor can a mere conclusory allegation of an agreement or conspiracy suffice to convert allegations of parallel conduct into an adequate allegation of a violation of *§ 1*.

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

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

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

HN18[ ] **Sherman Act, Scope**

Mere allegations that defendants engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting an illegal agreement to that effect, are insufficient to state a claim under *§ 1* of the Sherman Act. Consequently, to duly assert a violation, allegations of parallel conduct must be placed in a factual context which raises a plausible suggestion of a preceding agreement rather than identical independent action, since a defendant's business activity could be an entirely natural, unilateral reaction of the defendant to the business activities by defendant's competitors.

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

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

HN19[ ] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act sets forth a general rule that excludes from the scope of the Sherman Act all conduct involving "non-import" foreign commerce unless two conditions are met: (1) the alleged conduct has a direct, substantial and reasonably foreseeable effect on United States domestic commerce; and (2) the domestic anti-competitive effect "gives rise to" a claim under the Sherman Act. *15 U.S.C.S. § 6a*.

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

HN20[] **International Aspects, Foreign Trade Antitrust Improvements Act**

See *15 U.S.C.S. § 6a*.

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

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

HN21[] **International Aspects, Foreign Trade Antitrust Improvements Act**

First, the Foreign Trade Antitrust Improvements Act (FTAIA) asks whether all defendants were involved in import trade or import commerce. If all that defendants were doing was actually bringing goods or services into the United States, then the FTAIA is not even triggered, i.e., the claim squarely falls within the scope of the Sherman Act. However, if defendants did not directly bring items or services into the United States, they cannot be labeled "importers," nor it could be said that defendants have they engaged in import trade or commerce. In other words, even if a certain importer purchased or otherwise obtained the defendants' product in a foreign market (be it the defendants' national market or any other market) and brought the defendants' product into the United States, the fact that the product eventually found its way into the United States does not transform the defendant into an "importer" and, hence, an antitrust claim against the defendants must pass muster under the FTAIA before the Sherman Act claim can be entertained.

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN22[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Once it is determined that the defendants are not actual importers or that they were importing goods all over the world, the Foreign Trade Antitrust Improvements Act (FTAIA) is triggered. However, the FTAIA bar does not exclude every possible conduct by the defendants which are not directly importing into the United States from the reach of the Sherman Act. Rather, the second prong of the inquiry must be conducted, namely, whether the defendants' alleged conduct involved trade or commerce with foreign nation. *15 U.S.C.S. § 6a*. Generally, where the defendants' conduct is directed at the competitiveness of a foreign market, such conduct involves foreign trade or commerce. Hence, if the foreign defendants are not involved in importation into any foreign market, i.e., if they operate only within their own domestic market, the FTAIA bars antitrust suits against such defendants by removing subject matter jurisdiction of a United States court to entertain Sherman Act claims against such defendants, even if certain ripple effects of the defendants' conduct reach the United States' market.

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN23[] **International Aspects, Foreign Trade Antitrust Improvements Act**

In the context of the Foreign Trade Antitrust Improvements Act, if the foreign defendants are involved in importation into foreign markets (which may or may not include the United States), then the third prong of the inquiry comes into play. *15 U.S.C.S. § 6a(2)*. Specifically, the court shall determine whether the foreign defendants' export activities (i.e., the defendants' bringing of their goods or services into markets other than their own) caused direct, substantial and reasonably foreseeable effect on the United States' market, i.e., either on our nations' interstate commerce or on the importation into the United States. Once this third prong is satisfied, the court establishes its subject matter jurisdiction to examine the sufficiency of plaintiff's claim pursuant to the Sherman Act.

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN24[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The courts agree that participation by American firms in the alleged conspiracy does not, by itself, establish an anticompetitive effect in the United States. Similarly, mere intent of defendants to reduce competition in the United States is insufficient to meet the "direct effect" standard. To establish "direct effect," the plaintiff must show a causal link between the wrongful conduct and the anticompetitive effect suffered in the United States. Thus, mere spillover effects within the United States caused by a conspiracy targeting foreign markets are not sufficiently "direct" to satisfy the Foreign Trade Antitrust Improvements Act (FTAIA), just as mere ripple effects felt in the United States as a result of anticompetitive conduct abroad are not sufficiently "substantial" to meet FTAIA requirements.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN25[] **Dispute Resolution, Comity Doctrine**

The term "comity" describes a theory for accommodating conflicting legal policies of territorial sovereigns. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily. Those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state and another state's courts. Thus, the legal doctrine of international comity is not a rule of public international law but a judicial tradition based on respect for sovereignty, a discretionary power of the court to decline jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against United States international convenience and duties.

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

HN26[] **International Aspects, Foreign Trade Antitrust Improvements Act**

In the United States Court of Appeals for the Fourth Circuit, in determining whether the Foreign Trade Antitrust Improvements Act applies, a court should consider whether the defendants' acts, targets, and effects are primarily foreign or primarily domestic. This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly produce.

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

HN27[] **International Aspects, Foreign Trade Antitrust Improvements Act**

In the United States Court of Appeals for the Fourth Circuit, the Foreign Trade Antitrust Improvements Act bars claims failing to establish not only a clear link between the defendants' illegal conduct and the United States trade and commerce, but also that the United States trade was, at the very least, "a" focus point of the defendants' illegal conduct.

Antitrust & Trade Law > Sherman Act > Claims

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

HN28[] **Sherman Act, Claims**

It is axiomatic that a business entity cannot conspire with its wholly-owned subsidiary for purposes of the Sherman Act liability.

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

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

HN29[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Activities of a foreign producer fall outside the reach of the Sherman Act since a "producer" is neither an "importer" into the United States nor an entity engaged in "trade or commerce" for the purposes of the Foreign Trade Antitrust Improvements Act.

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

HN30[] **International Aspects, Foreign Trade Antitrust Improvements Act**

In the context of the Foreign Trade Antitrust Improvements Act, if an entity is conducting its business in a developing country, the fact that the entity's costs might be lower than those of analogous enterprises doing business in developed nations is neither indicative of the entity's anticompetitive practices nor suggests that the entity's goal is to affect the trade in a certain consumer nation.

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

HN31[] **Amendment of Pleadings, Leave of Court**

Ordinarily, the plaintiff may be granted leave to amend when justice so requires. That said, allowing leave to amend where there is a stark absence of any suggestion by the plaintiffs that they have developed any facts since the action was commenced, which would, if true, cure the defects in the pleadings would frustrate the court's ability to filter out lawsuits that have no factual basis.

Counsel: [1]** For **ANIMAL SCIENCE PRODUCTS, INC., Plaintiff: DAVID S. STONE, ROBERT A. MAGNANINI,** *LEAD ATTORNEYS,* BOIES, SCHILLER & FLEXNER, LLP., SHORT HILLS, NJ; **RICHARD E. DONOVAN,** KELLEY DRYE & WARREN LLP, PARSIPPANY, NJ.

For **RESCO PRODUCTS, INC., Plaintiff: DAVID S. STONE, ROBERT A. MAGNANINI,** *LEAD ATTORNEYS,* BOIES, SCHILLER & FLEXNER, LLP., SHORT HILLS, NJ.

For **CHINA NATIONAL METALS & MINERALS IMPORT & EXPORT CORPORATION, CHINA NATIONAL MINERALS IMPORT & EXPORT CORPORATION, SINOSTEEL CORPORATION, CHINA METALLURGICAL IMPORT & EXPORT CORPORATION, LIAONING JIAYI METALS & MINERALS CO., LTD., HAICHENG HOUYING CORP. LTD., HAICHENG HUAYU GROUP IMPORT & EXPORT CO. LTD. (HUAZIYU), Defendants: LEDA DUNN WETTRE,** *LEAD ATTORNEY,* **DONALD A. ROBINSON,** ROBINSON, WETTRE & MILLER LLC, NEWARK, NJ.

For **MINMETALS, INC., Defendant: GREGORY KARL MUELLER,** *LEAD ATTORNEY,* LAW OFFICES OF GREGORY K. MUELLER, PC, TENAFLY, NJ; **LEDA DUNN WETTRE,** *LEAD ATTORNEY,* ROBINSON, WETTRE & MILLER LLC, NEWARK, NJ.

Judges: GARRETT E. BROWN, JR., Chief Judge, United States District Judge.

Opinion by: GARRETT E. BROWN, JR.

Opinion

[*846] BROWN, Chief Judge:

This matter comes before the Court upon Plaintiffs' motion for default judgment (Docket Entry No. 28, "Plaintiffs' Motion") **[**2]** and defendant Minmetals Inc.'s ("Minmetals") motion to dismiss Plaintiffs' complaint (Docket Entry No. 27, "Defendant's Motion"). For the reasons stated below, Plaintiffs' Motion will be denied. Defendant's Motion will be granted insofar that Plaintiffs' complaint will be dismissed without prejudice, and Plaintiffs will be granted leave to amend their complaint. All residual motions will be dismissed as moot.

TABLE OF CONTENTS

[*847] I. [3] PROCEDURAL BACKGROUND**

At issue here is the extraterritorial scope of the Sherman Antitrust Act and its application to this case. The putative Plaintiffs' class comprises certain United States consumers of magnesite products who allege that a number of Chinese entities and their trade association conspired to keep prices on certain magnesite products artificially inflated worldwide, including in the United States.

On September 7, 2005, Plaintiffs Animal Science Products, Inc. and Resco Products, Inc. ("Animal Science" and "Resco," collectively, "Plaintiffs") filed a civil complaint naming the following seventeen entities as Defendants in this matter: China National Metals & Minerals Import & Export Corporation; China National Minerals Import & Export Corporation; Sinosteel Corporation; China Metallurgical Import & Export Corporation; Liaoning Jiayi Metals & Minerals Co. Ltd.; Haicheng Houying Co. Ltd.; Haicheng Huayu Group Import & Export Co. Ltd.; Minmetals; Xiyang Group; Xiyang Imoprt & Export Ltd. Co.; Xiyang Refractory Materials Ltd. Co.; Xiyang Fireproof Material Co. Ltd.; Liaoning Foreign Trade General Co.; Liaoning Jinding Magnesite Group; Dalian Golden Sun Import & Export Co.; **[**4]** Haicheng Pailou Magnesite Ore Co. Ltd.; and Yingkou Huachen Co. Ltd. See Docket Entry No. 1.

On October 17, 2005, an order extending Minmetals' time to file a responsive pleading was issued by Judge Harold A. Ackerman; that time was re-extended by Judge Ackerman on November 7, 2005, and then re-extended once again by Magistrate Judge Mark Falk on December 15, 2005. See Docket Entries Nos. 3, 5 and 6. No responsive pleading followed and, on May 4, 2007, Magistrate Judge Esther Salas (to whom the case was reassigned from Judge Falk) issued another order granting Minmetals two extensions to file such a pleading. [1] See Docket Entries Nos. 18 and 25. On December 14, 2007, Minmetals filed Defendant's Motion. See Docket Entry No. 27. Plaintiffs' filed their opposition on January 14, 2008, see Docket Entry No. 33, and Minmetals filed their reply on February 12, 2008. See Docket Entry No. 38.

Meanwhile, during 2007, Plaintiffs filed numerous motions for entries of default, see, e.g., Docket Entries Nos. 16, 19 (hence, causing the Clerk to enter corresponding defaults); **[**5]** Plaintiffs followed those applications by filing Plaintiffs' Motion on December 14, 2007. See Docket Entry No. 28. On February 5, 2008, certain Defendants filed

[1] The chain of time extensions was based on the parties' dispute as to the validity of Plaintiff's international service of process.

their opposition to Plaintiffs' Motion, see Docket Entries Nos. 36 (supplemented by Docket Entry No. 41), together with Defendants motion to **[*848]** compel arbitration. [2] See Docket Entry No. 37. On February 25, 2008, Plaintiffs filed their reply to Defendants' opposition. See Docket Entry No. 42. Defendants' sur-reply was filed on March 6, 2008. See Docket Entry No. 48 (supplemented by Docket Entry No. 50). Since then, extensive briefing of the arbitration issue has taken place.

On September 15, 2008, the matter was reassigned to the undersigned. On October 6, 2008, this Court held oral arguments as to the pending motions.

II. MOTION FOR DEFAULT JUDGMENT

HN1[] Default is governed by *Federal Rule of Civil Procedure 55*. **[**6]** See *Fed. R. Civ. P. 55*. "Pursuant to *Rule 55(a)*, a plaintiff can request the clerk's entry of default against a party 'against whom a judgment for affirmative relief is sought that has failed to plead or otherwise defend [and] that fact is made to appear by affidavit or otherwise.'" *Doug Brady, Inc. v. N.J. Bldg. Laborers Statewide Funds, 250 F.R.D. 171, 2008 U.S. Dist. LEXIS 28324, at *18-19 (D.N.J. April 7, 2008)*, (quoting *Fed. R. Civ. P. 55(a)*). "Thereafter, the plaintiff may seek the Court's entry of default judgment under either *Rule 55(b)*." *Doug Brady, 250 F.R.D. 171, 2008 U.S. Dist. LEXIS 28324 at *19* (citing *Nationwide Mutual Ins. Co. v. Starlight Ballroom Dance Club, Inc., 175 Fed. App'x 519, 521, n.1 (3d. Cir. 2006)*. "The district court has the discretion to enter default judgment, although entry of default judgments is disfavored as decisions on the merits are preferred." *Super 8 Motels, Inc. v. Kumar, No. 06-5231, 2008 U.S. Dist. LEXIS 28066, at *7 (D.N.J. April 1, 2008)* (citing *Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir.1984))*. In other words, district courts must remain mindful that, like dismissal with prejudice, default is a sanction of last resort, see *Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984)* **[**7]** ("We reiterate what we have said on numerous occasions: that dismissals with prejudice or defaults are drastic sanctions"), and district courts must resolve all doubt in favor of proceeding on the merits. See *Zawadski de Bueno v. Bueno Castro, 822 F.2d 416, 420 (3d Cir. 1987)*.

Moreover, ***HN2***[] "before imposing the extreme sanction of default, district courts must make explicit factual findings as to: (1) whether the party subject to default has a meritorious defense, (2) the prejudice suffered by the party seeking default, and (3) the culpability of the party subject to default." *Doug Brady, 250 F.R.D. 171, 2008 U.S. Dist. LEXIS 28324, at *19* (quoting *Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987)*, stating "[W]e have further required the district court to make explicit findings concerning the factors it must consider in rendering judgment by default or dismissal, or in declining to reopen such judgment"). Hence, a litigant's failure to state a claim upon which relief may be granted, e.g., an assertion of a claim over which the court lacks jurisdiction, prevents the presiding court from entering a default judgment, see *Comcast Cable Communs. v. Dorris, 2005 U.S. Dist. LEXIS 23156, at *5-6 (D.N.J. Feb. 8, 2005)*; **[**8]** *Abney v. Alameida, 334 F. Supp. 2d 1221 (S.D. Cal. 2004)*; see also *Quirindongo Pacheco v. Rolon Morales, 953 F.2d 15 (1st Cir. 1992)*; *Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)*; *Danning v. Lavine, 572 F.2d 1386, 1388* ***[*849]*** *(9th Cir. 1978)*; *Kelley v. Carr, 567 F. Supp. 831, 840 (W.D. Mich. 1983)*; Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688 at 447-48 (1983), since, under *Rule 55(b)(2)*, the litigant is not entitled to a default judgment unless (s)he establishes that the essential elements of the pleaded claims are present and states factual allegations in support of these elements. [3] See Comdyne I v. Corbin, 908 F.2d 1142, 1149 (3d Cir. 1990); *Fehlhaber v. Indian Trails, Inc., 425 F.2d 715, 717 (3d Cir. 1970)*; *D.B. v. Bloom, 896 F. Supp. 166, 170 n. 3 (D.N.J. 1995)*.

---

[2] As of the date of entry of the Order accompanying this Opinion, Defendants Xiyang Group, Xiyang Import & Export Ltd. Co., Xiyang Refractory Materials Ltd. Co., Xiyang Fireproof Material Co. Ltd., Liaoning Foreign Trade General Co., Liaoning Jinding Magnesite Group, Dalian Golden Sun Import & Export Co. did not make appearances in this matter.

[3] In addition, ***HN3***[] entry of a default judgment is an inappropriate use of judicial discretion where there has been insufficient service. See *First American Bank, N.A. v. United Equity Corp., 89 F.R.D 81 (D.D.C. 1981)*; see also *Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 685 (N.D. Iowa 1995)* (where it appears that plaintiffs "have never properly served the defendants, **[**9]** … neither entry of default nor entry of default judgment would be proper"). Thus, if there is a challenge to the adequacy of

Finally, ***HN4***[] if default is entered against some defendants in a multi-defendant case, the preferred practice is for the court to withhold granting default judgment until the action is resolved on its merits against non-defaulting defendants: if plaintiff loses on merits, the complaint should then be dismissed against both defaulting and non-defaulting defendants. See *Jefferson v. Briner, Inc., 461 F. Supp. 2d 430 (E.D. Va. 2006)* (relying on *Frow v. De La Vega, 82 U.S. 552, 21 L. Ed. 60 (1872))*; see also *Northland Ins. Co. v. Cailu Title Corp., 204 F.R.D. 327 (W.D. Mich. 2000)*; *Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403 (S.D.N.Y. 1974)*; accord *Thabault v. Chait, 541 F.3d 512, 531 (3d Cir. 2008)*.

It appears that the matter at hand presents this Court with the entire panoply of obstacles to default **[**10]** judgment, since it is a multi-defendant case where some Defendants defaulted but others did not, the validity of service of process is challenged by all Defendants, the sufficiency of Plaintiff's pleading is challenged by one of them, and the complaint is yet to pass muster for the purposes of this Court's sua sponte dismissal power. This Court, therefore, while taking due notice of Defendants' service-related challenges and the prudential considerations pertinent to the entry of default judgment against selected defendants in a multi-defendant suit, finds it prudent and in the interests of judicial economy (as well as in the interests of litigants, granted the current procedural posture of this matter) to limit this Court's review to the issues of subject matter jurisdiction and sufficiency of Plaintiffs' pleading: it is indeed axiomatic that, ***HN5***[] prior to entering default judgment, the Court must ensure that its has proper jurisdiction over the action, just as the Court must determine that Plaintiffs, at the very least, sufficiently stated their claim. See *Quirindongo Pacheco, 953 F.2d 15*; *Au Bon Pain Corp., 653 F.2d 61*; *Danning, 572 F.2d 1386*; *Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278 (D. Conn. 2008)*; **[**11]** *Calderon v. Burton, 457 F. Supp. 2d 480 (S.D.N.Y. 2006)*; *Comcast Cable Communs., 2005 U.S. Dist. LEXIS 23156*; *Abney, 334 F. Supp. 2d 1221*; *Patray v. Northwest Publ., 931 F. Supp. 865 (S.D. Ga. 1996)*; *Kelley, 567 F. Supp. 831*; see also 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688 at 447-48 (1983).

[*850] III. CHALLENGES TO SUBJECT MATTER JURISDICTION

HN6[] The failure of a party to address the issue of subject matter jurisdiction neither waives nor disposes of the issue. [4] See *Three Keys Ltd. v. SR Util. Holding Co., 540 F.3d 220, 226 (3d Cir. 2008)* (citing *Bracken v. Matgouranis, 296 F.3d 160, 162 (3d Cir. 2002)* ("[The] Court has a continuing obligation to sua sponte raise the issue of subject matter jurisdiction if it is in question"); *Morel v. INS, 144 F.3d 248, 251 n.3 (3d Cir. 1998)* (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)*, as to the observation that "[a] federal court . . . will raise lack of subject-matter jurisdiction on its own motion.")

HN8[] Deficiencies as to the "subject matter jurisdiction may be either 'facial' or 'factual.'" *Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 300, n. 4 (2002)*. Assessing a factual deficiency, the court: (1) "must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings," id. (citing *Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1260-61 (11th Cir. 1997)*; *Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)*; *Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981))*;

---

service, the party who seeks default judgment and, allegedly, served the complaint bears the burden of establishing its validity when a challenge to its effectiveness is made." *Adams v. American Bar Association, 400 F. Supp. 219, 222 (E.D. Pa. 1975)*.

[4] ***HN7***[] Federal courts are courts of limited jurisdiction. Thus, a federal court shall presume lack of jurisdiction, and the party seeking to invoke the court's **[**12]** jurisdiction bears the burden of proving that subject matter jurisdiction exists. See *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. While the court is obligated to test subject matter jurisdiction sua sponte, *Rule 12(b)(1)* also authorizes a party to move to dismiss a claim for lack of subject matter jurisdiction. See *Fed. R. Civ. P. 12(b)(1)*. A party challenging the court's jurisdiction under *Rule 12(b)(1)* may do so by raising either a facial attack or a factual attack. In contrast, a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests only the legal sufficiency of a claim.

and (2) "can **[**13]** look beyond the pleadings to decide factual matters relating to jurisdiction." [5] Id. (quoting *Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000))*.

HN10[] In contrast, "[f]acial attacks contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true." Id. However, last year the Supreme Court elaborated on the requirements a pleading must meet to withstand a facial attack. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In Twombly, the Court explained that the pleading must provide "enough **[**14]** factual matter" to suggest that the alleged event took place. See *id. at 1965*. While the Supreme Court left it to the district courts to determine, on a case-by-case basis, how much factual matter is "enough," the Court unambiguously indicated that represented litigants cannot satisfy the pleading requirements by invoking the overly lenient regime of "pure notice" originated in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, a case decided half a century ago. In fact, the Twombly Court explicitly disavowed **[*851]** the oft-quoted statement in Conley of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" stating that the "no set of facts" language "has earned retirement" and "is best forgotten." *Twombly, 127 S. Ct. at 1968-69* (quoting *Conley, 355 U.S. at 45-46*).

Moreover, the Court, using a variety of phrases, indicated that more than an oblivious notice of a claim is needed to allege a violation. For example, the Court required "enough facts to raise a reasonable expectation that discovery will reveal evidence of [the alleged claim]," **[**15]** "facts that are suggestive enough to render [plaintiff's allegations] plausible," "allegations plausibly suggesting (not merely consistent with) [plaintiff's allegations]," a "plain statement" with "enough heft" to show entitlement to relief, and "enough facts to state a claim to relief that is plausible on its face." *Id. at 1969-74*. Finally, the Court refused to entertain a plaintiff's far-fetched flights of fancy by unambiguously stating that the line "between the factually neutral and the factually suggestive . . . must be crossed [by allegations made in plaintiff's pleadings] to enter the realm of plausible liability," *id. at 1966 n.5*, and stated that no "reassurances of plaintiff's' counsel" that discovery would soon flesh out plaintiff's claim, which is currently pled so that it is "just shy of a plausible entitlement," can prevent facial dismissal. *Id. at 1967* and n.6 (referring to *id. at 1975* (Stevens, J., dissenting)). Thus, the ***HN11***[] plaintiff's complaint will survive facial dismissal only if it contains "enough [factual] heft" establishing the plaintiff's claims rather than plaintiff's conjecture, or self-serving interpretations of actual events, or mere "labels and conclusions, **[**16]** and a formulaic recitation of the elements of a cause of action." *Twombly, 127 S. Ct. at 1965-69*; accord *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*; *Phillips v. County of Allegheny, 515 F.3d 224, 231-33 (3d Cir. 2008)*.

IV. PLAINTIFFS' ALLEGATIONS

A. Assertions as to Trade and Commerce

Substantively, the Complaint opens with a section titled "Trade and Commerce." See Compl. PP 37-44. The section provides no citations to Plaintiffs' sources and reads as follows:

> Magnesium is the eighth most abundant element on earth and constitutes about two percent of the earth's crust. Magnesite is the naturally occurring carbonate form of magnesium . . . . China is estimated to have 80 percent of global magnesium reserves. Magnesite is mined from magnesium deposits and delivered from the mine to a crushing plant where it is crushed in three stages. Depending on the grade of the crushed material, the crushed magnesite . . . produce[s] different forms of magnesite. There are three principal forms of

---

[5] ***HN9***[] The Court of Appeals for the Third Circuit clarified that, "in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim," *Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 73 (3d Cir. 2000)* (citing *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 892 (3d Cir. 1977))*, hence, requiring the party invoking the court's jurisdiction to produce sufficient evidential proof. Defining the sufficiency of such proof, the Court of Appeals observed that "it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage." Id.

> magnesite sold in U.S. commerce. Dead-burned magnesite ("DBM") is produced by high temperature conversion of magnesite. DBM is used for the lining of metallurgical or refractory furnaces, used for the **[**17]** melting of steel, nonferrous metal and glass and the making of cement. Approximately 70 percent of the world's production of magnesite [results in] DBM. Caustic-calcined magnesite ("CCM") is produced by low temperature conversion. Approximately 22 percent of the world's production of magnesite [results in] CCM. [The] third type of magnesite [is] electro-fused magnesite ("EFM"), [and it] is produced by fusing CCM at high temperatures in an **[*852]** electric arc furnace. . . . Approximately 8 percent of the world's production of magnesite [results in] EFM. China accounts for 80 percent of worldwide EFM production. During the period described in this Complaint, [that is, from April 2000 to at least the date of Plaintiffs' filing of the Complaint, September 7, 2005 ("Relevant Period"),] the international market for magnesite and magnesite products was dominated by [D]efendants . . . . Defendant producers have lower costs than their western competitors and[,] as a result[,] also dominate the group of manufacturers worldwide who can produce magnesite and magnesite products at costs below other producers. Exporters from China also enjoy a competitive advantage relative to manufacturers in other nations **[**18]** because China has employed a fixed currency exchange rate which undervalues the Yuan, making Chinese exports of magnesite and magnesite products to the United States relatively less expensive compared to exports of magnesite and magnesite products from other nations. During the period of this Complaint, the conduct of defendants and their coconspirators has taken place in and affected the interstate and foreign trade and commerce of the United States. Over 650,000 metric tons of magnesite are imported into the United States each year and over sixty percent of that is imported from China. U.S. Import of magnesite and magnesite products from China [during an unspecified period of time] exceed[s or exceeded] $ 50 million per year.

Id.

B. Anticompetitive Conduct

The next section of the Complaint, titled "Factual Background," aims to state Plaintiffs' facts as to Defendants' alleged cartel-like activities. See PP 45-55. Plaintiffs' sources as to these alleged facts are similarly not provided to the Court.

According to the Complaint: (a) in April of 2000, "thirteen producers and exporters of magnesite in China [unidentified in the Complaint] established a cartel called the 'Jiayuan Magnesite **[**19]** Export Group' for the export of magnesite, and reached agreement of fixing unified export prices to avoid competitive price cutting"; (b) "[d]uring the same [time,] a second cartel [was] formed[,] called 'Huaxia Magnesia Products Export Group'"; and (c) these "two cartel[s] . . . represent more than 70 percent of the export volume of magnesite in China." Id. P 45.

According to the Complaint, "[a]s a result of these cartel agreements, despite slumping demand [in markets unidentified in the Complaint, i.e., either world-wide or in any region of the world], the price of magnesite and magnesite products increased [in geographic consumption markets also unidentified in the Complaint] during 2000 by over 45 percent compared to 1999. The president of the Jiayuan Magnesite Export Group reported by mid-2001 that [his/her] cartel's efforts had been successful and would generate an additional 50 million U.S. dollars [presumably, for his/her cartel]." Id. P 46. The Complaint further asserts that

> [the two cartels joined into] a single cartel under the name of the "Chinese Magnesite Export Association" [("CMA"), which grew to encompass] 23 exporting companies, including [those out of the seventeen **[**20]** named Defendants that were Chinese exporting companies]. Since April 2000, the [CMA] has conducted [an unspecified number of] cartel meetings of [D]efendants and other exporters. On March 22, 2003, at least 19 exporting companies, including [unspecified entities among D]efendants, met in Shenyang, China [and] agreed to **[*853]** strengthen . . . cooperation to reduce competition in exports of magnesite. The [CMA]

> agreed to establish itself under the name the "China Magnesite Forum" [6] and established goals of restraining competition and establishing limits on export supply in order to maintain and increase prices. . . . After achieving [unspecified] price increases, the cartel has successfully stabilized the prices of magnesite and magnesite products in the United States and avoided major price cutting despite [unspecified] low levels of demand [in unspecified geographic consumption markets]. During the period of the charged combination and conspiracy, [D]efendants . . . have participated in [unspecified] meetings . . . in China and elsewhere in which the prices, volume of sales, and markets for magnesite and magnesite products were . . . agreed upon. Together, [D]efendants and their co-conspirators **[**21]** dominate the production and sale of magnesite in the world and the United States. . . . Although non-cartel members represent 30 to 40 percent of the U.S. market, the cartel has been successful because [unspecified] other producers have higher costs for magnesite and magnesite products [and] currency costs [and] cannot compete [against Defendants]. Further[more, these other producers] have shown that they would follow price increases rather than undercut the [CMA's] price levels. . . . [T]he collusive arrangements [adopted among Defendants keeps resulting in] prices [that Plaintiffs believe to be] above those of a competitive market. . . . [P]rices of magnesite in the animal feed industry [have] risen an overall 25 percent.

Id. PP 47-54.

C. Additional Elaborations

Finally, Plaintiffs assert that:

> Plaintiffs did not discover and could not discover, through the exercise of reasonable diligence, the existence of the claims sued upon [until an unspecified date/event] because [D]efendants . . . actively, intentionally, and fraudulently concealed **[**22]** the existence of the combination and conspiracy from Plaintiffs . . . through at least the time four years prior to the filing [by]
> (a) Meetings which were kept secret from U.S. customers in which the prices, sales volumes, and markets for magnesite and magnesite products were discussed and agreed;
> (b) Intentionally setting prices purportedly on a competitive basis when such prices were the result of collusion;
> (c) Instructing members of the conspiracy at the above-described meetings not to divulge the existence of the conspiracy to others not in the conspiracy;
> (d) Treating cartel agreements and meetings as confidential and proprietary information [and] enforc[ing] adherence to the agreed-upon price and supply agreements.

Id. P 59. [7]

Plaintiffs' conclude their Complaint with allegations that "[t]he price of magnesite and magnesite **[*854]** products purchased by [P]laintiffs (and the [putative] classes) has been fixed [and] maintained [at] non-competitive levels," id. P 60, and seek: (a) injunctive relief preventing Defendants from continuing the alleged combination and conspiracy; (b) monetary relief in the amount of "three-fold their damages;" and (c) legal costs and attorney fees. See id. at 13-14.

---

[6] It is unclear, from the face of the Complaint, whether the CMA assumed an "underground" name "China Magnesite Forum" or it was officially so renamed.

[7] The Court is not entirely clear as to the purpose of this elaboration. While it appears plausible that Plaintiffs included these statements in their Complaint to address the issue of statute of limitations (or the common law doctrine of laches), the Complaint is silent as to *when and how* Plaintiffs discovered the alleged conspiracy. See generally, Compl. Similarly, whilst these statements might be construed as Plaintiffs' attempt to elaborate on their allegations **[**23]** that the CMA's unspecified members met during an unspecified number of meetings conducted at unspecified destinations "in China and elsewhere," the excerpt quoted above does not provide any specific information as to these alleged meetings. See Compl. P 59.

V. INDUSTRY-RELATED DATA

The Court's careful reading of the twenty-one page Complaint yielded a total of eleven allegations providing the Court with statistical or statistics-related data. Three of these statistical allegations do not bear on the subject of the Complaint since they relate to the global tendencies in magnesite production processes, i.e.: (a) "70 percent of the world's production of magnesite [results in] DBM"; (b) "22 percent of the world's production of magnesite **[**24]** [results in] CCM"; and (c) "8 percent of the world's production of magnesite [results in] EFM." Compl. at 8. The remaining eight allegations relate to China's position in -- and export of-- magnesite and to Defendants' alleged cartel activities: (a) "China is estimated to have 80 percent of global magnesite reserves"; (b) "China accounts for 80 percent of worldwide EFM production"; (c) "Over 650,000 metric tons of magnesite are imported into the United States each year and over sixty percent of that is imported from China"; (d) "U.S. import of . . . magnesite products from China exceeds $ 50 million per year"; (e) "[T]he price of . . . magnesite products increased during 2000 by over 45 percent compared to 1999"; (f) "The president of the Jiayuan Magnesite Export Group reported . . . that the cartel's efforts . . . would generate an additional 50 million U.S. dollars"; (g) "[N]on-cartel members represent 30 to 40 percent of the U.S. market"; and (h) "[P]rices of magnesite in the animal feed industry [had] risen an overall 25 percent." See id. at 8-12.

All above-quoted statistical data are presented by Plaintiffs without any reference to the sources of Plaintiffs' information. While **[**25]** the Court, on its own, is aware of certain sources that contain figures (or even allegations) quite similar to those of Plaintiffs, see, e.g., Magnesium, Magnesite and Dolomite, A Strategic Global Business Report (Global Indus. Analysists, Inc. Mar. 2008), license purchase available at <<http://www.reportlinker.com/p087368/World-Magnesium-Magnesite-and-Dolomite-M>> ("Strategic Report"), such sources cannot serve as a basis for legal claim. For instance, the Strategic Report, a 425-page compilation, cannot operate as a factual basis for litigation since: (a) just as the Complaint, it fails to state its sources, hence allowing for presumption that the statements made therein are merely the authors' reading of the mix of industry rumors and verifiable facts; [8] and (b) it contains facially self-contradicting data. [9]

---

[8] The Strategic Report merely informs the reader that "[a] combination of primary and secondary research has been used for all findings. The usage of obtained information is based on the perceived reliability of the source by the researcher. In many cases, a combination of such sources was used." Strategic Report at I-1

[9] The Strategic Report provides conclusions virtually identical **[**26]** to those made in the Complaint, PP 37, 45-48:

> Magnesium Product Producers and Marketing Enterprises established Huaxia Magnesium Products Export Group in China. . . . This Group was formed to counter the problems of intense competition and low export prices. . . . Magnesite producing companies established [another] magnesite export group, in order to reach unified selling prices. The setting up of this group with 13 companies result[ed] in additional revenues of US$ 50 million per annum. . . . The group members agreed upon unifying prices and curb underselling practices thus enhancing magnesite revenues by US$ 50 million every year. . . . The China Magnesite Export Association was formed in February 2001 from two other groups, which were set up in 2000. . . . The primary goals of [this new association was] stabilizing export prices of magnesite. . . .

Strategic Report, at 11-106; III-123. And, just as Plaintiffs, the Strategic Report asserts that China is estimated to have 80 percent of global magnesite reserves, see Strategic Report, at II-109; III-123 ("China is home to about 80% of the global magnesite reserves. . . . About 80% of world's total magnesite resources are found in China"). **[**27]** However, these observations notwithstanding, the very same Strategic Report opens with the following statement:

> China, the world's leading supplier of magnesite, *boasts around 27% of the global magnesite resources.* Other leading producers of magnesite include Russia, North Korea and Slovakia. Together, *these four countries account for nearly 83% of the overall global magnesite resources.*

Strategic Report, at II-5 (emphasis supplied). It appears self-evident that ***HN12***[] a litigant's claims cannot be based on a source containing unverifiable and, in addition, mutually exclusive data. See, e.g., *Ohio Midland, Inc. v. Proctor, 2006 U.S. Dist. LEXIS 85888, at *15 (S.D. Ohio Nov. 28, 2006)* (plaintiff's allegations cannot be based on mutually exclusive facts); accord *Twombly, 127 S. Ct. at 1965-69* (the complaint will survive only if it contains enough factual heft rather than conjecture); *Kumho*

The foregoing, however, in no way suggests that a litigant cannot **[**28]** rely, for the **[*855]** facts asserted in the litigant's pleadings, on a source containing statistical information bearing an imprimatur of reliability; and a litigant mounting a challenge related to international trade in magnesite is not in danger of facing paucity of sources. See, e.g., U.S. Geological Survey, Magnesium Compounds (U.S. Dept. of Interior), at <<*http://minerals.usgs.gov/minerals/pubs/* commodity/magnesium/index.html#mcs>> ("Government Surveys"). [10] The Government Surveys provide data relevant to Plaintiffs' statistical allegations as to China's magnesite resources and export practices. For instance, contrary to Plaintiff's assertion that "China is estimated to have 80 percent of global magnesite reserves," the Government Surveys provide statistical data indicating that, out of the total of 3,600,000,000 tons of world magnesite reserves, China holds 860,000,000 tons (i.e., 23.8%), being closely followed by North Korea (750,000,000) and Russia (730,000,000). See <<*http://minerals.usgs.gov/minerals/pubs/* commodity/magnesium/mgcommcs04.pdf>>. Furthermore, relevant to Plaintiffs' other statistical statements, the Government Surveys indicate that:

(1) with respect to the United States' **[**29]** importation of magnesite products (i.e., CCM, DBM and EFM, that is, the products subject to the Complaint, collectively, hereinafter, "Processed Magnesite"), China accounted, during the Relevant Period, for:

(a) 67% to 76% of total importation (67% in 1999; 68% in 2000; 73% in **[*856]** 2001; 69% in 2002; 76% in 2003 and 2004; and 77% in 2005);
(b) import quantity ranging from 493,000 metric tons to 637,000 metric tons (515,000 in 1999; 637,000 in 2000; 493,000 in 2001; 542,000 in 2002; 529,000 in 2003; 575,000 in 2004; and 630,000 in 2005);
(c) gross profit per annum ranging from US$ 42,550,000 to US$ 90,290,000 (42.55M in 1999; 43.35M in 2000; 45.63M in 2001; 50.42M in 2002; 59.35M in 2003; 82.3M in 2004; and 90.29M in 2005) and, thus, prices ranging from $ 68 per metric ton to $ 143 per metric ton ($ 82 in 1999; $ 68 in 2000; $ 92 in 2001; $ 93 in 2002; $ 112 in 2003; and $ 143 in 2004 and 2005); [11] and

(2) Chinese annual "total production" of magnesite ranged, during the Relevant Period, from 2,400,00 metric tons to 4,700,000 metric tons (2,400,000 in 1999; 2,450,000 in 2000; 3,580,000 in 2001; 4,560,000 in 2002; 4,600,000 in 2003; 4,650,000 in 2004; and 4,700,000 in 2005), i.e., the amount **[**30]** of Processed Magnesite exported by China to the United States varied from 11% to 26% of the total Chinese magnesite produced (21% in 1999; 26% in 2000; 13% in 2001; 11% in 2002 and 2003; and 12% in 2004 and 2005).

See <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/401499.pdf>>;* <<http:// minerals.usgs.gov/minerals/pubs/commodity/magnesium/401400.pdf>>; <<*http://minerals.usgs*. gov/minerals/pubs/commodity/magnesium/mgcmyb2001.pdf>>; <<*http://minerals.usgs.gov*/ minerals/pubs/commodity/magnesium/mgcomyb02r.pdf>>; <<*http://minerals.usgs.gov/minerals*/ pubs/commodity/magnesium/mgcommyb03.pdf>>; <<*http://minerals.usgs.gov/minerals/pubs/* commodity/magnesium/mgcommyb04.pdf>>; and <<*http://minerals.usgs.gov/minerals/pubs/* commodity/magnesium/mgcommyb05.pdf>> (collectively, "Government Surveys - Citations"). [12]

Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (clarifying that judicial gatekeeping obligations apply to all technical testimony and providing a checklist of factors the courts should use in assessing the reliability of technical evidence).

[10] For the purposes of final disposition, either on merits or on procedural grounds, a federal court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *Fed. R. Evid. 201(b)*. However, at the instant juncture, the Court finds it premature to discuss whether judicial notice shall **[**31]** be taken of any Government Survey.

[11] The Court's discussion does not detail the shifts in production from the cheaper CCM to the more expensive DBM and EFM, although these shifts affected the average price per ton.

[12] It appears self-evident that the data contained in the Government Surveys contradicts many of Plaintiffs' allegations. For example, while China accounted for up to 77% of Processed Magnesite exportation into the United States, such importation did not reach 650,000 metric tons even by the end of the Relevant Period: rather, it ranged from 493,000 metric tons to 637,000.

The Government Surveys also provide information detailing shifts in the United States importation of Processed Magnesite during the Relevant Period, e.g.: (a) "[In 2000,] U.S. production of [DBM] dropped by about 9% from that in 1999, mostly because of the closure of National Refractories and Minerals Corp.'s Moss Landing, CA [('NRMC')]. U.S. imports of [DBM] in 2000 increased by 28% from those in 1999. . . . [T]he *reasons for the significant increase in imports was to replace . . . the domestically produced material . . . lost* **[*857]** when [NRMC] closed"; (b) "[In 2001, a] *general economic downturn led to decreasing demand* for [CCM], *and as a result, production and imports declined* by 20% . . . from the 2000 levels. U.S. imports of [DBM] in 2001 declined significantly, with the imports from China, the main source country, declining by more than 100,000 metric tons"; (c) "[In 2002,] imports of [CCM] and [DBM] rose in 2002. U.S. imports of [DBM] in 2002 were about 9% higher than those in 2001 . . . . Imports of [CCM] were **[**33]** 14% higher than those in 2001"; (d) "[In 2003,] imports of [DBM] fell by about 4% from those in 2002 . . . . Imports of [CCM] . . . were slightly higher than those in 2002"; (e) "[In 2004,] imports of [DBM] increased by about 10% from those in 2003 . . . . Imports of [CCM] were about 5% higher than those in 2003"; (f) "[In 2005,] imports of [DBM] increased by about 14% . . . . Imports of [CCM] were about 3% less than those in 2004." See id. (emphasis supplied). The Court, therefore, examines the content of Plaintiffs' Complaint in light of availability of precise statistical and factual data with respect to the United States importation and Chinese exportation of Processed Magnesite.

VI. PERTINENT LEGAL REGIME

A. The Sherman Act

Plaintiffs assert that Defendants violated *Section 1* of the Sherman Act. [13] See Compl. P 1. ***HN13***[] The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." [14] *15 U.S.C. § 1*. "To establish a violation of *Section 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant **[**34]** product and geographic markets; (3) that the concerted action [was] illegal; and (4) that [the plaintiff] was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)* (citations omitted), cert. denied, *547 U.S. 1092, 126 S. Ct. 1777, 164 L. Ed. 2d 557 (2006)*. A related statute, the Clayton Act, provides a litigant with the right of private action to vindicate violations of the Sherman Act. Accord Compl. P 3 (asserting that Plaintiffs bring the instant action pursuant to the Clayton Act, *15 U.S.C. §§ 4* and *16*).

1. "Per Se" and "Rule of Reason" Analyses

Similarly, while Chinese annual gross profit from Processed Magnesite ranged from US$ 42,550,000 to US$ 90,290,000, the prices did not "increase during 2000 by over 45 percent compared to 1999," as Plaintiffs assert: rather, the prices *decreased* by 11%, falling from $ 82 per ton in 1999 to $ 68 per ton in 2000. Analogously, contrary to Plaintiffs' assertion that "[t]he president of [one of the alleged original, i.e., smaller cartels] reported that the cartel's efforts . . . generate[d] an additional 50 million U.S. dollars [presumably, for the cartel, per annum]" the Government Surveys indicate that the *entire* ***[**32]*** *Chinese exportation* of Processed Magnesite over *all six years of the Relevant Period* grew from US$ 42,550,000 to US$ 90,290,000, that is, less than 50 million U.S. dollars.

[13] Turning to the venue of the instant action, Plaintiffs assert that the matter is properly before this Court, because Plaintiffs, that is, Animal Science, a Texas corporation, and Resco, a Pennsylvania corporation, are suing seventeen Defendants, one of which, that is, Minmetal, is a New Jersey corporation (with the remaining sixteen Defendants being Chinese entities). See Compl. PP 5-7.>

[14] The "commerce with foreign nations" component of the statute is no more self-explanatory than its domestic counterpart. Just as the federal courts developed, over the time, a body of federal case law interpreting the Sherman Act for the purposes of domestic antitrust **[**35]** cases, see *State Oil Co. v. Khan, 522 U.S. 3, 20-21, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*; Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 103 (2d ed. 2000) (federal courts have been invested "with a jurisdiction to create and develop an '***antitrust law***' in the manner of the common law courts"), the courts also developed common-law-like tests for determining when the Act applies to foreign conduct. See Part V(B) of this Opinion for discussion of the "foreign conduct" antitrust regime.

HN14[] To determine whether a particular action unreasonably restrains trade, courts apply either the "per se" analysis or the "rule of reason." Under the per se rule, certain types of restraints are presumed to be unreasonable, hence enabling the court to avoid an elaborate economic **[*858]** effect inquiry. See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* ("per se rules are appropriate only for 'conduct that is manifestly anticompetitive'") (quoting *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568, (1977))*. If a restraint is per se illegal, further examination of the practice's impact on the market is unnecessary for finding that it produced adverse, anticompetitive **[**36]** effects within relevant product and geographic markets. See *Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000)* ("[the per se] standard, which is based on considerations of 'business certainty and litigation efficiency,' allows a court to presume that certain limited classes of conduct have an anticompetitive effect without engaging in the type of involved, market-specific analysis ordinarily necessary to reach such a conclusion"). Per se liability is reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Examples of agreements which implicate the per se rule include horizontal price-fixing arrangements, market allocation, group boycotts and some "tying" arrangements. See, e.g., *Socony-Vacuum Oil Co., 310 U.S. at 223* (declaring per se illegal any agreement "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce"); *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)* (holding that "[t]raditional 'hard-core' price **[**37]** fixing remains per se unlawful"); *United States v. Andreas, 216 F.3d 645, 667 (7th Cir. 2000)* (finding per se illegal a sales volume allocation agreement, an output restriction, that necessarily furthered a practice of price fixing).

In contrast, ***HN15***[] the rule of reason, which is the "prevailing standard," ordinarily requires the court to engage in a detailed analysis of the effect that the restraint had or is having on competition in a relevant market. See *GTE Sylvania Inc., 433 U.S. at 49* (holding that the rule of reason typically requires a detailed examination "in light of the competitive situation in the product market as a whole"); *United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993)* (holding that the rule of reason "ordinarily requires a detailed inquiry into the market impact of a restraint"). Typical examples of the conduct subject to the rule of reason analysis are agreements to exchange pricing information, certain "tying" arrangements, vertical non-price restraints, customer rebates and discount programs, promotional allowances to dealers and cooperative advertising programs, exclusive distributorships, etc. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*; **[**38]** *United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*; *United States v. Citizens & Southern National Bank, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*; *United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962)*; *Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; see also ABA Sec. of Antitrust L., ***Antitrust Law*** Developments 50-78 (5th ed. 2002).

However, ***HN16***[] the issue of whether the court should assess the allegedly illegal conduct under the per se rule or the rule of reason does not depend on the litigants' positions as to which rule should apply, nor does it depend on the labels utilized in the complaint: only the plaintiff's factual assertions allow the court to utilize the curtailed per se analysis. See *Expert Masonry, **[*859]** Inc. v. Boone County, Kentucky, 440 F.3d 336, 344 (6th Cir. 2006)* (To determine if restraints are per se illegal, courts look to the circumstances, details, and logic of a restraint to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction may be reached.); see also *GTE Sylvania Inc., 433 U.S. at 58-59* (observing that "departure from the rule-of-reason standard [in ***antitrust*** **[**39]** ***law***] must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"); see also *Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 724-726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (reiterating twice the preference for considering substantial economic effect, rather than formalism).

2. Parallel Pricing

HN17[] As a matter of substantive ***antitrust law***, it has long been established that defendants' mere parallel conduct, even if it is consciously parallel, does not violate *Section 1* of the Sherman Act. See, e.g., *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*.

> Indeed, such conduct is commonplace and often efficient. Of course, parallel conduct can result from an agreement between competitors, and such an agreement could violate *Section 1*. But an allegation of agreement under *Section 1* must rest on something more than allegations of parallel conduct, lest commonplace and efficient economic behavior provide a sufficient basis for costly litigation over largely groundless claims. Nor can a mere conclusory allegation of an agreement or conspiracy suffice to convert allegations of parallel conduct into an adequate allegation of a violation of *Section 1*.

Bell Atlantic **[**40]** Corp. v. Twombly, 2005 U.S. LEXIS Briefs 1126, at *9-10 (Brief for the United States, as Amicus Curiae Supporting Petitioners).

Consequently, the Supreme Court held that *HN18*[] mere allegations that defendants engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting an illegal agreement to that effect, were insufficient to state a claim under *Section 1* of the Sherman Act. See *Twombly, 127 S. Ct. at 1964*. Consequently, to duly assert a violation, allegations of parallel conduct must be placed in a factual context which raises a plausible suggestion of a preceding agreement rather than identical independent action, since a defendant's business activity could be an entirely natural, unilateral reaction of the defendant to the business activities by defendant's competitors. See *Twombly, 127 S. Ct. at 1964* ("Because *§ 1* of the Sherman Act does not prohibit all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express").

B. The Foreign Trade Antitrust Improvements [41] Act**

1. Legislative History

Known as "inelegantly phrased," *Carpet Group, 227 F.3d at 69*, the Foreign Trade Antitrust Improvements Act ("FTAIA") is an adjunct of antitrust jurisprudence: the statute rarely appears on the pages of case law and, even when it does so, it is often misconstrued. See *Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 299 (2002)* ("Although [the FTAIA was] passed two decades ago, few federal courts have had occasion to apply [it]"); see also Makan Delrahim, Drawing the Boundaries of the Sherman Act: Recent Developments in the **[*860]** Application of the ***Antitrust Law*** to Foreign Conduct, *61 N.Y.U. Ann. Surv. Am. L. 415 (2005)* (surveying the complexities of the statute revealed by FTAIA litigations).

The Supreme Court first addressed the applicability of the Sherman Act to conduct abroad in *American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826*, in 1909, a time when the United States was less economically interconnected with much of the world than today. The American Banana Court relied on a tort principle (namely, the conflict-of-laws rule that the legality of an act "must be determined wholly by the law of the country where the act is done") to conclude that wholly foreign **[**42]** conduct in a foreign country did not state a Sherman Act claim. See *id. at 356*. Sherman Act jurisprudence matured, however, and the certainty expressed in American Banana began to dissolve when cases came to the Court involving conduct not wholly foreign and with more obvious effects on United States commerce. See e.g., *United States v. Sisal Sales Corp., 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927)* (involving a conspiracy to monopolize Mexican sisal exports and American sisal sales).

By 1945, the modern view crystallized in *United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416 (2d Cir.)*, a case that seems contemporary because it involved a foreign company as a participant in a foreign cartel that affected United States prices. The Second Circuit, sitting as court of last resort and speaking through Judge Learned Hand, held that the Sherman Act reached conduct abroad that was intended to affect -- and did in fact have a significant effect on -- United States commerce. See *id. at 444*. Hence, the situs of the effects, as opposed to the conduct, therefore determined whether the court presented with a foreign conduct-based antitrust challenge had the necessary jurisdiction to entertain the challenge **[**43]** under the Sherman Act. [15]

> Legislating on this background, Congress in 1982 enacted [the FTAIA] to clarify the application of United States antitrust laws to foreign conduct [in order to] promote [inter alia,] the "certainty in assessing the applicability of American ***antitrust law*** to international business transactions and proposed transactions."

Turicentro, 303 F.3d at 298-99 (quoting H.R. REP. NO. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2494.3); see also *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 952 (7th Cir. 2003)* ("If FTAIA sets out an issue on the merits, resolution of the issue could be delayed until late in the case, [hence, creating] an effect on foreign markets . . . while the case remained pending. . . . Treating the matter as one of subject matter jurisdiction reduces the potential for offending the economic policies of other nations. [The] FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong. And the power of the courts is precisely what subject matter jurisdiction is about.").

2. Methodology of the FTAIA Analysis

HN19[] The FTAIA sets forth a general rule that excludes from the scope of the Sherman **[*861]** Act all conduct involving "non-import" foreign commerce unless two conditions are met: (1) the alleged conduct has a "direct, substantial and reasonably foreseeable effect" on United States domestic commerce; and (2) the domestic anti-competitive effect "gives rise to" a claim under the Sherman Act. See *15 U.S.C. § 6a*. Thus, the FTAIA poses the following three-prong inquiry. [16]

HN21[] First, the FTAIA asks whether all defendants were "involve[d in] import trade or import commerce." See *Carpet Group, 227 F.3d at 69, 72*. If all that defendants were doing was *actually* bringing goods or services *into the United States,* then the FTAIA (and the FTAIA's requirement for "direct, substantial and reasonably foreseeable effect") is not even triggered, i.e., the claim squarely falls within the scope of the Sherman Act. See *Turicentro, 303 F.3d at 302* ("[While the FTAIA] does not define the term 'import,' . . . the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad") (citing Webster's Third New Int'l **[**46]** Dictionary (1986); Black's Law Dictionary (6th ed. 1990)). However, if "[d]efendants *did not directly bring items or services into the United States* . . . , they cannot be labeled 'importers,' [nor it could be said that defendants] have they engaged in 'import trade or commerce.'" See id. (emphasis supplied). In other words, even if a certain importer purchased or otherwise obtained the defendants' product in a foreign market (be it the

---

[15] The "effects test" has prevailed consistently since Alcoa, and by 1993 the Supreme Court declared that the law **[**44]** is "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." See *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*.

[16] *Section 6a of the FTAIA* provides, in relevant part, that:

> ***HN20***[] [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless-
>
> (1) such conduct has a direct, substantial and reasonably foreseeable effect-
>
> > (A) [on domestic, i.e., interstate] trade or commerce, or on import trade or import commerce with foreign nations . . .
>
> (2) such effect gives rise to a claim under the provisions of *Sections 1 to 7* **[**45]** of [the Sherman Act].

15 U.S.C. § 6a. The Court notes, in passing, that the three-prong inquiry discussed in the instant Opinion reflects solely the aspects of FTAIA pertinent to the case at hand: in light of the complexities of FTAIA, the Court finds it prudent to omit from the discussion an alternative FTAIA scenario not implicated by the case at bar, i.e., that of effects "on export trade or . . . commerce with foreign nations" by an entity exporting goods or services from the United States. *15 U.S.C. § 6a(1)(A)* and *(1)(B)*.

defendants' national market or any other market) and brought the defendants' product into the United States, the fact that the product eventually found its way into the United States does not transform the defendant into an "importer" and, hence, an antitrust claim against the defendants must pass muster under the FTAIA before the Sherman Act claim can be entertained. See *id. at 304* (The fact "[t]hat 'some of the goods purchased in [a foreign market] may ultimately have been imported by individuals into the United States' [is] immaterial to determining if defendants [are] involved in 'import trade or import commerce' [since the defendants' own] actions did not *directly* increase or reduce imports into the United States") (quoting *Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002)*, **[**47]** emphasis supplied).

HN22[] Once it is determined that the defendants are not actual importers or that they were importing goods all over the world, the FTAIA is triggered. However, the FTAIA bar does not exclude every possible conduct by the defendants which are not directly importing into the United States from the reach of the Sherman Act. Rather, the second prong of the inquiry must be conducted, namely, whether the **[*862]** defendants' alleged conduct "involv[e]d trade or commerce with foreign nation." See *15 U.S.C. § 6a*. Generally, "where [the defendants'] conduct . . . is directed at the competitiveness of a foreign market, such conduct involves 'foreign trade or commerce.'" See See *Turicentro, 303 F.3d at 302* (quoting *Kruman, 284 F.3d at 395* ("When there is conduct directed at reducing the competitiveness of a foreign market . . . such conduct involves foreign trade or commerce, regardless of whether some of the conduct occurred in the United States"). Hence, if the foreign defendants are not involved in importation into any foreign market, i.e., if they operate only within their own domestic market, the FTAIA bars antitrust suits against such defendants by removing subject matter jurisdiction **[**48]** of a United States court to entertain Sherman Act claims against such defendants, even if certain ripple effects of the defendants' conduct reach the United States' market.

However, if the answer to the second prong is in affirmative, i.e., ***HN23***[] if the foreign defendants are involved in importation into foreign markets (which may or may not include the United States), then the third prong of the inquiry comes into play. See *15 U.S.C. § 6a(2)*. Specifically, the court shall determine whether the foreign defendants' export activities (i.e., the defendants' bringing of their goods or services into markets other than their own) caused "direct, substantial and reasonably foreseeable effect" on the United States' market, i.e., either on our nations' interstate commerce or on the importation into the United States. See id. Once this third prong is satisfied, the court establishes its subject matter jurisdiction to examine the sufficiency of plaintiff's claim pursuant to the Sherman Act. See *id. at 301*.

3. Direct, Substantial, and Reasonably Foreseeable Effect

HN24[] The courts agree that participation by American firms in the alleged conspiracy does not, by itself, establish an anticompetitive effect in **[**49]** the United States. See *Kruman, 284 F.3d at 395*. Similarly, mere intent of defendants to reduce competition in the United States is insufficient to meet the "direct effect" standard. See *Dee-K Enters., Inc. v. Heveafil Snd. Bhd., 299 F.3d 281, 292 (4th Cir. 2002)*, cert. denied, *539 U.S. 969, 123 S. Ct. 2638, 156 L. Ed. 2d 675 (2003)*. To establish "direct effect," the plaintiff must show a causal link between the *wrongful conduct* and the *anticompetitive effect* suffered in the United States. See *United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004)* ("[A]n effect is 'direct' if it follows as an immediate consequence of defendant's activity"); *Info. Res. Inc. v. Dun & Bradstreet Corp., 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000)*; *Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984)* (finding no jurisdiction under the FTAIA when "the link between the defendants' conduct abroad and the price . . . in the United States is far from apparent"); see also *In re Monosodium Glutamate Antitrust Litig., 2005 U.S. Dist. LEXIS 39641, 2005 WL 2810682 (D.Minn. Oct. 26, 2005)* (to avoid the FTAIA bar, the plaintiff must show "proximate" causation, not just "but for" causation, between the alleged domestic effects of defendants conduct **[**50]** and the defendants' alleged worldwide activities); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V., 2005 U.S. Dist. LEXIS 19788, 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005)* (same); *eMag Solutions LLC v. Toda Kogyo Corp., 2005 U.S. Dist. LEXIS 44512, 2005 WL 1712084 (N.D. Cal. July 20, 2005)* (same); accord *Sniado v. Bank Austria AG, 378 F.3d 210 (2d Cir. 2004)* (declining subject matter jurisdiction where plaintiff asserted a worldwide exchange rate fixing scheme but did not characterize the **[*863]** scheme as even a but-for cause of his injury). Thus, mere spillover effects within the United States caused by a conspiracy targeting foreign markets are not sufficiently "direct" to satisfy the FTAIA, see *Eurim-Pharm GmbH, 593 F. Supp. at 1106*, just as mere ripple effects felt in the United States as a result of anticompetitive conduct abroad are not sufficiently "substantial" to meet FTAIA requirements. See *Turicentro, 303 F.3d at 304* ("[p]laintiffs' alleg[ations that] defendants' conduct . . . substantially reduced [plaintiffs'] business values, forcing at least one member of the putative class out of business [do not state] any 'effect' on United States commerce"); *Dee-K Enters. Inc., 299 F.3d at 292*.

4. Additional Considerations

a. *Comity*

In Hartford **[**51]** Fire, nineteen of the U.S. States and numerous U.S. private plaintiffs filed complaints alleging that the defendants, which consisted of four domestic primary insurers, domestic reinsurers, brokers and trade associations, as well as reinsurers based in London, United Kingdom, violated the Sherman Act by engaging in various conspiracies that forced certain other primary insurers to change the terms of their standard domestic insurance policies. After the actions were consolidated for litigation, the District Court for the Northern District of California granted the defendants' motions to dismiss, primarily on the grounds of antitrust immunity, pursuant to the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*. See *In re Insurance Antitrust Litigation, 723 F. Supp. 464 (N.D. Cal. 1989)*. The Court of Appeals for the Ninth Circuit reversed the district court's conclusion with respect to the McCarran-Ferguson Act and, in addition, the court rejected the district court's conclusion that the principle of international comity barred the court from exercising Sherman Act jurisdiction over the claims brought solely against the London reinsurers. [17] See *In re Insurance Antitrust Litig., 938 F.2d 919 (9th Cir. 1991)*. **[**52]** Upon grant of certiorari, the Supreme Court affirmed in part and reversed in part. See *Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*. Justice Souter, delivering the opinion of the Court, observed:

> The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist.* ***[*864]*** *Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)*. The London reinsurers contend that applying the [Sherman] Act to their conduct would conflict significantly with British law [governing their conduct], and the British Government, appearing before [the Supreme Court] as amicus curiae, concurs. . . . But this is not to state a conflict. "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. . . . No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." *Restatement (Third) Foreign Relations Law § 403, Comment e*. 25. Since the London reinsurers **[**53]** do not argue that British law requires them to act in some fashion prohibited by the law of the United States, . . . or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law. See *Restatement (Third) Foreign Relations Law § 403, Comment e*, *§ 415, Comment j*. We have no need in this litigation to address other

---

[17] ***HN25***[] The term "comity" describes a theory for accommodating conflicting legal policies of territorial sovereigns; it was developed by scholars in 17th-century by Dutch scholar Ulrich Huber to resolve conflicts between the laws of the various Dutch provinces. See Davies, The Influence of Huber's de Conflictu Legum on English Private International Law, 18 Brit. Y.B. Int'l L. 49, 52 (1937). Huber summarized his analysis into three now well-known axioms: (1) the laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond; (2) those are held to be subject **[**54]** to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily; (3) those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state and another state's courts. See id. at 26. Thus, the legal doctrine of international comity is not a rule of public international law but a judicial tradition based on respect for sovereignty, a discretionary power of the court to decline jurisdiction in international cases out of respect for the actions and laws of another nation, which are weighed against United States international convenience and duties. See *Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 129 (E.D.N.Y. 2000)* (citing *Societe Nationale Industrielle Aerospatiale, 482 U.S. at 555*).

> considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

Hartford Fire, 509 U.S. at 798-99 (citations to parties' and amici briefs omitted).

Consequently, the Hartford Fire Court concluded that comity did not prevent the district court from entertaining the plaintiff's claim under the specific set of facts presented by the case, but stressed that all inquiries implicating a sovereign's actions, including inquiries examining the **[**55]** effect a sovereign's actions might have on global operations of the entities under the sovereign's domain, are necessarily fact specific. See *id. at 797* (discussing the totality of factors).

b. *"Mixed FTAIA" Scenario*

The Court of Appeals for the Fourth Circuit in *Dee-K Enters., 299 F.3d 281*, built on the Supreme Court's teaching in Hartford Fire. In Dee-K Enterprises, two United States companies that purchased rubber thread filed a putative antitrust class action alleging a price-fixing conspiracy led by Southeast Asian producers of the thread. The plaintiffs named, as defendants, nine Southeast Asian producers of rubber thread and some of their subsidiaries and distributors in the United States, [18] and alleged that the plaintiffs: (a) paid "artificially high and non-competitive prices"; (b) "were deprived of free and open competition in the market"; and (c) "the competition among defendants . . . was restrained" in the United States *and thoughout world.* See *id. at 284*.

> [The plaintiff] introduced substantial evidence at trial of horizontal price fixing among the producers. This price fixing apparently originated at least in part in reaction to 1991 threats by the United States government **[**56]** to punish Southeast Asian rubber-thread producers for violating antitrust prohibitions . . . . In December 1991, responding to the dumping **[*865]** accusations, officials of the Malaysian producers . . . met with a Malaysian government official and agreed to fix [Malasian] rubber-thread prices throughout the world. Later joined by other rubber-thread producers from Malaysia, Indonesia, and Thailand, they continued to meet for several years, at conventions and in other settings, to discuss and implement these and other efforts to fix prices. They met regularly between 1992 and 1995 -- in Kuala Lumpur, in Columbo, in Bali, and in Penang [but] never met in the United States. . . . From 1991 to 1996, United States prices for rubber thread . . . generally rose, [and the plaintiff] attributes these increases to the price-fixing conspiracy. . . . At the conclusion of [the] trial, the district court submitted a special verdict form to the jury [asking, inter alia, whether] "the conspiracy ha[d] a substantial effect in the United States" [and] the jury answered [this] question in the negative [causing the plaintiff's appeal].

Id. at 284-85. The Fourth Circuit did not disturb the jurors' finding. The **[**57]** court conducted a two-prong inquiry, first agreeing with the district court's conclusion that the plaintiffs' allegations clearly implicated the FTAIA because the alleged price-fixing conspiracy constituted a "foreign conduct" in light of the plaintiffs' assertion of "a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market." *Id. at 286-93* (providing an extensive discussion of the FTAIA and refusing to read the language in *Carpet Group, 227 F.3d at 75*, and *United States v. Nippon Paper Indus., 109 F.3d 1, 9 (1st Cir. 1997)*, as contradicting the FTAIA's legislative history, the position of the Department of Justice, the Supreme Court's holding in Hartford Fire and the positions of all other circuit and district courts). The court stressed that, ***HN26***[] in determining whether the FTAIA applies,

> a court should consider whether the [defendants'] *acts, targets, and effects* . . . are *primarily* foreign or *primarily* domestic. This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization

[18] Specifically, the plaintiffs named, as defendants, five Malaysian companies, two Indonesian, two Thai, as well as three United States wholly-owned subsidiaries of the Malaysian companies and two United States independent distributors used by other producers. See *Dee-K Enters., 299 F.3d at 283-84*. In other words, the scenario examined in Dee-K presented substantially more ties to the United States market than **[**60]** the case at bar, where the sole connection is the existence of a single United States subsidiary of one of sixteen other Defendants.

> as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly **[**58]** produce. We cannot begin to foresee the scope or complexity of future transactions. To adopt simplistic rules . . . might well yield unintended and unfortunate results. . . . We note that this approach echoes that of the Third Circuit in Carpet Group and finds support in several of the treatises.

Id. at 294 (citing *Carpet Group, 227 F.3d at 75*; Wilbur L. Fugate, Foreign Commerce and the Antitrust Laws § 2.12 at 80-82 (5th ed. 1996); *Restatement (Third) of Foreign Relations Law § 415(2)*, and *Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981))* (emphasis supplied). Then, the court concluded that, even in a scenario where the plaintiffs actually proved horizontal price fixing, the allegations that "the agreements . . . were all formed entirely outside the United States -- in several other countries, [the] target of the conspiracy was a global market, [and the] links to the United States are mere drops in the sea of conduct that occurred . . . around the world" fail to establish that the defendants' activities caused the "direct, substantial and reasonably foreseeable effect" on the United States trade necessary to remove the FTAIA bar. *Id. at 295-96*; accord *Eurim-Pharm GmbH, 593 F. Supp. at 1106*; **[**59]** accord *Turicentro, 303 F.3d at 304*. Thus, Dee-K Enterprises stands for the proposition that ***HN27***[] the FTAIA bars claims failing to establish not only a clear link between the **[*866]** defendants' illegal conduct and the United States trade and commerce, but also that the United States trade was, at the very least, "a" focus point of the defendants' illegal conduct. [19] Cf. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981)*, cert. denied, *454 U.S. 1163, 102 S. Ct. 1036, 71 L. Ed. 2d 319 (1982)* (finding no jurisdiction over claims against a world-wide combination of petroleum producers under the act-of-state doctrine); compare *Carpet Group, 227 F.3d at 73* (Congress did not intend to remove federal jurisdiction in the cases which *clearly involve conduct in the United States* rather than abroad)

VII. DISCUSSION

A. Presumption as to Lack of Sovereign Action

Plaintiffs name as Defendants in this action sixteen Chinese business entities and Minmetals, a wholly owned United States subsidiary of one of these sixteen entities. See Compl. P 9-25. ***HN28***[] It is axiomatic that a business **[**62]** entity cannot conspire with its wholly-owned subsidiary for purposes of the Sherman Act liability, see *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, and Plaintiffs' antitrust claims against Minmetals could be plausible only if the Court is to supplement Plaintiffs' claim with an allegation (not stated in the Complaint but suggested by Plaintiffs during the October 6, 2008, oral argument) that Minmetal conspired with Defendants *other* than its parent company. Plaintiffs' failure to plead so is, however, of less concern to this Court than Plaintiffs' silence as to the comity implications raised by this matter.

---

[19] This Court finds the holding of Dee-K Enterprises both insightful and sensitive to the realities of the modern, progressively globalized world trade: any holding otherwise risks creating a judicial rule undermining the legislative rationale of the FTAIA. To illustrate, if one is to presume that there is a cartel of producers-importers of a certain merchandise which: (a) operates world-wide, without focusing on the United States market; and (b) sell its merchandise in the United States at the cheapest prices, comparing to those charged for comparable merchandise by domestic producers and other importers (as it is the case with Chinese Processed Magnesite), a blind application of United States ***antitrust law*** to such cartel could, inadvertently, create an effect diametrically opposite to the goal of the Sherman Act. Specifically, such blind application of United States ***antitrust law*** could cause the United States a self-imposed "quasi-embargo," in the sense that the cartel -- after being found in violation of the Sherman Act --might elect not to change its **[**61]** pricing practices but rather to avoid the reach of the United States law by simply selling *all* its merchandise in non-United States markets. Such self-imposed quasi-embargo would, in turn, create a dire shortage of the merchandise in the United States and, hence, an incentive for numerous intermediaries to profiteer from this shortage by re-selling the cartel's merchandise in the United States purchased in foreign markets: this scenario would result in higher prices paid by United States consumers -- even if the intermediaries diligently compete against each other within the meaning of the Sherman Act -- since the intermediaries would sell the merchandise in the United States at prices necessarily exceeding those paid by them to the cartel (simply because the intermediaries would have no business incentive to import the merchandise in order to sell it at the price below those that they themselves paid, or at cost).

The People's Republic of China ("China" or "State") was formally established on October 1, 1949 when, after a victory by the Communist Party of China, Mao Zedong proclaimed the creation of a communist state, hence triggering the State's centrally planned economic system. [20] See **[*867]** <<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Intro>> ("China-Intro"). However, in 1978, "China adopted **[**63]** its open-door policy and allowed its economy to be exposed to the international market, [coining] what Deng Xiaoping called 'socialism with Chinese characteristics.'" Lan Cao, Public Perspectives on Privatization: Chinese Privatization: Between Plan and Market ("Public Perspectives"), *63 Law & Contemp. Prob. 13, 13 (2000)*. The reforms started with the phasing out of collectivized agriculture and expanded, in a piecemeal fashion, to include gradual liberalization of prices, fiscal decentralization and growth of the non-state sector. See China-Intro; *Public Perspectives at 18, 28*. However, "Chinese [government] deferred state-sector privatization and focused on establishing the fundamentals of a market-oriented economy . . . in the newly created non-state sector." *Public Perspectives at 22*. Therefore, "the state sector remain[ed] remarkably large, [and, by the year 2000,] China [still had] more than 200 million people employed in its 340,000 state owned enterprises, which account[ed] for thirty-four percent of the country's total industrial output, fifty-seven percent of its total fixed asset investment, and more than one-third of its GDP." *Id. at 32* (citations omitted). "Like other **[**64]** centrally planned economies in transition, the purchase of inputs and sale of outputs [by state-owned enterprises] in China remain[ed] linked to the central planning system despite efforts to de-link portions of the economy from the central plan." *Id. at 26*.

> The issue of which commodities and industries [must be still] subjected to price regulation and economic plan is first settled on the state-wide level and then at the provincial level, where each province can designate additional commodities or industries as essential and subject them to the province's own [central] economic plan. For example, on the state level, China regulates such commodities as meat, sugar, and vegetables as well as public services, new technology sectors, industries related to state security, banking, and insurance. Conversely, such industries as coal, machine-building, electronics, and textiles are not subject to the state-wide control. However, these industries could be controlled [upon or without an express State's mandate] on a local level. For example, [certain] Provinces considered chemicals, building materials, metallurgy, and machine building essential enough to be regulated by the provinces' economic **[**65]** plans.

Id. at 33, n. 101 (citations omitted).

In the case at bar, Plaintiffs enlighten this Court as to the juridical status of Defendants only by stating that one of Defendants **[**66]** is a "Chinese state-owned trading company," while another is a "Chinese directly owned state company." See Compl. at 2-3. With respect to fourteen other Defendants, Plaintiffs merely informed the Court that these Defendants **[*868]** are either "Chinese trading companies" or "Chinese corporations," see id. at 3-5, leaving the Court to guess whether Defendants are: (a) wholly owned by the State and, thus, are nothing but the State's assets/instrumentalities; or (b) now-privatized or newly-created private entities obligated to operate in its domestic, as well as foreign, markets subject to certain State-wide and/or Province(s)-wide price and production economic plans; or (c) enterprises operating outside Chinese regulatory constraints; or (d) different combinations of the above-listed choices. See *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)*; *Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)*.

This Court's discussion of different scenarios based on a multitude of hypotheticals presuming: (a) different composition of the State's ownership and control of some of Defendants, as well as (b) different Chinese regulatory

---

[20] In a centrally planned economy, the state government controls all (or, at least, all major) sectors of the economy and formulates all decisions about their use, i.e., the government decides what should be produced, as well as the quantities and situs of production, and sets the prices at which the products are to be sold. Planned economies are in contrast to unplanned economies, such as a market economy, where production, distribution, pricing, and investment decisions are made by the private owners of the factors of production based upon their own and their customers' interests rather than upon furthering some overarching governmental macroeconomic plan. See Daniel Myers, Construction Economics 288 (2004); Bertell Ollman, Market Socialism: The Debate Among Socialists 12 (Routledge, 1997); Alec Nove, Planned Economy, in The New Palgrave: A Dictionary of Economics, vol. 3 at 879 (1987); <<http://www.enotes.com/biz-encyclopedia/centrally-planned-economy>>; <<http://dictionary.reference. com/browse/planned%20economy>>.

regimes, appears **[**67]** to be wholly unwarranted at the instant juncture: it would produce nothing but a treatise-long dictum. The Court, therefore, presumes -- *for the purposes of this discussion only* -- that all Defendants named in this matter are entities enjoying such juridical status and/or operational regime that Plaintiffs' allegations stated in the Complaint *cannot* be qualified as implicating either the act-of-state or foreign sovereign compulsion, or comity doctrines, or the Foreign Sovereign Immunities Act ("FSIA"), *Pub. L. No. 94-583, 90 Stat. 2891*, or as probing exceptions to the FSIA, or as bringing into this discussion any other provision, judicially-create doctrine or public policy related to a foreign sovereign's action. [21]

B. As Drafted, Plaintiffs' Complaint Is Barred by the FTAIA

As noted supra, Plaintiffs named seventeen Defendants, sixteen of which are described by such terms as "Chinese state-owned trading company," "Chinese directly owned state company," "Chinese trading company" and "Chinese corporation." See Compl. at 2-5. The seventeenth Defendant, Minmetals, is defined as "a New Jersey corporation [which is] a subsidiary and affiliate of [the Defendant that is a Chinese state-owned trading company]." Id. at 3.

The Complaint is void of any information as to whether any of these seventeen Defendants was *actually bringing* Processed Magnesite *into the United States.* [22] See Compl. P 26 (merely notifying the Court that "[e]ach of these [D]efendants [either] directly [or] *through affiliates* . . . is engaged in the business of manufacturing **[**69]** and selling [Processed Magnesite] in the United States and *throughout the world,"* hence allowing for a presumption that none of Defendants actually imported **[*869]** Processed Magnesite into the United States).

Moreover, the Complaint is infused with statements unambiguously indicating that Defendants' allegedly illegal combination activities: (a) took place primarily in China or at unknown destinations which appear to be locales other than the United States, see Compl. P 51 (asserting that Defendants "participated in meetings and conversations *in China and elsewhere*"); and (b) targeted and affected Defendants' entire world trade in Processed Magnesite rather than aiming primarily at the United States market. See id. PP 1, 26, 45-51, 53. Therefore, Plaintiffs' allegations must necessarily be construed as inviting the FTAIA scrutiny. See *Dee-K Enters., 299 F.3d at 294*; accord *Turicentro, 303 F.3d at 302*.

1. Trade and Commerce

At the outset of its FTAIA analysis, the Court shall **[**70]** establish whether Plaintiffs' allegations indicate that Defendants' alleged conduct "involv[ed] trade or commerce . . . with foreign nation." See *15 U.S.C. § 6a*; *Turicentro, 303 F.3d at 302*. The inquiry, while usually simple, does not present an easy task in the case at hand, since the allegations made by Plaintiffs discuss mainly Defendants' alleged "combination and conspiring" activities, see Compl. at 9-11 (enlightening the Court that "Defendants began their ongoing combination and conspiracy to suppress competition by fixing the price and controlling export sale volumes of [Processed Magnesite] offered for sale . . . in the United States and elsewhere"). These generic references to "conspiracy" and "fixing prices" do not establish that any Defendant was actually involved trade or commerce with foreign nation, since Defendants could

---

[21] The Court notes, in passing, that Plaintiffs' claims are based on Defendants' activities that started, allegedly, around April of 2000 and continued, at least, to the date of Plaintiffs' filing of the Complaint, i.e., until September 7, 2005 ("Complained Period"). See Compl. PP 45, 62. However, since Chinese privatization processes started in 1978 and, according to *Public Perspectives at 32*, kept at least one-third of Chinese industry owned by the State, it is entirely **[**68]** plausible that all (or some) of the seventeen Defendants were State-owned enterprises at the beginning of the Complained Period but changed their juridical status and became non-State-owned entities by the end of the Complained Period and -- in addition -- might have experienced intermittent regulatory and non-regulatory sub-periods since they became privately owned.

[22] Indeed, the Complaint does not assert that Minmetals, an alleged arm of its parent Defendant, operated as an importer of any Chinese goods, or as an importer of Chinese Processed Magnesite in particular. See Compl. at 3.

merely be producers of Processed Magnesium, producers of any other metals or minerals, sellers of Processed Magnesite in their own domestic market, or even equity holders, advisory entities, etc. [23]

However, **[**72]** being mindful of the Court of Appeals observation that a defendant might be presumed to be involved in import trade or commerce, if the defendant elects to refer to itself as an "importer," see *Carpet Group, 227 F.3d at 72*, the Court takes notice of the fact that the names of seven Defendants out of the seventeen named in the Complaint (i.e., China National Metals & Minerals Import & Export Co., China National Minerals Import & Export Corporation, China Metallurgical Import & Export Co., Haicheng Huayu Group Import & Export Co. Ltd., Xiyang Imoprt & Export Ltd. Co., Liaoning Foreign Trade General Co. and Dalian **[*870]** Golden Sun Import & Export Co.) include such terms as "import," "export" and "foreign trade," see Compl. at 2-3, hence inviting the conclusion that at least these seven Defendants were actually involved in exportation from China to some foreign markets. Accord Compl. P 26 (similarly suggesting such possibility by asserting that "[D]efendants [either] directly [or] through affiliates [were] engaged in the business of manufacturing and selling [Processed Magnesite] throughout the world"). The Court, therefore, deems this prong of the FTAIA satisfied for the purposes of the instant **[**73]** analysis.

2. Plaintiffs Failed to Assert Facts Showing a Link Between Defendants' Alleged Illegal Actions and the United States Commerce

To avoid the FTAIA bar, the plaintiff must show a clear link between the aim of Defendants' alleged *illegal* activities and *the United States market.* See *Dee-K Enters., 299 F.3d at 295-96*. Here, Plaintiffs' three allegations, apparently made with an express aim to assert such a link, read as follows: (1) "[Defendants'] horizontal prices were designed to, and in fact did, have a substantial and adverse impact in the United States"; (2) "the conduct of [D]efendants . . . affected the interstate and foreign trade and commerce in the United States"; and (3) "[t]he conduct of [D]efendants . . . has directly, substantially and foreseeably restrained such trade and commerce." Compl. PP 27; 43-44. These conclusive allegations, however, are facially insufficient in light of the Supreme Court's teaching that the plaintiff can meet the plaintiff's pleading burden only if the complaint contains "enough [factual] heft" rather than "labels and conclusions [or] a formulaic recitation of the elements of a cause of action." *Twombly, 127 S. Ct. at 1965-69*. The Court, thus, **[**74]** dispenses with these bold conclusions without further review. [24]

In addition to these three conclusory statements, Plaintiffs make seven other allegations which might be interpreted as Plaintiffs' attempt to assert a link between Defendants' **[**75]** allegedly illegal activities and the United States

---

[23] For the time being, the Court will not consider Plaintiffs' allegation that Defendants were "controlling export sale volumes of [Processed Magnesite] offered **[**71]** for sale . . . in the United States and elsewhere," since the export quotas of Processed Magnesite were typically established by the Chinese government through a licensing mode, where licences are purchased by Chinese entities with respect to the particular goods the entity desires to export. See, e.g., Government Surveys - Citations. Therefore, any challenge to the Chinese government's decisions as to exportation quotas clearly implicates provision, judicially-create doctrine or public policy related to a foreign sovereign's action. Moreover, the fact that China became a member of the WTO in 2001 affected Chinese licencing policies, and any allegations as to the illegality of Chinese export quotas qualify as claims of China's violations of its WTO obligations: such allegations are not properly before this Court and should be entertained pursuant to the WTO dispute resolution mode incorporated into the treaty. That said, Plaintiffs are indeed free to state in an amended complaint any allegations against Defendants based on Defendants' agreements to control the volume of Processed Magnesite exportation *on the bases other than those ensuing from the governmental licensing scheme.*

[24] The Court notes, in passing, that -- while not substituting for Plaintiffs' facts -- Plaintiffs' statements that Defendants' actions had a "substantial and adverse impact" and that Defendants "substantially and foreseeabl[y] restrain[ed]" U.S. commerce appear indicative of Plaintiffs' awareness that the case at hand is governed by the FTAIA, since: (a) the "direct, substantial and reasonably foreseeable effect" test is never implicated by the Sherman Act, see *Carpet Group, 227 F.3d at 72* (citing 54 Am. Jur. 2d § 18, at 77); and (b) even the less rigorous analysis of effects that the restraint allegedly had on the competition should be wholly inapplicable to Plaintiffs' claim based on the "violation per se" theory, see Compl. P 1, since any "effects" analysis is relevant only to the "rule of reason" claims. See *Pace Elecs., Inc., 213 F.3d at 123* (if a restraint is per se illegal, further examination of the practice's impact on the market is unnecessary).

market. These seven allegations read as follows: (1) "Defendant producers have lower costs than their western competitors"; (2) "[e]xporters from China . . . enjoy a competitive advantage . . . because China . . . undervalues the Yuan, making Chinese export [goods] relatively less expensive compared to exports . . . from other nations"; (3) "[d]uring the conspiracy, prices of [Processed Magnesite] have not followed the laws of supply and demand that exist in a competitive market. Prices have remained stable or increased during the [Relevant Period] despite low demand"; (4) "[d]ue to [D]efendants' price fixing and market allocation activity, the prices of [Processed Magnesite] have increased despite reduction in the cost of production"; [25] (5) "as the cartel **[*871]** has taken steps to restrain production and increase prices, competitors [around the world] have shown that they would follow price increases rather than undercut the new cartel price levels"; (6) "[i]n 2004, the collusive agreements of the cartel continued to maintain prices well above those of a competitive market"; and (7) "[p]rices of magnesite in the animal feed industry . . **[**76]** . have steadily grown . . . and risen an overall 25 percent during [the Relevant Period]." Compl. PP 42; 53-54; 56-57. However, none of these allegations suggests a link between Defendants' *illegal* activities and the United States market.

a. Cost-of-Production Arguments

Three of the above-quoted seven statements appear to reflect Plaintiffs' view as to how the United States market should have benefitted -- but did not benefit -- from Defendants' allegedly low costs of production. [26] The first of these statements invites the Court to deduce that Defendants illegal activities must be linked to the United States trade and commerce because "Defendant producers have lower costs than their western competitors." Compl. P 42.

However***HN30***[] if an entity is conducting its business in a developing country, the fact that the entity's costs might be lower than those of analogous enterprises doing business in developed nations is neither indicative of the entity's anticompetitive practices nor suggests that the entity's goal is to affect the trade in a certain consumer nation. To illustrate, coffee-shop "A" selling a cup of cappuccino for $ 2.00 while incurring 50 cents of total fixed and variable costs per cup cannot be accused of anticompetitive practices simply because it elects not to sell its cup of coffee at a price between $ 0.51 and $ 1.99, even if: (a) all neighboring stores, except for a certain other coffee-shop "B," incur total costs per cup of $ 0.51 or higher and sell their cappuccino for **[**78]** $ 2.10 or above; and (b) coffee-shop "B" has both costs and sale prices identical to those of the "A" coffee-shop. Had it been otherwise, any entity operating above its break-even level would necessarily be suspect of anticompetitive practices.

The fact that an entity does not elect to sell its goods or services "even cheaper" suggests neither the entity's illegal activities nor a link between these illegal activities and the United States market. [27] Since Plaintiffs' facts equally allow for a conclusion that Defendants' prices were a result of Defendants' legitimate assessment of the world's markets, Plaintiffs' allegations based on a stereotypical observation that expenses born by western producers are usually higher than those of Chinese counterparts **[*872]** cannot be qualified as a fact linking Defendants' allegedly illegal actions to the United States trade and commerce. See Twombly, 127 S. Ct. at at 1966 n.5 (the line "between the factually neutral and the factually suggestive . . . must be crossed").

---

[25] Since, short of this single reference to "market allocation activity," see Compl. P 57, the Complaint is entirely silent as to any market allocation actions, the Court will not presume that Plaintiffs' single reference to "market allocation activity" was a result of a conscious desire to assert allocation of markets.

[26] At the outset, it shall be noted that ***HN29***[] activities of a foreign *producer* fall outside the reach of the Sherman Act since a "producer" is neither an "importer" **[**77]** into the United States nor an entity engaged in "trade or commerce" for the purposes of the FTAIA (i.e., not an importer into markets other than the United States). See *Carpet Group, 227 F.3d at 72*. In light of Plaintiffs' systemic conflation of the terms "producer" and "importer," the Court presumes that Plaintiff intended to assert that every Defendant was a producer, as well as an importer, of Processed Magnesite.

[27] Here, Plaintiffs appear to concede that Chinese imports of Processed Magnesite were the cheapest (or among the cheapest) available at the market, be it the United States market or world **[**79]** market, and be it in comparison with the products of developed or developing nations. See Compl. P 53 ("Chinese producers . . . set a floor below which other producers cannot compete).

Next, Plaintiffs attempt to show a link between Defendants' allegedly illegal conduct and the United States trade and commerce by stating that "the prices of [Processed Magnesite] have increased [during the Relevant Period] despite reduction in the cost of production," presumably, in China. Compl. P 57. This statement is similarly flawed on many levels.

The Court is unaware of any economic theory -- and Plaintiffs enlighten the Court about none -- upon which an entity, whose profit margin increased due to a reduction in costs of production, would have an incentive to forfeit that profit margin by passing the saving to the consumer or to forfeit an opportunity to raise its prices (and, hence, net profit) if the market so allows. The only economic concept vaguely resembling Plaintiffs' assertion is that a business entity, whose operational costs are marginally reduced, *might* consider lowering its prices in an attempt to gain a larger market share. However, even this concept in no way produces a mandatory **[**80]** rule, since a business considering to seek a larger market share makes its decision in light of a multitude of economic considerations, such as the principle of increased opportunity cost and/or the speed and likelihood of obtaining return of and profit on its capital investment. [28]

Moreover, even if there were an economic theory supporting Plaintiffs' position, Plaintiffs' conclusions would necessarily be true only if Defendants, in fact, enjoyed a "reduction in the cost of production" during the Relevant Period. However, the Complaint is void of facts so suggesting, and the Court's own information indicates to the contrary. For instance, **[*873]** United States official data shows that: (a) the cost of energy and freight in China increased notably during the Relevant Period, see <<*http://minerals.usgs.gov/minerals/pubs/commodity/magne* sium/mgcommyb03.pdf>>; <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/* mgcommyb04.pdf>>; see also <<*http://www.stats.gov.cn/tjsj/ndsj/2005/html/I0913E.HTM>>* (showing 9% increase in costs of fuel and power between 1999 to 2004); and (b) the cost of labor in Chinese mining and mining-related industries more than doubled from 2000 to 2005. [29] See <<*http://www.stats.gov.cn/tjsj/ndsj/2006/html/E0520E.HTM>>;* <<*http://www.stats.gov.cn*/ english/statisticaldata/yearlydata/yb2004-e/html/E0526ae.htm>>; **[**83]** <<*http://www.stats.gov.cn*/ english/statisticaldata/yearlydata/YB2002e/html/e0526ae.htm>>; <<*http://www.stats.gov.cn*/ english/statisticaldata/yearlydata/YB2001e/html/e0526ae.htm>> (information provided by the National Bureau of Statistics of China, indicating that the wages of employees in state-owned facilities increased, between 1999 and 2005, from 8,283 yuan to 20,992 yuan per annum, that is 254%; while the wages in collectively-owned units increased from 4,857 to 11,268 (231%), and in all other units went from 9,842 to 21,207,

---

[28] The principle of increased opportunity cost (also known as the principle of diminishing marginal returns) provides that, in a production system operating with both fixed and variable factors of production, there invariably comes a point when each additional unit of variable input yields less output per each input unit. See Robert S. Pindyck, Daniel L. Rubinfeld, Microeconomics 194-97, 218-19 (6th ed. 2005). E.g., a pizza store having an oven capable of baking, at maximum 1,000 pizzas per day cannot bake 1,001st pizza even if the owner keeps hiring employees capable of preparing more that 1,000 pies per day: all that owner would incur with these new hires is less pizzas per employee, i.e., his profit would decrease because the output would remain the same but the overhead would keep increasing. A business entity might invest in fixed asset (also known as property, plant and equipment, or "PPE") to remedy **[**81]** the above scenario e.g., buy an additional pizza oven to allow the additional employees produce more pizzas. See, e.g., Charles T. Horngren, et al., Introduction to Financial Accounting 336-49 (9th ed. 2005). However, since PPE cannot easily be converted into cash (plus, equipment and plant are also subject to depreciation), a fixed asset investment might recoup itself only in the long run or, in the event of an unfavorable economic turn (e.g., a decline of pizza-consumption) or regulatory change (e.g., an ordinance prohibiting two ovens in one pizzeria as in violation of the local fire code), might even result in capital loss. Therefore, in industries where PPE investment is necessarily substantial (such as in mining and processing of minerals industries), the considerations related to long-term investment recoupment and uncertainties about the legal and economic regime often outweigh the discounted-to-their-current-value potential future profits. Here, the Complaint indicates that production of Processed Magnesite requires extensive labor and substantial investments in plant and equipment. See Compl. PP 38-41; see also <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/mgcmyb2001.pdf>>* **[**82]** (discussing a Chinese-Japanese joint venture launched in 2001 aiming to build a plant producing Processed Magnesite in Liaoning Province, China, at the construction cost of $ 3.65 million).

[29] The discussion of CCM, DRB and EFM production provided in the Complaint suggests production of Processed Magnesite is a labor-intensive process. See Compl. PP 38-41.

that is, 215%). Therefore, Plaintiffs' bold assertions appear to be contrary to the known economic theories and based on nothing but Plaintiffs' factless conjecture.

Plaintiffs' third statement seemingly related to Defendants' costs of production asserts that, "[i]n 2004, the collusive agreements of the cartel continued to maintain prices well above those of a competitive market." Compl. P 54. This allegation warrants little discussion, since it merely expresses Plaintiffs' belief that competitive **[**84]** market prices in the United States should necessarily have been lower during the Relevant Period, without any explanation as to Plaintiffs' bases for such a bold conclusion. See *Twombly, 127 S. Ct. at 1965-69* (the complaint cannot be based on self-serving interpretations of actual events, or mere labels and conclusions).

b. Currency- and Sale-Price-Based Arguments

Next, Plaintiffs try to show a link between Defendants' allegedly illegal activities and the United States trade and commerce by asserting that "[e]xporters from China . . . enjoy a competitive advantage . . . because China . . . undervalues the Yuan, making Chinese export[ed goods] relatively less expensive compared to exports from other nations." Compl. P 42. Plaintiffs argue against their own position.

The renminbi, Chinese mainland national currency, is issued by the People's Bank of China and measured in units referred to as "yuan." See Currency Trading, Wall St. J. C18 (Nov. 8, 1996); Larry L. Drumm, Changing Money: Foreign Exchange Reform in the People's Republic of China, 18 Hastings Int'l & Comp. L. Rev. 359, 384-386 (Winter 1995). Initially pegged to the U.S. dollar at 2.46 yuan per dollar, renminbi kept declining **[**85]** in its pegged exchange rate until 1994 and then kept rising (while still being pegged) until 2005, when the peg was lifted causing revaluation from 8.27 to 8.11 yuan per dollar. See <<*http://www.pbc.gov.cn/english//detail.asp?col=6400&IDcol=6400&ID=542*>>. Had the renminbi not been pegged to U.S. dollar, Chinese goods would cost American consumers more, i.e., they would be closer, price-wise, to comparable goods from the countries which did **[*874]** not undervalue their currencies. [30] It follows that, had Defendants been taking an illegal advantage of the undervalued renminbi, they should have fixed their prices just a tad below those of all other importers. However, the market data available suggests none of such price fixing tendencies.

The Government Surveys indicate that, during the Relevant Period, China and Canada were the largest United States importers with respect to CCM, while China, Australia and Austria were the largest United States importers with respect to DBM and EFM. [31] See Government Surveys - Citations. Detailing the prices charged by these importers, the Surveys show that: (a) in CCM market, Chinese prices were *substantially* below Canadian ones (i.e., $ 106 per metric ton versus $ 177 per metric ton in 1999; $ 112 versus $ 174 in 2000; $ 119 versus $ 188 in 2001; $ 111 versus $ 179 in 2002; $ 103 versus $ 171 in 2003; $ 117 versus $ 167 in 2004; and $ 142 versus $ 180 in 2005); just as (b) in DBM and EFM markets, Chinese prices were *substantially* below Australian **[**87]** and Austrian prices (i.e., $ 126 per metric ton versus $ 262 per metric ton in 1999; $ 129 versus $ 224 in 2000; $ 148 versus $ 197 in 2001; $ 141 versus $ 204 in 2002; $ 160 versus $ 236 in 2003; $ 208 versus $ 527 in 2004; and $ 212 versus $ 507 in 2005). See id. Granted the foregoing, it appears that Plaintiffs' currency-based argument is nothing but another expression of Plaintiffs' disappointment with the fact that the world prices on Chinese

---

[30] The peg was widely discussed in American academic and periodic literature since, when U.S. dollar was depreciating against other major currencies (which was rendering U.S. exports more competitive), the fact that the renminbi was pegged to the dollar automatically caused the value of renminbi to go down in foreign markets, hence minimizing the advantage U.S. products were gaining in world markets. See Wayne M. Morrison & Marc Labonte, CRS Report for Congress, **[**86]** China's Currency Peg: A Summary of the Economic Issues, at 4 (2005). Moreover, because of the peg, Chinese goods entered the United States market at significantly lower prices than other imports (making Chinese goods attractive to American consumers), while American goods were entering China's domestic markets at much higher costs (rendering these goods less attractive to Chinese consumers), thus increasing United States trade deficit. See id.

[31] While Australia was the second leading, that is, volume-wise, United States importer of DBM and EFC during 1999-2003, Austria surpassed Australia and became the second leading importer of DBM and EFM in 2004 and 2005. China remained the largest importer of CCM, DBM and EFC through the entire Relevant Period. See Government Surveys -- Citations.

Processed Magnesite were not lower than what they actually were. However, Plaintiffs' disappointment (or Plaintiffs' belief that Defendants should have made less profit by selling their Processed Magnesium even cheaper), can neither translate into a fact suggesting that Defendants' activities were anti-competitive nor link the United States trade and commerce to any illegal activities. See *Twombly, 127 S. Ct. at 1965-69* (the complaint cannot be based on self-serving conclusions). Plaintiffs' following allegation, i.e., that, "as the cartel has taken steps to restrain production and increase prices, competitors [around the world] have shown that they would follow price increases rather than undercut the new cartel price levels," Compl. P 53, **[**88]** appears not only factually unsubstantiated (since the Court is left to speculate about the prices and pricing rationale of all Processed Magnesite importers in the world) but also facially insufficient to either suggest Defendants' illegal activities or to link these activities to the United States market: the fact of parallel pricing does not satisfy the pleading requirements even with respect **[*875]** to the far-less-demanding standard posed by the Sherman Act. See *Twombly, 127 S. Ct. at 1964*.

c. Economic Arguments

According to the Complaint, "[d]uring the conspiracy, prices of [Processed Magnesite] have not followed the laws of supply and demand that exist in a competitive market. Prices have remained stable or increased during the [Relevant Period] despite low demand." Compl. P 56. The argument suggests Plaintiffs' misunderstanding of the economic **[**89]** concepts they invoke.

The "supply and demand" economic model describes the operations of market mechanism. It is graphically represented through two curved functions which, if read jointly, reflect the understanding that, in a competitive market, price will function to equalize supply and demand. See, e.g., Robert S. Pindyck, Daniel L. Rubinfeld, Microeconomics 20-24 (6th ed. 2005). The model neither requires all producers to sell comparable goods at the same price nor implies that a decline in demand would force *all* producers to lower their prices: the leeway available to sellers depends on price elasticity of their goods. See id. at 24-53 (discussing the concept of price elasticity, as well as related concept of supply/demand elasticity). Thus, if demand for certain goods begins to decline, the sellers offering their goods at the upper-bracket prices would be forced to lower them (or go out of business if competitive prices become so low to render their businesses unprofitable), while the sellers offering their goods at lower-bracket prices do not have to change their pricing policies -- and may even legitimately increase their prices -- until the demand drops to such a point that **[**90]** there is not enough market even for the goods they sell. [32] See id. at 32-53, 265-89 (discussing the relationship between elasticities, marginal revenue, short-run and log-run supplies). Hence, Plaintiffs' argument that the gradual increase in the prices of Processed Magnesite imported from China during the Relevant Period was in contradiction to the rules of supply and demand is based on an incorrect reading of economic theories. Moreover, Plaintiffs' assertion that the Processed Magnesite market suffered a *systemic* decline during the entire Relevant Period appears erroneous, since the decline occurred only in 2001, duly causing a substantial decline in importation from China. See <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/401400.pdf>>* ("[Only in 2001, a] general economic downturn led to decreasing demand . . . and as a result, production and imports declined by 20% . . . from the 2000 levels . . . , with the imports from China . . . declining by more than 100,000 metric tons"). This decline of 2001 followed the spike in importation that took place in 2000, see <<*http://minerals.usgs.gov/minerals/pubs/commodity/* magnesium/mgcmyb2001.pdf>> (explaining that "the reasons **[**91]** for the significant increase in imports was to replace . . . the domestically produced material . . . lost when [NRMC] closed"), and preceded a systemic **[*876]** rebound that took place after 2001. See Government Survey - Citations.

---

[32] To illustrate, if tomato growers who previously sold their crop for $ 1.00 to $ 2.00 per pound are faced with a market decline, the growers who were selling at $ 2.00 per pound would have to lower their prices in order to compete for the shrunk market (or to leave the business if they cannot afford reduction in price), while the growers who were selling at $ 1.00 per pound would still be in the position to keep increasing their prices until the decline in demand becomes such that even these growers cannot sell their entire crop (at which point, these growers would have to either compete with each other by lowering their sale prices or reduce their production).

In the same vein, Plaintiffs' final observation, i.e., that [p]rices of magnesite in the animal feed industry . . . have steadily grown . . . and risen an overall 25 percent during [the Relevant Period]," Compl. P 54, does not suggest a link between Defendants' alleged illegal activities and the United States **[**92]** trade and commerce, since the increase in supply prices in animal feed industry could have occurred for an infinite number of reasons, either entirely unrelated to Defendants' importation practices or related to Defendants' legitimate activities, or a combination of both. [33]

3. The Complaint Indicates Lack of Subject Matter Jurisdiction

As the foregoing discussion illustrates, Plaintiffs' allegations fail to state any facts linking Defendants' alleged illegal activities and the United States trade and commerce: all that Plaintiffs assert is that world Processed Magnesite prices (as well as Chinese Processed Magnesite prices) were rising during the Relevant Period. See generally Compl. However, **[**93]** such allegations cannot remove the FTAIA bar. Compare *Carpet Group, 227 F.3d at 73*. In Carpet Group, being presented with allegations (and extensive documentary evidence) indicating that defendants' specifically threatened to cease dealing with and expel from their trade associations those manufacturers/retailers that participated in the plaintiffs' *United States* trade shows and/or traded with *United States* plaintiffs, the Court of Appeals stressed that the FTAIA bar is inapplicable if:

> [t]he crux of [the] case involves conduct in the United States, not conduct abroad [because such] activities are not the type of conduct Congress intended to remove from our antitrust jurisdiction when it enacted the FTAIA.

Id. at 73. Here, in contrast, the case involves predominantly foreign conduct, i.e., Defendants' world-wide trade practices, which no statement made in the Complaint (short of Plaintiffs' self-serving conclusions), renders anticompetitive. Rather, the circumstances at hand are similar to those examined in Dee-K Enterprises in the sense that the alleged defendants' business activity was world-wide, without any focus on the United States (although, unlike here, the plaintiffs in Dee-K **[**94]** Enterprises actually alleged and proved specific facts showing that the defendants' business operations stemmed from an illegal conspiracy). See *Dee-K Enters., 299 F.3d 281*. The Court of Appeals for the Fourth Circuit, while acknowledging the conspiracy aspect, still found that liability was barred by the FTAIA because the target of defendants' operations "was a global market, [and the] links to the United States are mere drops in the sea of conduct that occurred . . . around the world." *Dee-K Enters., 299 F.3d at 295-96*. A fortiori, the allegations at hand, containing no facts suggesting an illegal conspiracy and asserting nothing more than Defendants' world-wide business operations, a small fraction of which implicated the United States market, [34] are barred by the **[*877]** FTAIA: stripped of all niceties, Plaintiffs' assertion is nothing but a circular argument first stating that Defendants' Processed Magnesite prices kept rising during the Relevant Period (along with the world's Processed Magnesite prices), then deducing from that fact that the price rise must be attributed to a conspiracy, and then following that conclusion with a deducement that the rising prices must have had a direct **[**95]** and substantial effect on the United States market *simply because the prices were rising all over the world,* United States included. See generally, Compl. However, the "direct, substantial and reasonably foreseeable effect" element of the FTAIA cannot be pled by a mere expression of Plaintiffs' disappointment with the world's pricing tendencies. In light of the foregoing, the Court will dismiss the Complaint for lack of subject matter jurisdiction, pursuant to *15 U.S.C. § 6a*.

C. As Drafted, Plaintiffs' Complaint Fails to State a Sherman Act Claim

---

[33] Since the prices on Chinese-produced CCM imported into the United States increased from $ 106 per metric ton in 1999 to $ 142 per metric ton in 2005 (that is, by 34%), while the prices on Chinese-produced DBM and EFM imported into the United States increased from $ 126 in 1999 to $ 212 in 2005 (that is, by 68%), the 25% increase in prices of magnesite in the United States animal feed industry does not appear to correspond to the changes in prices charged by importers of Chinese Processed Magnesite.

[34] As noted supra, the amount of Processed Magnesite exported from China to the United States ranged from 11% to 26% of Chinese production: 21% in 1999; 26% in 2000; 13% in 2001; 11% in 2002 and 2003; and 12% in 2004 and 2005. See Government Surveys.

Even if the Court were to ignore the deficiencies of the Complaint related to the FTAIA, the Complaint should be dismissed for failure to state a claim under the Sherman Act.

As noted supra, "[t]o establish a violation of *Section 1*, a plaintiff must prove, [inter alia]: (1) [a] concerted action by the defendants; [and (2)] that the concerted action [was] illegal." *Gordon, 423 F.3d at 207*. Here, Plaintiffs' **[**96]** statements related to Defendants' alleged combination and conspiracy consists of the following assertions: (a) in April of 2000, thirteen unidentified Chinese producers and exporters of magnesite reached a price-fixing agreement and established a certain cartel; (b) about the same time, the second cartel consisting of unspecified number of unidentified members reached their own price-fixing agreement; (c) shortly thereafter, the two cartels formed a unified cartel, which conducted an unspecified number of meetings in China and "elsewhere," one of which took place on March 22, 2003, in Shenyang, China, gathering nineteen cartel members that included an unspecified number of unidentified Defendants; and (d) during this meeting, the cartel renamed itself, reiterated its goal of maintaining and increasing Processed Magnesite prices, and successfully stabilized the prices from that point on. See Compl. PP 44-54. The foregoing is further detailed only by the names of the two original cartels, the name of the unified cartel, and the name the unified cartel assumed upon self-renaming. See id. Plaintiffs justify such paucity of information by noting that they did not and could not discover **[**97]** more information because Defendants "intentionally, and *fraudulently* concealed the existence of the combination and conspiracy" by having secret meetings, enforcing the secrecy through threats and "[i]ntentionally setting prices purportedly on a competitive basis." Id. P 59 (the Section titled "Fraudulent Concealment") (emphasis supplied).

Defendants argue that the Complaint, having the Section titled "Fraudulent Concealment" and the language asserting that Defendants "intentionally, and *fraudulently* concealed the existence of the combination and conspiracy," see id., should be read as alleging "that [D]efendants carried out their antitrust conspiracy through fraud" and, hence, scrutinized pursuant to *Rule 9(b)*. See Docket Entry No. 38, at 6-7 (citing *Lum v. Bank of America, 361 F.3d 217, 228 (3d Cir.)*, cert. denied, *543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203* ***[*878]*** *(2004))*. The Court agrees. [35]

In Lum, plaintiffs-borrowers alleged that defendants-banks, in setting their "prime plus" interest rates, violated the Sherman Act by agreeing to misrepresent that these "prime rates" were the lowest available. See *Lum, 361 F.3d at 220*. The Court of Appeals found that the borrowers' **[**99]** claim was insufficiently pled to meet the steep *Rule 9(b)* requirement. See *id. at 228*. The Lum court expressly pointed out that, in order to bring a pleading within the realm of *Rule 9(b)*, it is sufficient for the complaint to utilize the term "fraud" or "fraudulent" just in one paragraph. See id. (noting that the complaint was deemed to alleged that the banks "accomplished the goal of their conspiracy through fraud" because one paragraph in the complaint asserted that the banks "entered into a . . . conspiracy . . . designed to fraudulently and artificially inflate the 'prime rate' [and,] as a result of this . . . conspiracy . . . , the 'prime rate' . . . remained artificially high").

Here, Plaintiffs' allegations that Defendants "fraudulently concealed the existence of . . . conspiracy [while] intentionally setting prices purportedly on a competitive basis [and causing Processed Magnesite prices to be]

---

[35] Application of the strict requirements of *Rule 9* to cases involving allegations of fraud has been uniformly recognized and invariably administered by all courts. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*; *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *Karvelas v. Melrose Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004)*; **[**98]** *First Capital Asset Mgt, Inc. v. Satinwood, Inc., 385 F.3d 159, 178-179 (2nd Cir. 2004)*; *Lum, 361 F.3d at 223-224*; *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783-784 (4th Cir. 1999)*; *Tel-Phonic Services, Inc. v. TBS Intern., Inc., 975 F.2d 1134, 1138-1139 (5th Cir. 1992)*; *Advocacy Organization for Patients and Providers v. Auto Club Ins. Assn., 176 F.3d 315, 322 (6th Cir. 1999)*; *Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 468-470 (7th Cir. 1999)*; *Parnes v. Gateway 2000, Inc., 122 F.3d 539, 549-550 (8th Cir. 1997)*; *Lancaster Comm. Hospital v. Antelope Valley Hospital Distr., 940 F.2d 397, 405 (9th Cir. 1991)*; *Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989)*; *Brooks v. Blue Cross & Blue Shield of Florida, 116 F.3d 1364, 1380-1381 (11th Cir. 1997)*; *Danielsen v. Burnside-Ott Aviation Training Center, Inc., 291 U.S. App. D.C. 303, 941 F.2d 1220, 1229 (D.C. 1991)*.

stabilized at artificial and non-competitive levels," id. P 59-60, practically mimic those examined by the Third Circuit in Lum. The Court, therefore, finds the application of *Rule 9(b)* appropriate to Plaintiffs' pleading.

Pursuant to *Rule 9(b)*, a plaintiff averring a claim in fraud **[**100]** must specify "'the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Advanta Corp. Sec. Litig., 180 F.3d 525, 534 (3d Cir. 1999)* (quoting *DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990))*. "Although *Rule 9(b)* falls short of requiring every material detail of the fraud such as date, location, and time, plaintiffs must use 'alternative means of injecting *precision and some measure of substantiation* into their allegations of fraud.'" *In re Rockefeller Ctr. Props. Secs. Litig., 311 F.3d 198, 216 (3d Cir. 2002)* (quoting *In re Nice Sys., Ltd. Secs. Litig., 135 F. Supp. 2d 551, 577 (D.N.J. 2001)*, emphasis supplied). Here, in contrast, Plaintiffs' allegations are exceedingly vague: short of stating the names and renaming of alleged cartels, Plaintiffs' precision of pleading is limited to the date of a single meeting and a claim that one of the original cartels consisted of thirteen unidentified members. See Compl. PP 44-54. Defendants and the Court are left to guess whether any of the named Defendants was a member of either the original or unified-and-later-renamed **[*879]** cartel or attended any of the alleged meetings, the locations "in China and elsewhere," **[**101]** where the alleged meetings took place, and/or the terms of the agreements reached and whether any of the named Defendants actually accepted and/or adhered to these agreements. [36] See id.; see also, *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (a would-be member of a conspiracy comes within the Sherman Act when it *actually engages* in "anticompetitive conduct" by attaining, at the very least, dangerous probability of success in a relevant market). The vagueness of the allegations at hand is such that they fail to meet even the lenient Rule 8 pleading requirement. See *Twombly, 127 S. Ct. at 1969-74* (explaining that even a "plain statement" must contain "enough facts to state a claim to relief that is plausible on its face"); accord *Dura, 125 S. Ct. at 1633-34* ("it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of [facts stating the elements of the claim] that the plaintiff has in mind").

Moreover, the Court is left unpersuaded by Plaintiffs' claim they "did not discover and could not discover" facts about the alleged anticompetitive conduct because of the alleged cartels' extreme secrecy (and severe enforcement of that the secrecy). See Compl. P 59. For instance, the Government Surveys, *documents publically available on a government website since 1996,* i.e., since the time long predating the events alleged in the Complaint, indicate that:

(a) "In February [of 2001], the China Magnesite Export Association ("CMEA") was formed, uniting the two separate export **[**103]** syndicates that were formed in 2000. . . . The stated goals of the CMEA [was] to stabilize magnesia export prices and ensure supply of quality products." (The Survey published in 2001).

(b) "In February [of 2003], a new Chinese magnesia export association was formed [to] control[] about 70% of the [China's] magnesite export license[e]s . . . . This new association represents the *fourth time* that China's major magnesite producers have attempted to form an association that would stabilize the country's magnesite supply by setting floor prices." (The Survey published in 2003).

(c) "In February [of 2004], another magnesite export syndicate was formed in China -- the China Magnesite Self-Disciplined Association. This is the *fifth version* of a group [trying] to regulate magnesite exports and prices since 2000. The new group represents five of the leading Chinese magnesite producers, and its goal was to maintain [DBM] prices." (The Survey published in 2004).

---

[36] Notably, Plaintiffs assert that the alleged meetings of conspirators were "coordinated," presumably, time- and location-wise, with legitimate "trade association meetings for associations in which [D]efendants [were] **[**102]** members." Compl. P 51. Plaintiffs' assertion suggests that even if Plaintiffs offered the Court facts indicating the presence of Defendants' representatives at locations where the alleged cartel meetings took place during the time of these alleged cartel meetings, these facts would still be insufficient to allege Defendants' participation in an illegal conspiracy, since this presence might equally be attributed to Defendants' attendance of their legitimate trade association meetings. See *Twombly, 127 S. Ct. at at 1966 n.5* (the line "between the factually neutral and the factually suggestive . . . must be crossed").

(d) "The Chinese magnesite export syndicate that was formed in February **[*880]** 2004 *fell apart* [in 2005] less than 1 year after its formation[: it] was the fifth in a series of associations [attempting] to control pricing . . . of magnesite." (2005 **[**104]** Survey).

Government Surveys - Citations (emphasis supplied). The above-quoted information: (a) suggests a very little degree of secrecy, if any; and (b) prompts a conclusion that well-publicized efforts to create a Chinese magnesite syndicate either yielded in a number of short-lived and independent -- for the purposes of ***antitrust law*** -- combinations (which may or may have not included any Defendant named in this action) or failed in toto due to the refusal of the invited members to accept/adhere to the proposed terms. Accord Industrial Minerals: And Then There Was One: China's Latest Magnesia Export Group, The Royal Society of Chemistry 7 (Chem. Bus. NewsBase: Indus. Minerals, Fin. Times Info., Apr. 24, 2001) (observing that Liaoning Jiayi Industrial Development Co., Ltd, an entity not named as a defendant in this action, was "spearheading" the 2001 efforts to form a "unified group [with] objectives [to obtain] price bargaining power as a group, [but] observers [were] skeptical as to the capability of the group's leaders to convince union members to forego potential individual profit for the sake of the union").

In light of availability of such information, as well as in light of the **[**105]** vagueness of Plaintiffs' allegations, the Court concludes that the Complaint fails to state a claim upon which relief can be granted even under the lenient *Rule 8* requirement and, a fortiori, under the steep requirement of *Rule 9(b)*. Compare *Lum, 361 F.3d at 228* (quoting the Supreme Court's pre-Twombly observation, made in *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*, that leniency of pleading requirement might be warranted in "antitrust [cases when the] proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot").

D. Plaintiffs' Motion for Default Judgment Will Be Denied

In light of the Court's finding that, as drafted, the Complaint fails to establish the Court's subject matter jurisdiction over this action and, in addition, fails to state a claim upon which relief can be granted, granting Plaintiffs' motion for default judgment would be wholly inappropriate. See *Comcast Cable Communs., 2005 U.S. Dist. LEXIS 23156, at *5-6*; *Abney, 334 F. Supp. 2d 1221*; see also *Comdyne I, 908 F.2d at 1149*; *Fehlhaber, 425 F.2d at 717*; *Bloom, 896 F. Supp. at 170 n. 3*. The Court, therefore, will deny Plaintiffs' Motion with prejudice.

VIII. LEAVE TO AMEND

A. [106] Grant of Leave Is in the Interests of Justice**

Having thoroughly examined Plaintiffs' Complaint, this Court now turns to the question of whether Plaintiffs shall be allowed to replead their claims.

HN31[] Ordinarily, the plaintiff may be granted "leave [to amend,] . . . when justice so requires." See *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993)*. That said, "[a]llowing leave to amend where there is a stark absence of any suggestion by the plaintiffs that they have developed any facts since the action was commenced, which would, if true, cure the defects in the pleadings'" would frustrate the Court's ability to filter out lawsuits that have no factual basis. *Cal. Pub. Emples'. Ret. Sys. v. Chubb Corp., 394 F.3d 126, 164 (3d Cir. 2004)* (internal quotation marks and citations omitted). Here, the vagueness of Plaintiffs' **[*881]** pleadings causes the Court substantial concern. [37] However, at the instant juncture, the Court has no reason to conclude that the vague content of Plaintiffs' Complaint is necessarily indicative of

[37] The content of Plaintiffs' submissions made in opposition to various Defendants' motion or as reply to Defendants' opposition to Plaintiffs' motion causes the Court additional concern, since: (a) Defendants' submissions did raise, albeit without extensive discussion, the entire panoply of issues detailed or touched upon in the instant Opinion, such as the FTAIA, FSIA, abstention doctrines, the degree of precision required by *Rule 8* and the particularity of requirement of *Rule 9*, etc., but (b) Plaintiffs' responsive submissions failed to state either Plaintiffs' facts or Plaintiffs' legal position as to any of these issues.

Plaintiffs' lack of factual basis for their allegations. [38] The Court, therefore, finds it in the interests of justice to allow Plaintiffs **[**107]** an opportunity to re-plead their claims, and will grant them leave accordingly.

B. Future Litigation

Thus far, the Court has been presented with a multitude of motions (in addition to those addressed in this Opinion). See generally, Docket. Since these motions, as well as peripheral challenge embedded **[**108]** in the Motions resolved by this discussion, raise a panoply of issues, the Court finds it prudent to provide the parties with a roadmap to the future litigation in the event: (a) Plaintiffs' elect to take advantage of the leave to file an amended complaint; and (b) Defendants elect to renew some or all of the challenges extended in Defendants' motions and/or scattered in Defendants' oppositions to Plaintiffs' Motion.

Hence, in the event Plaintiffs file an amended complaint, Plaintiffs *must* incorporate in their submission evidentiary proof allowing the Court to conduct a *factual determination* (in contrast with the facial analysis conducted herein) and to conclusively satisfy itself as to presence or lack of subject matter jurisdiction over this action. In the event Defendants wish to extend challenges to the Court's subject matter jurisdiction and/or to assert that the Court shall abstain from resolving the instant matter on the grounds involving any provision, judicially-create doctrine or public policy related to a foreign sovereign's action or to Chinese regulatory or legal regime, Defendants should do so at their *first opportunity* to respond to the amended complaint.

If, and only **[**109]** if, the Court: (a) determines that it *has* proper subject matter jurisdiction over this action; and (b) finds that it shall *not* abstain from resolving it, Defendants may, if they so desire, renew their currently extended challenges in the following order:

(1) Defendants shall first raise their challenges based on the alleged lack of personal jurisdiction, insufficient service of process and improper venue;

(2) only in the event Defendants elect not to raise such challenges, of if the Court determines that in personam jurisdiction was duly obtained and, in addition, establishes that the instant matter is properly before the Court, Defendants may, if they wish, re-raise their argument that the Court shall compel arbitration of this action; and

(3) if, and only if, Defendants elect not to raise such challenge or the Court denies Defendants' request to compel arbitration, Defendants may, if **[*882]** they so desire, renew their challenges asserting Plaintiffs' lack of standing and failure to state a claim upon which relief can be granted. [39]

Plaintiffs, therefore, are strongly encouraged to draft their amended complaint with an eye on the challenges that had been raised and might be renewed by Defendants, while Defendants are encouraged to focus their efforts in accordance with the above-given roadmap. [40]

---

[38] While the FTAIA and Rule 9(b) pleading standards were well established at the time of Plaintiffs' filing of their Complaint, the Court is mindful of the fact that the Complaint was drafted without the benefit of the Supreme Court's clarifications provided later in Twombly.

[39] The Court will not address certification of Plaintiffs' putative class until and unless the issues of subject matter and in personam jurisdictions, abstention, **[**110]** venue, arbitration, standing to sue, sufficiency of substantive pleadings, etc. are conclusively resolved in favor of Plaintiffs.

[40] Plaintiffs and Defendants may contact other entities, such as United States or Chinese government agencies and/or trade associations interested in seeking amici status in order to present this Court with these entities' positions as to the issues involved in this action. An entity "seeking to appear as amicus must . . . make a showing that [its] participation is useful or otherwise desirable to the court." *Woodfin Suite Hotels, LLC v. City of Emeryville, 2007 U.S. Dist. LEXIS 4467, at *7-8 (N.D. Cal. Jan. 8, 2007)* (quoting *In re Roxford Foods Litigation, 790 F. Supp. 987, 997 (E.D. Cal. 1991)*, quoting, in turn, *United States v. Louisiana, 751 F. Supp. 608, 620 (E.D. La. 1990))*.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for default judgment, Docket Entry No. 28, will be denied **[**111]** with prejudice. Defendant's Motion, Docket Entry No. 27, will be granted.

Plaintiffs' Complaint will be dismissed, as against all Defendants, for lack of subject matter jurisdiction or, in alternative, for failure to state a claim upon which relief can be granted. Such dismissal will be without prejudice, and Plaintiffs will be granted leave to amend their Complaint. Plaintiffs' motion for certification of Plaintiffs' putative class will be denied as premature. This matter will be administratively terminated, subject to reopening in the event Plaintiffs elect to file their amended pleadings.

All Defendants' motions other than Defendant's Motion, Docket Entry No. 27, will be dismissed, as moot, without prejudice to renewal of Defendants' challenges in the event Plaintiffs file an amended complaint and this matter is reopened. Defendants' renewed challenges, if any, shall be presented in the sequence detailed herein.

An appropriate Order accompanies this Opinion.

/s/ Garrett E. Brown

GARRETT E. BROWN, JR.

Chief Judge

United States District Court

Dated: December 30, 2008

In re Hydrogen Peroxide Antitrust Litig.

United States Court of Appeals for the Third Circuit

April 17, 2008, Argued; December 30, 2008, Filed

No. 07-1689

Reporter

552 F.3d 305 *; 2008 U.S. App. LEXIS 26871 **; 2008-2 Trade Cas. (CCH) P76,453

IN RE: HYDROGEN PEROXIDE ANTITRUST LITIGATION; Arkema Inc., Arkema France S.A., FMC Corp., Kemira Chemicals Canada, Inc., Kemira OYJ, Appellants

Subsequent History: Claim dismissed by *Conopco, Inc. v. Arkema, Inc. (In re Hydrogen Peroxide Antitrust Litig.), 702 F. Supp. 2d 548, 2010 U.S. Dist. LEXIS 32220 (E.D. Pa., 2010)*

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. Civil Action No. 05-cv-0666 and MDL No. 1682. (Honorable Stewart Dalzell).

In re Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 2007 U.S. Dist. LEXIS 4402 (E.D. Pa., 2007)

Core Terms

class certification, prices, district court, antitrust, certification, hydrogen peroxide, predominance, defendants', conspiracy, grades, sodium, disputes, certify, plaintiffs', alleged conspiracy, class action, class period, merits, expert opinion, customers, rigorous, purchasers, advisory committee note, Linerboard, perborate, relevant evidence, class member, percarbonate, damages, concentrations

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Relevance > Relevant Evidence

HN1[] **Class Actions, Certification of Classes**

In deciding whether to certify a class under *Fed. R. Civ. P. 23*, a district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Certification of Classes**

The decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of *Fed. R. Civ. P. 23* is met. Factual determinations supporting *Rule 23* findings must be made by a preponderance of the evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN3[] **Class Actions, Certification of Classes**

A court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits--including disputes touching on elements of the cause of action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Relevance > Relevant Evidence

HN4[] **Class Actions, Certification of Classes**

In deciding whether to certify a class, a court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN5[] **Class Actions, Certification of Classes**

Class certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Fed. R. Civ. P. 23* are met. *Rule 23(b)(3)* requirements demand a "close look."

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN6[] **Class Actions, Certification of Classes**

A class certification decision requires a thorough examination of the factual and legal allegations.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN7[ ] Prerequisites for Class Action, Commonality

A class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8[ ] Class Actions, Certification of Classes

Class certification under *Fed. R. Civ. P. 23* has two primary components. The party seeking class certification must first establish the four requirements of *Rule 23(a)*: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *Fed. R. Civ. P. 23(a)*. If all four requirements of *Rule 23(a)* are met, a class of one of three types (each with additional requirements) may be certified. *Fed. R. Civ. P. 23(b)(1)-(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN9[ ] Class Actions, Certification of Classes

A trial court, well-positioned to decide which facts and legal arguments are most important to each *Fed. R. Civ. P. 23* requirement, possesses broad discretion to control proceedings and frame issues for consideration under *Rule 23*. A decision on class certification may implicate highly fact-based, complex, and difficult matters. But proper discretion does not soften the rule: a class may not be certified without a finding that each *Rule 23* requirement is met.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN10[ ] Regulated Practices, Private Actions

In some cases, class certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. *Fed. R. Civ. P. 23* advisory committee's note, 1998 Amendments. Accordingly, the potential for unwarranted settlement pressure is a factor a court weighs in its certification calculus. Certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN11[] Prerequisites for Class Action, Maintainability

Certification under Fed. R. Civ. P. 23(b)(3) is permissible when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The twin requirements of Rule 23(b)(3) are known as predominance and superiority.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN12[] Prerequisites for Class Action, Maintainability

See Fed. R. Civ. P. 23(b)(3) advisory committee's note, 1966 Amendment.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN13[] Prerequisites for Class Action, Maintainability

Fed. R. Civ. P. 23(b)(3) identifies some matters pertinent to the findings of predominance and superiority: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN14[] Prerequisites for Class Action, Commonality

For purposes of Fed. R. Civ. P. 23(b)(3), predominance tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, a standard far more demanding than the commonality requirement of Rule 23(a), requiring more than a common claim. Issues common to the class must predominate over individual issues.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN15[] Class Actions, Appellate Review

For purposes of Fed. R. Civ. P. 23(b)(3), because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case, If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable. Accordingly, a court of appeals examines the elements of the plaintiffs' claim "through the prism" of *Rule 23* to determine whether a district court properly certified a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN16[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(b)(3) requires a court to consider how a trial on the merits would be conducted if a class were certified.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Special Proceedings > Class Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Sherman Act > Claims

HN17[] **Clayton Act, Claims**

The elements of a claim under the Clayton Act are (1) a violation of the antitrust laws, such as *15 U.S.C.S. § 1* of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages. *15 U.S.C.S. § 15*. Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits in a class action, every class member must prove at least some antitrust impact resulting from the alleged violation.

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

Civil Procedure > Special Proceedings > Class Actions > General Overview

Securities Law > Civil Liability Considerations > Remedies > General Overview

HN18[] **Private Actions, Remedies**

In antitrust and securities fraud class actions, proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury).

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN19[] **Private Actions, Remedies**

In antitrust cases, impact often is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof. Proof of conspiracy is not proof of common injury.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN20[] **Private Actions, Remedies**

Antitrust plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for the plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which the plaintiffs propose to use the evidence to prove impact at trial. *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Appeals > Standards of Review > General Overview

HN22[] **Class Actions, Appellate Review**

A court of appeals reviews a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact. Whether an incorrect legal standard has been used is an issue of law to be reviewed de novo.

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

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

HN23[] **Standards of Review, Abuse of Discretion**

A district court by definition abuses its discretion when it makes an error of law.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN24[] **Private Actions, Remedies**

For purposes of determining whether to certify an antitrust class action, generally, when the prices for some customers are going up while the prices of other customers are not, there is reason to doubt that the different customers (class members) are experiencing a common impact.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN25[] **Class Actions, Certification of Classes**

For purposes of determining whether a class should be certified, a district court's conclusion that an expert's opinion is admissible does not necessarily dispose of the ultimate question of whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of *Fed. R. Civ. P. 23* have been met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] **Class Actions, Certification of Classes**

Regarding the proper standard of "proof" for class certification, the United States Supreme Court has described the inquiry as a "rigorous analysis" and a "close look," but it has elaborated no further.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN27[] **Class Actions, Certification of Classes**

A party seeking class certification bears the burden of establishing that all requirements of *Fed. R. Civ. P. 23* have been satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN28[] Class Actions, Certification of Classes

The requirements set out in Fed. R. Civ. P. 23 are not mere pleading rules. A court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN29[] Class Actions, Certification of Classes

Pleading requirements are distinct from the requirements for certifying a case as a class action. A court may not and should not certify a class action without a rigorous examination of the facts to determine if the certification requirements of Fed. R. Civ. P. 23(a) and (b) have been met. The proposition that a district judge must accept all of a complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN30[] Class Actions, Certification of Classes

The plain text of Fed. R. Civ. P. 23 requires a court to "find," not merely assume, the facts favoring class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN31[] Class Actions, Certification of Classes

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN32[] Class Actions, Certification of Classes

Some uncertainty ensued when the United States Supreme Court declared in Eisen v. Carlisle & Jacquelin that there is nothing in either the language or history of Fed. R. Civ. P. 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Only a few years later, in addressing whether a party may bring an interlocutory appeal when a district court denies class certification, the Supreme Court pointed out that the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Eisen is best understood to preclude only a merits inquiry that is not necessary to determine a *Rule 23* requirement.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

HN33[] **Class Actions, Certification of Classes**

Because a decision whether to certify a class requires a thorough examination of the factual and legal allegations, a court's rigorous analysis may include a preliminary inquiry into the merits, and the court may consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take. In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action. A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact. Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > General Overview

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

HN34[] **Class Actions, Prerequisites for Class Action**

When a district court properly considers an issue overlapping the merits in the course of determining whether a *Fed. R. Civ. P. 23* requirement is met, it does not do so in order to predict which party will prevail on the merits. Rather, the court determines whether the alleged claims can be properly resolved as a class action. A concern for merits-avoidance should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the *Rule 23* class action requirements.

Governments > Courts > Judicial Precedent

HN35[] **Courts, Judicial Precedent**

To the extent that the decision of a later panel of a federal court of appeals conflicts with existing circuit precedent, court panels are bound by the earlier, not the later, decision.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

HN36[] Class Actions, Certification of Classes

A determination as to a Fed. R. Civ. P. 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge. A trial judge's finding on a merits issue for purposes of a Rule 23 requirement no more binds the court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction. The court's determination for class certification purposes may be revised (or wholly rejected) by the ultimate factfinder.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN37[] Class Actions, Certification of Classes

The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient. Where a court finds, on the basis of substantial evidence, that there are serious problems appearing, it should not certify the class merely on the assurance of counsel that some solution will be found. The requirement that a district court include in its class certification order a clear and complete summary of those claims, issues, or defenses subject to class treatment provides for the full and clear articulation of the litigation's contours at the time of class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN38[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(1)(A), as amended in 2003, alters the timing requirement for the class certification decision. The amended rule calls for a decision on class certification at an early practicable time after a person sues or is sued as a class representative, while the prior version had required that decision be made as soon as practicable after commencement of an action. This change in language, though subtle, reflects the need for a thorough evaluation of the Rule 23 factors--for this reason the rule does not require or encourage premature certification determinations.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Discovery & Disclosure > General Overview

HN39[] Class Actions, Certification of Classes

Allowing time for limited discovery supporting class certification motions may be necessary for sound judicial administration. It may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN40[] Class Actions, Certification of Classes

In introducing the concept of a "trial plan," *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments, focuses attention on a rigorous evaluation of the likely shape of a trial on the issues.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN41[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Discovery & Disclosure > General Overview

HN42[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Discovery & Disclosure > General Overview

HN43[] **Class Actions, Certification of Classes**

The language of the 2003 amendments to *Fed. R. Civ. P. 23* authorizes the more flexible approach many courts take to class-action litigation, recognizing the important consequences to the parties of the court's decision on certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN44[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN45[] **Class Actions, Certification of Classes**

Courts should not grant class certification except after searching inquiry, and courts should not rely on later developments to determine whether certification is appropriate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Relevance > Relevant Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN46[] **Class Actions, Certification of Classes**

While the 2003 amendments to *Fed. R. Civ. P. 23* do not alter the substantive standards for class certification, they guide a trial court in its proper task--to consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class. The 2003 amendments arguably combine to permit a more extensive inquiry into whether the *Rule 23* requirements are met than was previously appropriate. These subtle changes reflect that a district court's certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN47[] **Class Actions, Prerequisites for Class Action**

Because each requirement of *Fed. R. Civ. P. 23* must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN48[] **Class Actions, Certification of Classes**

Class certification requires a finding that each of the requirements of *Fed. R. Civ. P. 23* has been met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN49[] **Prerequisites for Class Action, Maintainability**

Fed. R. Civ. P. 23(b)(3) requires a court to find predominance.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN50[] **Class Actions, Certification of Classes**

Factual determinations necessary to make *Fed. R. Civ. P. 23* findings must be made by a preponderance of the evidence. In other words, to certify a class a district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of *Rule 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN51[] Class Actions, Certification of Classes

Use of the term "findings" in the context of class certification should not be confused with binding findings on the merits. A judge's consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues.

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN52[] Standards of Review, Abuse of Discretion

In reviewing a district court's judgment on class certification, a court of appeals applies the abuse of discretion standard. A district court abuses its discretion in deciding whether to certify a class action if its decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

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

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN53[] Standards of Review, Abuse of Discretion

Under the *Fed. R. Civ. P. 23* standards, a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each *Rule 23* requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties. The abuse of discretion standard requires the judge to exercise sound discretion--failing that, the judge's decision is not entitled to the deference attendant to discretionary rulings.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN54[] Class Actions, Certification of Classes

If a class is certified, the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis. *Fed. R. Civ. P. 23(c)(1)(B)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN55[] **Class Actions, Certification of Classes**

Proper analysis under *Fed. R. Civ. P. 23* requires rigorous consideration of all the evidence and arguments offered by the parties. It is incorrect to state that a plaintiff need only demonstrate an "intention" to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase "threshold showing" risks misapplying *Rule 23*. A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard. The requirements of *Rule 23* must be met, not just supported by some evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN56[] **Class Actions, Certification of Classes**

Although a trial court has discretion to grant or deny class certification, the court should not suppress "doubt" as to whether a *Fed. R. Civ. P. 23* requirement is met--no matter the area of substantive law. Accordingly, Eisenberg v. Gagnon should not be understood to encourage certification in the face of doubt as to whether a *Rule 23* requirement has been met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN57[] **Class Actions, Certification of Classes**

The 2003 amendments to *Fed. R. Civ. P. 23* reject tentative decisions on certification and encourage development of a record sufficient for informed analysis. *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN58[] **Class Actions, Certification of Classes**

See *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Class Actions

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN59[] **Regulated Practices, Private Actions**

For purposes of deciding whether to certify a class action, predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. But it does not follow that a court should relax its certification analysis, or presume a requirement for certification is met, merely because a plaintiff's claims fall within one of those substantive categories. *Fed. R. Civ. P. 23(b)(3)* advisory committee's note, 1966 Amendment.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN60[] **Regulated Practices, Private Actions**

See *Fed. R. Civ. P. 23(b)(3)* advisory committee's note, 1966 Amendment.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN61[] **Regulated Practices, Private Actions**

There are no hard and fast rules regarding the suitability of a particular type of antitrust case for class action treatment. Rather, the unique facts of each case will generally be the determining factor governing certification. Actual, not presumed, conformance with the *Fed. R. Civ. P. 23* requirements remains necessary. Although a putative class may bring a type of claim that "typically" involves common questions of law or fact, careful attention to the requirements of *Rule 23* remains indispensable.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN62[] **Class Actions, Appellate Review**

One important reason for granting interlocutory appeals under *Fed. R. Civ. P. 23(f)* is to address novel or unsettled questions of law. Under *Fed. R. Civ. P. 23* advisory committee's note, 1998 Amendments, cases in which the certification decision turns on a novel or unsettled question of law are among the best candidates for interlocutory appeal.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN63[] **Class Actions, Certification of Classes**

Expert opinion with respect to class certification, like any matter relevant to a *Fed. R. Civ. P. 23* requirement, calls for rigorous analysis. It follows that opinion testimony should not be uncritically accepted as establishing a *Rule 23* requirement merely because the court holds the testimony should not be excluded, under Daubert or for any other reason.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Relevance > Relevant Evidence

HN64[] **Class Actions, Certification of Classes**

The view has been rejected that an expert's testimony may establish a component of a *Fed. R. Civ. P. 23* requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each *Rule 23* requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN65[] **Class Actions, Certification of Classes**

Under *Fed. R. Civ. P. 23* a district court must be "satisfied" or "persuaded" that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN66[] Class Actions, Certification of Classes

In ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case, including the resolution of expert disputes concerning the import of evidence concerning the factual setting--such as economic evidence as to business operations or market transactions.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN67[] Class Actions, Certification of Classes

For purposes of determining whether to certify a class, critical evaluation of an expert's opinion as to what conclusions the evidence supports will frequently bring courts close upon the merits, but it is no more than *Fed. R. Civ. P. 23* demands. An expert who testifies, for example, that every plaintiff has suffered injury is in effect testifying that injury may be established by common proof. However, the decision as to whether the elements of a claim are susceptible to common proof is for the judge and may not be handed off to experts.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

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

HN68[] Class Actions, Certification of Classes

Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court--no matter whether a dispute might appear to implicate the "credibility" of one or more experts, a matter resembling those usually reserved for a trier of fact. Rigorous analysis need not be hampered by a concern for avoiding credibility issues; findings with respect to class certification do not bind the ultimate fact-finder on the merits. A court's determination that an expert's opinion is persuasive or unpersuasive on a *Fed. R. Civ. P. 23* requirement does not preclude a different view at the merits stage of the case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HN69[] Class Actions, Certification of Classes

That weighing expert opinions is proper in determining whether to certify a class does not make it necessary in every case or unlimited in scope. To avoid the risk that a *Fed. R. Civ. P. 23* hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on *Rule 23* requirements. But even with some limits on discovery and the extent of the hearing, the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each *Rule 23* requirement has been met.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Relevance > Relevant Evidence

HN70[] Class Actions, Certification of Classes

In its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a class certification requirement, but it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits. Genuine disputes with respect to the *Fed. R. Civ. P. 23* requirements must be resolved, after considering all relevant evidence submitted by the parties. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives. The district court must resolve the disputes before deciding whether to certify the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN71[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23 calls for definitive assessment of its requirements. The view has been rejected that a district judge may not weigh conflicting evidence and determine the existence of a *Rule 23* requirement just because that requirement is identical to an issue on the merits.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Relevance > Relevant Evidence

HN72[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN73[] Class Actions, Certification of Classes

Actual, not presumed, conformance with the Fed. R. Civ. P. 23 class certification requirements is essential.

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

Civil Procedure > Discovery & Disclosure > General Overview

Evidence > Inferences & Presumptions > Presumptions

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN74[] Regulated Practices, Price Fixing & Restraints of Trade

Applying a presumption of impact in an antitrust class action based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Fed. R. Civ. P. 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery. Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Discovery & Disclosure > General Overview

HN75[] Class Actions, Certification of Classes

See Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments.

Counsel: STEVEN E. BIZAR, ESQUIRE (ARGUED), LANDON Y. JONES III, ESQUIRE, THOMAS P. MANNING, ESQUIRE, HOWARD D. SCHER, ESQUIRE, Buchanan Ingersoll & Rooney, Philadelphia, Pennsylvania, Attorneys for Appellants, Arkema Inc. and Arkema France SA.

MICHAEL I. FRANKEL, ESQUIRE, JOSEPH A. TATE, ESQUIRE, CHRISTINE C. LEVINE, ESQUIRE, Dechert LLP, Philadelphia, Pennsylvania, Attorney for Appellant, FMC Corporation.

JEFFREY S. CASHDAN, ESQUIRE, STEPHEN P. CUMMINGS, ESQUIRE, CHRISTINE A. HOPKINSON, ESQUIRE, CATHERINE M. O'NEIL, ESQUIRE, King & Spalding, Atlanta, Georgia.

JOANNA J. CLINE, ESQUIRE, BARBARA W. MATHER, ESQUIRE, Pepper Hamilton, Philadelphia, Pennsylvania, Attorneys for Appellants, Kemira OYJ and Kemira Chemicals Canada, Inc.

GREGORY K. ARENSON, ESQUIRE (ARGUED), ROBERT N. KAPLAN, ESQUIRE, Kaplan Fox & Kilsheimer, New York, New York.

ANTHONY J. BOLOGNESE, ESQUIRE, Bolognese & Associates, Philadelphia, Pennsylvania.

WILLIAM P. BUTTERFIELD, ESQUIRE, Cohen Milstein Hausfeld & Toll, Washington, D.C., Attorneys for Appellees, Artco Chemical, Inc., Astro Chemicals, Inc., Borden & Remington **[**2]** Corporation, Chem/Ser, Inc., EMCO Chemical Distributors, Inc., Finch Pruyn and Company, Inc., Interstate Chemical Company, Lensco Products, Inc., Lincoln Paper & Tissue, LLC, Ohio Chemical Services, Inc., James R. Pacific, Robert Chemical Company, Inc., Safer Textile Processing Corporation, Young Chemical Company, City of Philadelphia, Borough of Middletown and Middletown Borough Authority.

STEVEN A. KANNER, ESQUIRE, Freed Kanner London & Millen, Bannockburn, Illinois, Attorney for Appellees, Direct Purchaser Plaintiffs and EMCO Chemical Distributors, Inc.

Judges: Before: SCIRICA, Chief Judge, AMBRO and FISHER, Circuit Judges.

Opinion by: SCIRICA

Opinion

[*307] OPINION OF THE COURT

SCIRICA, *Chief Judge*.

At issue in this antitrust action are the standards a district court applies when deciding whether to certify a class. We will vacate the order certifying the class in this case and remand for proceedings consistent with this opinion.

HN1[] In deciding whether to certify a class under *Fed. R. Civ. P. 23*, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties. *See* *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166, 167 (3d Cir. 2001)* **[**3]** (citing *Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001)*; *Manual for Complex Litigation (Third)* § 30.1 (1995)). In this appeal, we clarify three key aspects of class certification procedure. First, ***HN2***[] the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of *Rule 23* is met. Factual determinations supporting *Rule 23* findings must be made by a preponderance of the evidence. Second, ***HN3***[] the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits--including disputes touching on elements of the cause of action. Third, ***HN4***[] the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.

I.

Purchasers of hydrogen peroxide and related chemical products brought this antitrust conspiracy action against chemical manufacturers. [1] An inorganic liquid, hydrogen peroxide is used most prominently as a bleach in the pulp and paper industry with smaller amounts appearing in chemicals and laundry products, environmental applications, textiles, **[**4]** and electronics. Hydrogen peroxide is available in solutions of different concentrations and grades depending on its intended use. Major concentrations are 35, 50, and 70 percent. The grades, roughly in order from least- to most-expensive, are: standard, food/cosmetic (which must meet FDA standards), electronic, and propulsion. All defendants sold the standard grade, but not all defendants sold all other grades. Defendants sold

[1] Named as defendants were Arkema, Inc., Arkema France S.A., FMC Corp., Degussa Corp., Degussa GmBH, Kemira Chemicals Canada, Inc., Kemira OYJ, Solvay America, Inc., Solvay Chemicals, Inc., Solvay S.A., EKA Chemicals, Inc., Akzo Nobel, Inc., and Akzo Nobel Chemicals International B.V. Degussa Corp. and Degussa **[**5]** GmBH are now known as Evonik Degussa Corp. and Evonik Degussa GmBH, respectively. The following defendants are no longer participating in this appeal because plaintiffs voluntarily dismissed them after settlement: Evonik Degussa Corp., Evonik Degussa GmBH, EKA Chemicals, Inc., Akzo Nobel, Inc., Akzo Nobel Chemicals International B.V., Solvay S.A., Solvay America, Inc., and Solvay Chemicals, Inc.

different amounts of each of the grades. Each grade has different supply and demand conditions because the grades are sold to end-users in a variety of industries with different economic characteristics. According to defendants, the different **[*308]** grades are not economic substitutes for each other, but plaintiffs disagree. Prices diverge dramatically among grades; electronic or propulsion grade can be as much as five times more expensive than standard grade.

The other two products at issue are sodium percarbonate and sodium perborate, together known as persalts, which are granular solids containing hydrogen peroxide used primarily as detergents. Among the defendants, only Solvay produced and sold sodium percarbonate in the United States during the class period. Solvay Chemicals, Degussa Corp., and FMC sold sodium perborate in the United States during the class period. Akzo, Arkema, and Kemira did not sell or produce sodium perborate in the United States during the class period.

After the United States Department of Justice and the European Commission began investigating possible violations of the antitrust laws in the hydrogen peroxide industry, [2] several plaintiffs filed class action complaints against producers of hydrogen peroxide and persalts **[**6]** under *§ 4* of the Clayton Act, *15 U.S.C. § 15*, alleging a conspiracy in restraint of trade violating *§ 1* of the Sherman Act, *15 U.S.C. § 1*. The Judicial Panel on Multidistrict Litigation transferred all cognate federal actions to the United States District Court for the Eastern District of Pennsylvania, which consolidated the cases. *See In re Hydrogen Peroxide Antitrust Litig., 374 F. Supp. 2d 1345 (J.P.M.L. 2005)*. The consolidated amended complaint alleged that during an eleven-year class period (January 1, 1994-January 5, 2005) defendants (1) communicated about prices they would charge, (2) agreed to charge prices at certain levels, (3) exchanged information on prices and sales volume, (4) allocated markets and customers, (5) agreed to reduce production capacity, (6) monitored each other, and (7) sold hydrogen peroxide at agreed prices.

The District Court denied defendants' motion to dismiss the complaint for failure to state a claim. Following extensive discovery, [3] plaintiffs moved to certify a class of direct purchasers of hydrogen peroxide, sodium perborate, and sodium percarbonate, over an eleven-year class period. In support of class certification, plaintiffs offered the opinion of an economist. Defendants, opposing class certification, offered the opinion of a different economist. Defendants separately moved to exclude the opinion of plaintiffs' economist as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Concluding plaintiffs' expert's opinion was admissible and supported plaintiffs' motion for class certification, the District Court certified a class of direct purchasers of hydrogen peroxide, sodium perborate, and sodium percarbonate under *Fed. R. Civ. P. 23(b)(3)*. *See In re Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163 (E.D. Pa. 2007)*. The District Court identified seven issues to be tried on a class-wide basis: (1) whether defendants **[**8]** and others engaged in a combination **[*309]** and conspiracy to fix, raise, maintain, or stabilize prices; allocate customers and markets; or control and restrict output of hydrogen peroxide, sodium perborate, and sodium percarbonate sold in the United States; (2) the identity of the participants in the alleged conspiracy; (3) the duration of the alleged conspiracy and the nature and character of defendants' acts performed in furtherance of it; (4) the effect of the alleged conspiracy on the prices of hydrogen peroxide and persalts during the class period; (5) whether the alleged conspiracy violated the Sherman Act; (6) whether the activities alleged in furtherance of the conspiracy or their effect on the prices of hydrogen peroxide and persalts during the class period injured named plaintiffs and the other members of the class; and (7) the proper means of calculating and distributing damages. The class was defined as:

> All persons or entities, including state, local and municipal government entities (but excluding defendants, their parents, predecessors, successors, subsidiaries, and affiliates as well as federal government entities) who purchased hydrogen peroxide, sodium perborate, or sodium **[**9]** percarbonate in the United States, its

---

[2] European Commission regulators charged eighteen hydrogen peroxide manufacturers with price-fixing on January 31, 2005. In 2006, two defendants in this action, Solvay S.A. and Akzo Nobel Chemicals International, B.V., agreed to plead guilty in the United States to price-fixing in the hydrogen peroxide market for the period July 1, 1998 to December 1, **[**7]** 2001. Solvay also agreed to plead guilty to price-fixing sodium perborate sold to one customer from June 1, 2000 to December 1, 2001.

[3] Defendants assert, and plaintiffs do not dispute, that they provided to plaintiffs all available sales transactions and other market data relevant to how hydrogen peroxide and persalts were bought and sold during the class period.

> territories, or possessions, or from a facility located in the United States, its territories, or possessions, directly from any of the defendants, or from any of their parents, predecessors, successors, subsidiaries, or affiliates, at any time during the period from September 14, 1994 to January 5, 2005.

We granted defendants' petition for an interlocutory appeal under *Fed. R. Civ. P. 23(f)*. [4]

II.

HN5[] Class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of *Rule 23* are met. [5] *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; *see* *Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006)*; *see also* *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (*Rule 23(b)(3)* requirements demand a "close look"). ***HN6***[] "A class certification **[**10]** decision requires a thorough examination of the factual and legal allegations." *Newton, 259 F.3d at 166*. [6]

[*310] ***HN9***[] The trial court, well-positioned to decide which facts and legal arguments are most important to each *Rule 23* requirement, possesses broad discretion to control proceedings and frame issues for consideration under *Rule 23*. *See* *Amchem, 521 U.S. at 630* (Breyer, J., concurring in part and dissenting in part) (recognizing that the decision on class **[**12]** certification may implicate "highly fact-based, complex, and difficult matters"). But proper discretion does not soften the rule: a class may not be certified without a finding that each *Rule 23* requirement is met. Careful application of *Rule 23* accords with the pivotal status of class certification in large-scale litigation, because

> denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . .

---

[4] The District Court had jurisdiction under *28 U.S.C. §§ 1331*, *1337*. We have jurisdiction under *28 U.S.C. § 1292(e)* and *Fed. R. Civ. P. 23(f)*.

[5] Although the Supreme Court in the quoted statement addressed *Fed. R. Civ. P. 23(a)*, there is "no reason to doubt" that the language "applies with equal force to all *Rule 23* requirements, including those set forth in *Rule 23(b)(3)*." *In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 33 n.3 (2d Cir. 2006)*.

[6] ***HN7***[] A class action is

> an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. For in such cases, the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under *Rule 23*.

Falcon, 457 U.S. at 155 (quotation marks and citations omitted) (alteration in original) (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*).

HN8[] Class certification under *Rule 23* has two primary components. The party seeking class **[**11]** certification must first establish the four requirements of *Rule 23(a)*: "(1) the class is so numerous that joinder of all members is impracticable [numerosity]; (2) there are questions of law or fact common to the class [commonality]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy]." *Fed. R. Civ. P. 23(a)*. If all four requirements of *Rule 23(a)* are met, a class of one of three types (each with additional requirements) may be certified. *See* *Fed. R. Civ. P. 23(b)(1)-(3)*. (*Rule 23* received stylistic revisions effective December 1, 2007. *Fed. R. Civ. P. 23* advisory committee's note, 2007 Amendment. We quote the restyled version; its changes are immaterial to this appeal.)

Newton, 259 F.3d at 162; *see* id. at 167 ("Irrespective of the merits, certification decisions may have a decisive effect on litigation."); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). **HN10**[] In some cases, class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments. Accordingly, the potential for unwarranted settlement pressure "is a factor we weigh in our certification calculus." Newton, 259 F.3d at 168 n.8. The Supreme **[**13]** Court recently cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007).

III.

Here, the District Court found the Rule 23(a) requirements were met, a determination defendants do not now challenge. Plaintiffs sought **HN11**[] certification under Rule 23(b)(3), which is permissible when the court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." [7] Fed. R. Civ. P. 23(b)(3). The twin requirements of Rule 23(b)(3) are known as predominance and superiority.

Only the predominance requirement is disputed in this appeal. **HN14**[] Predominance **[*311]** "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," Amchem, 521 U.S. at 623, a standard "far more demanding" than the commonality requirement of Rule 23(a), id. at 623-24, "requiring more than a common claim," Newton, 259 F.3d at 187. "Issues common to the class must predominate over individual issues . . . ." In re The Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 313-14 (3d Cir. 1998). **HN15**[] Because the "nature of the evidence that will suffice to resolve a question determines whether the question is common or individual," Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005), **[**15]** "'a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case,'" In re New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008) [hereinafter *New Motor Vehicles*] (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000)). [8] "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Newton, 259 F.3d at 172. Accordingly, we examine the elements of plaintiffs' claim "through the prism" of Rule 23 to determine whether the District Court properly certified the class. Id. at 181.

A.

HN17[] The elements of plaintiffs' claim are (1) a violation of the antitrust laws--here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages. 15 U.S.C. § 15; Am. Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984); **[**16]** Blades, 400 F.3d at 566. Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977); *see* Newton, 259 F.3d at 188 (**HN18**[] In antitrust and securities fraud class actions,

---

[7] *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note, 1966 Amendment (**HN12**[] "The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device.").

HN13[] Rule 23(b)(3) **[**14]** identifies some "matters pertinent to these findings": "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

[8] *See* ***Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)*** **HN16**[] (Rule 23(b)(3) requires the court to "consider how a trial on the merits would be conducted if a class were certified").

"[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)").

HN19[] In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. *See* New Motor Vehicles, 522 F.3d at 20 ("In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof"); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability **[**17]** for individual class members defeats Rule 23(b)(3) predominance."); *see also* Blades, 400 F.3d at 572 ("[P]roof of conspiracy is not proof of common injury.").

HN20[] Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual **[*312]** to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial. *See* Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments (*HN21*[] "A critical need is to determine how the case will be tried."); *see, e.g.,* In re Linerboard Antitrust Litig., 305 F.3d 145, 155 (3d Cir. 2002) ("reject[ing] the contention that plaintiffs did not demonstrate that sufficient proof was available, for use at trial, to prove antitrust impact common to all the members of the class").

Here, the District Court found the predominance requirement **[**18]** was met because plaintiffs would be able to use common, as opposed to individualized, evidence to prove antitrust impact at trial. On appeal, defendants contend the District Court erred in three principal respects in finding plaintiffs satisfied the predominance requirement: (1) by applying too lenient a standard of proof for class certification, (2) by failing meaningfully to consider the views of defendants' expert while crediting plaintiffs' expert, and (3) by erroneously applying presumption of antitrust impact under Bogosian, 561 F.2d at 454-55.

HN22[] We review a class certification order for abuse of discretion, which occurs if the district court's decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." Newton, 259 F.3d at 165. "[W]hether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*." In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 32 (2d Cir. 2006) [hereinafter *IPO*] (citation omitted). [9]

B.

We summarize briefly the evidence and arguments offered to the District Court. As noted, both plaintiffs and defendants presented the opinions of expert economists. Importantly, the experts disagreed on the key disputed predominance issue--whether antitrust impact was capable of proof at trial through evidence common to the class, as opposed to individualized evidence.

Plaintiffs' expert, John C. Beyer, Ph.D., offered an opinion purporting to show that "there is common proof that can be used to demonstrate that the alleged conspiracy to raise prices, restrict output and allocate customers would have impacted all purchasers of hydrogen peroxide, sodium perborate, and sodium percarbonate." Beyer's "market analysis" suggested that conditions in the hydrogen **[**20]** peroxide industry favored a conspiracy that would have impacted the entire class. First, hydrogen peroxide and persalts are fungible, undifferentiated commodity products,

---

[9] *See* Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (*HN23*[] "A district court by definition abuses its discretion when it makes an error of law."); Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 380 (5th Cir. 2007) **[**19]** ("Whether the district court applied the correct legal standard in reaching its decision on class certification . . . is a legal question that we review de novo." (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 408 (5th Cir. 1998)) (quotation marks omitted); Elcock v. Kmart Corp., 233 F.3d 734, 745 (3d Cir. 2000) ("Because we are evaluating the District Court's legal interpretation of a federal rule, our review is plenary.").

which means producers compete on price, not quality or other features. Second, production is heavily concentrated in a small group of manufacturers. [10] Third, **[*313]** there are high barriers to entry in the industry and no close economic substitutes, preventing any competitors from entering the market and undercutting prices. Fourth, defendants' geographic markets overlapped, so that purchasers would have benefitted from price competition if not for the alleged conspiracy.

Beyer also observed a "pricing structure" in the hydrogen peroxide industry which, he contended, showed prices across producers, grades and concentrations of hydrogen peroxide, and end uses moved similarly over time. [11] This, according to Beyer, suggested a conspiracy would have impacted all class members:

> My analysis of the similarity in price **[**21]** movements over time indicates that hydrogen peroxide prices charged by different manufacturers are affected by the same market forces of supply and demand . . . . These similarities in movement are sometimes referred to as "pricing structure" or "structure to prices." This analysis confirms that prices would have behaved similarly, in a consistent and generalized manner[,] to a conspiracy to fix prices at artificially high levels [and] to restrict output or to allocate customers.

Beyer also pointed to coordinated increases in list prices by defendants as evidence of common impact.

Beyer identified two "potential approaches" to estimating damages on a class-wide basis: (1) benchmark analysis, which would compare actual prices during the alleged conspiracy with prices that existed before the class period; and (2) regression analysis, through which it "may be possible . . . to estimate the relationship between price of hydrogen peroxide, sodium perborate, and sodium percarbonate and the various market forces that influence prices, including demand and supply variables." These methods, **[**22]** according to Beyer, could be used to estimate the prices plaintiffs would have faced but for the conspiracy. Beyer stated that "sufficient reliable data" exist to allow him to employ one or both of the potential approaches.

Defendants offered the opinion of their own expert economist, Janusz A. Ordover, Ph.D., to "provide an independent expert assessment of whether certification of the proposed class of Plaintiffs is appropriate in this matter." Specifically, Ordover set out to address "whether, assuming a conspiracy of the kind described in the Complaint, the Plaintiffs will be able to show, through common proof, that all or virtually all of the members of the proposed class suffered economic injury caused by the alleged conspiracy." Ordover also "opine[d] on whether a formulaic approach exists by which impact could be demonstrated and damages to the class could be reasonably calculated." Ordover responded to and disputed many of Beyer's opinions.

First, Ordover disputed Beyer's finding that hydrogen peroxide and persalts are fungible, contending that the "various grades of hydrogen peroxide . . . [and persalts] have different supply characteristics and face different demand conditions. **[**23]** The existence of supply and demand characteristics that are specific to the various grades and uses requires individualized assessment of the impact of the alleged conspiracy at least across these different grades and uses. Consequently, a finding of class-wide impact from the alleged conspiracy cannot be inferred from the mere fact of the conspiracy and from common **[*314]** evidence." Second, Ordover alleged that, over the eleven-year proposed class period, "the industry experienced prolonged periods of increasing capacity, increasing production, and an overall trend of declining real and nominal prices in the face of stable or increasing costs." Ordover disputed Beyer's pricing structure analysis, contending "there is no tendency for prices charged to individual customers to move together, which indicates that the alleged conspiracy cannot be shown to have had class-wide impact," necessitating individualized inquiries to determine whether a customer incurred impact.

Ordover also found some of defendants' price-increase announcements were ineffective--actual prices did not follow the purported announcements--suggesting list prices could not be used to measure antitrust impact on a basis common **[**24]** to the class. Ordover observed that a number of contracts for the sale of hydrogen peroxide were individually negotiated, with a variety of contract terms. And deposition testimony from named plaintiffs

---

[10] As defendants note, however, DuPont--not a named defendant--was a major producer of hydrogen peroxide (with about 25 percent market share) during the beginning of the class period until it left the market in 1999.

[11] Beyer also contended sodium perborate sales exhibited a pricing structure over the "long-term trend."

indicated list prices were sometimes disregarded. Ordover opined that the statistical methods by which Beyer proposed to demonstrate common impact and damages were not feasible. Given the record of prices and output in the industry and the apparent influence of individualized factors on pricing, "class-wide assessment of impact based on aggregate price information [was] impossible," and any formulaic approach to determine a set of "but-for prices" would have to incorporate a multitude of different "variables," defeating any reasonable notion of proof common to the class.

Significantly, Ordover presented empirical analysis of the data on individual sales transactions and found that different customers purchasing the two most common grades and three most common concentrations from the same hydrogen peroxide producer in a given year were as likely to experience a decline in actual prices over the year as an increase, while other similarly situated customers experienced no change in price. **[**25]** Defendants contend this disparity goes to the core of the predominance issue--plaintiffs and their expert, Beyer, failed to "explain . . . how or which common proof could be used to determine that the alleged conspiracy impacted customers whose prices declined, as well as customers whose prices increased or stayed the same, over the same time period." [12] Br. of Appellant at 5. Beyer, according to defendants, only "promised" to come up with a method to overcome this obstacle, without showing or even suggesting how it might be done. Defendants contend the market analysis is "generic" and note it would apply equally to a large number of industries. With respect to the pricing structure analysis, they contend Beyer's use of average prices, rather than those of individual transactions, to show pricing structure, was erroneous because it glossed over differences in actual prices. The theme of defendants' argument is that the data, which Ordover analyzed, rebut Beyer's "theory" that common proof was feasible. Beyer's and Ordover's analyses are irreconcilable.

In addition to presenting Ordover's testimony, defendants moved to exclude Beyer's testimony as unreliable, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. [13] **[*315]** The District Court denied the *Daubert* motion in its memorandum and order certifying the class.

C.

The District Court concluded the predominance requirement was met. It held that "[e]ither [Beyer's] market analysis or the pricing structure analysis would likely be independently sufficient at this stage. Plaintiffs and Dr. Beyer have provided us with both. Despite defendants' claims to the contrary, we should require no more of plaintiffs in a motion for class **[**28]** certification." Because hydrogen peroxide is fungible, the court found, "purchasing decisions [are] made primarily on the basis of price rather than quality or specific properties," and "price is by far the most significant means of competition among producers and an agreement to control prices will seriously hinder competition." The court rejected defendants' objection that different grades and concentrations of hydrogen peroxide called into question its fungibility. The prices of the grades and concentrations were related to each other, so in the view of the court, the differences would not preclude common proof of antitrust impact. Defendants' high combined market share meant that "no competitor who was not a member of the conspiracy would be able to take up the slack and keep prices stable." The high barriers to entry and lack of economic substitutes implied "a conspiracy such as the one alleged here [could] continue indefinitely with limited risk that a new competitor would enter the market and undercut the agreed-upon prices." Also, the court accepted Beyer's opinion that "prices in the hydrogen peroxide industry moved similarly over time and the industry exhibited structure **[**29]** in pricing." The

[12] *See* ABA Section of ***Antitrust Law***, *Econometrics* 210 (2005) (***HN24***[] "Generally, when the prices for some customers are going up while the prices **[**26]** of other customers are not, there is reason to doubt that the different customers (class members) are experiencing a common impact.").

[13] Before the District Court, both parties agreed *Fed. R. Evid. 702* and *Daubert* should be applied to assess whether Beyer's testimony should be admitted for consideration. On appeal, neither party argues otherwise, and defendants do not now challenge the District Court's denial of the *Daubert* motion. (The District Court stated that "because the evidence is here offered for the limited purpose of class certification, our inquiry is perhaps less exacting than it might be for evidence to be presented at trial.") As we explain, however, ***HN25***[] a district court's conclusion that an expert's opinion is admissible does not necessarily dispose of the ultimate question--whether the district court is satisfied, by all the evidence and arguments including all relevant expert opinion, that the requirements of *Rule 23* **[**27]** have been met.

court added that it believed "plaintiffs would be able to show antitrust impact on all purchasers merely by showing that defendants kept list prices that were artificially high because of their conspiracy."

The District Court held that it was sufficient that Beyer proposed reliable methods for proving impact and damages; it did not matter that Beyer had not completed any benchmark or regression analyses, and the court would not require plaintiffs to show at the certification stage that either method would work.

IV.

A.

Defendants contend the District Court applied too lenient a standard of proof with respect to the *Rule 23* requirements by (1) accepting only a "threshold showing" by plaintiffs rather than making its own determination, (2) requiring only that plaintiffs demonstrate their "intention" to prove impact on a class-wide basis, and (3) singling out antitrust actions as appropriate for class treatment even when compliance with *Rule 23* is "in doubt."

Although it is clear that the party seeking certification must convince the district **[*316]** court that the requirements of *Rule 23* are met, little guidance is available on the subject of ***HN26***[] the proper standard of "proof" for class **[**30]** certification. [14] The Supreme Court has described the inquiry as a "rigorous analysis," *Falcon, 457 U.S. at 161*, and a "close look," *Amchem, 521 U.S. at 615*, but it has elaborated no further.

1.

The following principles guide a district court's class certification analysis. First, ***HN28***[] the requirements set out in *Rule 23* are not mere pleading rules. *Szabo, 249 F.3d at 675-77*. The court may 'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" *Newton, 259 F.3d at 167* (quoting 5 James Wm. Moore et al., *Moore's Federal Practice § 23.61 [5]*); *see Beck, 457 F.3d at 297* (same); *see also Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 189 (3d Cir. 2001)* (district court properly "examine[d] the factual record underlying plaintiffs' allegations in making its certification decision"). [15]

---

[14] The burden of proof rests on the movant. *See Unger v. Amedisys Inc., 401 F.3d 316, 320 (5th Cir. 2005)* (***HN27***[] "The party seeking certification bears the burden of establishing that *all* requirements of *Rule 23* have been satisfied.").

[15] *See* 5 James Wm. Moore et al., *Moore's Federal Practice § 23.61[1]* (3d ed. 2008) (***HN29***[] "Pleading requirements are distinct from the requirements **[**31]** for certifying a case as a class action. A court may not and should not certify a class action without a rigorous examination of the facts to determine if the certification requirements of *Rule 23(a)* and *(b)* have been met." (citation omitted)); *Szabo, 249 F.3d at 675* ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in *Rule 23* and has nothing to recommend it"); *see also Unger, 401 F.3d at 321*) (***HN30***[] "The plain text of *Rule 23* requires the court to 'find,' not merely assume, the facts favoring class certification." (quoting *Fed. R. Civ. P. 23(b)(3)*)); *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004)* ("If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of *Rule 23(a)* and *(b)* would automatically lead to a certification order, frustrating the district court's responsibilities for taking a 'close look' at relevant matters, for conducting a 'rigorous analysis' of such matters, and for making 'findings' that the requirements of *Rule 23* have been satisfied." (citations **[**32]** omitted)); *Tardiff v. Knox County, 365 F.3d 1, 4-5 (1st Cir. 2004)* ("It is sometimes taken for granted that the complaint's allegations are necessarily controlling; but class action machinery is expensive and in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another."). In *Szabo*, the Court of Appeals for the Seventh Circuit offered this persuasive explanation:

> The reason why judges accept a complaint's factual allegations when ruling on motions to dismiss under *Rule 12(b)(6)* is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later--by a motion for summary judgment under *Rule 56*, and if necessary by trial. By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional).

HN31[] An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes **[**33]** when necessary to determine whether a class certification requirement is met. ***HN32***[] Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*, that there is "nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in **[*317]** order to determine whether it may be maintained as a class action." Only a few years later, in addressing whether a party may bring an interlocutory appeal when a district court denies class certification, [16] the Supreme Court pointed out that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Livesay, 437 U.S. at 469* (quoting *Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963))*. As we explained in *Newton, 259 F.3d at 166-69*, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a *Rule 23* requirement. Other courts of appeals have agreed. [17] ***HN33***[] Because the decision whether to certify a class "requires a thorough examination of the factual and legal allegations," *id. at 166*, the court's **[**34]** rigorous analysis may include a "preliminary inquiry into the merits," *id. at 168*, and the court may "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take," *id. at 166* (quoting 5 *Moore's Federal Practice § 23.46[4]*) **[*318]** (quotation marks omitted). *See id. at 168* ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."). [18] A contested requirement is not forfeited in favor of the party seeking certification merely because it is

---

249 F.3d at 675-76.

[16] *R. Civ. P. 23(f)*, which provides for interlocutory appeals from class certification orders.

[17] *See, e.g., New Motor Vehicles, 522 F.3d at 24* ("It is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the *Rule 23* **[**35]** criteria."); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007)* ("*Eisen* did not drain *Rule 23* of all rigor. A district court still must give full and independent weight to each *Rule 23* requirement, regardless of whether that requirement overlaps with the merits."); *Regents of Univ. of Cal., 482 F.3d at 380* ("[W]e may address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision."); *IPO, 471 F.3d at 41* ("With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a *Rule 23* requirement, there is no reason to lessen a district court's obligation to make a determination that every *Rule 23* requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue."); *Gariety, 368 F.3d at 366* ("[W]hile an evaluation of the merits to determine the strength of plaintiffs' case is not part of a *Rule 23* analysis, the factors spelled out in *Rule 23* must be addressed through findings, even if they overlap with issues on the merits."); *Szabo, 249 F.3d at 677* **[**36]** ("[N]othing in the 1966 amendments to *Rule 23*, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers."); *see also* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785 (3d ed. 2005), at 379; Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, *33 Hofstra L. Rev. 51, 63 (2004)* ("It would be bizarre to conclude that the framers of *Rule 23* would have set forth a careful set of prerequisites for class certification only to deny trial courts the ability to apply those prerequisites in a factually-based and reasoned manner."); *New Motor Vehicles, 522 F.3d at 17* ("It would be contrary to the 'rigorous analysis of the prerequisites established by *Rule 23* before certifying a class' to put blinders on as to an issue simply because it implicates the merits of the case." (quoting *Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003))*). ***HN34***[] When a district court properly considers an issue overlapping the merits in the course of determining whether a *Rule 23* requirement is met, it does not **[**37]** do so in order to predict which party will prevail on the merits. Rather, the court "determine[s] whether the alleged claims can be properly resolved as a class action." *Newton, 259 F.3d at 168*; *see IPO, 471 F.3d at 39 n.10*. A concern for merits-avoidance "should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the *Rule 23* class action requirements." *Castano v. Am. Tobacco Co., 84 F.3d 734, 744 n.17 (5th Cir. 1996)* (quoting *Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984))* (quotation marks omitted).

[18] *Chiang v. Veneman, 385 F.3d 256, 262, 46 V.I. 679 (3d Cir. 2004)*, decided after *Newton* and *Johnston*, cited *Eisen* for the proposition that "in determining whether a class will be certified, the substantive allegations of the complaint must be taken as true." No supporting analysis of *Rule 23* jurisprudence accompanied this statement, which contradicts and conflicts with *Newton, Johnston*, and *Szabo* (which we relied upon in *Newton*). ***HN35***[] "To the extent that the decision of a later panel conflicts with

similar or even identical to one normally decided by a trier of fact. Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits. [19]

HN37[] The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient. *See* id. at 191 ("[W]here the court finds, on the basis of substantial evidence as here, that there are serious problems *now appearing*, it should not certify the class merely on **[**39]** the assurance of counsel that some solution will be found." (quoting *Windham v. Am. Brands, Inc., 565 F.2d 59, 70 (4th Cir. 1977))* (quotation marks omitted); *Wachtel v. Guardian Life Ins. Co., 453 F.3d 179, 184, 186 (3d Cir. 2006)* (the requirement that a district court include in its class certification order "a clear and complete summary of those claims, issues, or defenses subject to class treatment" provides for the "full and clear articulation of the litigation's contours at the time of class certification").

Support for our analysis is drawn from amendments to *Rule 23* that took effect in 2003. First, *HN38*[] amended *Rule 23(c)(1)(A)* altered the timing requirement for the class certification decision. The amended rule calls for a decision on class certification "[a]t an early practicable time after a person sues or is sued as a class representative," while the prior version had required that decision be made "as soon as practicable after commencement of an action." We recognized in *Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004)*, that this change in language, though subtle, reflects the need for a thorough evaluation of the *Rule 23* factors--for this reason the rule does not **[**40]** "require or encourage premature certification determinations." We explained:

> *Fed. R. Civ. P. 23* directs that certification decisions be made "at an early practicable time." *Fed. R. Civ. P. 23(c)(1)(A)*. This recent amendment replaced the language of the old rule: The former "'as soon as practicable' exaction neither reflect[ed] prevailing practice nor **[*319]** capture[ed] the many valid reasons that may justify deferring the initial certification decision." *See Fed. R. Civ. P. 23(c)(1)(A)* Advisory Committee Notes. . . .
>
> *HN39*[] Allowing time for limited discovery supporting certification motions may . . . be necessary for sound judicial administration. *See* [*Newton, 259 F.3d at 166*] ("[I]t may be necessary for the Court to probe behind the pleadings before coming to rest on the certification question.") (quoting [*Falcon, 457 U.S. at 160*]) . . . .

Id. at 347-48 n.17; *see Gariety, 368 F.3d at 365* (noting the change). [20] Relatedly, *HN40*[] in introducing the concept of a "trial plan," the Advisory Committee's 2003 note focuses attention on a rigorous evaluation of the likely shape of a trial on the issues:

---

existing circuit precedent, we are bound by the **[**38]** earlier, not the later, decision." *United States v. Monaco, 23 F.3d 793, 803 (3d Cir. 1994)*.

[19] [T]he *HN36*[] determination as 19 to a *Rule 23* requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." *IPO, 471 F.3d at 41* (citing *Gariety, 368 F.3d at 366*); *see id. at 39* ("A trial judge's finding on a merits issue *for purposes of a Rule 23 requirement* no more binds the court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction."); *Unger, 401 F.3d at 323* ("[T]he court's determination for class certification purposes may be revised (or wholly rejected) by the ultimate factfinder . . . .").

[20] The Advisory Committee's note explains:

> *HN42*[] Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery."

Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments.

> HN41[] A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting [**41] class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.

Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments.

Additionally, the 2003 amendments eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification "may be conditional." [21] The Advisory Committee's note explains: [**43] HN44[] "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." The Standing Committee on Rules of Practice and Procedure advised:

> The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied.

[*320] *Committee Report, supra*, at 12; *see* 5 Moore's Federal Practice § 23.80[2] ("The 2003 amendment clarifies that HN45[] courts should not grant certification except after searching inquiry, and that courts should not rely on later developments to determine whether certification is appropriate.").

HN46[] While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task--to consider carefully all relevant evidence and make a definitive determination that the requirements **[**44]** of Rule 23 have been met before certifying a class. *See* IPO, 471 F.3d at 39 (2003 amendments "arguably combine to permit a more extensive inquiry into whether Rule 23 requirements are met than was previously appropriate"); Oscar, 487 F.3d at 267 (noting that these "subtle changes" reflect that "a district court's certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it").

To summarize: HN47[] because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.

2.

HN48[] Class certification requires a finding that each of the requirements of Rule 23 has been met. [22] *See* Unger, 401 F.3d at 321 ("The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring

---

As the Standing Committee on Rules of Practice and Procedure explained in its **[**42]** report proposing this amendment, HN43[] the new language

> authorizes the more flexible approach many courts take to class-action litigation, recognizing the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present.

Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 10 (2002) [hereinafter *Committee Report*].

[21] Although the language 21 allowing for "conditional" certification has been removed, Fed. R. Civ. P. 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment."

[22] As the Court of Appeals for the First Circuit has explained,

> [Some] circuits' HN51[] use of the term 'findings' in this context should not be confused with binding findings on the merits. The judge's consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues.

class certification."); Gariety, 368 F.3d at 365 (HN49[] Rule 23(b)(3) requires the court to find predominance). HN50[] Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes **[**45]** each fact necessary to meet the requirements of Rule 23. *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008).

HN52[] In reviewing a district court's judgment on class certification, we apply the abuse of discretion standard. A district court abuses its discretion in deciding whether to certify a class action if its "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995) (citation and quotation marks omitted); *see* Newton, 259 F.3d at 165. HN53[] Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class **[**46]** will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties. The abuse of discretion standard requires the judge to exercise sound discretion--failing that, the judge's decision is not entitled to the deference attendant to discretionary rulings.

HN54[] If a class is certified, "the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining **[*321]** the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." Wachtel, 453 F.3d at 187; *see* Fed. R. Civ. P. 23(c)(1)(B).

B.

Although the District Court properly described the class certification decision as requiring "rigorous analysis," some statements in its opinion depart from the standards we have articulated. The District Court stated, "So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. **[**47]** It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants'." With respect to predominance, the District Court stated that "[p]laintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." (quoting Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 174 (E.D. Pa. 1997)). As we have explained, HN55[] proper analysis under Rule 23 requires rigorous consideration of all the evidence and arguments offered by the parties. It is incorrect to state that a plaintiff need only demonstrate an "intention" to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase "threshold showing" risks misapplying Rule 23. A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate **[**48]** and improper standard. "[T]he requirements of Rule 23 must be met, not just supported by some evidence." IPO, 471 F.3d at 33; *see e.g.*, id. at 40, 42 (rejecting the view that a party seeking certification need only make "some showing" with respect to the Rule 23 requirements).

Citing Cumberland Farms, Inc. v. Browning-Ferris Industries, 120 F.R.D. 642, 645 (E.D. Pa. 1988), the District Court reasoned, "[i]t is well recognized that private enforcement of [antitrust] laws is a necessary supplement to government action. With that in mind, in an alleged horizontal price-fixing conspiracy case when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class." *See also* Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) (citing Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970)) (advising that in a "doubtful" case when presented with a putative securities class action, court should err, if at all, in favor of certification). These statements invite error. HN56[] Although the trial court has discretion to grant or deny class certification, the court should not suppress "doubt" as to whether a Rule 23 requirement is met--no matter the **[**49]** area of substantive law. Accordingly, Eisenberg should not be understood to encourage

---

New Motor Vehicles, 522 F.3d at 24.

certification in the face of doubt as to whether a Rule 23 requirement has been met. *Eisenberg* pre-dates the **HN57**[] recent amendments to Rule 23 which, as noted, reject tentative decisions on certification and encourage development of a record sufficient for informed analysis. *See* Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments (**HN58**[] "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."). We recognize the Supreme Court has observed that **HN59**[] "[p]redominance is a **[*322]** test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." Amchem, 521 U.S. at 625. But it does not follow that a court should relax its certification analysis, or presume a requirement for certification is met, merely because a plaintiff's claims fall within one of those substantive categories. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note, 1966 Amendment (**HN60**[] "Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions."); Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 420-21 (5th Cir. 2004) **[**50]** (**HN61**[] "There are no hard and fast rules . . . regarding the suitability of a particular type of antitrust case for class action treatment. Rather, the unique facts of each case will generally be the determining factor governing certification." (citations and quotation marks omitted)). "[A]ctual, not presumed, conformance" with the Rule 23 requirements remains necessary. Newton, 259 F.3d at 167 (quoting Falcon, 457 U.S. at 160); *see, e.g.,* E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (although a putative class may bring a type of claim that "typically" involves common questions of law or fact, "careful attention to the requirements of [Rule 23] remains . . . indispensable").

To the extent that the District Court's analysis reflects application of incorrect standards, remand is appropriate. We recognize that the able District Court did not have the benefit of the standards we have articulated. Faced with complex, fact-intensive disputes, trial courts have expended considerable effort to interpret and apply faithfully the requirements of Rule 23. **HN62**[] One important reason for granting interlocutory appeals under Fed. R. Civ. P. 23(f) is to address "novel or unsettled questions **[**51]** of law" like those presented here. Newton, 259 F.3d at 164; *see* Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments (cases in which "the certification decision turns on a novel or unsettled question of law" are among the best candidates for interlocutory appeal).

C.

Defendants contend the District Court erred as a matter of law in failing to consider the expert testimony of defendants' expert, Ordover, instead deferring to the opinion of plaintiffs' expert, Beyer. Plaintiffs do not dispute that a district court may properly consider expert opinion with respect to Rule 23 requirements at the class certification stage, but maintain that in this case the District Court considered and rejected Ordover's opinion and defendants' arguments based on it.

In addressing defendants' *Daubert* motion to exclude Beyer's opinion, the court discussed whether it should consider Ordover's opinion in deciding whether Beyer's opinion was admissible. The court stated it would be improper to "weigh the relative credibility of the parties' experts"--in other words, to weigh Ordover's opinion against Beyer's--for the purpose of deciding whether to admit or exclude Beyer's opinion. Concluding Beyer's **[**52]** opinion was admissible, the court denied the *Daubert* motion. But in addressing the Rule 23 requirements, the court did not confront Ordover's analysis or his substantive rebuttal of Beyer's points. Nor did the court address Ordover's finding of substantial price disparities among similarly situated purchasers of hydrogen peroxide. The court appears to have assumed it was barred from weighing Ordover's opinion against Beyer's for the purpose of deciding whether the requirements of Rule 23 had been met. This was erroneous.

[*323] 1.

HN63[] Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. *See* West, 282 F.3d at 938. [23] It follows that opinion testimony should not be uncritically

---

[23] *See* Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev. Litig. 405, 425 (2003) (**HN67**[] "Critical evaluation of an expert's opinion **[**55]** as to what conclusions the evidence supports will frequently bring courts close upon the merits, but it is no more than Rule 23 demands. An expert who testifies, for example, that every plaintiff has suffered

accepted as establishing a *Rule 23* requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason. *See* *IPO, 471 F.3d at 42* (***HN64***[] rejecting the view that "an expert's testimony may establish a component of a *Rule 23* requirement simply by being not fatally flawed" and instructing that "[a] district judge is to assess all of the relevant evidence admitted at the class certification stage and determine **[**53]** whether each *Rule 23* requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit"); [24] *Blades, 400 F.3d at 569-70, 575* (affirming denial of class certification where the district court denied defendants' *Daubert* motion and "considered all expert testimony offered by both sides in support of or in opposition to class certification" and "afforded that testimony such weight as [it] deemed appropriate"). ***HN65***[] Under *Rule 23* the district court must be "satisfied," *Falcon, 457 U.S. at 161*, or "persuaded," *IPO, 471 F.3d at 41*, that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands. *See* *Blades, 400 F.3d at 575* (***HN66***[] "[I]n ruling on class certification, **[**54]** a court may be required to resolve disputes concerning the factual setting of the case," including "the resolution of expert disputes concerning the import of evidence concerning the factual setting--such as economic evidence as to business operations or market transactions"); *West, 282 F.3d at 938* (cautioning that neglecting to resolve disputes between experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert"); *see also* *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106-07 (2d Cir. 2007)* (analyzing the opinions of plaintiffs' and defendants' experts); *In re Polymedica Corp. Sec. Litig., 432 F.3d 1, 5-6, 19 (1st Cir. 2005)* (vacating class certification order but finding no error in the "level of inquiry" the district court applied under *Rule 23* when it "went well beyond the four corners of the pleadings, considering both parties' expert reports and literally hundreds of pages of exhibits focused on market efficiency"). [25]

[*324] ***HN68***[] Resolving expert disputes in **[**56]** order to determine whether a class certification requirement has been met is always a task for the court--no matter whether a dispute might appear to implicate the "credibility" of one or more experts, a matter resembling those usually reserved for a trier of fact. Rigorous analysis need not be hampered by a concern for avoiding credibility issues; as noted, findings with respect to class certification do not bind the ultimate fact-finder on the merits. A court's determination that an expert's opinion is persuasive or unpersuasive on a *Rule 23* requirement does not preclude a different view at the merits stage of the case.

HN69[] That weighing expert opinions is proper does not make it necessary in every case or unlimited in scope. As the Court of Appeals for the Second Circuit instructed,

> To avoid the risk that a *Rule 23* hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements. But even with some limits on discovery and the extent of the hearing, the district judge must receive enough evidence, by affidavits, documents, **[**57]** or testimony, to be satisfied that each *Rule 23* requirement has been met.

IPO, 471 F.3d at 41. ***HN70***[] In its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual

---

injury is in effect testifying that injury may be established by common proof. However, the decision as to whether the elements of a claim are susceptible to common proof is for the judge and may not be handed off to experts." (footnote omitted)).

[24] The District Court found the Court of Appeals for the Second Circuit's opinion in *IPO* arguably imposes a higher burden on a party seeking certification than our circuit's case law. We find *IPO* consistent with a proper application of our circuit's standards.

[25] In *New Motor Vehicles*, the Court of Appeals for the First Circuit analyzed the opinions of both plaintiffs' and defendants' experts. *522 F.3d at 20-21*. It also observed that in *Polymedica* and *In re Xcelera.com Securities Litigation, 430 F.3d 503 (1st Cir. 2005)*, the district court and the court of appeals had "rigorously tested the evidence submitted by both sides" with respect to the fraud-on-the-market presumption. *New Motor Vehicles, 522 F.3d at 25*.

dispute because of concern for an overlap with the merits. Genuine disputes with respect to the *Rule 23* requirements must be resolved, after considering all relevant evidence submitted by the parties. *See West, 282 F.3d at 938* ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."); *Szabo, 249 F.3d at 676* (district court must "resolve the disputes before deciding whether to certify the class"); *IPO, 471 F.3d at 41* (***HN71***[] *Rule 23* calls for "definitive assessment" of its requirements); *id. at 42* (rejecting the view that "a district judge may not weigh conflicting evidence and determine the existence of a *Rule 23* requirement just because that requirement is identical to an issue on the merits").

2.

Plaintiffs contend the District Court's acceptance of their expert's opinion was consistent with *In re Linerboard Antitrust Litigation, 305 F.3d 145 (3d Cir. 2002)*, **[**58]** an antitrust conspiracy action in which we affirmed class certification. There are a number of surface similarities between this case and *Linerboard*. Plaintiffs' expert, Beyer, also appeared as an expert for the plaintiffs in *Linerboard*, and in both cases he presented an analysis of the industry and a "structure in pricing" analysis. *Id. at 153*. As in *Linerboard*, Beyer here proposed to demonstrate antitrust impact through the use of "benchmarks" and "multiple regression analysis." *Id. at 153-54*. In affirming the district court's grant of class certification in *Linerboard*, we concluded that Beyer, along with another **[*325]** expert for the plaintiffs, "effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur" antitrust impact. *Id. at 155*.

In *Linerboard* we did not address whether such expert opinion offered by the party opposing class certification would have been properly considered by the district court in the exercise of its discretion. But defendants here presented expert opinion disputing much of the evidence and argument plaintiffs offered for certification--specifically, Ordover disputed Beyer's characterizations **[**59]** of the market and the alleged pricing structure. Defendants contend Ordover raised substantial doubts, not considered by the District Court, about whether common proof would be available for plaintiffs to demonstrate antitrust impact at trial.

We do not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid. But the question at class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence. Here, the District Court apparently believed it was barred from resolving disputes between the plaintiffs' and defendants' experts. ***HN72***[] *Rule 23* calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties. Accordingly, we will vacate the order certifying the class and remand for proceedings **[**60]** consistent with this opinion. [26]

D.

Defendants contend the District Court, by relying on *Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)*, erroneously presumed the predominance requirement was met. In *Bogosian*, also a Clayton Act *§ 4* case in which plaintiffs sought class certification, the district court had denied class certification on the assumption that the issue of antitrust impact would have to be proven on an individual, as opposed to common, basis. *561 F.2d at 454*. Finding that assumption erroneous, we reasoned that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not fact of damage can be proven on a common basis therefore depends upon the circumstances of each case." *Id*. Applying the concept, we continued:

[26] The current record suggests it may be possible to overcome some obstacles to class certification by shortening the class period or by fashioning sub-classes. *See Fed. R. Civ. P. 23(c)(5)*.

> If, in this case, a nationwide conspiracy is proven, the result **[**61]** of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions **[*326]** than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Id. at 455; *see* *Newton, 259 F.3d at 179 n.21* ("In antitrust class actions, injury may be presumed when it is clear the violation results in harm to the entire class."); *Linerboard, 305 F.3d at 151-53*.

In *Linerboard*, we found a "strong argument [could] be made that the *Bogosian* concept of presumed impact was properly applied" on the facts of that case. *Id. at 152*. Plaintiffs had alleged a horizontal conspiracy by manufacturers **[**62]** to restrict supply and raise prices of linerboard, the paper lining used in corrugated cardboard boxes and sheets. *Id*. Over a two-year period, defendants allegedly had agreed to idle their plants to reduce inventories to a twenty-year low and boost prices. *Id. at 150-51*. During the two-year class period, prices had risen by ninety percent. *See* *id. at 152* ("Coincident with [defendants'] interference with the normal market forces, linerboard prices in the eastern United States rose in six consecutive price increases, from a low of around $ 270 to $ 290 per ton in third quarter 1993 to $ 530 per ton by April 1995."). The record in this case is different. Although the price of hydrogen peroxide rose at some points during the lengthy class period, the price was lower, not higher, at the end of the class period than at the beginning. And the evidence, as interpreted by defendants' expert, shows that through much of the class period the production of hydrogen peroxide was increasing rather than decreasing. Moreover, there was an active dispute between the experts as to the "price structure in the industry" to which *Bogosian* refers. Defendants cited, for example, Ordover's empirical analysis **[**63]** showing substantial price disparities among similarly situated customers. Accordingly, defendants contended, it was far from "clear the violation result[ed] in harm to the entire class," *Newton, 259 F.3d at 179 n.21*. It is not apparent that the District Court considered, or believed it had the authority to consider, all the evidence in the record with respect to this dispute.

While the District Court found the *Bogosian* presumption applied, it also relied on Beyer's analysis. *Cf.* *Linerboard, 305 F.3d at 155* ("[T]his was not a case where plaintiffs relied solely on presumed impact and damages."). As in *Linerboard*, plaintiffs here stress that they do not rely merely on *Bogosian's* presumption to support class certification, but also on their expert's analysis. Plaintiffs do not contend a bare allegation of a price-fixing conspiracy, in the absence of supporting evidence and analysis, suffices to support class certification consistent with a proper "rigorous analysis" under *Rule 23*. We emphasize that ***HN73***[] "[a]ctual, not presumed, conformance" with the *Rule 23* requirements is essential. *Newton, 259 F.3d at 167* (quoting *Falcon, 457 U.S. at 160*). **[**64]** ***HN74***[] Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to *Rule 23*, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery. *See* *Fed. R. Civ. P. 23* advisory committee's note, 2003 Amendments (***HN75***[] "[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.").

The District Court, upon review of all the evidence consistent with this opinion, may again consider whether the reasoning in *Bogosian* is compatible with the record of this case. *See* *In re Salomon Analyst* ***[*327]*** *Metromedia Litig., 544 F.3d 474, 485-86 (2d Cir. 2008)* (remanding for opportunity for party opposing class certification to present evidence rebutting the fraud-on-the-market presumption, because *Rule 23* requires a "definitive assessment" as to the predominance requirement).

V.

For the foregoing reasons, we will vacate the class certification order and remand for proceedings consistent with this opinion.

In re Rail Freight Fuel Surcharge Antitrust Litig.

United States District Court for the District of Columbia

December 31, 2008, Decided; December 31, 2008, Filed

MDL Docket No. 1869; Misc. No. 07-489 (PLF)

Reporter

593 F. Supp. 2d 29 *; 2008 U.S. Dist. LEXIS 105107 **; 2009-1 Trade Cas. (CCH) P76,459

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION; This document relates to: INDIRECT DIRECT PURCHASER PLAINTIFFS

Subsequent History: Motion denied by *In re Rail Freight Fuel Surcharge Antitrust Litig., 258 F.R.D. 167, 2009 U.S. Dist. LEXIS 56748 (D.D.C., July 2, 2009)*

Prior History: *In re Rail Freight Fuel Surcharge Antitrust Litig., 587 F. Supp. 2d 27, 2008 U.S. Dist. LEXIS 95456 (D.D.C., 2008)*

Core Terms

railroads, regulation, plaintiffs', preempted, fuel, purchaser, surcharges, antitrust, indirect, transportation, freight, state law, preemption, defendants', allegations, remedies, consumer protection, grounds, traffic, injunctive relief, motion to dismiss, airline, prices, rail transportation, unjust enrichment, anti trust law, unregulated, injunction, antitrust claim, federal remedy

LexisNexis® Headnotes

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

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

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

Fed. R. Civ. P. 12(b)(6) allows dismissal of a complaint if a plaintiff fails to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. The United States Supreme Court has clarified the standard of pleading that a plaintiff must meet in order to survive a motion to dismiss under *Rule 12(b)(6)*. *Fed. R. Civ. P. 8(a)(2)* requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Although detailed factual allegations are not necessary to withstand a *Rule 12(b)(6)* motion, a plaintiff must furnish more than labels and conclusions or a formulaic recitation of the elements of a cause of action to provide the grounds of entitlement to relief. While there is no probability requirement at the pleading stage, something beyond mere possibility must be alleged. The facts alleged in the complaint must be enough to raise a right to relief above the speculative level, or must be sufficient to state a claim for relief that is plausible on its face. The Court refers to this newly clarified standard as "the plausibility standard."

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

HN2[] Motions to Dismiss, Failure to State Claim

On a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must accept as true all of the factual allegations contained in the complaint. It must construe the complaint liberally in the plaintiffs' favor, and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. The court, however, need not accept inferences drawn by plaintiffs if those inferences are unsupported by facts alleged in the complaint; nor must it accept plaintiffs' legal conclusions.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN3[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Federal courts are courts of limited jurisdiction. They therefore may hear only cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress.

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

HN4[] Motions to Dismiss, Failure to State Claim

Under *Fed. R. Civ. P. 12(b)(1)*, the plaintiffs bear the burden of establishing subject matter jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

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

HN5[] Jurisdiction, Subject Matter Jurisdiction

In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction, the court must accept all of the factual allegations in the complaint as true. The court, however, need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must it accept plaintiffs' legal conclusions.

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN6[] Antitrust & Trade Law, Consumer Protection

Only direct purchasers may obtain damage awards under federal ***antitrust law***.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

HN7[] Transportation, Common Carriers

See *49 U.S.C.S. § 10501(b)*.

Constitutional Law > Supremacy Clause > Federal Preemption

HN8[] Supremacy Clause, Federal Preemption

Preemption doctrine is rooted in the *Supremacy Clause of the United States Constitution*. *U.S. Const. art. VI, cl. 2*. A federal statute preempts state law when (1) the preemptive intent is explicitly stated in the statute's language or implicitly contained in its structure and purpose; or (2) the state law actually conflicts with federal law; or (3) federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it. The purpose of Congress is the ultimate touchstone' of pre-emption analysis.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN9[] Transportation, Common Carriers

The preemption language in Interstate Commerce Commission Termination Act of 1995 (ICCTA), *49 U.S.C.S. § 10101 et seq.* is plain and explicit: The remedies provided with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. *49 U.S.C.S. § 10501(b)*. The language of the statute could not be more precise. The most natural reading of *§ 10501(b)(2)* is that the federal remedies provided by the ICCTA are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICCTA has expressly provided otherwise. Indeed, it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN10[] Transportation, Common Carriers

While the enactment of Interstate Commerce Commission Termination Act of 1995 (ICCTA), *49 U.S.C.S. § 10101 et seq.* was the culmination of a movement toward deregulation of the railroads that began in the late 1970's, Congress did not intend that the state fill the regulatory void. The regulation of railroad operations had always been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm. Thus, as numerous courts have held, ICCTA preempts the economic regulation of railroads by the states, as well as state laws whose application would unreasonably interfere with a railroad's operations. As the United States Court of Appeals for the Third Circuit has put it, the ICCTA does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. The question is always whether the action would have the effect of preventing or unreasonably interfering with railroad transportation.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN11[] **Transportation, Common Carriers**

There is always a presumption against finding preemption when Congress has legislated in a field the states have traditionally occupied. Conversely, the case for preemption is particularly strong where, as in rail transportation, the state regulates in an area where there has been a history of significant federal presence.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN12[] **Transportation, Common Carriers**

The states retain their traditional police powers to protect health and safety, which is reserved to them by the Constitution, but only so long as the application of these powers is not unreasonably burdensome on railroad operations.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN13[] **Transportation, Common Carriers**

The most natural reading of *49 U.S.C.S. § 10501(b)(2)* is that the federal remedies provided by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), *49 U.S.C.S. § 10101 et seq.* are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICCTA has expressly provided otherwise.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN14[] **Transportation, Common Carriers**

With similarly broad language, Interstate Commerce Commission Termination Act of 1995 (ICCTA), *49 U.S.C.S. § 10101 et seq.* preempts state laws with respect to regulation of rail transportation. *49 U.S.C.S. § 10501(b)*. A core concern of the ICCTA is the regulation of economics and finances of the rail carriage industry, and, just as with the airline industry, such regulation by the states is preempted.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

HN15[] Transportation, Common Carriers

49 U.S.C.S. 10709(c)(1) states that a contract that is authorized by this section, and transportation under such contract, shall not be subject to this part *49 U.S.C.S. § 10101 et seq.*, and may not be subsequently challenged before the Surface Transportation Board (STB) or in any court on the grounds that such contract violates a provision of *49 U.S.C.S. § 10101 et seq. 49 U.S.C.S. § 10709(c)(1)*. Read in its entirety, the sentence makes clear that Congress intended it to mean only that the STB has no regulatory authority over contract claims, not to create an opportunity for state regulation.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN16[] Transportation, Common Carriers

Through its enactment of Interstate Commerce Commission Termination Act of 1995, *49 U.S.C.S. § 10101 et seq.*, Congress intended that the Federal scheme of economic regulation and deregulation of the railroads address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN17[] Transportation, Common Carriers

49 U.S.C.S. § 10709(c)(2)'s references to lawsuits in court, and not before the Surface Transportation Board (STB), as the exclusive remedy for alleged breaches of contract by railroads does not mean that all claims against railroads arising from shipments governed by contract may be brought in federal courts. Under *§ 10709(c)(2)*, courts may rule on breach of contract claims against railroads, a grant of jurisdiction that is necessary for any industry to function.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Constitutional Law > Supremacy Clause > Federal Preemption

HN18[] Transportation, Railroads

The evidentiary savings clause, *49 U.S.C.S. § 10706(a)(3)(B)(ii)*, of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), *49 U.S.C.S. § 10101 et seq.*, includes the phrase, "in any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in *§ 10706(a)(2)(A)* of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from certain kinds of evidence". *49 U.S.C.S. § 10706(a)(3)(B)(ii)*. By this section, Congress provided railroads with certain evidentiary protections, but these protections cannot be transformed into a grant of authority for the enforcement of state antitrust laws that are preempted by ICCTA's express preemption clause. Had Congress intended that the entire body of state ***antitrust law*** not be preempted by *49 U.S.C.S. § 10501(b)*, it would not have created the exception so tangentially.

Antitrust & Trade Law > Consumer Protection > General Overview

HN19[] **Antitrust & Trade Law, Consumer Protection**

The Supreme Court's decision in Illinois Brick prohibits claims for damages, but not those for injunctive relief, by indirect purchasers under federal ***antitrust law***.

Antitrust & Trade Law > General Overview

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN20[] **Antitrust & Trade Law**

The essential standing question for antitrust claims for injunctive relief is whether the plaintiffs have alleged an antitrust injury -- namely a threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > General Overview

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN21[] **Antitrust & Trade Law**

Associated General Contractors v. Cal. State Council of Carpenters (AGC) established a multi-factor test to determine whether federal antitrust plaintiffs met prudential standing requirements. However, the "efficient enforcement factors" identified in AGC do not apply to claims for injunctive relief. In Cargill, in Associated General Contractors the Court considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4 of the Clayton Act for damages. However, many of these other factors are not relevant to the standing inquiry under § 16 of the Clayton Act for an injunction. The relevant inquiry under § 16 is whether plaintiffs have alleged an antitrust injury because the only remedy available is equitable in nature. Standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries once an injunction is imposed.

Antitrust & Trade Law > Consumer Protection > General Overview

HN22[] Antitrust & Trade Law, Consumer Protection

Where it is alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

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

HN23[] Antitrust & Trade Law

Once plaintiffs have alleged an antitrust injury, they must also allege a causal connection between the prohibited behavior and their injury, a requirement common to standing for all plaintiffs.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN24[] Standing, Burdens of Proof

Standing is an Article III requirement under which the plaintiffs must show, at an irreducible constitutional minimum: (1) that they have suffered an injury in fact -- the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury.

Counsel: [1]** For RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION - MDL NO. 1869, In Re: Roger M. Adelman, LEAD ATTORNEY, PRO HAC VICE, Washington, DC; Gordon Douglas Jones, PRO HAC VICE, HASKELL SLAUGHTER YOUNG & REDIKER, LLC, Birmingham, AL; Richard P. Rouco, PRO HAC VICE, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL.

For DAKOTA GRANITE COMPANY, on behalf of itself and all others similarly situated, Plaintiff: Aaron M. McParlan, James S. Reece, Michael E. Jacobs, Richard M. Hagstrom, LEAD ATTORNEYS, ZELLE, HOFMAN, VOELBEL, MASON & GETTE LLP, Minneapolis, MN; Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; James Joseph Pizzirusso, Michael D. Hausfeld, LEAD ATTORNEYS, Steig D. Olson, HAUSFELD LLP, Washington, DC.

For MCINTYRE GROUP, LTD., Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; James Shedden, Lawrence W. Schad, Matthew S. Burns, Tony Kim, SCHAD DIAMOND & SHEDDEN P.C., Chicago, IL.

For GVL PIPE & DEMOLITION, INC., On behalf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Simon B. Paris, LEAD

ATTORNEY, PRO HAC VICE, **[**2]** SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C., Philadelphia, PA; Daniel E. Gunstafson, Jason S. Kilene, PRO HAC VICE, GUSTAFSON GLUEK PLLC, Minneapolis, MN; Donald L. Perelman, PRO HAC VICE, FINE, KAPLAN & BLACK, Philadelphia, PA; Patrick Howard, PRO HAC VICE, SALTZ, MONGELUZZI, BARRETT & BENDESKY, P.C., Philadelphia, PA; Thomas A. Muzilla, PRO HAC VICE, THE MUZILLA LAW FIRM, LLC, Cleveland, OH.

For FERRARO FOODS OF NORTH CAROLINA, LLC, On behlaf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Lynn Lincoln Sarko, LEAD ATTORNEY, KELLER ROHRBACK, LLP, Seattle, WA; Mark A. Griffin, Raymond J. Farrow, T. David Copley, PRO HAC VICE, KELLER ROHRBACK LLP, Seattle, WA; SUBLETTE COOPERATIVE, INC., On behalf of itself and all others similarly situated, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Krishna B. Narine, LAW OFFICE OF KRISHNA B. NARINE, P.C., Huntingdon Valley, PA.

For STRATES SHOWS, INC., Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; James Joseph Pizzirusso, LEAD ATTORNEY, HAUSFELD LLP, Washington, **[**3]** DC; Joshua D. Snyder, Michael J. Boni, LEAD ATTORNEYS, BONI & ZACK LLC, Bala Cynwyd, PA.

For WEST ALABAMA SAND & GRAVEL, INC., Plaintiff: Joe R. Whatley , JR., LEAD ATTORNEY, WHATLEY DRAKE & KALLAS, LLC, New York, NY; Richard P. Rouco, LEAD ATTORNEY, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL; Roger M. Adelman, LEAD ATTORNEY, PRO HAC VICE, Washington, DC.

For CEDAR FARMS CO., INC., on behalf of itself and all others similarly situated, Plaintiff: Daniel Paul Dietrich, LEAD ATTORNEY, William J. Schifino, Jr., WILLIAMS SCHIFINO MANGIONE & STEADY, PA, Tampa, FL; Jeffrey B. Gittleman, BARRACK, RODOS & BACINE, Philadelphia, PA.

For DAD'S PRODUCTS CO., INC., Plaintiff: James Joseph Pizzirusso, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC; Michael D. Hausfeld, Steig D. Olson, LEAD ATTORNEYS, HAUSFELD LLP, Washington, DC.

For ZINIFEX TAYLOR CHEMICALS, INC., Plaintiff: Mary Jane Fait, LEAD ATTORNEY, WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLC, Chicago, IL.

For DUST PRO, INC., Plaintiff: Marc L. Greenwald, Stephen R. Neuwirth, LEAD ATTORNEYS, Daniel Brockett, Sami H. Rashid, QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, New York, NY; Paul M. Donovan, LEAD ATTORNEY, LAROE WINN, MOERMAN & DONOVAN, Washington, **[**4]** DC.

For QUALITY REFRACTORIES INSTALLATION, INC., Plaintiff: Eugene A. Spector, LEAD ATTORNEY, SPECTOR, ROSEMAN AND KODROFF PC, Philadelphia, PA; Jay S. Cohen, William G. Caldes, SPECTOR, ROSEMAN & KODROFF & WILLIS, P.C., Philadlephia, PA.

For DONNELLY COMMODITIES INCORPORATED, On behalf of itself and all others similarly situated, Plaintiff: Barry J. Nace, LEAD ATTORNEY, PAULSON & NACE, Washington, DC; Steig D. Olson, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC.

For US MAGNESIUM LLC, Plaintiff: Paul M. Donovan, LEAD ATTORNEY, LAROE WINN, MOERMAN & DONOVAN, Washington, DC.

For RB RUBBER PRODUCTS, INC., individually and on behalf of all those similarly situated, Plaintiff: Michelle A. Parfitt, LEAD ATTORNEY, Susan Carole Minkin, ASHCRAFT & GEREL, Washington, DC; Richard P. Rouco, LEAD ATTORNEY, WHATLEY DRAKE & KALLAS, LLC, Birmingham, AL; Matthew H. Armstrong, SCHLICHTER BOGARD & DENTON, St. Louis, MO.

For M.C. DIXON LUMBER COMPANY, INC., Plaintiff: Steven A. Skalet, LEAD ATTORNEY, MEHRI & SKALET, PLLC, Washington, DC.

For STERLING STEEL CO., LLC, Plaintiff: David M. Peterson, LEAD ATTORNEY, PETERSON & ASSOCIATES, PC, Kansas City, MO; Joseph A. Kronawitter, LEAD ATTORNEY, HORN, AYLWARD & BANDY, **[**5]** LLP, Kansas City, MO; R. Keith Johnston, LEAD ATTORNEY, WALTERS BENDER STROHBEHN & VAUGHAN, PC, Kansas City, MO.

For ALL PLAINTIFFS, Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, DC; Paul M. Weiss, LEAD ATTORNEY, FREED & WEISS LLC, Chicago, IL.

For FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, Consol Plaintiff: Christopher Lovell, LEAD ATTORNEY, New York, NY; Gary Edward Mason, LEAD ATTORNEY, THE MASON LAW FIRM, LLP, Washington, DC; Imtiaz A. Siddiqui, LEAD ATTORNEY, LOVELL STEWART HALEBIAN LLP, New York, NY; Reginald Terrell, LEAD ATTORNEY, PRO HAC VICE, THE TERRELL LAW GROUP, Richmond, CA.

For AGWAY LIQUIDATING TRUST, on behalf of itself and all others similarly situated, MAROON INCORPORATED, on behalf of itself and all others similary situated, Consol Plaintiffs: Christopher Lovell, LEAD ATTORNEY, New York, NY; Gary Edward Mason, LEAD ATTORNEY, THE MASON LAW FIRM, LLP, Washington, DC; Imtiaz A. Siddiqui, LEAD ATTORNEY, LOVELL STEWART HALEBIAN LLP, New York, NY.

For SOMERSET INDUSTRIES, INC., Consol Plaintiff: Ronald J. Aranoff, LEAD ATTORNEY, BERNSTEIN LIEBHARD & LIFSHITZ, LLP, New York, NY.

For COMPLETE TRANSPORATION **[**6]** SYSTEMS, INC., on behalf of itself and all others similary situated, Consol Plaintiff: Adel A. Nadji, William M. Audet, LEAD ATTORNEYS, AUDET & PARTNERS, LLP, San Francisco, CA.

For BLUE GRASS TOBACCO COMPANY, on behalf of itself and all others similarly situated, Consol Plaintiff: James E. Cecchi, Lindsey H. Taylor, LEAD ATTORNEYS, CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN, Roseland, NJ; Stephen A. Weiss, LEAD ATTORNEY, Seeger Weiss LLP, New York, NY.

For CARTER DISTRIBUTING COMPANY, on behalf of itself and all others similarly situated, Consol Plaintiff: Theodore J. Leopold, LEAD ATTORNEY, Leopold-Kuvin, P.A., West Palm Beach, FL.

For UNITED CO-OPERATIVE FARMERS, INC., on behalf of itself and all others similarly situated, Consol Plaintiff: H. Laddie Montague, LEAD ATTORNEY, Eric L. Cramer, BERGER & MONTAGUE, P.C., Philadelphia, PA.

For ISSAC INDUSTRIES, INC., on behalf of itself and all others similarly situated, Consol Plaintiff: Linda P. Nussbaum, Robert N. Kaplan, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, New York, NY.

For ASSOCIATION OF AMERICAN RAILROADS, Defendant: David Irving Gelfand, LEAD ATTORNEY, PRO HAC VICE, CLEARY, GOTTLIEB, STEEN & HAMILTON, Washington, **[**7]** DC; Mark Leddy, LEAD ATTORNEY, Joanne Louise Werdel, CLEARY, GOTTLIEB, STEEN & HAMILTON LLP, Washington, DC.

For BNSF RAILWAY COMPANY, Defendant: Gary A. Winters, LEAD ATTORNEY, Adam B. Miller, MAYER BROWN LLP, Washington, DC; Richard Joseph Favretto, LEAD ATTORNEY, MAYER, BROWN ROWE & MAW, Washington, DC; Linda Sue Steinm, Samuel M. Sipe, Jr., STEPTOE & JOHNSON, L.L.P., Washington, DC.

For CSX TRANSPORTATION, INC., Defendant: Kent Alan Gardiner, LEAD ATTORNEY, George D. Ruttinger, Kathryn D Kirmayer, Richard McMillan , Jr., Shari Ross Lahlou, CROWELL & MORING, L.L.P., Washington, DC.

For KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant: Reid L. Ashinoff, LEAD ATTORNEY, David R. Baum, Michael S. Gugig, Robert T. Joseph, SONNENSCHEIN NATH & ROSENTHAL LLP, New York, NY.

For NORFOLK SOUTHERN RAILWAY COMPANY, John Murray Nannes, LEAD ATTORNEY, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, Washington, DC.

For Tara L. Reinhart, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, DC; Claudia R. Higgins, KAYE SCHOLER, LLP, Washington, DC.

For Saul P. Morgenstern, KAYE SCHOLER LLP, New York, NY.

For UNION PACIFIC RAILROAD COMPANY, Defendant: Alan Mitchell Wiseman, LEAD ATTORNEY, Peter A. Barile, **[**8]** III, HOWREY, LLP, Washington, DC; Tyrone R. Childress, LEAD ATTORNEY, David G. Meyer, HOWREY LLP, Los Angeles, CA.

For CEDAR CREEK WHOLESALE, INC., Defendant: Joseph M. Barton, LEAD ATTORNEY, GOLD BENNETT CERA & SIDENER LLP, San Francisco, CA; Paul F. Bennett, LEAD ATTORNEY, PRO HAC VICE, GOLD

BENNETT CERA & SIDENER LLP, San Francisco, CA; Steven O. Sidener, PRO HAC VICE, GOLD BENNETT CERA & SIDENER LLP, San Francisco, CA.

Judges: PAUL L. FRIEDMAN, United States District Judge.

Opinion by: PAUL L. FRIEDMAN

Opinion

[*32] This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction under *Rules 12(b)(6)* and *12(b)(1) of the Federal Rules of Civil Procedure*. [1] The Court has carefully considered the arguments made by the parties in their papers and the oral arguments presented by counsel in open court on October 10, 2008. The Court has concluded that the indirect purchaser plaintiffs' state law claims are preempted by federal law and must be dismissed. The Court has also concluded that the indirect purchaser plaintiffs have stated a federal antitrust claim for injunctive relief and that this claim may proceed.

I. BACKGROUND

The Multidistrict Litigation Panel consolidated eighteen separate class actions, pending in six districts, involving common antitrust allegations against the four major United States railroads and transferred them to this Court on November 6, 2007. The plaintiffs were divided into two putative classes -- those who allegedly purchased rail freight transportation **[**10]** services directly from defendants from July 1, 2003 until at least June 30, 2007 and who were assessed a rail fuel surcharge for the transportation services, and those who allegedly purchased rail freight transportation services indirectly from the defendants and were subject to a similar surcharge. Plaintiffs in both putative classes allege that the defendant railroads violated *Section 1 of the Sherman Act* by conspiring to fix prices through their use of fuel surcharges. The indirect purchaser plaintiffs also allege various claims arising from state antitrust, consumer protection and unjust enrichment law for the same alleged behavior by defendants.

Defendants BNSF Railway Company ("BNSF"), CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Company ("NS"), and Union Pacific Railway Company ("UP") moved to dismiss the claims of both putative classes. The Court denied defendants' motion to dismiss the direct purchasers' complaint on November 7, 2008. See *In re Rail Freight Fuel Surcharge Antitrust Litig., Misc. No. 07-489, 587 F. Supp. 2d 27, 2008 U.S. Dist. LEXIS 95456 (D.D.C. Nov. 7, 2008)*. The indirect purchaser plaintiffs' (hereafter "plaintiffs") complaint, and defendants' challenge to it, **[**11]** are discussed in this Opinion. [2]

II. STANDARD OF REVIEW

Defendants move to dismiss all of plaintiffs' claims for failure to state a claim upon which relief can be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. **[*33]** They also move to dismiss for lack of jurisdiction under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* on the grounds that plaintiffs lack standing.

---

[1] The papers **[**9]** submitted in connection with this motion include: Indirect Purchaser Plaintiffs' Consolidated Amended Class Action Complaint ("Compl."); Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Defendants' Joint Reply to Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Indirect Purchaser Plaintiffs' Supplement to their Opposition to Defendants' Joint Motion to Dismiss; Defendants' Supplemental Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; and Indirect Purchaser Plaintiffs' Supplemental Memorandum Regarding Federal Injunctive Relief Standing.

[2] The putative indirect purchaser plaintiff class is represented by Agway Liquidating Trust; Fayus Enterprises; and Maroon Incorporated.

A. Rule 12(6)(6)

HN1[] *Rule 12(b)(6) of the Federal Rules of Civil Procedure* allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be granted." *FED. R. CIV. P. 12(b)(6)*. In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court clarified the standard of pleading that a plaintiff must meet in order to survive a motion to dismiss under *Rule 12(b)(6)*. The Court noted that "*Federal Rule of Civil Procedure 8(a)(2)* **[**12]** requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" *Bell Atlantic Corp. v. Twombly, 127 S. Ct. at 1965* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*; see also *Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)*; *Aktieselskabet AF 21 v. Fame Jeans Inc., 381 U.S. App. D.C. 76, 525 F.3d 8, 15 (D.C. Cir. 2008)*. Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to provide the "grounds" of "entitle[ment] to relief." *Bell Atlantic Corp. v. Twombly, 127 S. Ct. at 1964-65*; see also *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*. While there is no "probability requirement at the pleading stage," *Bell Atlantic Corp. v. Twombly, 127 S. Ct. at 1965*, "something beyond . . . mere possibility . . . must be alleged[.]" *Id. at 1966*. The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level," *id. at 1965*, or must be sufficient "to state a claim for **[**13]** relief that is plausible on its face." *Id. at 1974*. The Court referred to this newly clarified standard as "the plausibility standard." *Id. at 1968* (abandoning the "no set of facts" language from *Conley v. Gibson*).

HN2[] On a motion to dismiss under *Rule 12(b)(6)*, the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 127 S. Ct. at 2200*; see also *Bell Atlantic Corp. v. Twombly, 127 S. Ct. at 1965*; *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*; *Aktieselskabet AF 21 v. Fame Jeans Inc., 525 F.3d at 15*. It must construe the complaint "liberally in the plaintiffs' favor, and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994)*; see also *Aktieselskabet AF 21 v. Fame Jeans Inc., 525 F.3d at 15*. The Court, however, need not accept inferences drawn by plaintiffs if those inferences are unsupported by facts alleged in the complaint; nor must it accept plaintiffs' legal conclusions. See *Kowal v. MCI Communications Corp., 16 F.3d at 1276*; *Browning v. Clinton, 352 U.S. App. D.C. 4, 292 F.3d 235, 242 (D.C. Cir. 2002)*.

B. Rule 12(b)(1)

HN3[] Federal courts are **[**14]** courts of limited jurisdiction. They therefore may hear only cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. See, e.g., *Beethoven.com L.L.C. v. Librarian of Congress, 364 U.S. App. D.C. 295, 394 F.3d 939, 945 (D.C. Cir. 2005)*; *Best v. United States, 522 F. Supp. 2d 252, 254 (D.D.C. 2007)*; *Srour v. Barnes, 670 F. Supp. 18, 20 (D.D.C.1987)* (citing *City of Kenosha v. Bruno, 412 U.S. 507, 511, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973))*. *HN4*[] Under *Rule 12(b)(1)*, the plaintiffs bear the burden **[*34]** of establishing subject matter jurisdiction. See *Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*; *Moms Against Mercury v. FDA, 376 U.S. App. D.C. 18, 483 F.3d 824, 828 (D.C. Cir. 2007)* (citing *Georgiades v. Martin-Trigona,234 U.S. App. D.C. 345, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984))*.*HN5*[] In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all of the factual allegations in the complaint as true. The Court, however, need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must it accept plaintiffs' legal conclusions. See *Best v. United States, 522 F. Supp. 2d at 255*; *Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 47 (D.D.C. 2003)*.

III. **[**15]** PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that in 2003, the four defendants, who control approximately ninety percent of all rail freight traffic in the United States, sought to increase their revenues through the use of fuel surcharges. Compl. PP 2-3, 43. Before

Congress passed the Staggers Rail Act in 1980, defendants would have had to apply to the Interstate Commerce Commission for approval of an across-the-board rate increase. Compl. PP 4, 55. Following deregulation of the railroad industry, however, at least eighty percent of all rail shipments move under private transportation contracts, which are not rate regulated, or are otherwise exempt from rate regulation. Compl. P 56. Plaintiffs allege that defendants determined that the most efficient means to increase their profits was through the imposition of an across-the-board artificially high and uniform fuel surcharge. Compl. P 60.

The barrier to this plan, according to plaintiffs, was that many rail freight transportation contracts already included rate escalation provisions that weighted a variety of cost factors, including fuel, based on an index called the All Inclusive Index (the "AII"). Compl. PP 11, 61. The railroad trade **[**16]** organization known as the Association of American Railroads ("AAR"), which is dominated by the four defendants, publishes this index. Compl. PP 12, 61. Plaintiffs allege that the AII (as well as a related cost index called the Rail Cost Adjustment Factor ("RCAF")) already accounted accurately for the impact of fuel cost increases. Compl. PP 5, 61. Any actual increase in fuel costs, no matter how large, would be reflected in the All and the RCAF. Compl. P 61. Plaintiffs allege that the defendants conspired to remove fuel from the All so that they could apply a separate "fuel surcharge" as a percentage of the total cost of freight transportation. Compl. P 62. Doing so permitted plaintiffs to raise total freight prices widely by a given percentage. Id.

According to plaintiffs, top executives from each of the defendants met regularly at various industry conferences and events in the spring of 2003 and thereafter to discuss their industry. Compl. P 64. Shortly after one such industry meeting, in July 2003, the western railroads (BNSF and UP) began charging identical fuel surcharges based on the U.S. Department of Energy On-Highway Diesel Fuel Price Index. Compl. PP 16, 65. Plaintiffs allege **[**17]** that this parallel and complex pricing decision was based on an agreement among the defendants. Compl. PP 66-69.

The next step in the alleged conspiracy, according to plaintiffs, was the defendants' agreement and collective action to cause the AAR to create a new cost escalation index, the All Inclusive Index Less Fuel ("AIILF"), which removed fuel costs from the prior cost escalation index (the AII). Compl. P 72. According to plaintiffs, defendants **[*35]** reached this agreement during the October and December 2003 meetings of the AAR. Compl. P 71. The index was published in December 2003. Compl. P 72. Subsequently, and in furtherance of the conspiracy, according to plaintiffs, the eastern railroads (CSX and NS) announced that they would apply identical fuel surcharges based on the West Texas Intermediate Index. Compl. PP 75-77.

Plaintiffs allege that at that point, and as a result of these collective actions, defendants each applied their fuel surcharges in the same way -- as a percentage multiplier of the total base rate for rail freight transportation. Compl. P 84. They were able to do so because, under the AIILF, fuel was no longer included in the general cost escalation index. Plaintiffs **[**18]** allege that this approach yielded defendants billions of dollars of additional profits because the surcharge raised rates far beyond the real increased cost of fuel. Compl. PP 81-83, 91. Plaintiffs allege that defendants, in the east and west, coordinated their computation of the surcharges. Compl. P 89. As a result of this alleged collusion, the eastern and western railroads, respectively, imposed identical fuel surcharges for more than three years. Compl. P 89.

In sum, relying on the uniformity of fuel surcharges, the creation and use of the AIILF, and various other allegations, plaintiffs contend that defendants conspired to fix prices in violation of *Section 1 of the Sherman Act* as well as the antitrust, consumer protection and unjust enrichment laws of various states. Plaintiffs further allege that as a result, the members of the plaintiff class have all paid higher prices for unregulated rail freight transportation than they would have absent this asserted unlawful activity. Compl. PP 26, 112. Defendants have moved to dismiss on the grounds that plaintiffs have not met the Twombly pleading standard; that plaintiffs' state law claims are all preempted by the Interstate Commerce **[**19]** Commission Termination Act of 1995 ("ICCTA"); that plaintiffs lack standing under Article III to claim violations of the laws of states in which they do not reside or do business; that plaintiffs have failed to demonstrate that they have "antitrust standing;" and that plaintiffs' unjust enrichment and consumer protection claims fail on a number of grounds.

IV. ANALYSIS

The complaint alleges both federal and state antitrust claims as well as state consumer protection and unjust enrichment claims. Plaintiffs must pursue the state claims in order to recover damages, because following *Illinois Brick v. Illinois, 431 U.S. 720, 746-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, ***HN6***[] only direct purchasers may obtain damage awards under federal ***antitrust law***. As explained in further detail below, the Court finds that the plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Plaintiffs' federal antitrust claim survives, however, because they have met the pleading standard enunciated by the Supreme Court in *Twombly* and have standing to pursue their claim for injunctive relief.

A. The Twombly Standard

Defendants argue that the complaint does not meet the pleading standard for federal or state antitrust claims as articulated **[**20]** by the Supreme Court in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The Court previously found that the direct purchaser plaintiffs' allegations, which are substantially similar to the indirect purchasers' allegations, met the Twombly standard. It therefore denied defendants' motion to dismiss the direct purchasers' claims on November 7, 2008. See *In re* ***[*36]*** *Rail Freight Fuel Surcharge Antitrust Litig., Misc. No. 07-489, 587 F. Supp. 2d 27, 2008 U.S. Dist. LEXIS 95456 at * 18-19, 23-26 (D.D.C. Nov. 7, 2008)*. The defendants do not raise any additional or different arguments as to why the indirect purchaser plaintiffs' complaint should not be allowed to proceed under Twombly. For the same reasons explained in the Court's earlier Opinion, the Court finds that the indirect purchasers' complaint states claims under *Twombly*, and it therefore will not dismiss their complaint on those grounds. Id.

B. Federal Preemption of State Law Claims

Defendants argue that plaintiffs' state antitrust, consumer protection and unjust enrichment claims are preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), *49 U.S.C. § 10101 et seq.* The preemption clause in ICCTA provides:

> ***HN7***[] The jurisdiction **[**21]** of the [Surface Transportation] Board over -- (1) transportation by rail carriers, and the remedies provided in this part [*49 USC §§ 10101 et seq.*] *with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers*; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part [*49 USC §§ 10101 et seq.*], the remedies provided under this part [*49 USC §§ 10101 et seq.*] *with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law*.

49 U.S.C. § 10501(b) (emphasis added).

HN8[] Preemption doctrine is rooted in the *Supremacy Clause of the United States Constitution*. *U.S. CONST. art. VI, cl. 2*. A federal statute preempts state law when (1) the preemptive intent is "'explicitly stated in the statute's language or implicitly contained in its structure and purpose'"; or (2) the state law "actually conflicts with federal **[**22]** law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)* (internal quotations and citations omitted). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id. at 516* (quoting *Malone v. White Motor Corp., 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978)*); see also *Altria Group, Inc. v. Good, No. 9127, 555 U.S. 70, 129 S. Ct. 538, 172 L. Ed. 2d 398, 2008 U.S. LEXIS 9127 at *10 (U.S. Dec. 15, 2008)*.

HN9[] The preemption language in ICCTA is plain and explicit: The remedies provided "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *49 U.S.C. § 10501(b)*. "The language of the statute could not be more precise." *Friberg v. Kansas City S. Ry., 267 F.3d 439, 443 (5th Cir. 2001)*. See also *Emerson v. Kansas City S. Ry., 503 F.3d 1126, 1128-29 (10th Cir. 2007)*; *Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 641 (2d Cir. 2005)*; *City of Auburn v. United States, 154 F.3d 1025, 1030 (9th*

Cir. 1998). "The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination **[**23]** Act are the only remedies available as to the regulation of rail transportation, and that the **[*37]** federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise." CSX Transp. v. Georgia PSC, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Indeed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." Id.

HN10[] While the enactment of ICCTA was the culmination of a movement toward deregulation of the railroads that began in the late 1970's, Congress did not intend that the state fill the regulatory void. [3] The regulation of railroad operations had always been "a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." Friberg v. Kan. City S. Ry., 267 F.3d at 443; see also City of Auburn v. United States, 154 F.3d at 1029. [4] Thus, as numerous courts have held, ICCTA preempts the economic regulation of railroads by the states, as well as state laws whose application would unreasonably interfere with **[**24]** a railroad's operations. See PCS Phosphate Co. v. Norfolk Southern Corp., 520 F. Supp. 2d 705, 715 (E.D.N.C. 2007) (collecting cases). As the Third Circuit put it, "the Termination Act does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (quoting Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001)). The question is always whether the action "would have the effect of preventing or unreasonably interfering with railroad transportation." PCS Phosphate Co. v. Norfolk Southern Corp., 520 F. Supp. 2d at 715.

HN12[] The states retain their traditional police powers to protect health and safety, which is reserved to them by the Constitution, but only so long as the application of these powers is not unreasonably burdensome **[**26]** on railroad operations. See, e.g., Green Mt. R.R. Corp. v. Vermont, 404 F.3d at 642 ("Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to **[*38]** withstand preemption."); Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d at 1339 (application of local zoning laws to a company leasing railroad property was not preempted by ICCTA because "the zoning ordinances with which [the lessee] must comply, do not burden [the railroad] with the patchwork of regulation that motivated the passage of the ICCTA."); Maumee & W. R.R. Corp. and RMW Ventures, LLC Petition for Declaratory Order, S.T.B. Dkt. No. 34354, 2004 WL 395835, at *I (S.T.B. Mar. 2, 2004) (localities retain certain police powers to protect health and safety so long as they do not interfere with interstate rail operations).

To permit plaintiffs to pursue their state antitrust, consumer protection, and unjust enrichment claims against defendant railroads in this case, however, is not the least bit similar to the exercise by states of these non-burdensome police **[**27]** powers through state laws whose application are remote from railroad operations. Rather, for this Court to resolve plaintiffs' claims would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been -- creating just the

---

[3] Congress began deregulating the industry in the late 1970's, first with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1980, followed shortly thereafter by the Staggers Rail Act of 1980. See City of Auburn v. United States, 154 F.3d at 1029 & n.6. Congress enacted ICCTA in order to complete the railroad **[**25]** deregulation that the earlier statutes had begun. See S. REP. No. 104-176, at 5 (1995) ("the bill continues the deregulation theme of the past 15 years by providing further regulatory reductions in the surface transportation industries.").

[4] Plaintiffs argue that **HN11**[] there is always a presumption against finding preemption. Certainly this is true when Congress has legislated in a field the states have traditionally occupied. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Conversely, the federal government's historic regulation of the railroad system counsels against such a presumption in this case. See CSX Transp. v. Williams, 365 U.S. App. D.C. 331, 406 F.3d 667, 673 (D.C. Cir. 2005) ("the case for preemption is particularly strong where, as here [rail transportation], 'the State regulates in an area where there has been a history of significant federal presence'") (quoting United States v. Locke, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)); see also Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d at 1327-28.

patchwork of railroad regulation that ICCTA sought to preempt. As the Senate noted when it enacted ICCTA in 1995:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

See S. REP. No. 104-176, at 6 (1995).

Plaintiffs also argue that because *Section 10501(b)* establishes both the STB's jurisdiction as well as the preemptive effect of its decisions and remedies, any claims arising out of private railroad contracts (such as the claims at issue here) are not within the STB's statutory authority and therefore could not be preempted. This argument confuses the STB's **[**28]** jurisdiction with the scope of federal preemption and assumes that Congress would not have allowed ICCTA to leave a regulatory void. The argument is not supported by either the statute's language or its legislative history. The Senate Report expressly stated that "nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill." S. REP. No. 104-176, at 6 (1995). Similarly, the Conference Committee noted that "integrated into the statement of general jurisdiction is the delineation of the exclusivity of federal remedies with respect to the regulation of rail transportation." H.R. CONF. REP. No. 104-422, at 168 (1995). And the courts that have considered the matter have recognized that through its deregulation of the railroads, Congress purposely left potential plaintiffs without a federal remedy. As one of the first courts to consider ICCTA explained:

> Defendants, however, read the ICC Termination Act's preemption clause to preempt state remedies only when federal remedies are provided under the Act.... Defendants' argument reflects a misunderstanding not only of the plain language of *section 10501(b)(2)*, **[**29]** but also of the ICC Termination Act generally. ***HN13***[] The most natural reading of *section 10501(b)(2)* is that the federal remedies provided by the ICC Termination Act **[*39]** are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise.

CSX Transp. v. Georgia PSC, 944 F. Supp. at 1581.

Congress has created similarly broad preemption in other industries. Airlines are a prime example -- like railroads, the operation of airlines is necessarily between states, indeed, nationwide. Congress recognized in the Airline Deregulation Act ("ADA") that any regulation of the airlines by individual states would create significant problems, and so it prohibited the enactment or enforcement of state laws or regulations "related to a price, route, or service of an air carrier that may provide air transportation under this subpart." *49 U.S.C. § 41713(b)(1)* (previously *49 U.S.C. § 1305(a)(1)*), which the Supreme Court concluded preempted even state laws of general applicability because they "relate to" the airline industry:

> [P]etitioner advances the notion that only state laws specifically **[**30]** addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language.

Morales v. Transworld Airlines, 504 U.S. 374, 386, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). See also *Altria Group, Inc. v. Good, 555 U.S. 70, 129 S. Ct. 538, 172 L. Ed. 2d 398, 2008 U.S. LEXIS 9127 at *26* ("the phrase 'relating to' indicates Congress' intent to pre-empt a large area of state law to further its purpose of deregulating the airline industry"). One court expressly held that the ADA preempted the application of state antitrust and consumer protection laws to airlines setting of fares because they "relate to … a price of an air carrier." *In re Korean Air Lines Co., LTD, Antitrust Litig., 567 F. Supp. 2d 1213, 1220 (C.D. Cal. 2008)*. ***HN14***[] With similarly broad language, ICCTA preempts state laws with "respect to regulation of rail transportation." *49 U.S.C. § 10501(b)*. Plaintiffs' challenges to defendants' rates and rate practices under state antitrust, **[**31]** consumer protection and unjust enrichment laws implicate a core concern of the ICCTA -- the regulation of "economics and finances of the rail carriage industry," and, just as with the airline industry, such regulation by the states is preempted. *New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d at 252*.

Plaintiffs nevertheless argue that ICCTA does not preempt state regulation of contract traffic exempted by Congress from STB regulation under another section of the statute, *49 U.S.C. § 10709*. ***HN15***[] *Section 10709(c)(1)* states that "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part [*49 USC §§ 10101 et seq.*], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part [*49 USC §§ 10101 et seq.*]." *49 U.S.C. § 10709(c)(1)*. Plaintiffs rely on the "shall not be subject to this part" language for their argument that ICCTA's preemption clause does not apply to any contract traffic, and thus does not apply to any of plaintiffs' claims, all of which involve contract traffic. But plaintiffs have not cited, nor has the Court discovered, any case **[**32]** that interprets the interplay between *Sections 10501* and *10709* in the manner plaintiffs suggest, and the Court is not persuaded by plaintiffs' arguments. Read in its **[*40]** entirety, the sentence makes clear that Congress intended it to mean only that the STB has no regulatory authority over contract claims, not to create an opportunity for state regulation.

To read the "shall not be subject to this part" language as eliminating ICCTA preemption for all contract traffic would be inconsistent with congressional intent. Contract traffic, or otherwise unregulated traffic, accounts for eighty percent of all rail freight traffic. Compl. P 56. ***HN16***[] Through its enactment of ICCTA, Congress intended that "the Federal scheme of economic regulation and deregulation [of the railroads] … address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. REP. No. 104-311, at 95-96 (1995). Interpreting *Section 10709(c)* as exempting eighty percent of rail traffic from federal preemption **[**33]** opens that traffic up to the risk of pervasive state regulation of "rates" and "practices," and would make it impossible for uniform federal standards to govern railroad operations.

HN17[] Nor does *Section 10709(c)(2)*'s references to lawsuits in court, and not before the STB, as the exclusive remedy for alleged breaches of contract by railroads mean that all claims against railroads arising from shipments governed by contract may be brought in federal courts. Under *Section 10709(c)(2)*, courts may rule on breach of contract claims against railroads, a grant of jurisdiction that is necessary for any industry to function. Ensured enforcement of contracts is a basic premise of our economic system. But plaintiffs are not seeking contractual remedies here. Plaintiffs' desired remedies, through their state antitrust, consumer protection and unjust enrichment claims, are extra-contractual. To allow shippers access to extra-contractual state law remedies against a railroad, simply because they have a contract with the railroad, would gut the purposes of ICCTA.

Plaintiffs' argument concerning ICCTA's evidentiary savings clause, *49 U.S.C. § 10706(a)(3)(B)(ii)*, is similarly unavailing. ***HN18***[] The savings clause **[**34]** includes the phrase, "[i]n any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from [certain kinds of evidence]." *49 U.S.C. § 10706(a)(3)(B)(ii)*. By this section, Congress provided railroads with certain evidentiary protections, but these protections cannot be transformed into a grant of authority for the enforcement of state antitrust laws that are preempted by ICCTA's express preemption clause. Had Congress intended that the entire body of state ***antitrust law*** not be preempted by *Section 10501(b)*, it would not have created the exception so tangentially. The Court will not rely on plaintiffs' interpretation of this one clause as adequate counterweight to the plain language in *Section 10501(b)*, as well as the run of legislative history and of judicial decisions on ICCTA preemption.

For these reasons, the Court concludes that all of plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Because the Court finds the state claims are preempted **[**35]** as a matter of law, it need not reach the issue of whether the named plaintiffs would have standing to bring state laws claims for states in which they do not reside. [5]

[*41] *C. Standing*

The indirect purchaser plaintiffs' remaining claim is a federal antitrust claim for injunctive relief. ***HN19***[] The Supreme Court's decision in Illinois Brick prohibits claims for damages, but not those for injunctive relief, by indirect purchasers under federal ***antitrust law***. See *Illinois Brick v. Illinois, 431 U.S. 720, 746-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. See also *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 592-94 (3d Cir. 1979)*. Defendants contend that although Illinois Brick does not bar plaintiffs' claim for injunctive relief, the claim is barred on other standing grounds and must be dismissed for lack of jurisdiction under *Rule 12(b)(1) of the Federal Rules of Civil Procedure*. Defendants specifically allege that (1) the indirect purchaser plaintiffs fail to allege injury **[**36]** resulting from the conspiracy described in the complaint, and (2) any resulting injunction would be duplicative of the results that may be achieved by the direct purchaser plaintiffs.

HN20[] The essential standing question for antitrust claims for injunctive relief is whether the plaintiffs have alleged an antitrust injury -- namely a "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Defendants argue that ***HN21***[] Associated General Contractors v. Cal. State Council of Carpenters ("AGC"), which established a multi-factor test to determine whether federal antitrust plaintiffs met prudential standing requirements, governs plaintiffs' standing. See *Associated General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 542, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. [6] The indirect purchaser plaintiffs are correct, however, that the "efficient enforcement factors" identified in *AGC* do not apply to claims for injunctive relief. As the Supreme Court stated in Cargill:

> [I]n Associated General **[**37]** Contractors we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under *§ 4* [of the Clayton Act for damages].... [H]owever, many of these other factors are not relevant to the standing inquiry under *§ 16* [of the Clayton Act for an injunction].").... [The relevant inquiry under *Section 16* is whether plaintiffs have alleged an antitrust injury because] the only remedy available is equitable in nature .... [S]tanding under *§ 16* raises no threat of multiple lawsuits or duplicative recoveries [once an injunction is imposed].

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 at 110-11, 107 S. Ct. 484, 93 L. Ed. 2d 427 & nn. 5-6.

The complaint alleges that "[p]laintiffs and the Class have suffered injury, and will continue to suffer injury in their business or property, proximately caused by Defendants' unlawful conduct, in that they have paid supra-competitive prices **[**38]** for Rail Fuel Surcharges applied to unregulated rail freight transportation services during **[*42]** the Class Period." Compl. P 120. Unlike in the cases cited by defendants, where the alleged injuries harmed a single competitor, through their allegations identifying defendants' supra-competitive prices, plaintiffs here have alleged an injury to competition itself. See, e.g., *Dial A Car v. Transportation, Inc., 884 F. Supp. 584, 588 (D.D.C. 1995)*, *aff'd in part, rev'd in part* *317 U.S. App. D.C. 240, 82 F.3d 484 (D.C. Cir. 1996)*. This is precisely the sort of injury that the antitrust laws are intended to protect against. See *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. at 115* ("The antitrust laws ... were enacted for 'the protection of *competition*, not *competitors*'") (citations omitted) (emphasis in original); *In re Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 364 (D.N.J. 2001)* (***HN22***[] "Where ... it is

---

[5] Nor need the Court decide whether a dismissal on preemption grounds is a dismissal for want of subject matter jurisdiction under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* or for failure to state a claim under *Rule 12(b)(6)*.

[6] The AGC factors include: (1) the nature of the plaintiff's alleged injury; (2) the directness of the injury; (3) the risk of duplicative recovery; and (4) the complexity of the apportionment of damages. *Associated General Contractors v. Cal. State Council of Carpenters ("AGC"), 459 U.S. at 542-44*.

alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted.").

HN23[] Once plaintiffs have alleged an antitrust injury, they must also allege a causal connection between the prohibited behavior and their **[**39]** injury, a requirement common to standing for all plaintiffs. See *Arden Wood, Inc. v. United States Citizenship & Immigration Servs., 480 F. Supp. 2d 141, 147 (D.D.C. 2007)* (***HN24***[] "[s]tanding is an Article III requirement under which the plaintiffs must show, at an 'irreducible constitutional minimum': (1) that they have suffered an injury in fact -- the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury.") (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. See also *Weaver's Cove Energy, LLC v. State of Rhode Island Dep't of Envtl. Mgmt., 381 U.S. App. D.C. 17, 524 F.3d 1330, 1332-33 (D.C. Cir. 2008)*.

Defendants argue that the indirect purchasers fail to allege the necessary causal connection between the charged conspiracy and their injury. In fact, however, the indirect purchasers allege:

> Agway has been in the business of shipping farm products to various customs clearance yards in Chicago, Illinois and Detroit, Michigan, transferring those products to storage facilities, and re-shipping product from these storage facilities to customers **[**40]** of Agway. Agway purchased unregulated freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel surcharges indirectly to Defendants.
>
> * * *
>
> … During the Class Period, Fayus was a California-based wholesale and retail outlet for African and Caribbean food products servicing a diverse clientele ranging from small independent restaurants, institutional foodservice establishments as well as supermarkets and grocery stores.
>
> * * *
>
> … At all relevant times during the Class Period, Maroon has been in the business of shipping chemical products to various customs clearance yards … transferring those products to storage facilities, and re-shipping said products from said storage facilities to customers of Maroon…. Maroon purchased unregulated rail freight transport services indirectly from **[*43]** one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.
>
> * * *
>
> … [Plaintiffs] purchased unregulated rail freight transportation indirectly from one or more of the Defendants during the Class Period, and during the Class Period one or more of the Defendants assessed Rail Fuel Surcharges on Plaintiffs in connection **[**41]** with that unregulated rail freight transportation. The prices Plaintiffs paid to Defendants for unregulated rail freight transportation services on which Rail Fuel Surcharges were imposed were greater than the prices Plaintiffs would have paid absent the conspiracy alleged herein.

Compl. PP 28-31. Defendants' challenges to these allegations are essentially that plaintiffs purchased the rail freight services *indirectly*, a fact which, as discussed above, does not, on its own, invalidate their claims for injunctive relief. [7] Plaintiffs have alleged an antitrust injury caused by these asserted antitrust violations which their desired injunction may ameliorate; and they have alleged adequate factual detail to trace the injury to defendants' allegedly collusive activities. The Court finds that they have adequately alleged both antitrust injury and standing.

Defendants further argue that regardless of whether plaintiffs would otherwise have standing, the Court should dismiss their federal claims on equitable grounds. Doing so, according to defendants, would eliminate the possibility

---

[7] Defendants' reliance on O.K. Sand & Gravel v. Martin Marietta Technologies for the required amount of factual detail that must be pled for antitrust standing is misplaced. The court there considered whether the plaintiff had produced enough evidence *at trial* to support the verdict, not what a plaintiff must plead to make the initial showing **[**42]** of standing. See *O.K. Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565, 573 (7th Cir. 1994)*.

that the indirect purchaser plaintiffs' desired injunction would be duplicative of the injunction that the direct purchaser plaintiffs seek, would protect defendants against the payment of attorneys' fees to two sets of lawyers and would promote judicial economy. The Court recognizes the possibility that allowing both the direct and indirect purchasers to proceed with their cases may result in some inefficiency. Because the outcome of the direct purchasers' case is not yet determined, however, it is not yet known whether allowing the indirect purchasers to proceed will actually be inefficient. There is no assurance at this point that the direct purchasers will obtain an injunction against defendants. And none of the cases cited by defendants supports dismissing plaintiffs' claims before the potentially duplicative injunction is in place. Furthermore, it is **[**43]** possible that a settlement agreement could be reached between defendants and the putative direct purchaser class, a realistic possibility given that the direct purchasers' claims for money damages are viable. Even if they do not settle before trial, the two putative classes have different attorneys and may pursue different strategies during discovery or at trial, all of which may result in different outcomes. In short, the Court finds that it would be premature to dismiss the indirect purchasers' federal claim on equitable grounds at this point.

V. CONCLUSION

For these reasons, the Court will grant defendant's motion to dismiss in part and will deny in part. Plaintiff's state law claims will be dismissed. Their federal antitrust claim for injunctive relief will not be dismissed. A separate Order consistent with this Opinion shall issue this same day.

SO ORDERED.

/s/ Paul L. Friedman

PAUL L. FRIEDMAN

United States District Judge

DATE: 12/31/08

LexisNexis

Gulf States Reorganization Group v. Nucor Corp.

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

January 5, 2009, Decided; January 5, 2009, Filed

Case No.: 1:02-cv-2600-RDP

Reporter
2009 U.S. Dist. LEXIS 154734 *

Gulf States Reorganization Group, Inc., Plaintiff, v. Nucor Corp., et al., Defendants.

Core Terms

restraint of trade, conspiracy, summary judgment, conspired, pawn, conspiracy claim, Vermiculite, steel mill, floor covering, commerce, economic power, no evidence, co-conspirators, hot, distributors, antitrust, Airline, rolled, coil, advertising, magazine, parties, video, gift, anticompetitive, covenants, proffer, Sugar, sufficient evidence, Recommendation

Counsel: **[*1]** For Special Master, Special Master: James F Rill, LEAD ATTORNEY, BAKER BOTTS LLP, Washington, DC.

For Gulf States Reorganization Group, Inc., Plaintiff: Philip Clark Jones, GREENBURG, SPENCE & TAYLOR, PC, Rockville, MD; Thad G Long, BRADLEY ARANT BOULT CUMMINGS LLP, Birmingham, AL; Ralph K Strawn, Jr, STRAWN & ROBERTSON LLC, Gadsden, AL.

For Nucor Corporation, Defendant: Joseph W Carlisle, Zupancic Rathbone Law Group, P.C., Lake Oswego, OR; Joshua W Abbott, Bert W Rein, D Mark Renaud, John B Wyss, WILEY REIN LLP, Washington, DC; Thad G Long, BRADLEY ARANT BOULT CUMMINGS LLP, Birmingham, AL; R Marcus Givhan, GILPIN GIVHAN, Birmingham, AL.

Judges: JAMES F. RILL, SPECIAL MASTER.

Opinion by: JAMES F. RILL

Opinion

REPORT AND RECOMMENDATION OF SPECIAL MASTER

In 2002, Gulf States Reorganization Group, Inc. ("GSRG") filed suit against Nucor Corporation ("Nucor"), Casey Equipment Corporation ("Casey"), and Gadsen Industrial Park, LLC ("Park") alleging that they conspired to restrain trade and assist Nucor to monopolize the hot rolled coil steel industry.[1] This Court first dismissed GSRG's case upon the defendants' motion to dismiss; however, on appeal, the Eleventh Circuit found that GSRG had pled a cognizable antitrust injury **[*2]** and had standing to bring suit.[2] The parties have now completed discovery on

---

[1] Compl. (D.I. 1).

[2] *Gulf States Reorganization Group, Inc. v. Nucor Corp., 466 F.3d 961, 966-68 (11th Cir. 2006)*.

GSRG's allegation that Casey/Park[3] unlawfully contracted, combined, and conspired with Nucor[4] in violation of *Sections 1* and *2* of the Sherman Act.[5] This matter is before the Court on Casey/Park's motion for summary judgment, seeking a ruling that by virtue of the undisputed relevant market at issue, and the undisputed facts regarding the alleged conduct and the nature of Casey/Park's business, Casey/Park cannot be held to be a co-conspirator with Nucor under *Sections 1* and *2* of the Sherman Act.[6] Casey/Park's motion has now been fully briefed.[7]

On October 22, 2008, James F. Rill was appointed as Special Master pursuant to the Order of the Honorable R. David Proctor.[8] The Court ordered the Special Master to consider Casey/Park's motion for summary judgment on a priority basis, and submit a Report and Recommendation on that Motion forthwith.[9] The Special Master afforded the parties an opportunity to present any additional evidence or arguments that the parties wanted the Special Master to consider in issuing his Report and Recommendation. The parties also presented their arguments to the Special Master at an in-person meeting on November 19, 2008.

Special Master **[*3]** James F. Rill respectfully submits this report and recommendation to U.S. District Judge the Honorable R. David Proctor.

I. STATEMENT OF CONTROLLING LEGAL PRINCIPLES

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure empowers the Court to grant summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[10] To survive Casey/Park's motion for summary judgment, GSRG must show "that there is a genuine issue of material fact as to whether [Casey/Park] entered into an illegal conspiracy that caused [GSRG] to suffer a cognizable injury."[11] GSRG may not rely "merely on the allegations or denials in its own pleadings; rather its response must — by affidavits or as

[3] Casey Equipment Corporation ("Casey") and Gadsen Industrial Park, LLC ("Park") filed a unified Motion on behalf of both Casey and Park. Gulf States Reorganization Group, Inc. ("GSRG") does not argue that Casey and Park require individual analysis to determine their respective liability, and no evidence within the record suggests that separate analysis for Casey and Park is required. Therefore, for the purposes of this Report and Recommendation, Casey and Park will be referred to as one entity ("Casey/Park").

[4] Casey/Park's Br. (D.I. 119) at 4-5.

[5] *15 U.S.C. §§ 1-2*.

[6] Casey/Park's Br. (D.I. 119).

[7] GSRG had requested additional discovery relating to its *Section 2* claim pursuant to *Rule 56(f)*; however, Counsel for GSRG informed the Special Master that that motion has since been resolved.

[8] October 22, 2008, Order (D.I. 181) at 2.

[9] *Id.*

[10] *Fed. R. Civ. P. 56(c)*.

[11] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1.986*).

otherwise provided in [*Rule 56*] — set out specific facts showing a genuine issue for trial."[12] "Where the record taken as a whole could not lead a rational trier of fact to find for [GSRG], there is no 'genuine issue for trial.'"[13]

B. Standard for Section 1 Conspiracy Claims

Every contract or agreement within commerce restrains trade to some extent.[14] *Section 1* does not make every combination between two companies **[*4]** illegal;[15] the Supreme Court has construed *Section 1* to prohibit only *unreasonable* restraints of trade.[16] Thus, the elements of a *Section 1* claim are widely recognized to be (i) the existence of a contract, combination, or conspiracy among two or more separate entities that (ii) unreasonably restrains trade and (iii) affects interstate or foreign commerce.[17] In this case, GSRG has alleged that Nucor and Casey/Park conspired with one another to restrain trade in the hot rolled coil steel market.[18]

In *Seagood Trading Corp. v. Jerrico, Inc.*, the Eleventh Circuit announced the standard for analyzing *Section 1* conspiracy claims:

> The threshold requirement of every conspiracy claim, under both *Section 1* and *Section 2*, *is an agreement to restrain trade*. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[19]

Plaintiff incorrectly adumbrates that somehow "contract, combination, and conspiracy" and "restraint of trade" are independent elements such that once an agreement regarding the economic event is shown, all that is needed for liability is evidence of one party's illegal act affecting the economic **[*5]** event. The correct interpretation is that the joint meeting of the minds must incorporate the illegal restraint and, thus, those elements are inextricably intertwined.

Eleventh Circuit precedent does not require GSRG to prove "an intent on the part of the co-conspirators to restrain trade or to build a monopoly" for a *Section 1* conspiracy claim.[20] To survive summary judgment, however, GSRG

[12] *Fed. R. Civ. P. 56(e)*.

[13] *Matsushita, 475 U.S. at 587* (quoting *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)*).

[14] *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)*.

[15] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, n.15 (1984)*.

[16] *Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911)*.

[17] *Jack Russell Terrier Network v. Am. Kennel Club, Inc., 407 F.3d 1027, 1033 (9th Cir. 2005)*.

[18] *See* *Northern Securities Co. v. United States, 193 U.S. 197, 403 (1904)*. In his dissent, Justice Holmes draws a distinction between two types of *Section 1* claims: (i) contracts that restrain trade, and (ii) combinations or conspiracies that restrain trade.

[19] *Seagood Trading Corp. v. Jerr•ico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991)* (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)*) (emphasis added). *See also* *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1455 (11th Cir. 1991)* ("Liability will only attach to agreements designed unreasonably to restrain trade in, or affecting, interstate commerce; thus, before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an agreement to restrain trade exists.").

[20] *Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 819-820 (11th Cir. 1990)* (internal citation omitted). Plaintiffs must, however, show "'actual unlawful effects [or] facts which radiate a potential for future harm' to competition." *U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 1001 (11th Cir. 1993)* (quoting *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622 (1953)*).

must present "evidence that reasonably tends to prove" that Casey/Park and Nucor "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[21]

The Eleventh Circuit has recognized that "it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators."[22] Thus, GSRG is permitted to rely on circumstantial evidence to support its *Section 1* claim. However, there are limitations to "the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy."[23]

"Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[24] Indeed, "the mere **[*6]** opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy."[25] The Eleventh Circuit has also cautioned that, "when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred."[26] Thus, to survive summary judgment, GSRG must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[27]

C. Requirements for Subordinate Actor Liability Under Section 1

The facts of this case present the infrequent, but not unprecedented, question of whether a company's agent should be held liable for *Section 1* conspiracy where the agent had some role in facilitating the restraint. The Areeda and Hovenkamp leading antitrust treatise[28] distinguishes "pawns" from "principal actors" because of the pawn's "subordinate role in performing a discrete, designated task at the direction of his principal."[29] Areeda teaches that "pawns" are generally not held liable as co-conspirators:

> In our economy sales through brokers or other intermediaries are ubiquitous, and they are not complicit in vertical **[*7]** restraints simply because they were employed in a transaction later challenged as anticompetitive.[30]

Thus, Areeda identifies three "prerequisites to finding a conspiracy" between a pawn and his principal:

(i) The pawn must have knowledge of the principal's objective to restrain trade;

---

[21] *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)*. *See also* *Chalal v. Northwest Medical Center, Inc., 147 F. Supp. 2d 1160 (N.D. Ala. 2000)*.

[22] *Seagood, 924 F.2d at 1573*.

[23] *Id. at 1574*.

[24] *Matsushita, 475 U.S. at 588*.

[25] *Seagood, 924 F.2d at 1574*.

[26] *Id.*

[27] *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 764*).

[28] 7 P. Areeda & H. Hovenkamp, ***Antitrust Law***: an Analysis of Antitrust Principles and Their Application, ¶ 1474 (2007) (hereafter "Areeda").

[29] *Id.* at ¶ 1474(a).

[30] *Id.* at ¶ 1474(c) (2007 Supp.).

> (ii) The pawn must not only facilitate the restraint, but must have a stake in the restraint, as distinct from merely selling its own services for their usual market price;
> (iii) The pawn must contribute materially to the restraint.[31]

Under these principles, to survive summary judgment, GSRG must not only prove that Casey/Park had knowledge of Nucor's objective to restrain trade in the hot rolled coil market, but also that Casey/Park had a stake in the illegal outcome.[32] GSRG must also show that the alleged agreement to restrain trade between Casey/Park and Nucor "reflects a merging of the parties' resources, rights, or economic power" and that the agreement contributed materially to Nucor's alleged objective to restrain trade.[33]

1. Courts' Decisions Are Consistent with Areeda's Limitations on Pawn Liability

The purpose of *Section 1* of the **[*8]** Sherman Act is to prevent conduct by separate entities that "deprives the marketplace of the independent centers of decision-making that competition assumes and demands."[34] It follows, then, that cases in which courts have resisted finding pawns liable for transactions with their principals cite *Copperweld* for this very proposition. In *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*,[35] cited by both Casey/Park and GSRG, the Fourth Circuit began its analysis with this principle:

> We reaffirm what was made clear by *Copperweld*, that concerted activity susceptible to sanction by *Section 1* is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices).[36]

In that case, W.R. Grace & Co. ("Grace"), one of Virginia Vermiculite's competitors in the vermiculite mining industry, donated a large tract of land to Historic Green Springs, Inc. ("HGSI").[37] The deed of gift contained various restrictive covenants that prohibited HGSI from conducting any mining activities on the property. These covenants had "the purpose of preventing [Virginia Vermiculite] **[*9]** from mining the properties and from using the properties to transport its vermiculite ore, in the event that [Virginia Vermiculite] ever found itself in a position to do so."[38] Virginia Vermiculite sued Grace and HGSI, alleging that Grace and HGSI conspired to restrain trade in the

---

[31] *Id.* at ¶ 1474(a). Note that Areeda's second prerequisite demands that the pawn "must not only facilitate the principal's restraint, but must also intend to restrain trade." This requirement is in direct contravention to prevailing Eleventh Circuit law, and therefore the Court should not consider Casey/Park's intent in determining the fate of GSRG's *Section 1* claim. However, no Eleventh Circuit precedent prohibits the Court from looking at other factors, such as whether Casey/Park bad a stake in the alleged restraint or whether Casey/Park was operating in its usual business capacity when it facilitated the purchase and resale of the steel mill assets.

[32] *Id.*

[33] *Id.* at ¶ 1474(c) (2007 Supp.) (quoting *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 282 (4th Cir. 2002)*).

[34] *Copperweld, 467 U.S. at 769*.

[35] *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277*.

[36] *Id. at 282*.

[37] *Virginia Vermiculite, Ltd v. W.R. Grace & Co., et al., 144 F. Supp. 2d 558 (W.D. Va. 2001)*.

[38] *Id.* at 579 (¶ 219).

vermiculite mining business.[39] The court granted summary judgment in favor of Grace and HGSI on Virginia Vermiculite's *Section 1* claims.[40]

On appeal, the Fourth Circuit held that the mere receipt of a gift cannot give rise to concerted conduct under *Section 1*.[41] The court found that Virginia Vermiculite had not proffered any proof that HGSI had surrendered its "resources, rights, or economic power" to Grace when it accepted the deed of gift:

> In the instant case, [Virginia Vermiculite] proffered no evidence that the donation by Grace to HGSI was not a genuine (i.e., unilaterally given) gift. It often can be difficult to determine whether a purported gift is a gift in fact, or whether it merely disguises bilateral action by which two parties join their resources, rights, or economic power together. But here, [Virginia Vermiculite] simply did not proffer evidence sufficient to raise that difficult question. [Virginia Vermiculite] did **[*10]** not proffer evidence that HGSI joined any resource to Grace's in order to establish the covenants, or to affect the land transfer.[42]

The Fourth Circuit warned, however, that with sufficient evidence a court could have found that HGSI, as Grace's pawn, had engaged in concerted conduct under *Section 1*:

> All this is not to say that in the instant case, HGSI did not in fact join some right, resource, or economic power to Grace's, in order to achieve an outcome otherwise unachievable due to the naturally competing interests of the two. It is only to say that [Virginia Vermiculite] did not proffer evidence of such. Had HGSI been in a position to impose a covenant and offered that covenant in exchange for the parcel, a court could find that Grace and HGSI had combined economic power to establish the covenants and that consequently there had been concerted action. But [Virginia Vermiculite] proffered no evidence of an exercise of right, resource, or economic power by HGSI that diminished market forces created by the naturally competing interests of the two entities.[43]

The opinion reads broadly in its requirement that a subordinate actor must surrender some right, resource, or economic power before liability **[*11]** will attach. Thus, any attempt to limit the principle expressed in *Virginia Vermiculite* to a gift situation should be rejected.

The Eleventh Circuit has also refused to inculpate pawns for lawful transactions with their principals. For instance, in *Seagood*, two wholesale food distributors - Seagood Trading Corporation and Falcon Food Service Company - sued Long John Silver's, Inc. ("LJS"), LJS's cod suppliers, and LJS's wholesale food distributor for a host of alleged anticompetitive conduct.[44] Plaintiffs complained in count VI of their complaint that LJS conspired with Martin-Brower Company ("M-B"), LJS's wholesale distributor "to have M-B refuse to deal with all of LJS's" competitors in violation of *Section 1* of the Sherman Act."[45] M-B moved the trial court for summary judgment, arguing that plaintiffs' claims were without merit.[46] The court agreed and entered summary judgment in favor of M-B.[47] In doing so, the trial court

---

39 *Virginia Vermiculite, Ltd v. Historic Green Springs, Inc., 307 F.3d at 279-80*.

40 *Id. at 280*.

41 *Id. at 282*.

42 *Id.*

43 *Id.*

44 *Seagood, 924 F.2d at 1558-65*.

45 *Id. at 1563*.

46 *Id. at 1558*.

47 *Id.*

specifically found that M-B's refusal to provide its distribution services to the plaintiffs was not anticompetitive, and that M-B's purpose for doing so was to maintain the efficiency of its operation.[48]

On appeal, the Eleventh Circuit upheld summary judgment in favor of M-B.[49] The court found that **[*12]** there was no direct or circumstantial evidence showing that M-B had conspired with LJS and its cod suppliers to restrain trade.[50] Analyzing the facts under a rubric similar to that posited by Areeda, the court found that there was (i) no evidence that M-B had knowledge of LJS's alleged objective to restrain trade, and (ii) no evidence that M-B played any role in the alleged conspiracy.[51]

Two years later, the Eleventh Circuit applied a similar analysis in *U.S. Anchor Mfg. v. Rule Industries, Inc*.[52] In that case, the Eleventh Circuit overturned a jury verdict against Rule Industries, Inc. ("Rule") and Tie Down Engineering, Inc. ("Tie Down"), both of whom had been charged with conspiring against the plaintiff in violation of *Sections 1* and *2*.[53] The court held that the plaintiff had presented insufficient evidence for the jury to find that Tie Down, Rule's supplier, had participated in Rule's alleged scheme to restrain trade within the fluke anchor market.[54] Accordingly, the Eleventh Circuit found that the district court erred in denying Tie Down and Rule's motions for judgment as a matter of law.[55]

In its opposition brief, GSRG argues that Areeda's discussion of pawn liability only cautions against finding **[*13]** antitrust conspiracies where none exist in the context of vertical distribution agreements.[56] GSRG cites Areeda's discussion of *International Travel Arrangers*, *Inc. v. Western Airlines, Inc.*[57] in support of this limitation.[58] However, Areeda does not restrict the application of the pawn liability analysis to any single class of anticompetitive conduct.[59] In fact, Areeda summarizes the chapter on pawn liability with an example analogous to the facts presented in this case:

> Suppose that a firm uses borrowed funds to monopolize the silver market in violation of *Sherman Act § 2* or to take over another firm in violation of *Sherman Act § 1* or Clayton Act *§ 7*. If these statutes are not independently violated, nothing improper has occurred even if the loan is characterized as a conspiracy. [...] Just as we do not regard shareholder investors in a newly formed company as illegal conspirators with each other or the company, we should not make lender-investors conspirators with their borrowers.[60]

---

48 *Id. at 1565*.

49 *Id. at 1558*.

50 *Id. at 1574*.

51 *Id.*

52 *U.S. Anchor, 7 F.3d 986*.

53 *Id. at 1006*.

54 *Id. at 1002*.

55 *Id.*

56 GSRG Br. in Opp. (D.I. 129), at 19.

57 *International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980)*.

58 GSRG Br. in Opp. (D.I. 129), at 19.

59 *See generally*, Areeda, at ¶ 1474.

60 Areeda, at ¶ 1474(d).

Moreover, GSRG's reliance on *International Travel Arrangers* is inapposite, and the case is readily distinguishable from the case before this Court.

In *International Travel Arrangers*, Western Airlines, Inc. ("Western") hired an advertising company, Batten, Barton, Durstine **[*14]** and Osborn ("BBD&O"), to run a false, misleading, and deceptive advertising campaign against International Travel Arrangers ("ITA").[61] The advertising campaign was designed to block ITA's development of travel group charters, which posed a competitive threat to Western's business.[62] ITA sued Western, alleging *Section 1* and *Section 2* conspiracy claims.[63]

The Eighth Circuit upheld the lower court's ruling, which found against Western on the *Section 1* and *Section 2* claims.[64] In its decision, the Eighth Circuit used the fact pattern in *Albrecht v. Herald Co*.[65] and the Court's brief analysis of the facts in that case as the benchmark for its own analysis.[66]

An important distinction between the case at bar and *International Travel Arrangers* is that ITA only named Western, the principal, as the defendant. BBD&O, Western's pawn, was not a defendant in the case. Thus, the Eighth Circuit was not confronted with the question of pawn liability faced by this Court.

Nonetheless, the Eighth Circuit did apply elements of the pawn liability analysis to ITA's claims, finding that BBD&O had actual knowledge of Western's illegal objective, and that BBD&O materially contributed to Western's scheme to restrain trade.[67] However, the court's finding that Western's ad **[*15]** campaign was false, misleading, and deceptive was central to the court's ruling on ITA's *Section 1* claim; it identified the ad campaign as the sole evidence of Western's unreasonable restraint of trade.[68] As such, any company that retained BBD&O to run the same ad campaign targeted against ITA would have been subject to liability for *Section 1* conspiracy. Thus, unlike Casey/Park's role in this case, BBD&O was viewed by the Eighth Circuit as not merely performing a ministerial role, but deliberately fashioning the conduct that was itself an illegal act, and which would have been suspect regardless of which competitor of ITA had conspired with BBD&O to fashion the advertisements at issue. In this case, the claim of Casey/Park's liability is dependent on the fact that it was Nucor which funded the purchase of the steel mill assets at auction. GSRG has not argued, nor alleged in its Amended Complaint, that Casey/Park's purchase and resale of the steel mill assets was by itself anticompetitive.[69] Unlike the situation relating to BBD&O, if any company other than Nucor had retained Casey/Park's services to buy the steel mill assets, it is doubtful that GSRG would have brought an antitrust suit.

---

[61] *International Travel Airangers, 623 F.2d at 1257-58*.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *See, infra*, *Albrecht v. Herald Co., 390 U.S. 145 (1968)*.

[66] *Id at 1265-66*.

[67] *Id.* The Eighth Circuit seemingly glossed over the "stake in the outcome of the alleged restraint" requirement; however, as BBD&O was not a defendant to the action, satisfaction of this element was unnecessary.

[68] *Id. at 1268*.

[69] *See* GSRG Br. in Opp. (D.I. 129); Amended Compl. (D.I. 1).

The foregoing **[*16]** analysis does not contemplate a threshold requirement that co-conspirators must participate in the same "line of commerce" as required by the Clayton Act[70] or "part of the trade or commerce" of the United States under *Section 2* of the Sherman Act[71] to establish a *Section 1* conspiracy claim. Indeed, long-standing precedent supports liability for *Section 1* violations against participants not in the "relevant market" as so defined. The unifying factor in all of these cases, however, is that the co-conspirators, although not market participants, had a direct stake in the principal defendants' area of commerce; that is, they dealt, at some level of manufacture, distribution, or service, with the product or service that was the subject of the plaintiffs' claims.[72] Thus, courts focus on whether a co-conspirator had a tangible interest - a direct stake - in the outcome in an overall economic context, dealing in the same economic zone as the principal defendant.

For example, in *Albrecht*, the Supreme Court found that The Herald Company ("Herald"), as well as two of its agents - Milne Circulation Services ("Milne") and George Kroner ("Kroner") - should have been held liable for *Section 1* conspiracy.[73] Herald published the Globe-Democrat, "a morning newspaper **[*17]** distributed in the St. Louis metropolitan area by independent carriers."[74] Albrecht, one of Herald's independent distributors, raised its retail price above Herald's advertised price.[75] In response, Herald hired Milne to solicit Albrecht's customers and offer to sell them the Globe-Democrat directly at the advertised price.[76] Herald hired Kroner to deliver the newspapers to those customers that Milne had successfully pulled from Albrecht's route.[77]

Under the Clayton Act's "line of commerce" requirement,[78] all three defendants would have been found to have engaged in three distinct relevant product markets: Herald produced newspapers (the news media market), Milne solicited customers for its clients (the direct marketing services market), and Kroner delivered newspapers (the newspaper sales market).[79] However, the Court found that all three defendants had an individual stake in restraining trade in a larger area of commerce: the sale and distribution of the Globe-Democrat.[80]

In *Fineman v. Armstrong World Industries, Inc.*, the Third Circuit followed and built upon the Court's rationale in *Albrecht*, drawing an important distinction for conspirator liability under *Section 1*: co-conspirators need not share the same *motive* ***[*18]*** for the restraint of trade so long as they both share the *objective* to restrain trade.[81] Plaintiffs

---

[70] 15 U.S.C. § 18.

[71] 15 U.S.C. § 2.

[72] *See, e.g, Albrecht v. Herald Co., 390 U.S. 145 (1968)*; *Seagood, 924 F.2d 1555*; ***Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)***.

[73] *Albrecht, 390 U.S. 145*. As both GSRG and Casey/Park have noted, the Court's opinion in Albrecht has been widely criticized, and its principal holding, that maximum resale price maintenance was a per se violation of *Section 1*, was later overturned in *Standard Oil v. Kahn, 522 U.S. 3 (1997)*. Indeed, Areeda notes that the Court found that the three defendants conspired to maintain maximum resale prices without finding that there was actually any agreement among the three to do so.

[74] *Id at 147*.

[75] *Id. at 147*.

[76] *Id.* at 147-148.

[77] *Id.*

[78] *United States v. Marine Bancorp., 418 U.S. 602, 618 (1974)*.

[79] *Albrecht, 390 U.S. at 147-8*.

[80] *Id.* at 149-50.

[81] ***Fineman v. Armstrong World Indus., Inc., 980 F.2d at 212***.

in *Fineman* alleged that Armstrong World Industries, Inc. ("Armstrong"), a manufacturer of floor coverings, leveraged its market power in the floor covering market to foreclose plaintiffs' competition in the retail floor covering video magazine market.[82] Plaintiffs Fineman and The Industry Network System, Inc. produced a monthly video magazine aimed at floor covering retailers, which plaintiffs attempted to market through Armstrong's network of distributors.[83] However, unbeknownst to plaintiffs, Armstrong had planned to release its own video magazine, and viewed plaintiffs' video magazine as direct competition to its forthcoming product.[84] Plaintiffs sued Armstrong when one of Armstrong's distributors, Stern & Company ("Stem"), backed out of its agreement to sell plaintiffs' video magazine.[85]

Fineman demonstrates a further extension of the "area of commerce" concept. Armstrong was first and foremost a producer of floor coverings, competing at various times in the sale of resilient tile, ceramic tile, and carpet to floor covering distributors.[86] Stem was a floor covering distributor, selling its products to retailers **[*19]** downstream.[87] However, the Third Circuit held that there was sufficient evidence to find that both Armstrong and Stem had a stake in restraining competition in advertising retail floor covering through video magazines.[88] Thus, even though the primary "line of commerce" for Armstrong and Stern was floor coverings, Armstrong could be found to have conspired to restrain trade in the market for video magazines promoting floor coverings.

Courts have a similar track record of finding antitrust conspiracy in "alter ego" cases, where associations, which do not themselves participate in the relevant market, conspire with their members to restrain trade within the market. For example, in *Sugar Institute, Inc. v. United States*, the Court upheld a decree of the Southern District of New York that dissolved a trade association that coordinated prices for its member companies within the "domestic refined" sugar industry.[89] The Sugar Institute, comprised of fifteen member companies, did not itself grow, refine, buy, or sell sugar. Instead, the trade association operated solely as a price signal to its member companies.[90] Even though the Institute did not compete in the sugar industry, the Court upheld the **[*20]** lower court's decree enjoining future operations of the trade association.[91]

More recently, in *United States v. Airline Tari Publishing Co.*, the government charged an airline fare publishing company and eight domestic airlines with *Section 1* violations.[92] Similar to The Sugar Institute's role, the Airline Tariff Publishing Co. ("ATP") operated a fare dissemination service.[93] The government alleged that ATP's system allowed participating airlines to "to reach price-fixing agreements or unnecessarily [. . .] facilitate fare

---

[82] ***Id. at 176***.

[83] ***Id. at 177-80***.

[84] ***Id. at 179-80***.

[85] ***Id. at 182***.

[86] *Id.* at 177-78.

[87] ***Id. at 181***.

[88] ***Id. at 214***.

[89] *Sugar Institute, Inc. v. United States, 297 U.S. 553, 571-572 (1936)*.

[90] *Id. at 577* (quoting the lower court, which found that the dominant purpose of the Institute was "to create and maintain a uniform price structure, thereby eliminating and suppressing price competition").

[91] *Id. at 605*.

[92] *United States v. Airline Tariff Publishing Co., 836 F. Supp. 9 (D.D.C. 1993)*.

[93] *Id.* at 12.

coordination."[94] Finding that the government had met all of the requirements of the Tunney Act,[95] the court granted the government's proposed final judgment, which enjoined the airlines' use of ATP's service.[96]

In sum, while the defendant need not be in the same line of commerce as embraced in the Sherman and Clayton Acts as its co-conspirator, it must be sufficiently involved in the product or service that is subject of the allegation of illegality, have a stake in the outcome of the illegal venture, and make a material contribution to the outcome of the illegal venture.

II. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF CASEY/PARK FOR GSRG'S SECTION 1 CONSPIRACY CLAIM

A. The Record, Taken as [*21] a Whole, Could Not Lead a Rational Trier of Fact to Find for GSRG on Its *Section 1* Claims

GSRG has failed to identify any evidence that Casey/Park joined with or surrendered its "resources, rights, or economic power" to Nucor as required for *Section 1* claims.[97] Nor has GSRG presented any evidence that demonstrates that Casey/Park and Nucor had formed "a conscious commitment to a common scheme designed to achieve an unlawful objective."[98] Indeed, the evidence presented by GSRG is more consistent with legitimate business operations than with an illegal conspiracy. Finally, there is no evidence to support the conclusion that Casey/Park had a stake in whether Nucor would be successful in achieving or maintaining monopoly power in the hot rolled coil market.[99]

Casey/Park is in the business of buying and reselling used steelmaking assets.[100] Casey/Park has also on occasion purchased parcels of land formerly occupied by manufacturers and converted them into industrial parks.[101] However, Casey/Park does not make, sell, or buy hot rolled coil stee1.[102]

Don Casey, Chairman of Casey Equipment Corporation, testified that he was evaluating an opportunity to purchase the used steel mill assets even before Nucor approached Casey/Park **[*22]** to discuss Nucor's purchase of the assets.[103] Casey estimated the scrap value of the steel mill assets to be at least $7-8 million.[104] There is also

---

94 *Id.*

95 *15 U.S.C. § 16*.

96 *United States v. Airline Tariff Publishing Co., 836 F. Supp. at 14*.

97 *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277*.

98 *Monsanto, 465 U.S. at 764*.

99 Areeda, at ¶ 1474(a).

100 Casey/Park's Statement of Facts (D.I. 120), ¶¶ 4-6; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 4-6. It is also undisputed that Nucor had previously bought and sold used steel assets. Casey/Park's Statement of Facts (D.I. 120), ¶¶ 44; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶ 44.

101 Casey/Park's Statement of Facts (D.I. 120), ¶¶ 72-74; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 72-74.

102 Casey/Park's Statement of Facts (D.I. 120), ¶¶ 7-9; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 7-9.

103 *See* Ex. 3 to Casey/Park's Statement of Facts (D.I. 121) at ¶ 14. *See also* Casey/Park's Statement of Facts (D.I. 120), ¶¶ 23, 41; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 23, 41. There is a dispute as to whether GSRG approached Nucor about the steelmaking assets or *vice versa*. However, a finding of fact in favor of either party would not affect the outcome of this Report and Recommendation.

evidence within the record that there existed at least some opportunity to resell the assets in the international market for a profit.[105]

However, there is no evidence, direct or circumstantial, that shows that Casey/Park knew that Nucor's alleged objective was to restrain trade in the hot rolled coil industry.[106] Although Don Casey was aware that GSRG had discussed reopening the shuttered steel mill if it won the bankruptcy auction, there is no evidence that Casey/Park had discussed GSRG's plans for the steel mill with Nucor.[107] The written agreement between Casey/Park and Nucor, perhaps the single most important piece of evidence in the case, appears neutral on its face.[108] The agreement does not even reference the hot rolled coil industry.[109]

Confidentiality provisions are the rule, rather than the exception, for business transactions. Thus, it is no surprise that the agreement between Casey/Park and Nucor contained a confidentiality provision.[110] It is also doubtful that Nucor's agreement to advance no more than $8 million **[*23]** for Casey/Park to bid on the steel mill assets was merely coincidental; Don Casey had estimated that the scrap value for the assets was at least $7-8 million and told Nucor that there was a significant upside potential for the resale of the assets.[111] Don Casey testified that there was a "hot" market for the sale of steel mill assets in Asia, and that the parties' agreement was drafted to incentivize Casey/Park to focus on reselling the assets to an international purchaser.[112]

Similarly, there is no evidence to show that GSRG had a stake in the alleged restraint of trade other than earning its typical commission from brokering the purchase and resale of the steel mill assets.[113] Nucor and Casey/Park agreed to split the proceeds of any sale of the steel mill assets: seventy-five percent to Nucor and the remainder to Casey/Park.[114] Don Casey testified that Casey/Park's twenty-five percent commission did not reflect an extraordinary and unexplained departure from other commission rates.[115] Casey/Park took on greater risk in the Nucor transaction than it had in deals with other companies.[116] For example, the agreement gave Casey/Park three

---

104 Casey/Park's Statement of Facts (D.I. 120), ¶ 38; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶ 38. Nucor, operating several hot rolled coil mills, is able to use scrapped steel to manufacture its product. GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 6-7; undisputed in Casey/Park's Reply Statement of Facts (D.I. 142),¶¶6-7.

105 Casey/Park's Statement of Facts (D.I. 120), ¶¶ 37, 40-41; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 37, 40-41. GSRG disputes whether there was, in fact, a "hot" market in Asia at the time at which Casey/Park bid on the steel mill assets. Whether or not the Asian market was "hot" at the time is immaterial; Casey/Park was able to sell the steel mill assets to a customer in Asia for three times the purchase price at bankruptcy. Casey/Park's Statement of Facts (D.I. 120), ¶ 82; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶ 82.

106 *Id.*

107 *See generally* Casey/Park's Statement of Facts and Materials in Support (D.I. 120-122) and GSRG's Counterstatement of Facts and Materials in Support (D.I. 130, 132-137).

108 Ex. 6 to Casey/Park's Statement of Facts (D.I. 122) at ¶ 9.

109 *Id.*

110 *Id.*

111 Casey/Park's Statement of Facts (D.I. 120), ¶¶ 37-38, 40-41; undisputed in GSRG's Counterstatement of Facts (D.I. 130), ¶¶ 37-38, 40-41.

112 Ex. 3 to Casey/Park's Statement of Facts (D.I. 121) at ¶¶ 16, 18.

113 *Id.*

114 Ex. 6 to Casey/Park's Statement of Facts (D.I. 122) at ¶ 4.

115 Ex. 3 to Casey/Park's Statement of Facts (D.I. 121) at ¶ 19.

116 *Id.*

years to find a suitable purchaser for the steel mill assets.[117] **[*24]** Casey/Park bore the risk of finding an acceptable purchaser for the steel mill assets in that three-year window.[118] If Casey/Park could not find an acceptable purchaser, the assets automatically transferred to Nucor and Casey/Park received no commission.[119]

In short, none of the facts marshaled by GSRG "tend to exclude the possibility" that the transaction between Casey/Park and Nucor was a legitimate business deal. While GSRG attributes ulterior motives for the purchase and resale of the steel mill assets and infers a conspiracy to restrain trade therefrom, the record simply reflects that Casey/Park was engaged its ordinary course of purchasing and selling steel mill assets and developing industrial parks.

Under these circumstances, and consistent with the legal principles and precedents hereinabove discussed, Casey/Park should not be held to be a co-conspirator with Nucor by reason of its purchase of the assets in question.

B. Summary Judgment Should Also Be Granted in Favor of Nucor for GSRG's *Section 1* Conspiracy Claim

Finding that summary judgment in favor of Casey/Park is appropriate on GSRG's *Section 1* claim, the Court should also dismiss GSRG's *Section 1* claim against Nucor. *Section 1* conspiracies require proof that at least two parties share "a conscious commitment to a common scheme designed to achieve an unlawful objective."[120] Because GSRG cannot **[*25]** establish its *Section 1* claim against Casey/Park, it is also foreclosed from asserting a *Section 1* claim against Nucor, the only alleged conspirator that remains.[121] Therefore, the Court should also enter summary judgment in favor of Nucor on GSRG's *Section 1* claim.[122]

III. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF CASEY/PARK AND NUCOR FOR GSRG'S SECTION 2 CONSPIRACY CLAIM

Conspiracy claims under *Section 2* of the Sherman Act require more proof than do *Section 1* conspiracy claims:

> Conspiracy under Eleventh Circuit law requires (1) an agreement in restraint of trade (2) deliberately entered into with the specific intent of achieving a monopoly (3) which could have had an anticompetitive effect and (4) at least one overt act in furtherance of the conspiracy.[123]

However, both *Section 1* and *Section 2* conspiracy claims "require the same threshold showing-the existence of an agreement to restrain trade."[124]

GSRG simply has not adduced sufficient evidence to enable a rational fact-finder to find in favor of GSRG on its *Section 2* conspiracy claims. As discussed above, GSRG has not marshaled any evidence to satisfy the threshold

---

117 Ex. 6 to Casey/Park's Statement of Facts (D.I. 122) at ¶ 6.

118 *Id.*

119 *Id.*

120 *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 768*.

121 *U.S. Anchor, 7 F.3d at 1002*.

122 *Id.*

123 *Spanish Broad. Sys. of Fla. v. Clear Channel Communs., 376 F.3d 1065, 1078 (11th Cir. 2004)*.

124 *U.S. Anchor, 7 F.3d at 1002*.

showing of the existence of an agreement to restrain trade. Moreover, even if GSRG could meet this threshold requirement, there is no evidence of Casey/Park's **[*26]** specific intent to assist Nucor in achieving monopoly power. Without sufficient evidence of an agreement to restrain trade or Casey/Park's specific intent to help Nucor monopolize the hot rolled coil industry, GSRG's *Section 2* conspiracy claim must also be dismissed.

Finally, as discussed above in reference to GSRG's *Section 1* claim, if GSRG cannot maintain its *Section 2* conspiracy claim against Casey/Park, the *Section 2* conspiracy claim against Nucor must also be dismissed.

IV. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Special Master hereby recommends that this Honorable Court grant summary judgment in favor of Casey/Park and Nucor on Counts I and III of GSRG's Amended Complaint.[125]

Date: January 5, 2009

/s/ James F. Rill

JAMES F. RILL

SPECIAL MASTER

End of Document

---

[125] Amended Complaint (D.I. 115), pp. 11-13.

LexisNexis

Studio v. Action Dvd

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

January 5, 2009, Decided; January 5, 2009, Filed

Case No.: 1:05 CV 1196

Reporter
2009 U.S. Dist. LEXIS 147479 *

STUDIO A ENTERTAINMENT, INC., Plaintiff v. ACTION DVD, et al., Defendants

Core Terms

copies, summary judgment, infringement, copyright infringement, unauthorized, summary judgment motion, purchasing, trademark infringement, importation, titles, counterclaim, bootleg, damages, film, disk, instant case, Distributors, genuine issue of material fact, trademark, printed, selling, adult, barcodes, covers, unfair, videos, copyright owner, Interrogatory, distribute, non-moving

Counsel: **[*1]** For Studio A Entertainment, Inc., Plaintiff, Counter-Defendant: Jules D. Zalon, LEAD ATTORNEY, West Orange, NJ.

For Action DVD, Alex Doe, Defendants: Alek H. El-Kamhawy, Law Office of Alek El-Kamhawy, Lakewood, OH; Lila Dawud Raslan, Raslan & Pla, Cleveland, OH.

For John Does 1-10, Action Software, Inc., Alex Belfer, Defendants: Alek H. El-Kamhawy, Law Office of Alek El-Kamhawy, Lakewood, OH.

For Action DVD, Alex Doe, Counter-Claimants: Alek H. El-Kamhawy, Law Office of Alek El-Kamhawy, Lakewood, OH.

Judges: SOLOMON OLIVER, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: SOLOMON OLIVER, JR.

Opinion

ORDER

Now pending before the court in the above-captioned case are the following motions: (1) Defendants Action Software, Inc. ("Action Software") and Alexander Belfer's ("Belfer") (collectively, "Defendants" or "Action") Motion to Dismiss or, in the Alternative Motion for Summary Judgment (ECF No. 156); and (2) Plaintiff Studio A Entertainment, Inc.'s ("Plaintiff" or "Studio A") Motion for Summary Judgment (ECF No. 157). For the following reasons, this court denies Defendants' Motion to Dismiss or, in the Alternative Motion for Summary Judgment and grants Plaintiff's Motion for Summary Judgment.

I. FACTS AND PROCEDURAL HISTORY [*2]

Plaintiff Studio A, a California corporation, is in the business of creating adult videos, which it sells primarily in DVD format throughout the country. Studio A, which is owned by Paul and Carol Nevitt, has obtained copyright registrations for many of these videos, and all of its DVD packages bear Plaintiff's registered trademark, "ANDREW BLAKE." Defendant Action, which is owned and operated by Alexander Belfer, is an Ohio corporation that is also in the business of selling adult videos. Action maintains a website entitled, "Action DVD" that has been selling adult videos for approximately eight years. Action frequently purchases Studio A's films to sell at its stores and online.

Although Action generally purchases films directly from Studio A, in June 2004, Action purchased Studio A DVDs from Active Distributors, Inc. ("Active"), a Canadian company operated by Billy Kyriazoglou ("Kyriazoglou"), for a cheaper price. It again purchased more Studio A DVDs from Active in October and December 2004, buying various quantities of 21 Studio A titles for a total of 1,145 DVDs. Action alleges that prior to purchasing them, they informed Studio A that its DVDs were being sold at a cheaper price **[*3]** from a Canadian store. Carol Nevitt, co-owner of Studio A, allegedly advised Defendants to "go and get" the cheaper DVDs. After purchasing the DVDs from Active, Action appears to have sold 912 DVDs out of the 1,145 that it purchased from Active.[1]

Studio A claims that all of the DVDs sold by Action were unauthorized or "bootleg" DVDs that were copied by another company without the consent of Studio A, then sold to Active who later sold them to Action. On May 11, 2005, Studio A filed the instant suit against Action DVD, Alex Doe, and John Does 1-10, asserting claims for copyright infringement and trademark infringement. This Complaint was subsequently amended, adding as defendants Action Software, Inc. and Alex Belfer. The First Amended Complaint also asserts two counts of copyright infringement. The first count is asserted pursuant to *17 U.S.C. § 106(3)*, which provides relief to a copyright owner when an infringer disrupts its right to distribute copies to the public, and the second claim falls under *17 U.S.C. § 602*, which provides relief to a copyright owner when a person imports into the United States copies of the owner's work.

In response, Defendants filed an answer and counterclaim, asserting a unfair competition **[*4]** counterclaim under *California Business and Professional Code §§ 17200, et seq.* Defendants argue that Studio A, as a competitor in the adult film industry, engaged in unfair competition by failing to comply with an alleged industry practice that requires a film producer dealing with piracy issues to notify distributors and customers of this problem.[2] Defendants allege that this practice is done in order to protect innocent customers, such as themselves, from purchasing unauthorized DVDs and opening themselves up to liability.

On June 12, 2007, Defendants filed a Motion to Dismiss or, in the Alternative Motion for Summary Judgment, contending that Plaintiff's suit should be dismissed because of insufficiency of process and a failure to properly serve Defendants. Defendants also claim that, in the alternative, summary judgment should be granted in their favor because Plaintiff failed to take any action to secure its works or alert distributors of any problems with the unauthorized copying of its DVDs, and because Plaintiff failed to demonstrate that Defendants sold unauthorized DVDs. Plaintiff, on that same day, filed a Motion for Summary Judgment, claiming that the evidence demonstrates that Defendants infringed Plaintiff's copyright and trademark. **[*5]** Plaintiff also argues that Defendants' counterclaim should be dismissed as a matter of law.

II. SUMMARY JUDGMENT STANDARD

---

[1] This court issued an *Ex Parte* Order granting Plaintiff a Temporary Restraining Order and Order of Seizure (ECF No. 10). Pursuant to that Order, on May 12, 2005, counsel for the Plaintiff carried out a seizure at Action's place of business, recovering 233 Studio A DVDs that were not yet sold.

[2] To support its claim that this industry practice exists, Defendants cite to the expert report of John Ban. This court, in a previous Order (ECF No. 170), struck John Ban's expert report in its entirety. The court again reaffirmed this decision in (ECF No. 175), in which the court denied Defendants' Motion for Reconsideration of the Order striking this report. The court, therefore, will not consider his report for the purpose of this Order, and an issue remains as to whether this industry practice indeed exists.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 153 (1970)*; *White v. Turfway Park Racing Ass'n, Inc., 909 F.2d 941, 943-44 (6th Cir. 1990)*. A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*. Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id. at 252*. However, "[c]redibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment." *Ahlers v. Scheibil, 188 F.3d 365, 369 (6th Cir. 1999)*.

Summary judgment **[*6]** is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)*. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989)* (citing *Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988))*. The nonmoving party is under an affirmative duty to point out specific facts in the record as it has been established that create a genuine issue of material fact. *Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992)*. The non-movant must show "more than a scintilla of evidence to overcome summary judgment"; it is not enough to show that there is slight doubt as to material facts. *Id.*

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e).

III. LAW AND ANALYSIS

A. Defendants' Motion to Dismiss, or Motion for Summary Judgment

Defendants first argue that Plaintiff's First Amended Complaint **[*7]** should be dismissed because of insufficiency of process and improper service by Plaintiff. Defendants, in the alternative, argue that summary judgment should be granted in their favor with regard to Plaintiff's copyright and trademark infringement claims. Lastly, they contend that even if Action Software is liable for these claims, Belfer, Action's owner, cannot be held personally liable.

1. Insufficiency of Process and Improper Service of Process

Defendants argue that this court should dismiss the instant action pursuant to *Federal Rule of Civil Procedure 12(b)(4)* for insufficiency of process because the Complaint named Action DVD, Inc. and Alex Doe as defendants instead of Action Software, Inc. and Alexander Belfer, which are the correct names for the corporation and its owner. Defendants further argue that Plaintiff has failed to process and serve Action Software, Inc. and Alexander Belfer pursuant to *Federal Rule of Civil Procedure 12(b)(5)*. Defendants' arguments in favor of dismissal, however, are not well-taken. First, while process may be technically deficient under *Rule 12(b)(4)* if the forms use the wrong name, courts generally overlook minor technical defects, particularly when there is no actual prejudice to the complaining party. *Libertad v. Welch, 53 F.3d 428, 440 (1st Cir. 1995)*; *see also* *Louisiana Acorn Fair Hous. v.*

Quarter House, 952 F. Supp. 352, 355 (E.D. La. 1997) (holding that process **[*8]** was sufficient even where plaintiff incorrectly named the party but defendant received notice and failed to suffer any prejudice as a result of the mistake.) In the instant case, Plaintiff mistakenly named Action DVD, the name of Action Software's website, instead of Action Software, and Alex Doe instead of Alexander Belfer in the Complaint. However, Plaintiff, in the First Amended Complaint, named Action Software, Inc. and Alex Belfer; therefore, Plaintiff corrected any technical error. Furthermore, even though the names were technically incorrect in the original Complaint, Defendant Belfer and Action Software had notice of the suit as evidenced by the fact that they retained counsel who appeared on their behalf on May 25, 2005 (ECF No. 16), two weeks after the original Complaint was filed. Defendants also failed to point to any prejudice that they suffered as a result of the mistake.

Second, under Rule 12(b)(5), service of process is insufficient if delivery is never accomplished or not accomplished within 120 days after commencement, or plaintiff otherwise failed to comply with Rule 4. *See* Fed. R. Civ. P. 4(m); Nafziger v. McDermott Int'l, Inc., 467 F.3d 514, 521 (6th Cir. 2006); Crane v. Battelle, 127 F.R.D. 174, 177 (S.D. Cal. 1989). Defendants fail to argue and the court finds no evidence that delivery was not accomplished on Action Software **[*9]** and Alexander Belfer within 120 days after Plaintiff commenced this suit.

Third, any challenges to service and process are waived unless properly raised by pre-answer motion or in the responsive pleading. *See* Fed. R. Civ. P. 12(h)(1)(B); Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 701 (6th Cir. 1978). In the instant case, Defendants did not file a pre-answer motion raising either of the two defenses. Furthermore, in Defendants' Answer and Counterclaim, they again failed to raise both Rule 12(b)(4) or 12(b)(5) as a defense. Therefore, even if Defendants had a proper basis for these defenses, they are procedurally waived.[3]

2. Copyright Infringement Claims

Plaintiff asserts two counts of copyright infringement against Defendants. The first count falls under 17 U.S.C. § 106, which allows copyright owners to institute an action for any infringement of the owner's interest. To establish a copyright infringement cause of action under this provision, the plaintiff must prove the following elements: (1) ownership of a valid copyright, and (2) "copying" of constituent elements of the work that are original. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Coles v. Wonder, 283 F.3d 798, 801 (6th Cir. 2002). The parties do not dispute Studio A's ownership interest in all 21 DVD titles at issue in this case.[4] Therefore, the remaining issue is whether Defendants "copied" Plaintiff's work. Copying means any action that **[*10]** conflicts with one of the exclusive rights conferred by the Copyright Act. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984). The Copyright Act "confers on owners the exclusive rights to reproduce the work, prepare derivative works, distribute copies to the public, to perform the work publicly, and to display the work publicly." Michaels v. Internet Enter. Group, 5 F. Supp. 2d 823, 830 (C.D. Cal. 1998) (citing 17 U.S.C. §§ 106 (1) - (5)). In the instant case, Plaintiff alleges that Defendants disrupted its exclusive right to distribute copies to the public by purchasing and selling unauthorized or bootleg DVDs to the public.

Defendants contend that summary judgment should be granted in their favor with regard to this claim. They argue that there is no evidence that the DVDs sold by Defendants are bootleg. However, Plaintiff has demonstrated that the DVDs found at Action differ in various respects to legitimate Studio A DVDs, which helps prove their claim that Defendants sold unauthorized copies of its registered works. First, Studio A assigns a unique production code to each of its titles when it makes its copies. (Carol Nevit's June 12, 2007 Decl. ¶ 10, ECF No. 157-5.) All of the 21

---

[3] Defendants also argue that Plaintiff failed to state any specific cause of action against either Action Software or Belfer. However, the First Amended Complaint clearly names them as Defendants and asserts each claim against "Defendants," which would therefore include Action Software and Belfer. (First Amended Compl. ¶¶ 9, 14, 21, ECF No. 158.) The court, therefore, finds this argument unpersuasive.

[4] Plaintiff attached the copyright registrations (ECF No. 157-5.) for 20 of the 21 DVD titles that demonstrate Studio A's ownership. For the remaining title, Plaintiff demonstrated that it was owned by another company, which was controlled by Studio A's president, Paul Nevitt. The registration was transferred to Studio A by oral agreement in 1996, and was confirmed in writing by the parties in March 2007.

Studio A titles that were seized from Defendants' place of business contained 4-digit production codes that did not match any code authorized by Studio **[*11]** A. (*Id.* at ¶ 12.) Second, Jerry Borreson ("Borreson"), the manager of Marina Beach Video who subcontracts out the replication of Studio A DVDs, states that each DVD contains a particular set of barcodes that corresponds with the title of the DVD. (Borreson Decl. ¶19.) He further states that the codes found on the Action DVDs were different from any code they ever used on any Studio A DVD. (*Id.* at ¶ 22.) Third, Borreson states that he embeds the title of the film onto the inner ring of the bottom side of the DVD for all of its titles except one in issue in this case. (*Id.* at ¶ 24.) However, none of the DVDs found with Defendants had the name of the film embedded on the disk; instead, they had only the unauthorized codes on the disks. (*Id.*) Fourth, all Studio A DVD titles except one at issue in this case are manufactured on semi-transparent disks. (*Id.* at ¶ 25.) This type of disk allows a person to view the front-cover artwork through the disk when held up to a strong light. (*Id.*) Ten of the alleged bootleg DVDs contain a white liner underneath the artwork, which prevents the disk from being semi-transparent. (*Id.*) Fifth, all Studio A DVDs, except two titles at issue in the instant case, **[*12]** have color printed inserts. (*Id.* at ¶ 29.) None of the DVDs found in Defendants possession had any inserts. (Carol Nevitt March 27, 2007 Decl. ¶ 18, ECF No. 132-3.) Lastly, Plaintiff attached the statement of Richard Breene ("Breene") (ECF No. 132-5), who is the president of the graphics company that prints the covers for Studio A DVDs.[5] Breene noticed several differences between the covers of the allegedly unauthorized DVDs and legitimate Studio A DVDs, including that the size of the covers were different and the barcodes on the covers appeared different. Breene states the barcodes on the allegedly bootleg DVDs were fuzzy and contained "tiny rosettes" or dots. In producing the covers for legitimate Studio A DVDs, however, Breene stated that they copy the cover in such a way as to avoid the appearance of these dots. (Breene Decl. ¶ 6-9.) To further illustrate this point, Plaintiff submitted to the court a Studio A DVD original along with a DVD seized from Defendants' place of business. (ECF No. 108.) The court could see the variation between the size of the cover as well as the dots in the barcode of the Action DVD, which were not present on the authentic Studio A DVD. Plaintiffs have **[*13]** therefore raised a genuine issue of material fact with regard to the legitimacy of the DVDs purchased by Action.

Defendants, on the other hand, argue that summary judgment should be granted in their favor because Studio A, who filed eight additional copyright infringement actions against various defendants in different jurisdictions, admitted that the DVDs recovered at those stores were identical to those found at Action's store. Defendants further contend that "[i]n each of the aforementioned matters, the Courts failed to find that DVDs seized by Studio A and by its counsel are illegitimate." However, Plaintiff states that all but one of those cases settled, and in the one case that did not settle, the defendants defaulted on discovery and abandoned their defense. While Plaintiff failed to provide evidence to support this contention, the court, in looking at the dockets of those cases, did not find any order issued in those cases that made a finding with regard to the legitimacy of any of those DVDs. Instead, the court discovered that Plaintiff, by stipulation, voluntarily dismissed most of the cases, which could indicate that the parties resolved the dispute before the court **[*14]** issued any dispositive ruling. Thus, the court is unpersuaded by Defendants' argument.

In addition to providing evidence that the DVDs were unauthorized copies, Plaintiff has also provided evidence, which Defendants do not dispute, that they resold these DVDs to the public. Action, who is in the business of selling adult films, ordered 1,145 Studio A copies from Active. (Defs. Response to Pl.'s Interrogatory # 26, ECF No. 157-3; Purchase Orders from Active Distributors, Inc., ECF No. 157-3.) These purchases occurred in June, October, and December of 2004. (*Id.*) On May 12, 2005, pursuant to this court's Order, Studio A seized only 233 DVDs on Action's premises that were placed in a bin for sale, indicating that Action had sold the other 912 DVDs.

[5] Plaintiff submitted the statement of Richard Breene as a lay witness and not an expert witness. However, many of the statements made by Breene in his declaration are based on his scientific knowledge within the graphics and printing field. Pursuant to *Federal Rule of Evidence 701*, the court is prohibited from considering this testimony without Plaintiff first establishing him as an expert witness. The court, however, is permitted to consider those statements that are based on Breene's personal knowledge as the owner of the printing company used by Studio A. *See e.g.* *Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993)* (finding that the district court did not err in permitting the plaintiff's owner to give lay opinion testimony as to damages as it was based on his knowledge and participation in the business.) The court will therefore consider only those statements made by Breene with personal knowledge and not those that are opinions derived from his potential expertise in the printing field.

Furthermore, Action impliedly admitted selling the DVDs, stating that all of its Studio A titles, which would include those purchased from Active and those purchased directly from Studio A, were placed in a bin and sold. (Defs. Response to Pl.'s Interrogatory #27, ECF No. 157-8.) Accordingly, Plaintiff presented sufficient evidence to rebut Defendants' argument that there is no evidence to support its claim. The court, therefore, denies summary **[*15]** judgment in favor of Defendants on Plaintiff's *Section 106(3)* claim for copyright infringement.

Plaintiff's second count for copyright infringement under *17 U.S.C. § 602* provides relief for a copyright owner when its work is imported into the United States without its authorization. *Section 602* provides in pertinent part that:

> [The] importation into the United States, without the authority of the owner of the copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is infringement of the exclusive right to distribute copies or phonorecords under *Section 106*, actionable under *Section 501*.

This section deals with two separate situations: (1) importation of bootleg works; and (2) unauthorized importation of copies or phonorecords that were lawfully made. *Parfums Givency v. C & C Beauty Sales, 832 F. Supp. 1378, 1383* (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 169 (1976)). There are three requirements for a copyright claim under this section: (1) plaintiff must be the owner of the copyright at issue; (2) copies of the work must have been imported into the United States "without the authority of the owner of the copyright"; and (3) the imported copies must have been "acquired outside the United States." *Parfums, 832 F. Supp. at 1383*. Plaintiff has met the first requirement as Studio **[*16]** A is the copyright owner of all titles in issue. Under the second requirement, Defendants have repeatedly argued that Studio A authorized the importation of these copies. They have provided the testimony of Belfer who alleges that he spoke to Carol Nevitt of Studio A and advised her that they could purchase Studio A DVDs from Canada for a cheaper price. Belfer further contends that Nevitt told him to "go and get it." (Belfer Dep. 114-17, ECF No. 155.) While this evidence, which Plaintiff disputes ever occurred, arguably demonstrates that Studio A authorized Belfer to import legitimate copies of Studio A DVDs from Canada, it does not, however, demonstrate that Nevitt authorized Belfer to import bootleg works, and Defendants have failed to provide any such evidence. Lastly, under the third element, it is clear that the DVDs arrived from Canada, as Action admits to purchasing the DVDs from Active Distributors, a Canadian company. (Defs. Response to Pl.'s Interrogatory # 26; Purchase Orders from Active Distributors, Inc.) Because Plaintiff has provided evidence to support its claim under *Section 602*, the court denies summary judgment in favor of Defendants. The court will later discuss whether summary **[*17]** judgment in favor of Plaintiff is warranted on its two counts of copyright infringement.

3. Trademark Infringement Claim

Defendants argue that if Plaintiff's copyright claim fails, its trademark infringement claim would fail as well because the claim is entirely encompassed by its copyright claim. Because the court has found that Plaintiff's copyright claim has not failed based on the evidence, Defendants' argument is without merit.

4. Personal Liability for Alexander Belfer

Defendants, without citing any law, argue that Belfer, individually, is not a proper defendant in the case at bar because "Plaintiff never alleged and/or otherwise maintained that Alex Belfer performed any acts outside the scope of his employment and duties as President of Action Software, Inc." (Pg 19, ECF No. 156.) Plaintiff, however, argues that regardless of whether Belfer acted within the scope of his employment, he is jointly liable either under a theory of "acting in concert" or vicarious liability. It is well-settled that both copyright and trademark infringement are tort claims, in which common law concepts, such as joint liability, apply. *See e.g. Demetriades v. Kaufmann, 690 F. Supp. 289, 292 (S.D.N.Y. 1988)*; *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc. 256 F. Supp. 399, 403 (S.D.N.Y. 1966)* ("[B]ecause copyright is analogous to a species of tort, **[*18]** 'common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy . . . ."); *David Berg and Co. v. Gatto Int'l Trading Co., 884 F.2d 306, 311 (7th Cir. 1989)* ("Because . . .trademark infringement [is] tortious, the doctrine of joint tortfeasors does apply.") Joint liability arises when the defendant knowingly participates in or furthers a tortious act. *Demetriades, 690 F. Supp. at 293*.

In the instant case, Belfer, as the president and sole owner of Action Software, makes all major business decisions, including what videos to purchase and who to purchase from. (Belfer Dep. 3-4, 25, ECF No. 155.) Belfer admits to purchasing these allegedly bootleg DVDs. (Belfer Dep. 121, 131.) Even though Belfer may have been acting within the scope of his employment by purchasing them, by doing so, he furthered a potentially tortious act of copyright and trademark infringement. Therefore, Belfer is jointly liable by furthering Action Software's alleged involvement in these claims.

Even if Belfer did not knowingly further this act, liability for copyright infringement is not limited to those who directly engage in infringing activity; instead, the doctrine of vicarious liability also applies. *See* *Jobete Music Co. v. Johnson Communs,. Inc., 285 F Supp. 2d 1077, 1083 (S.D. Ohio 2003)*. In *Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 434-35 (1984)*, the Court stated that:

> [T]he Copyright Act does not expressly render anyone **[*19]** liable for infringement committed by another. . . The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in infringing activity. . . [V]icarious liability is imposed in virtually all areas of the law.

The elements of vicarious liability are: (1) the officer has the right and ability to supervise the activity, and (2) the officer has a direct financial interest in such activities. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)*; *Jobete, 285 F. Supp. 2d at 1083*.

Here, Belfer again has the right and ability to supervise all video purchases as he stated in his deposition. (Belfer Dep 25.) Furthermore, he admitted that he receives the "lion's share" of Action's profits. (Belfer Dep. 105.) Thus, he had a direct financial interest in purchasing these allegedly bootleg DVDs. Plaintiff also has a basis under vicarious liability to assert its claims against Belfer.

Based on the foregoing analysis, the court denies, in full, Defendants' Motion to Dismiss or, in the Alternative Motion for Summary Judgment.

B. Plaintiff's Motion for Summary Judgment

Plaintiff argues that summary judgment should be granted in its favor with regard to its copyright **[*20]** and trademark infringement claims as well as Defendants' unfair business dealing counterclaim. Plaintiff also seeks monetary damages upon a finding of summary judgment in its favor.

1. Copyright Infringement Claims

As discussed above, with regard to Plaintiff's copyright infringement claim under *17 U.S.C. § 106(3)*, Plaintiff has presented evidence that Defendants distributed unauthorized copies of its work to the public. First, Defendants purchased copies of 21 Studio A titles from Active. (Active Distributors Invoice, ECF No. 157-3.) Second, Plaintiff has demonstrated that the DVDs purchased from Active differed in many respects from legitimate Studio A DVDs, including as follows:

(1) The production codes on the Action DVDs did not match any authorized Studio A code (Carol Nevitt's June 12, 2007 Decl. ¶ 10.);

(2) The barcodes found on the Action DVDs did not match any code ever used on a Studio A DVD (Borreson Dec. ¶ 19);

(3) None of the Action DVDs, as opposed to nearly all of the Studio A DVDs, contained the title of the film on the inner ring of the bottom side of the disk (Borreson Decl. ¶ 24);

(4) All of Studio A's DVDs are manufactured on semi-transparent disks, while only half of the Action DVDs were **[*21]** on this type of disk (Borreson Decl. ¶ 25);

(5) None of the Action DVDs contained a color printed insert, which nearly all of the Studio A DVDs contain (Carol Nevitt March 27, 2007 Decl. ¶ 18); and

(6) The barcodes on the cover of a sample of Action DVDs contained tiny dots, which is absent in all Studio A DVDs (Breene Decl. ¶ 6-9).

This evidence demonstrates that the DVDs found on Action's premises were not legitimate copies of Studio A DVDs.[6] Third, Plaintiff has shown that Defendants resold and were attempting to resell each of these unauthorized copies purchased from Active. (Defs. Response to Pl.'s Interrogatory # 26, ECF No. 157-3; Purchase Orders from Active Distributors, Inc., ECF No. 157-3.)

Defendants present two main arguments in opposition to Plaintiff's Motion for Summary Judgment on its copyright infringement claim under *Section 106(3)*. First, they argue that Plaintiff "unequivocally" abandoned its theory that the imbedded production codes on the Action DVDs differed from Studio A's DVDs and used other theories such as the printed inserts, barcodes, transparency of the disks, and other differences to support its claim. This argument is not well-taken as Plaintiff has continued to assert **[*22]** this theory in its Motion. Furthermore, Plaintiff is not precluded from providing additional differences between the DVDs to support its claim that the DVDs found with Action were unauthorized.

Second, Defendants argue that the statements submitted by Plaintiff, which includes the statements of Carol Nevitt, Jerry Borreson, and Richard Breene, are hearsay. Defendants, however, fail to specify whether particular statements are hearsay or whether the statements in their entirety are hearsay. It is well-settled that the court may consider affidavits submitted in support or opposition to a Motion for Summary Judgment as long as they are made on personal knowledge and set out facts that would be admissible in evidence. *See* *Fed. R. Civ. P. 56(e)(1)*. Carol Nevitt offered her statement based on her personal knowledge as a co-owner of Studio A. The same is also true of Jerry Borreson and Richard Breene, who both offered statements based on their work with Studio A and its DVD production. Without further basis from Defendants, the court finds nothing inadmissible with regard to these statements.

Plaintiff also presents evidence to support its importation copyright infringement claim under *17 U.S.C. § 602*. The invoices submitted by **[*23]** Plaintiff show that Active, located in Toronto, shipped various Studio A DVDs to Action Software, located in Ohio. (Purchase Orders from Active Distributors, Inc.) Furthermore, Action concedes purchasing the DVDs from a Canadian company. (Defs. Response to Pl.'s Interrogatory #27.) Defendants argue that the place of origin of the DVDs was the United States because each of the DVDs read "Printed in the U.S.A." on the back. They further argue that although Active is a Canadian company, it merely acted as a broker and did not actually ship the DVDs from Canada. Defendants, however, fail to support these arguments with evidence and instead merely speculate about the origin of the DVDs. The fact that all of the DVDs state that they were "Printed in the U.S.A." is inconsequential because all of Actions' DVDs appear to be mere photocopies of legitimate Studio A DVDs. The legitimate Studio A DVD covers also contain the language "Printed in the U.S.A." on the back. Therefore, this evidence does not demonstrate either way where the DVDs were in fact printed. Furthermore, Defendants provide no evidence that Active was merely a broker in the transaction, and the court finds no such evidence. Defendants **[*24]** have, therefore, failed to refute the undisputed evidence that Active, a Canadian company, shipped the Studio A DVDs in question, to Action Software, in the United States.

---

[6] Plaintiff also provides evidence of the origin of these unauthorized copies. This evidence, however, is based in part on the testimony of Kyriazoglou, the owner of Active Distributors, who sold these DVDs to Action. Kyriazoglou, however, was not deposed in the instant case and was instead deposed in another case, in which Defendants were not a party. Plaintiff argues that the court should consider this deposition and claims that it could not compel his testimony as Kyriazoglou is a Canadian citizen. Because he was not deposed in the instant suit, his testimony from another case is hearsay. Furthermore, Plaintiff has not demonstrated that the deposition testimony falls within the unavailability hearsay exception for former testimony under *Fed. R. Evid. 804(b)(1)*, as it has not shown that Defendants or "a predecessor in interest had an opportunity and similar motive to develop the testimony" of Kryriazoglou. Therefore, the court will not rely on this testimony.

Defendants have failed to present any evidence, affidavit, or depositions to oppose Plaintiff's Motion for Summary Judgment on its claims for copyright infringement. It is well-settled under *Federal Rule of Civil Procedure 56(e)(2)* that when a motion for summary judgment is properly made and supported, an opposing party must, by affidavit or other evidence, demonstrate that there is a genuine issue of material fact to be determined at trial. *E.g. Clemmer v. Key Bank N.A., 539 F.3d 349, 353 (6th Cir. 2008)* ("To survive summary judgment, the non-movant must provide evidence beyond the pleadings setting out specific facts showing a genuine issue for trial") (internal quotations omitted). If the opposing party fails to respond in accordance with this rule, the court should enter summary judgment in favor of the moving party, if appropriate. *Fed. R. Civ. P. 56(e)(2)*. In the instant case, Plaintiff has demonstrated, through affidavits and other evidence, that Defendants imported and distributed unauthorized copies of 21 Studio A titles, each of which Studio A possessed a valid copyright ownership. Defendants, on the other hand, have failed **[*25]** to provide any affidavits or other evidence to counter that provided by Plaintiff and has therefore failed to raise a genuine issue of material fact. Accordingly, the court grants summary judgment in favor of Plaintiff on its copyright infringement claims.

2. Trademark Infringement

Plaintiff Studio A also asserted a federal trademark infringement claim against Defendants. Each unauthorized DVD purchased by Defendants bore Plaintiff's trademark, "ANDREW BLAKE." (Carol Nevitt Aff. ¶ 14, ECF No. 157-5). Pursuant to the Lanham Act, *15. U.S.C. § 1114*, a defendant is liable for trademark infringement if:

> [The defendant], without the consent of the registrant use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

In the instant case, Defendants do not dispute that Studio A owns the "ANDREW BLAKE" trademark. Furthermore, Defendants do not dispute that this trademark was visible on all copies of the DVDs that they purchased from Active. Studio A did not authorize **[*26]** the use of this trademark on any of the bootleg copies that were purchased and offered for sale by Defendants. By using this trademark on the replicated DVDs that appear to be exact copies to the naked eye, purchasers of these DVDs were likely to believe that they were legitimate Studio A DVDs. Therefore, the court finds that there is no genuine issue of material fact with regard to this claim, and summary judgment in favor of Plaintiff is warranted.

3. Unfair Business Dealing Counterclaim

Defendants assert a counterclaim against Plaintiff for unfair competition under *California Business and Professional Code § 17200, et seq.* Defendants argue that Plaintiff engaged in unfair competition by failing to follow the common business practice of notifying innocent distributors about piracy problems. Defendants further contend that Plaintiff's actions were undertaken "in an attempt to misuse the copyright by engaging in conduct violative of the antitrust laws by attempting to extend its copyright beyond the limits established by the copyright laws and beyond legislative intent." (Defs.' Answer to Pl.'s First Am. Compl, Aff. Defenses, and Counterclaim "Answer and Counterclaim" ¶ 69, ECF No. 56.) Even if the court presumes that this industry practice **[*27]** exists, Defendants' counterclaim still fails as a matter of law.

Under *California Business and Professional Code § 17200*, unfair competition is defined as including, in pertinent part, "any unlawful, unfair or fraudulent business act." The California Supreme Court has defined "unlawful" as follows:

> The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law. . . . *Section 17200* "borrows" violations from other laws by making them independently actionable as unfair competitive practices.

CRST Van Expedited, Inc. v. Werner Enters., 479 F.3d 1099, 1107 (9th Cir. 2007) (quoting *Korea Supply Co. v. Lockheed Martine Corp., 63 P.3d 937, 943 (Cal. 2003)*. The California Supreme Court has also adopted the following test when a plaintiff claims to have suffered injury from a direct competitors' "unfair" practice under *Section 17200*:

> The word "unfair" in that section means conduct that threatens an incipient violation of ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Commc'ns v. L.A. Cellular Tel. Co., 973 P.2d 527, 544 (Cal. 1999). Lastly, fraudulent acts are ones where members of the public are likely to be deceived. *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1077-78 (C.D. Cal. 2003)*.

In the instant case, based on the foregoing definitions, Defendants have asserted a claim under *Section 17200* on the basis that Plaintiff **[*28]** engaged in an "unfair" practice, which requires proof that Plaintiff's actions harmed competition or violated the policy or spirit of ***antitrust law***. *See* *Cel-Tech, 973 P.2d at 544*. The Supreme Court has stressed that the purpose of antitrust laws are to protect competition, not competitors. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 115 (1986)*. Thus, injury to a competitor is not equivalent to injury to competition. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990)*. Here, by failing to notify others of potential issues of piracy, Plaintiff has not harmed competition, only arguably harmed a competitor. Defendants fail to provide any evidence that the adult film industry's competition has been harmed by Plaintiff's actions, and the court finds no such evidence. Plaintiff, by failing to notify others in the industry, did not prohibit Defendants and others in the industry from selling lawfully obtained, authorized Studio A DVDs. Additionally, Plaintiff did not prohibit others in the industry from creating adult films. Instead, Plaintiff, in instituting this action, was merely attempting to protect its ownership interest in its adult films and protect against the sale of unauthorized DVDs that were copied without its consent, excluding it from profits that rightfully belong to Studio A. Therefore, upon the court's **[*29]** finding that there is no genuine issue of material fact with regard to Defendants' counterclaim, the court grants summary judgment in favor of Plaintiff on this claim.

4. Remedies

Because the court has granted summary judgment in favor of Plaintiff on its claims, it is entitled to damages under the Copyright Act and the Lanham Act. The court discusses remedies under each statute in turn.

a. Copyright Infringement Remedies

Under *17 U.S.C. § 504*, a registered copyright owner is entitled to recover either actual damages and profits from the infringer or statutory damages. In this case, Plaintiff requests statutory damages against Action. *Section 504* provides that the court, in its discretion, may award damages under this statute "for all infringements involved in the action, with respect to any one work . . . a sum of not less than $750 or more than $30,000." Thus, where multiple registered works are infringed, a court must award damages for each of the separate works. *Pearson Educ., Inc. v. Jun Liao*, No. 07-*Civ-2423, 2008 U.S. Dist. LEXIS 38222, at *12 (S.D.N.Y. May 13, 2008)* (citing *Arclightz and Films Pvt. Ltd. v. Video Palace Inc., 303 F. Supp. 2d 356, 361 (S.D.N.Y. 2003))*. While a court may issue damages for the number of original works infringed, an infringer is not liable for the number or type of copies made. *Arclightz, 303 F. Supp. 2d. at 361*.

A court has discretion in determining the sum for which **[*30]** the infringer is liable; however, courts generally take into account the defendant's intent as relief under this provision is equitable in nature. *See e.g.* *Costello Publ'g Co. v. Rotelle, 670 F.2d 1035, 1044 n. 13 (D.C. Cir. 1981)*; *Columbia Pictures Indus., Inc. v. Pacheco, No. 87-1543, 1990 U.S. Dist. LEXIS 2825, at *8 (D.P.R. Feb. 27, 1990)*. Where an innocent infringement occurs, in which the defendant was not aware and had no reason to believe that his acts constituted infringement of the plaintiff's copyright, courts are more willing to limit the plaintiff's award to the minimum amount for each incident of infringement. *Columbia, 1990 U.S. Dist. LEXIS 2825, at *8*.

Here, Defendants imply that they purchased the DVDs from Active without knowing that they were unauthorized. Plaintiff does not argue that Defendants intentionally or willfully purchased unauthorized DVDs; however, Plaintiff does argue that the statutory minimum should be increased based on Defendants' counsel's conduct during this litigation. This conduct, however, is not equitably related to Action's conduct when it purchased and sold the bootleg Studio A DVDs. Plaintiff does not set forth additional evidence to support its claim that as an equitable matter, the court should increase the statutory award against Defendants. Accordingly, the court awards Plaintiff a total of $15,750.00 in statutory damages, which is the minimum $750 award for **[*31]** each of the 21 Studio A titles at issue.

In its First Amended Complaint, Plaintiff also requested a permanent injunction to prevent Defendants from continuing its infringement. Under Section 502(a) of the Copyright Act, a plaintiff, having established its claim for copyright infringement against the defendant, is entitled to a permanent injunction in addition to any monetary recovery. 4-14 *NIMMER ON COPYRIGHT § 14.06*. However, injunctive relief "ordinarily will not be granted, when there is no probability or threat of continuing of additional infringements." *Id.* (citing *Harolds Stores v. Dillard Dep't Stores, 82 F.3d 1533, 1555 (10th Cir. 1996)*; *Dolori Fabrics, Inc. v. Limited, Inc., 662 F. Supp. 1347, 1358 (S.D.N.Y. 1987))*.

In the instant case, there is no indication that Defendants will continue infringing Plaintiff's copyrighted DVDs. The court issued an Order of Seizure of all the counterfeit DVDs on Action's premises, which was carried out by Plaintiff on May 12, 2005. Defendants are no longer in possession of these unauthorized DVDs from Active and therefore cannot continue selling them. Furthermore, Plaintiff indicated, within its Memorandum in Support of this Motion, that Defendants have ceased infringing on its copyrights and that permanent injunctive relief was no longer necessary. Accordingly, the court will not issue a permanent injunction as doing so would be moot. **[*32]**

17 U.S.C. § 505 provides that courts have discretion to award full costs and "a reasonable attorney's fee to the prevailing party as part of the costs." If Plaintiff wishes to file a motion for fees, it must do so by January 28, 2009. Said motion shall include a fee bill and any other supporting documents. Defendants shall file a response within fourteen days of Plaintiff's motion, indicating whether they agree with Plaintiff's assessment of fees or whether they have any objections to Plaintiff's request.

b. Trademark Infringement Remedies

Plaintiff alleges that damages for trademark infringement are unnecessary because "the principal remedy - cessation of infringement - has already been obtained; moreover, any monetary recovery would only be duplicative, given the much stronger monetary remedies built into the Copyright Act." Plaintiff is therefore no longer pursuing damages under this claim, and the court will issue no such remedy in its favor.

IV. CONCLUSION

For the foregoing reasons, the court denies Defendants' Motion to Dismiss or, in the Alternative Motion Summary Judgment (ECF No. 156) and grants Plaintiff's Motion for Summary Judgment (ECF No. 157). The court issues an award in favor of Plaintiff **[*33]** and against Defendants in the amount of $15,750.00. The court will issue a ruling on attorneys' fees in a subsequent order. The parties shall follow the motion deadline for attorneys' fees as described above.

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*

UNITED STATES DISTRICT JUDGE

January 5, 2009

JUDGMENT ENTRY

The court, having granted Plaintiff's Motion for Summary Judgment (ECF No. 157) in a separate Order on this same date, hereby enters judgment for the Plaintiff in the amount of $15,750 and against the Defendants. The court shall issue a ruling on a later date regarding attorney fees if Plaintiff requests such fees.

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*

UNITED STATES DISTRICT JUDGE

January 5, 2009

End of Document

VIBO Corp. v. Conway

United States District Court for the Western District of Kentucky, Louisville Division

January 5, 2009, Decided; January 5, 2009, Filed

CIVIL ACTION NO. 08-571-C

Reporter

594 F. Supp. 2d 758 *; 2009 U.S. Dist. LEXIS 220 **; 2009-1 Trade Cas. (CCH) P76,462

VIBO CORPORATION, INC., PLAINTIFF, v. JACK CONWAY, ET AL., DEFENDANTS.

Subsequent History: Related proceeding at *Vibo Corp. v. State ex rel. McDaniel, 2011 Ark. 124, 380 S.W.3d 411, 2011 Ark. LEXIS 122 (Ark., 2011)*

Affirmed by *VIBO Corp. v. Conway, 669 F.3d 675, 2012 U.S. App. LEXIS 3475 (6th Cir. Ky., 2012)*

Related proceeding at *Suriel v. Comm'r, 2013 U.S. Tax Ct. LEXIS 36 (Dec. 4, 2013)*

Core Terms

manufacturers, Tobacco, Settling, provisions, immunity, terms, attorney general, alleges, waived, Participating, market share, escrow, motion to dismiss, anti-competitive, negotiating, effects, Sherman Act, grandfathered, settlement, defendant manufacturer, execute, rights, plaintiff's claim, obligations, challenges, violates, parties, constitutional right, sovereign immunity, government action

LexisNexis® Headnotes

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

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

When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

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

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

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

Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. In order to avoid a dismissal under *Fed. R. Civ. P. 12(b)(6)*, a plaintiff has an obligation to provide the grounds of his entitlement to relief, which requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. This does not require a heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. When ruling on a defendant's motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. The court's inquiry is limited to the content of the complaint. A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN3[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The Noerr-Pennington doctrine protects private actors from liability under the Sherman Act for petitioning the government for action. The doctrine rests on an individual's constitutional right to petition the government for action and the necessity, in a representative democracy, for citizens to communicate their needs and wants to the government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The motives of the parties are irrelevant to their protection by Noerr-Pennington; the parties remain immune even if they had a deliberately anticompetitive purpose under the Sherman Act in seeking government action. Immunity exists regardless of any conspiracy between the private parties and government actors that may be motivated by selfish interests. The immunity provided private actors by the doctrine extends to the effects of a successful petition: where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. Furthermore, the Noerr-Pennington doctrine applies to all of an individual's interactions with government, including its interactions with the executive branch and negotiations associated with the reaching of a settlement of litigation. A tobacco manufacturers' negotiating a settlement is akin to petitioning the government.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

The Parker immunity doctrine and Noerr-Pennington doctrine are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

No commercial agreement exception exists to the Noerr-Pennington doctrine.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN7[] **Sherman Act, Defenses**

When acting in its capacity as a sovereign entity, a state cannot violate antitrust laws. The Sherman Act was not enacted to curtail the sovereign activities of states. When a state imposes a trade restraint, it has imposed the restraint as an act of government and has not in so governing entered into a conspiracy in restraint of trade or established a monopoly. Under the so-called state action doctrine, it is well established that ***antitrust law*** does not apply to states acting as sovereigns. Principles of federalism and state sovereignty provide blanket protection for states.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN8[] **Scope, Exemptions**

In certain situations, a state's restraint of trade actions must be scrutinized to determine if state-action immunity applies. If the state, through a statute, has created some law or regulatory scheme that authorizes private actors to engage in antitrust violations, that statute may be preempted by the Sherman Act, pursuant to the *Supremacy Clause of the U.S. Constitution*. When such a statute is preempted, the state may nevertheless retain immunity if the state, acting in its sovereign capacity, remains sufficiently involved such that the regulatory scheme and its antitrust effects retain the character of direct state action. A court must resolve this question using the two-prong test crafted by the court in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. According to Midcal, first, the challenged restraint must be one articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself. Similarly, when a plaintiff directly challenges the actions of private actors or a state agency that claim they are acting according to some state authorization, the court also uses the Midcal test to determine whether the challenged actions are so closely connected to the sovereign state that they are acts of the state warranting state-action immunity.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN9[] **Scope, Exemptions**

The Midcal test does not apply to sovereign state acts, which are immune from antitrust liability so long as they are not preempted due to their having authorized per se illegal activities.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN10[] **Scope, Exemptions**

When a state authorizes an antitrust violation by private actors in all situations, that law is preempted by the Sherman Act.

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

HN11[] Scope, Monopolization Offenses

The basic elements of an essential facilities antitrust violation under the Sherman Act are that a competitor has denied the plaintiff reasonable access to some facility the competitor controls and that is necessary to compete in their shared market.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

HN12[] Scope, Exemptions

A state is incapable of entering an agreement that violates the Sherman Act. The state-action doctrine traditionally is applied to acts of the legislature or regulatory schemes constructed by states. However, it also applies to actions by officials in the state's executive branch.

Constitutional Law > ... > Immunities > Qualified Immunity > Executive Branch Officials

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Employees & Officials

HN13[] Qualified Immunity, Executive Branch Officials

A state attorney general, as a member of the executive branch of government, is entitled to immunity for his or her executive actions.

Civil Rights Law > ... > Elements > Color of State Law > State-Authorized Actions

Governments > State & Territorial Governments > Claims By & Against

HN14[] Color of State Law, State-Authorized Actions

The acts of the Attorneys General in negotiating and entering into a Master Settlement Agreement with tobacco companies are direct state action.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN15[] Types of Contracts, Settlement Agreements

A settlement agreement is a contract.

Contracts Law > Contract Interpretation > General Overview

HN16[] Contracts Law, Contract Interpretation

In interpreting a contract, the court is guided by well-established principles of contract interpretation.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN17[] Choice of Law, Significant Relationships

Federal choice-of-law rules dictate that a court must apply the law of the jurisdiction having the most significant relationship with the action.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > General Overview

HN18[] Contract Interpretation, Ambiguities & Contra Proferentem

Under Kentucky law, contract interpretation is a question of law for a court to determine. To interpret a contract, the court looks to its language to determine the parties' intentions. Where no ambiguity exists in the contract, a court looks only as far as the four corners of the document to determine that intent. Whether the contract is ambiguous is a question of law for the court to determine. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN19[] Judicial Review, Standards of Review

Any equal protection claim under the U.S. Constitution calls for rational-basis review.

Constitutional Law > Bill of Rights > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN20[] Constitutional Law, Bill of Rights

To be valid, a waiver of constitutional rights must be made voluntarily, intelligently, and knowingly. The law presumes against the waiver of constitutional rights, a presumption which only clear evidence to the contrary can overcome. In assessing the validity of a waiver of constitutional rights, the court should consider the circumstances in which the waiver was made.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN21[] Defenses, Demurrers & Objections, Waiver & Preservation of Defenses

A valid waiver can be defined as the intentional relinquishment or abandonment of a known right.

Civil Procedure > Settlements > General Overview

HN22[] Civil Procedure, Settlements

It is a well established principle that the law, and public policy, favor the settlement of disputes without litigation.

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN23[] Supremacy Clause, Supreme Law of the Land

The Compact Clause forbids any state from entering into any agreement or compact with another State without congressional consent. *U.S. Const. art. I, § 10, cl. 3*. Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. This clause applies only to any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Therefore, the court's central concern in any Compact Clause inquiry is whether the agreement at issue enhances state power to the detriment of the federal government's power. The Compact Clause does not circumscribe modes of interstate cooperation.

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN24[] Supremacy Clause, Supreme Law of the Land

In the context of the Compact Clause, *U.S. Const. art. I, § 10, cl. 3*, an increase in the states' collective bargaining power to settle a multistate lawsuit does not result in an accompanying decrease of federal power.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

HN25[] State Sovereign Immunity, State Immunity

The *Eleventh Amendment* bars a suit against state officials when the state is the real substantial party in interest. It follows, therefore, that a suit against a state official in his official capacity is a suit against the state, for it is not a suit against the official but rather is a suit against the official's office. An important exception to this general rule, the Ex Parte Young exception, is that a suit challenging the constitutionality of a state official's action is not one against the State. Importantly, the exception provided for by Ex parte Young rests on the need to promote the vindication of federal rights.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN26[] State Sovereign Immunity, State Immunity

A state and, accordingly, an official sued in his official capacity, retains immunity from claims that an official has violated state law. A federal court's grant of relief against state officials on the basis of state law does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the *Eleventh Amendment*.

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > Waiver > Consent

HN27[] State Sovereign Immunity, Abrogation of Immunity

There are three exceptions to a State's sovereign immunity: (a) when the State has consented to suit; (b) when the exception first set forth in Ex parte Young applies; and (c) when Congress has properly abrogated a State's immunity.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

HN28[] State Sovereign Immunity, Waiver of Immunity

Just as the federal government's waiver of sovereign immunity cannot be implied but must be unequivocally expressed, so must a state's waiver of its sovereign immunity be clear and unequivocal.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

HN29[] Subject Matter Jurisdiction, Federal Questions

No waiver of sovereign immunity by a state is required for a federal court to have jurisdiction over federal-law claims. *28 U.S.C.S. § 1331*.

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN30[] State Sovereign Immunity, Waiver

A state cannot constructively waive its sovereign immunity under the *Eleventh Amendment*.

Counsel: [1]** For VIBO Corporation, Inc., doing business as General Tobacco, Plaintiff: Brigid O. Gies, Christie A. Moore, Helen A. Thompson, John K. Bush, Greenebaum Doll & McDonald PLLC, Louisville, KY; J. Ronald Denman, Mayodan, NC.

For Jack Conway, in his official capacity as Attorney General, Commonwealth of Kentucky, Defendant: Tad Thomas, LEAD ATTORNEY, James M. Herrick, Michael Plumley, Kentucky Attorney General- Civil & Envirnonmental Law Div., Frankfort, KY; Gary D. Wilson, Washington, DC.

For Troy King, In his official capacity as Attorney General, State of Alabama, Defendant: James M. Steinwinder, Alabama Attorney General Office, Montgomery, AL.

For Talis J. Colbert, In his official capacity as Attorney General, State of Alaska, Defendant: Chris Poag, Alaska Attorney General Office, Juneau, AK.

For Terry Goddard, In his official capacity as Attorney General, State of Arizona, Defendant: Ann Uglietta, Kelly M. Peloquin, Arizona Attorney General Office, Phoenix, AZ.

For Dustin McDaniel, In his official capacity as Attorney General, State of Arkansas, Defendant: Eric B. Estes, Arkansas Attorney General Office, Little Rock, AR; Regina Harelson, Office of the Attorney General, Little Rock, AK.

For **[**2]** Edmund G. Brown, Jr., In his official capacity as Attorney General, State of California, Defendant: Michelle Hickerson, California Attorney General Office, San Diego, CA.

For John W. Suthers, In his official capacity as Attorney General, State of Colorado, Defendant: Brian L. Laughlin, Colorado Attorney General Office, Denver, CO.

For Richard Blumenthal, In his official capacity as Attorney General, State of Connecticut, Defendant: Rupal Shah Palanki, Connecticut Attorney General Office, Hartford, CT.

For Joseph R. Biden, III, In his official capacity as Attorney General, State of Delaware, Defendant: Thomas E. Brown, Delaware Attorney General Office, Wilmington, DE.

For Thurbert E. Baker, In his official capacity as Attorney General, State of Georgia, Defendant: Sidney R. Barrett, Georgia Department of Law, Atlanta, GA.

For Mark J. Bennett, In his official capacity as Attorney General, State of Hawaii, Defendant: Alex R. Barrett, Hawaii Attorney General Office, Honolulu, HI.

For Lawrence Wasden, In his official capacity as Attorney General, State of Idaho, Defendant: Brett T. DeLange, Idaho Office of the Attorney General, Consumer Protection Division, Boise, ID.

For Lisa Madigan, In her **[**3]** official capacity as Attorney General, State of Illinois, Defendant: Marilyn A. Kueper, Illinois Attorney General Office, Springfield, IL.

For Steve Carter, In his official capacity as Attorney General, State of Indiana, Defendant: Lawrence J. Carcare, II, Indiana Attorney General, Indianapolis, IN.

For Tom Miller, In his official capacity as Attorney General, State of Iowa, Defendant: Kristie R. Orme, McDowell Rice Smith & Buchanan, PC, Kansas City, MO.

For Stephen Six, In his official capacity as Attorney General, State of Kansas, Defendant: Patrick Y. Broxterman, Kansas Attorney General Office, Topeka, KS.

For James D. Caldwell, In his official capacity as Attorney General, State of Louisiana, Defendant: Patricia H. Wilton, Louisana Attorney General Office, Baton Rouge, LA.

For G. Steven Rowe, In his official capacity as Attorney General, State of Maine, Defendant: Jennifer A. Willis, Maine Attorney General Office, Augusta, ME.

For Douglas F. Gansler, In his official capacity as Attorney General, State of Maryland, Defendant: David S. Lapp, Maryland Attorney General Office, Baltimore, MD.

For Martha Coakley, In her official capacity as Attorney General, Commonwealth of Massachusetts, Defendant: **[**4]** Elizabeth J. Koenig, Massachusetts Attorney General Office, Boston, MA.

For Mike Cox, In his official capacity as Attorney General, State of Michigan, Defendant: Brian D. Delvin, Office of the Attorney General for the State of Michigan, Lansing, MI.

For Jeremiah W. Nixon, In his official capacity as Attorney General, State of Missouri, Defendant: Curtis R. Stokes, Missouri Attorney General, Jefferson City, MO.

For Mike McGrath, In his official capacity as Attorney General, State of Montana, Defendant: Mark M. McLaverty, Montana Attorney General Office, Helena, MT; Richard W. Head, New Hampshire Attorney General Office, Concord, NH.

For Jon Bruning, In his official capacity as Attorney General, State of Nebraska, Defendant: Lynne R. Fritz, Nebraska Attorney General Office, Lincoln, NE.

For Catherine Cortez Masto, In her official capacity as Attorney General, State of Nevada, Defendant: Victoria T. Oldenburg, Nevada Attorney General Office, Reno, NV.

For Kelly A. Ayotte, In her official capacity as Attorney General, State of New Hampshire, Defendant: David A. Rienzo, New Hampshire Attorney General Office, Concord, NH.

For Anne Milgram, In her official capacity as Attorney General, State of **[**5]** New Jersey, Defendant: Carol G. Jacobson, New Jersey Attorney General Office, Newark, NJ.

For Gary King, In his official capacity as Attorney General, State of New Mexico, Defendant: David K. Thomson, New Mexico Attorney General Office, Santa Fe, NM.

For Andrew Cuomo, In his official capacity as Attorney General, State of New York, Defendant: Christine E. Morrison, Dana H. Biberman, New York Attorney General Office, New York, NY.

For Roy Cooper, In his official capacity as Attorney General, State of North Carolina, Defendant: Melissa Lou Trippe, Richard L. Harrison, North Carolina Dept of Justice, Raleigh, NC.

For Wayne Stenehjem, In his official capacity as Attorney General, State of North Dakota, Defendant: Douglas A. Bahr, North Dakota Attorney General Office, Bismarck, ND.

For Nancy Hardin Rogers, In her official capacity as Attorney General, State of Ohio, Defendant: Susan C. Walker, Ohio Attorney General Office, Columbus, OH.

For Drew Edmondson, In his official capacity as Attorney General, State of Oklahoma, Defendant: E. Clyde Kirk, Oklahoma Attorney General, Oklahoma City, OK.

For Hardy Myers, In his official capacity as Attorney General, State of Oregon, Defendant: Lisa M. Udland, **[**6]** Oregon Department of Justice, Salem, OR.

For Tom Corbett, In his official capacity as Attorney General, Commonwealth of Pennsylvania, Defendant: Joel M. Ressler, Pennsylvania Attorney General Office, Harrisburg, PA.

For Patrick C. Lynch, In his official capacity as Attorney General, State of Rhode Island, Defendant: Maureen G. Glynn, Rhode Island Attorney General Office, Providence, RI.

For Henry McMaster, In his official capacity as Attorney General, State of South Carolina, Defendant: Jonathan B. Williams, Thomas P. Hunter, South Carolina Attorney General Office, Columbia, SC.

For Larry Long, In his official capacity as Attorney General, State of South Dakota, Defendant: Patricia J. Archer, South Dakota Attorney General Office, Pierre, SD.

For Robert E. Cooper, Jr., In his official capacity as Attorney General, State of Tennessee, Defendant: John H. Sinclair, Jr., Rebekah A. Baker, Stephen R. Butler, Tennessee Attorney General, Nashville, TN.

For Mark Shurtleff, In his official capacity as Attorney General, State of Utah, Defendant: Katherine H. Kinsman, Utah Attorney General Office, Salt Lake City, UT.

For William H. Sorrell, In his official capacity as Attorney General, State of Vermont, **[**7]** Defendant: Christy T. Mihaly, Vermont Attorney General Office, Montpelier, VT.

For Bob McDonnell, In his official capacity as Attorney, Commonwealth of Virginia, Defendant: William E. Thro, Christopher Newport University, Newport News, VA.

For Rob McKenna, In his official capacity as Attorney General, State of Washington, Defendant: Robert J. Fallis, Washington Attorney General Office, Seattle, WA.

For Darrell V. McGraw, Jr., In his official capacity as Attorney General, State of West Virginia, Defendant: John S. Dalporto, West Virginia Attorney General Office, Charleston, WV.

For J. B. Van Hollen, In his official capacity as Attorney General, State of Wisconsin, Defendant: Christopher J. Blythe, Wisconsin Attorney General Office, Madison, WI.

For Bruce A. Salzburg, In his official capacity as Attorney General, State of Wyoming, Defendant: Douglas J. Moench, Kenneth Miller, Wyoming Attorney General Office, Cheyenne, WY.

For Peter Nickles, In his official capacity as Attorney General, District of Columbia, Defendant: Brian R. Caldwell, District of Columbia Attorney General Office, Washington, DC.

For Vincent Frazer, In his official capacity as Attorney General, Virgin Islands of the United **[**8]** States, Defendant: Elliot M. Davis, Virgin Islands Attorney General Office, St. Thomas, VI.

For Philip Morris, Inc., Defendant: Charles S. Cassis, LEAD ATTORNEY, Theresa A. Canaday, Frost Brown Todd LLC, Louisville, KY; Douglas L Wald, Michael B. Bernstein, Arnold & Porter LLP, Washington, DC; Eric Shapland, Arnold & Porter LLP, Los Angeles, CA.

For R.J. Reynolds Tobacco Company, Defendant: Charles S. Cassis, LEAD ATTORNEY, Frost Brown Todd LLC, Louisville, KY; Barack S. Echols, Douglas G. Smith, Elli Leibenstein, Stephen R. Patton, Kirkland & Ellis LLP, Chicago, IL.

For Lorillard Tobacco Co., Defendant: Charles S. Cassis, LEAD ATTORNEY, Theresa A. Canaday, Frost Brown Todd LLC, Louisville, KY; Idit Froim, Irving Scher, Weil, Gotshal & Manges, LLP, New York, NY; Lee VanVoorhis, Weil, Gotshal & Manges LLP, Washington, DC.

For Liggett Group, LLC, Commonwealth Brands, Inc., Imperial Tobacco Limited/ITL (USA) Limited, Japan Tobacco International USA, Inc., King Maker Marketing, Lane Limited, Lignum-2, Inc., P.T. Djarum, Premier Manufacturing Inc., Santa Fe Natural Tobacco Co., Sherman's 1400 Broadway N.Y.C. Inc., Top Tobacco, LP, Defendants: Elizabeth B. McCallum, Robert J. Brookhiser, Howrey, **[**9]** LLP, Washington, DC; Merrill S. Schell, Wyatt, Tarrant & Combs LLP, Louisville, KY.

For Vector Tobacco, Inc., Defendant: Merrill S. Schell, LEAD ATTORNEY, Wyatt, Tarrant & Combs LLP, Louisville, KY; Robert J. Brookhiser, LEAD ATTORNEY, Elizabeth B. McCallum, Howrey, LLP, Washington, DC.

Judges: Jennifer B. Coffman, United States District Judge.

Opinion by: Jennifer B. Coffman

Opinion

[*767] **MEMORANDUM OPINION AND ORDER**

This matter is before the court upon motions to dismiss filed by the various defendants and one motion to quash service. [1] These motions are: (1) motion to dismiss complaint filed by defendants Lorillard Tobacco Co., Philip Morris, Inc., and R.J. Reynolds Tobacco Co. (DE 154); (2) motion to dismiss filed by defendants Commonwealth Brands, Inc., Imperial Tobacco Limited/ITL, Japan Tobacco International USA, Inc., King Maker Marketing, Lane Limited, Liggett Group, LLC, Lignum-2, Inc., P.T. Djarum, Premier Manufacturing Inc., Santa Fe Natural Tobacco Co., Sherman's 1400 Broadway N.Y.C., Inc., Top Tobacco, LP, and Vector Tobacco, Inc. (DE 156); (3) motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim by defendant Jack Conway, Attorney General of Kentucky (DE 149); (4) motion to **[**10]** dismiss for lack of personal jurisdiction and improper venue and contingent joinder in defendant Conway's motion to dismiss by the Attorneys General of the remaining forty-five states, five territories, and the District of Columbia (DE 208); (5) motion to dismiss for improper service of process by defendant Peter Nickles (DE 210); and (6) motion to quash purported service on defendant Jeremiah W. Nixon (DE 215).

I. Background [2]

In the mid-1990s a number of states sued the four largest tobacco manufacturers in the United States. **[**11]** [3] The states' claims "centered on allegations that the manufacturers targeted youth in their advertising; knew of, controlled, and failed to disclose research into harmful effects of cigarette smoke; and knew nicotine in cigarettes was addictive and marketed their cigarettes with those addictive properties in mind." Am. Compl.P105. In 1998, the parties resolved the litigation and signed the Master Settlement Agreement ("MSA").

The MSA originally was negotiated by eight states' Attorneys General and then was released to other states so that they might decide whether they wished to join **[*768]** it. *Id.* PP 109, 110. Additional states took action to enjoy the benefits of the MSA, and a total of fifty-two states and territories, through their Attorneys General, eventually signed on to the MSA. These states are collectively known as the "Settling States." [4] Kentucky, like other Settling States without a case already pending against the tobacco manufacturers, instigated **[**12]** litigation and then settled it by asking a state court to enter an agreed order approving the MSA and dismissing with prejudice the state's claims. *Id.* P 119. According to the terms of the MSA, in return for a tobacco manufacturer's agreement to the terms of the MSA, which included making substantial payments to the Settling States, a state agreed to release the company from all claims arising out of certain past and future conduct relating to its tobacco manufacturing business. *See* MSA § II(nn) (defining "released claims" and listing all types of conduct for which a manufacturer was released from liability). [5] Those manufacturers agreeing to the MSA are known as "Participating Manufacturers" ("PMs"). The four tobacco companies that were sued in the initial lawsuits and with which the states reached the initial settlement are known as the Original Participating Manufacturers ("OPMs"). Those that joined the MSA later are known as Subsequent Participating Manufacturers ("SPMs").

---

[1] After these motions were filed, but before the plaintiff filed its responses, the plaintiff filed an Amended Complaint ("Am. Compl."). The parties concede that the motions to dismiss apply equally to the Complaint (DE 1) and the Amended Complaint (DE 234). The court therefore addresses its attention to the Amended Complaint.

[2] The court will take the plaintiff's factual allegations as true for purposes of this motion to dismiss. *See* *Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (noting, ***HN1***[] "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" (citations omitted)).

[3] These companies were Philip Morris, Inc. ("Philip Morris"), R.J. Reynolds Tobacco Co. ("Reynolds"), Brown & Williamson Tobacco Corp. ("B&W"), and Lorillard Tobacco Co. ("Lorillard."). Reynolds subsequently acquired B&W. Am. Compl. P 3 n.3.

[4] The Settling States include 46 states (all except Florida, Minnesota, Mississippi, and Texas), five territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands), and **[**13]** the District of Columbia.

[5] The Master Settlement Agreement was attached as Exhibit A to the plaintiff's amended complaint. It is also available on the website of the National Association of Attorneys General (NAAG) at *http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_103246* 8605_cigmsa.pdf.

The OPMs feared that by signing the MSA, and thus incurring significant costs that would require an accompanying price increase of their products, they would be creating a significant market opportunity for tobacco manufacturers that did not sign the MSA. Am. Compl. P 127. That is, the OPMs anticipated that those companies who did not sign (known as Non-Participating Manufacturers, or "NPMs") and thus had no payment obligations would be able to price their products below the OPMs' market price, thereby taking sales away from the OPMs. *Id.* In order to address these concerns and encourage participation in the MSA by tobacco companies other than the OPMs, the Settling States agreed to several provisions of the MSA. *Id.* It is these aspects of the MSA that give rise to the instant plaintiff's claims.

First, the Settling States agreed to release claims not only against the PMs but also against **[**14]** tobacco retailers, suppliers, and distributors to the extent of their dealings in the PMs' products. *See* MSA § II(oo) (defining "released parties" to include suppliers, retailers, and distributors of the PMs' products). This provision encouraged sellers of tobacco products to carry only products made by PMs. *See* Am. Compl. P 128.

Second, to ensure that those companies not participating in the MSA have financial obligations to the states similar to those of the companies that are participating, the MSA includes a mechanism designed to equalize the potential profits of PMs and NPMs. The MSA provides that the states may enact "Escrow Statutes" or "Qualifying Statutes." *See* MSA § IX(d)(2). In general terms, the Escrow Statute of a state obligates the tobacco companies that do not sign the MSA (NPMs) to make **[*769]** annual deposits into an escrow account, based on their sales volume in the state. *See id.* The principal amounts are held in escrow for twenty-five succeeding years and, if there is no judgment against or settlement with a particular NPM on certain kinds of claims, the amounts remaining in escrow are to be returned to that NPM. *See* Am. Compl. P 143; *see also* Am. Compl., Exhibit A, MSA, **[**15]** Exhibit T, Model Statute. However, as originally enacted, the Escrow Statutes allowed an NPM to obtain a refund of the amount paid into escrow, to the extent that the amount paid to a state by the NPM exceeded the amount it would have paid that state under the MSA. [6] Am. Compl. P 146. This characteristic of the statutory scheme made it possible for an NPM to operate profitably by concentrating its business in only a few states. *Id.* States, including Kentucky, have enacted amendments to their Escrow Statutes in order to address this situation. *Id.* P 147; *see, e.g.,* *KRS § 131.604 et seq.*

Another such provision is the "back-payment" requirement. Pursuant to the terms of the MSA, every participating manufacturer upon signing the MSA must make any payment "that it would have been obligated to make in the intervening period had it been a signatory as of the MSA Execution Date." MSA § II(jj). The PMs signing the MSA as of its execution date were obligated to make annual settlement payments based on their nationwide sales beginning in 1999, with payments coming due each year. *Id.* § IX(I). The back-payment provision creates a disincentive for a tobacco manufacturer to delay **[**17]** signing the MSA while building a market share, as it will, upon signing, become liable under the MSA for any sales made since 1999.

As a part of the goal of encouraging smaller tobacco companies not sued in the original lawsuit to join the agreement, the MSA was structured to give NPMs the opportunity to join the MSA with a reduced payment

---

[6] The defendant Attorney General of Kentucky has provided the following explanation for how the mechanism worked:

> Every Participating Manufacturer makes a single annual settlement payment based on its total shipments or sales of cigarettes in the United States during the previous year. That payment is allocated among Settling States according to percentages for each State ("Allocable Share"), which Allocable Share bears no relationship to the PM's actual sales in the State. The original Escrow Statutes, however, allowed each NPM to obtain an immediate release of any excess (a) of its annual escrow deposit **[**16]** for sales in a State over (b) what would have been the State's Allocable Share of the hypothetical MSA payment the NPM would have made for those sales had it been an SPM. This could effectively eliminate an NPM's escrow obligation. For example, an NPM that made 50 percent of its cigarette sales in Kentucky could obtain a release of the difference between (a) an escrow deposit based on 50 percent of its sales and (b) Kentucky's Allocable Share of 1.7611586% of the NPM's total sales, which difference would result in a release of about 96.5 percent of the NPM's escrow deposit in Kentucky.

DE 149, p. 7 n.9.

obligation. Per the terms of the MSA, any SPM that joined the MSA within ninety days of its initial execution was not obligated to make payments to the extent that its market share in a particular year is less than its 1998 market share (or 125% of its 1997 market share, if that is higher). *See* MSA § IX(I). If the SPM's sales exceed this "grandfathered share," then it incurs payment obligations that are the same as other PMs, calculated on a per-unit basis for all cigarettes sold above the floor amount of its grandfathered share. *Id.* The plaintiff terms those SPMs that joined within ninety days the "grandfathered SPMs."

[*770] The plaintiff, Vibo Corporation, doing business as "General Tobacco," did not operate as a tobacco manufacturer at the time of the settlement. It began selling tobacco products in 2000, and until 2004, it operated as an NPM; that is, **[**18]** it sold cigarettes without signing on to the MSA. Am. Compl. PP 151-54. Despite the circumstances created by the MSA, because the plaintiff concentrated its sales in Kentucky and a few other states, the plaintiff was able to operate profitably until 2004, when the states began to implement amended escrow statutes. *Id.* PP 155, 157. As of 2004, the plaintiff had a market share of two percent. *Id.* P 156. In 2004, the plaintiff decided to apply for membership in the MSA. *Id.* P 160.

The plaintiff became a party to the MSA effective July 1, 2004. *Id.* P 167. It did so pursuant to the terms set forth in the "Adherence Agreement." *See* DE 234, Exhibit B. The Adherence Agreement specified the terms under which the plaintiff would meet its back-payment obligations and how it would make payments going forward. *Id.* Specifically, the Agreement provided that the plaintiff would make quarterly escrow payments toward its payment obligations. *See id.* P 10.

The present case arises from the failed attempt by General Tobacco to execute with the Settling States an Amended Adherence Agreement, granting it more favorable terms than those originally agreed to in the Adherence Agreement. General Tobacco and the **[**19]** Settling States had negotiated the new agreement successfully, Am. Compl. P 180, but the Settling States refused to execute the agreement without the OPMs' and a number of the SPMs' having waived any rights they might have under the MSA that would be triggered by the proposed amended terms of the plaintiff's membership in the MSA. Am. Compl. P 181. The rights at issue were those provided by the MSA's "Limited Most-Favored Nation" ("LMFN") clause. *Id.; see* MSA § XVIII(b). [7] When **[*771]** the manufacturers

---

[7] In pertinent part, the LMFN clause provides:

(b) <u>Limited Most-Favored Nation Provision.</u>

(2) If any Settling State resolves by settlement Claims against any Non-Participating Manufacturer after the **[**20]** MSA Execution Date comparable to any Released Claim, and such resolution includes overall terms that are more favorable to such Non-Participating Manufacturer than the terms of this Agreement (including, without limitation, any terms that relate to the marketing or distribution of Tobacco Products and any term that provides for a lower settlement cost on a per pack sold basis), then the overall terms of this Agreement will be revised so that the Original Participating Manufacturers will obtain, with respect to that Settling State, overall terms at least as relatively favorable (taking into account, among other things, all payments previously made by the Original Participating Manufacturers and the timing of any payments) as those obtained by such Non-Participating Manufacturer pursuant to such resolution of Claims. The foregoing shall include but not be limited: (a) to the treatment by any Settling State of a Future Affiliate, as that term is defined in agreements between any of the Settling States and Brooke Group Ltd., Liggett & Myers Inc. and/or Liggett Group, Inc.("Liggett"), whether or not such Future Affiliate is merged with, or its operations combined with, Liggett or any Affiliate **[**21]** thereof; and (b) to any application of the terms of any such agreement (including any terms subsequently negotiated pursuant to any such agreement) to a brand of Cigarettes (or tobacco-related assets)as a result of the purchase by or sale to Liggett of such brand or assets or as a result of any combination of ownership among Liggett and any entity that manufactures Tobacco Products. Provided, however, that revision of this Agreement pursuant to this subsection (2) shall not be required by virtue of the subsequent entry into this Agreement by a Tobacco Product Manufacturer that has not become a Participating Manufacturer as of the MSA Execution Date. Notwithstanding the provisions of subsection XVIII(j), the provisions of this subsection XVIII(b)(2) may be waived by (and only by) unanimous agreement of the Original Participating Manufacturers.

[. . . .]

made known that they intended to invoke LMFN privileges -- that is, that they would not agree to waive any of their rights that might be triggered by the Amended Adherence Agreement - the Settling States refused to execute the new Agreement. Am. Compl. P 184. In addition to alleging disparate treatment of SPMs such as itself and the "grandfathered" SPMs, the plaintiff contends that the PMs' "misuse" and "exploitation" of the LMFN provision was anti-competitive behavior in violation of the Sherman Act.

The plaintiff brings this action against a total of seventy defendants. These defendants are: (1) the three OPMs; [8] (2) fifteen "grandfathered" SPMs; [9] and (3) the fifty-two Attorneys General of the Settling States.

The plaintiff asserts that it does not challenge the MSA itself, only the preferential treatment given to the "grandfathered" SPMs and the allegedly wrongful utilization by the PMs of the LMFN clause of the MSA. The plaintiff challenges these aspects of the MSA and the failure of the Settling States to execute the Amended Adherence Agreement, making claims based on both antitrust and constitutional grounds. The plaintiff requests relief, under *42 U.S.C. § 1983*, for violations of its civil rights by the Attorneys General.

II. Legal Standard

HN2[] *Federal Rule of Civil Procedure 8(a)(2)* requires a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*, --, *550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (citing *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. In order to avoid a dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, a plaintiff has an obligation to provide the grounds of his entitlement to relief, which requires more than labels and conclusions; a formulaic recitation of the elements of a **[**24]** cause of action will not do. *Id. at 1964-65*. This does "not require a heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id. at 1974*. "[W]hen ruling on a defendant's motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (citations omitted). The court's "inquiry is limited to the content of the complaint." *Ohio Bell Telephone Co. v. CoreComm Newco., Inc., 214 F.Supp. 2d 810, 812 (N.D. Ohio 2002)*. "[A] well-pleaded complaint **[*772]** may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . ." *Bell Atlantic, 127 S.Ct. at 1965*.

III. Analysis

A. Antitrust Claims (counts one and eight of plaintiff's Amended Complaint).

The plaintiff alleges that the defendants have violated sections 1 and 3(a) of the Sherman Act, *15 U.S.C. §§ 1*, *3(a)*. Count one concerns the formation and provisions of the MSA itself and alleges wrongdoing by both the defendant

---

(4) **[**22]** If at any time any Settling State agrees to relieve, in any respect, any Participating Manufacturer's obligation to make the payments as provided in this Agreement, then, with respect to that Settling State, the terms of this Agreement shall be revised so that the other Participating Manufacturers receive terms as relatively favorable.

MSA §XVIII(b).

[8] The OPMs include: Philip Morris USA, Inc., R.J. Reynolds Tobacco Co., and Lorillard Tobacco Co.

[9] The "grandfathered" SPMs include: Commonwealth Brands, Inc., Liggett Group LLC, Vector Tobacco Inc., Imperial Tobacco Limited/ITL (USA), Japan Tobacco International USA, Inc., King Maker Manufacturing, Inc., Lane Limited, Lignum-2, Inc., M/S Dhanraj, P.T. Djarum, Premier Manufacturing, Inc., Santa Fe Natural Tobacco Co., Societe National D'Exploitation Industrielles des Tobacs et Allumettes (SEITA) Sherman's 1400 Broadway N.Y.C., Inc., and Top Tobacco, L.P. Defendant SPMs M/S Dhanraj and SEITA did not join the other SPMs in their motion **[**23]** to dismiss. *See* DE 156.

Attorneys General and the defendant manufacturers. The allegations of count eight concern actions taken only by the defendant manufacturers, **[**25]** not by any of the Settling States.

1. Antitrust Claims Against the Participating Manufacturers

The plaintiff asserts claims against the defendant manufacturers for violation of the Sherman Act in two counts of its complaint. The claims are interconnected but require separate analysis. First, the plaintiff challenges the PMs' involvement in the creation of the MSA and the inclusion in it of allegedly discriminatory provisions. Am. Compl. PP 195, 203. Second, the plaintiff seeks to hold the PMs liable for the more recent actions they took to influence the states not to execute the Amended Adherence Agreement. Am. Compl.PP 198, 199, 251-57.

The defendant PMs contend that the *Noerr-Pennington* doctrine grants them immunity from both claims. [10] In plainest terms, ***HN3***[] the *Noerr-Pennington* doctrine, named for the two Supreme Court cases from which it developed, protects private actors from liability under the Sherman Act for petitioning the government for action. *See United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. The doctrine rests on the individual's constitutional right to petition the government for **[**26]** action and the necessity, in a representative democracy, for citizens to communicate their needs and wants to the government. *See Huron Valley Hosp., Inc. v. City of Pontiac, 650 F.Supp. 1325, 1340 (E.D. Mich. 1986)*; *see also Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (explaining the reasoning used by the *Noerr* court); *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 383, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (describing *Noerr* immunity as protecting "citizens' participation in government").

HN4[] The motives of the parties are irrelevant to their protection by *Noerr-Pennington;* the parties remain immune even if they had a deliberately anti-competitive purpose in seeking government action. *See Campbell v. PMI Food Equip. Group, Inc., 509 F.3d 776, 790 (6th Cir. 2007)* (describing the "essence of the doctrine" as "parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent" (citations **[**27]** omitted)); *Westmac, Inc. v. Smith, 797 F.2d 313, 315 (6th Cir. 1986)* ("[G]enuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts." (citations omitted)). Immunity **[*773]** exists regardless of any conspiracy between the private parties and government actors that may be motivated by selfish interests. *City of Columbia, 499 U.S. at 383*. And, importantly to the present case, the immunity provided private actors by the doctrine extends to the effects of a successful petition: "'[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (citing *Noerr, 365 U.S. at 143*; *Pennington, 381 U.S. at 671*). Furthermore, the *Noerr-Pennington* doctrine applies to all of an individual's interactions with government, including its interactions with the executive branch and negotiations associated with the reaching of a settlement of litigation. *See Noerr, 365 U.S. at 136* **[**28]** ("[T]he Sherman Act does not prohibit two or more persons associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc., 263 F.3d 239, 252 (3d Cir. 2001)* (affirming district court's finding that defendant tobacco manufacturers' "negotiating the settlement was akin to petitioning the government"); *Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987)* (ordinance implemented as result of settlement negotiations of case involving damages claim; settlement and accompanying lobbying efforts were "protected efforts to petition the government").

---

[10] Defendant manufacturers filed two separate motions, one by the three OPMs and one by thirteen of the SPMs. Their motions are almost identical substantively.

The defendant manufacturers enjoy immunity for their role in the creation of the Master Settlement Agreement and the provisions challenged by the plaintiff as discriminatory. The MSA resulted from a lawsuit initiated by the state governments against the OPMs. As a product of the settlement of that lawsuit, it, and all of its provisions, represent the result of the OPMs' active negotiations with state government officials. The actions of the defendant OPMs in negotiating and executing **[**29]** the MSA were a "concerted effort by defendants to influence public officials, i.e., the states' Attorneys General, to accept a settlement in exchange for dismissing the numerous lawsuits pending against [them]," and, as such, these actions cannot be a source of antitrust liability. *Hise v. Philip Morris Inc., 46 F. Supp. 2d 1201, 1207 (N.D. Okla. 1999)*, *aff'd 208 F.3d 226 (10th Cir. 2000)*. To the extent that the plaintiff alleges that the grandfathered SPMs also were involved in petitioning for the inclusion of provisions favorable to them, those provisions are the product of those SPMs' interactions with state government officials. "[T]he doctrine would surely ring hollow if it failed to encompass private entities who, after having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement . . . ." *Hise, 46 F.Supp. 2d at 1207*.

In so finding, this court agrees with others which have already considered the issue of whether the defendants are shielded by the *Noerr-Pennington* doctrine from any antitrust liability connected with their role in the creation of the MSA. *See* *Sanders v. Brown, 504 F.3d 903 (9th Cir. 2007)*; **[**30]** *PTI, Inc. v. Philip Morris, Inc., 100 F. Supp. 2d 1179 (C.D. Cal. 2000)* (finding that "activities involved with the negotiation, execution, and attempts to implement the MSA" comprise "precisely the type of activity the doctrine was intended to protect"); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc., 104 F. Supp. 2d 501* ***[*774]*** *(W.D. Pa 2000)* (concluding that "to the extent Plaintiff's claims are based upon the Defendants' actions in negotiating and executing the MSA, said actions fall within the category of conduct protected by the *Noerr-Pennington* immunity doctrine"), *aff'd,* *263 F.3d 239 (3rd Cir. 2001)*; *Hise, 46 F. Supp at 1206-07*. [11]

The *Noerr-Pennington* doctrine likewise shields the defendants from liability for their more recent actions taken in order to influence the decision of the state **[**31]** Attorneys General to refuse to execute the plaintiff's Amended Adherence Agreement. The plaintiff alleges that the defendant manufacturers have "misused and exploited the LMFN provision." Am. Compl. P 256. Clarifying the factual contours of this claim at the motions hearing, plaintiff's counsel argued that although the defendants believe they are entitled to object to the agreement because they adjudge it gives the plaintiff more favorable terms under the MFA than they themselves enjoy, as a factual matter, the Amended Adherence Agreement actually does *not* grant the plaintiff more favorable terms under the MSA. Therefore, the plaintiff's argument proceeds, under the plaintiff's interpretation of the LMFN clause, the defendant manufacturers actually have no rights to exercise. *See* TR 121-22, 126-28.

Such details are irrelevant, however, to the court's resolution of the instant question. Regardless of what rights are granted by the LMFN provision, regardless of whether the exact terms of the Amended Adherence Agreement result in the plaintiff's receiving "more favorable terms" than the other PMs, the defendant manufacturers are immune under the *Noerr-Pennington* doctrine for any anti-competitive **[**32]** effects of the pressure that the plaintiff alleges they have asserted over the state Attorneys General.

Accepting all of the plaintiff's allegations as true, the plaintiff has merely alleged a classic example of a claim for which the *Noerr-Pennington* doctrine grants immunity. The PMs -- private actors -- have exerted influence on the government actors; and, as a result of that influence, the government actors have declined to sign and execute the Amended Adherence Agreement. This refusal, and the accompanying refusal to grant the plaintiff the terms of that agreement, have anti-competitive effects: the court accepts as true the plaintiff's allegations that it has been denied reasonable access to the MSA and that the MSA is an essential facility. [12] However, simply put, the PMs have

---

[11] The plaintiff has attempted to distinguish its claims from those made in the cited cases based on differences between itself and the other plaintiffs. As the relevant conduct at issue in this case, that is, the conduct of the defendant PMs in negotiating and executing the settlement, is identical, the differences in the situations of the plaintiffs is of no relevance to the court's reasoning.

[12] Given the court's reliance on *Noerr-Pennington,* the court need not determine whether the plaintiff **[**33]** has stated a claim under the "essential facilities" doctrine, although the court briefly addresses the elements of that doctrine in n.18, *infra.*

petitioned for, and received, certain government action that creates anti-competitive effects upon the plaintiff. Under the *Noerr-Pennington* doctrine, the defendant manufacturers are entitled to immunity for the anti-competitive effects of their successful petition for government action. *See* Noerr, 365 U.S. at 136.

The plaintiff alleges nothing beyond the PMs' agreement to persuade the defendant state actors to withhold access from the plaintiff, in restraint of trade. Importantly, any anti-competitive effects experienced by the plaintiff were caused by the **[*775]** government's *independent* action, not by the private action. *See* PTI, Inc., 100 F.Supp.2d at 1194 (distinguishing *Allied Tube* because the trade restraint imposed against the plaintiff in that case had been imposed by private persons, not by public officials). *Cf.* FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990) (finding no immunity under *Noerr-Pennington* where the anti-competitive effects of the competitors' boycott were caused directly by the respondents, not by an independent government action). [13]

The plaintiff emphasizes that its claims against the defendant manufacturers could constitute *per se* antitrust violations. TR 124-25. The *Noerr-Pennington* doctrine affords no exception, however, for the PMs' petitioning for the state's permission to commit *per se* antitrust violations. *See* S&M Brands, Inc. v. Summers, 393 F. Supp. 2d 604, 629 (M.D. Tenn. 2005)("Even if the MSA could be challenged as a *per se* Sherman Act violation, however, such a challenge would be barred by the *Noerr-Pennington* doctrine."); A. D. Bedell, 263 F.3d at 250-66 (holding action by the defendant tobacco company protected by the *Noerr-Pennington* doctrine even where it may not have been protected by the state-action doctrine due to state's failure to actively supervise the authorization **[**35]** it granted the manufacturers to commit *per se* violations).

The plaintiff has also argued that the *Noerr-Pennington* doctrine should not apply because the defendants' actions in influencing the government action fit the "sham" exception to the doctrine. DE 239, p. 11. Despite the applicability of the *Noerr-Pennington* doctrine, courts nevertheless hold defendants liable for the anti-competitive effects of their actions when the defendants have "use[d] the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). "A "sham" situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action, not one who genuinely seeks to achieve his governmental result, but does so *through improper means."* Id. at 380 (internal quotations omitted)(citation omitted). The plaintiff does not allege that the creation of the MSA itself was a sham; nor could it do so successfully. *See* PTI, Inc., 100 F.Supp.2d at 1193 ("Far from an objectively baseless attempt to harm its competitors through the abuse of governmental process, the M.S.A. reflects a genuine, **[**36]** ultimately successful attempt to settle extensive current and potential litigation with the states."). Beyond its claim of the PMs' allegedly wrongful assertion of LMFN rights, already addressed by the court, the plaintiff fails to allege any facts that would support the application of the "sham" exception; rather, it fully acknowledges throughout all pleadings and at the hearing on the motions that the defendants truly sought the anti-competitive effects of the states' **[*776]** denial. The "sham" exception, therefore, does not apply to the instant case. [14]

Given this resolution of the defendants' motions as to the antitrust claims against the defendant manufacturers, the court finds it unnecessary to consider their other **[**37]** arguments for dismissal of these claims.

---

[13] As a result, it is not actually clear that the wrong alleged even falls within the scope of the Sherman Act. *See* section II(A)(1), *infra,* for a discussion of the state action doctrine, also known as *Parker* immunity, and its applicability to the instant case. However, to whatever extent the **[**34]** wrong alleged does fall within the scope of the *Noerr-Pennington* doctrine, the defendant manufacturers are immune from liability. *See* City of Columbia, 111 S. Ct. at 1355 ("As we have described, ***HN5***[] *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government.").

[14] At the hearing on the motions, the plaintiff also argued that the defendants were not immune because the MSA is a commercial agreement between the defendant PMs and the states. ***HN6***[] "[N]o such 'commercial exception' exists to the Noerr-Pennington doctrine." *PTI, Inc., 100 F.Supp.2d at 1193 n.12* (citing In re Airport Car Rental Antitrust Litigation, 693 F.2d 84, 88 (9th Cir. 1982)); *see also* Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985).

2. Antitrust Claims Against the States

The court next will consider the antitrust claims made against the states. [15] The plaintiff challenges the involvement of the defendant Attorneys General in creating the MSA, with its resulting discriminatory impact on the plaintiff, as well as their enforcement of the MSA. The plaintiff also challenges the states' refusal to execute the Amended Adherence Agreement. Although the plaintiff generally characterizes that decision as a result of an antitrust violation by the defendant manufacturers, the rejection of the Amended Adherence Agreement by the state Attorneys General was an action taken by the states, and the states' decision to deny access is somewhat implicated in the plaintiff's complaint. *See* Am. Compl. PP 199, 200.

The defendant Attorneys General plead immunity under the doctrine of state-action immunity, as articulated in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. To the extent the plaintiff has responded to that argument, it maintains that the states have wrongfully allowed the defendant manufacturers to influence the states' decision to refuse to implement **[**39]** the Amended Adherence Agreement.

a. The state-action doctrine: the basics

HN7[] When acting in its capacity as a sovereign entity, a state cannot violate antitrust laws. *Parker v. Brown, 317 U.S. at 352 (1943)*. The Sherman Act was not enacted to curtail the sovereign activities of states. *Id. at 351* ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."). When a state imposes a trade restraint, it has "imposed the restraint as an act of government" and has not in so governing "entered into [a] conspiracy in restraint of trade or . . . establish[ed] [a] monopoly." *Id. at 352* (citing **[*777]** *Olsen v. Smith, 195 U.S. 332, 25 S. Ct. 52, 49 L. Ed. 224 (1904))*. "Under the so-called 'state action doctrine,' it is well established that ***antitrust law*** does not apply to states acting as sovereigns . . . . The Supreme Court has determined that principles of federalism and state sovereignty provide blanket protection for states." *Jackson, Tenn. Hosp. Co., LLC v. West Tenn. Healthcare, Inc., 414 F.3d 608, 611 (6th Cir. 2004)* (citing *Parker, 317 U.S. at 341*).

However, ***HN8***[] in certain situations, the challenged actions must be further scrutinized. **[**40]** If the state, through a statute, has created some law or regulatory scheme that authorizes private actors to engage in antitrust violations, that statute may be pre-empted by the Sherman Act, pursuant to the *Supremacy Clause of the U.S. Constitution*. *See* *Tritent Intern. Corp. v. Kentucky, 467 F.3d 547, 554 (2006)* (determining that where the state had passed a statute challenged as being a violation of the Sherman Act, the court must first engage in traditional pre-emption analysis in order to ascertain "whether there exists an irreconcilable conflict between federal and state regulatory schemes" (quoting *Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)))*. When such a statute is pre-empted, the state may nevertheless retain immunity if the state, acting in its sovereign capacity, remains sufficiently involved such that the regulatory scheme and its antitrust effects retain the character of direct state action. *Id.* The court must resolve this question using the two-prong test crafted by the court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. [16] Similarly, when a plaintiff directly challenges the actions of private actors or a state **[**41]** agency

[15] The court will attempt to address thoroughly such claims, although it is not entirely clear that the plaintiff intended to make them. At the hearing on the motions, plaintiff's counsel apparently disavowed such claims, stating that "[t]he antitrust conspiracy here is not state action." TR 55, ln 14-15. He added, "So we're not challenging state action here. We're challenging the inability **[**38]** of the states to act as they want to act with us, because the Defendant manufacturers have banded together and they're preventing the states from acting." TR 58, ln 2-5. Furthermore, in the plaintiff's response to the defendants' motions to dismiss, the plaintiff did not specifically address the argument of the defendant Attorneys General that state-action immunity applies to any antitrust claim against the states. At the hearing, however, the court asked the plaintiff whether counts one and eight were alleged against the states, to which counsel for the plaintiff replied: "Count 1 is against the states. Count 8 is not." TR 51, 18-19. The only antitrust claim that at all implicates the states is count one of the plaintiff's complaint. Am. Compl. PP 195, 196, 199, 200, 203. What follows is the court's attempt to reconcile these inconsistencies.

that claim they are acting according to some state authorization, the court also uses the *Midcal* test to determine whether the challenged actions are so closely connected to the sovereign state that they are acts of the state warranting state-action immunity. *See, e.g.,* First Amer. Title Co. v. Devaugh, 480 F.3d 438 (6th Cir. 2007).

b. Midcal is not applicable to the present case.

Where the plaintiff challenges acts taken directly by a state, however, the court does not apply the *Midcal* two-part test. *See* Hoover v. Ronwin, 466 U.S. 558, 568-69, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); *see also* Sanders v. Brown, 504 F.3d 903, 917 (9th Cir. 2007) (concluding that in *Hoover,* the Supreme Court established that **HN9**[] "the *Midcal* test does not apply to sovereign state acts, which are immune from antitrust liability so long as they [are not pre-empted due to their having] authoriz[ed] *per se* illegal activities"); *see also* Phillip E. Areeda and Herbert Hovenkamp, ***Antitrust Law*** **[**42]** P217b (3d ed. 2006) (explaining the relationship among *Midcal, Rice,* and *Parker* and describing the inquiries required by those cases as "fundamentally consistent but sequential"). [17]

[*778] Here, as far as the antitrust claims against the states go, neither of the two scenarios calling for the Midcal analysis is present. The plaintiff has neither challenged a statute nor alleged that the MSA itself is pre-empted by the Sherman Act because it authorizes the PMs to **[**43]** violate antitrust laws. [18]

---

[16] According to *Midcal,* "First, the challenged restraint must be one articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." Tritent, 467 F.3d at 555 (quoting Midcal, 445 U.S. at 105).

[17] The cited material also discusses Fisher v. City of Berkeley, California, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986), which established the concept of a "hybrid restraint." A "hybrid restraint" "exists when the state passes laws that enforce companies' decisions to collude on prices, to dictate prices by which other companies must abide, or to otherwise violate the Sherman Act." Sanders, 504 F.3d at 918. Plaintiff's counsel vaguely alluded to the ideas of *Fisher* at the hearing on the motions, in the context of the plaintiff's claims against the PMs. *See* TR 146, ln 18-19. Because the court does not understand the plaintiff to have alleged that the MSA is a hybrid restraint, it will not address *Fisher* or any relevance it may have to the present dispute.

[18] The court here attempts to address any confusion on this point.

At the hearing on the motions, in response to the court's question as to whether the plaintiff was alleging that the MSA or any portion of it constituted an antitrust violation, plaintiff's counsel stated, "We are alleging that the disparate payment terms for Subsequent Participating Manufacturers under the Master Settlement Agreement constitutes an antitrust violation." TR 54, ln 10-12. Counsel then elaborated, "The case law says that . . . an essential facilities claim . . . is a per se violation of the antitrust laws." TR 54, ln 14-16.

HN10[] When a state authorizes an antitrust violation by private actors in all situations, that law is pre-empted by the Sherman Act. *See* Tritent, 467 F.3d at 554-56. In *Tritent,* the plaintiff alleged that Kentucky's complementary legislation violated the Sherman Act. 467 F.3d at 548-49. Finding that the case was a "typical preemption case," the Sixth Circuit sought to determine "whether there exist[ed] an irreconcilable conflict between the federal and state regulatory schemes." Id. at 554 (quoting Rice, 458 U.S. at 659). Guided by *Rice,* the *Tritent* court concluded **[**44]** that the state legislation was not pre-empted by the Sherman Act. Id. at 556-58. The court emphasized that for such pre-emption to exist, a statute must mandate illegal activity "in all cases," and ultimately held that Kentucky's statute was not pre-empted because it did not do so. Id. 554-56.

Count one is the only count that the plaintiff asserts is against the states, and so any claim that the states have acted wrongfully because the MSA authorizes antitrust violations would have to come from this count. Count one concerns the plaintiff's "essential facilities" allegations. **HN11**[] The basic elements of an "essential facilities" antitrust violation are that a competitor has denied the plaintiff reasonable access to some facility the competitor controls and that is necessary to compete in their shared market. *See, e.g.,* Ohio Bell Telephone Co. v. CoreComm Newco, Inc. 214 F.Supp.2d 810, 818 (N.D.Ohio, 2002) (citing Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir.1996)) (describing the "elements necessary to establish an essential facilities claim").

The court will assume for the sake of argument that the MSA and its provisions are a "regulatory scheme" created by a state **[**45]** and capable of being pre-empted by federal law. The plaintiff has not alleged that the MSA authorizes its competitors to deny it access to the MSA. Rather, the plaintiff has argued that the state Attorneys General have allowed themselves, *unnecessarily,* and in violation of the rights actually created by the LMFN clause, to be influenced by the PMs' threats to invoke

[*779] c. The states are immune from liability for anti-competitive effects of all acts the plaintiff alleges were wrongful.

The states' negotiation, execution, and enforcement of the MSA and their decision not to enter into the Amended Adherence Agreement are all direct state action, and the states are immune from liability for those actions.

HN12[] A state simply is *incapable* of entering an agreement that violates the Sherman Act. [19] The state-action doctrine traditionally is applied to acts of the legislature or regulatory schemes constructed by states. However, it also applies to actions by officials in the state's executive branch. *See Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24, 28-29 (1st Cir. 1999)*; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987)*; *see also Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718 (6th Cir. 1993)* **[**47]** (finding state-action immunity for actions taken by state supreme court because it was regulating the practice of law pursuant to constitutional grant of power).

HN13[] A state attorney general, as a member of the executive branch of government, is entitled to immunity for his or her executive actions. Any decision made by the defendant Attorneys General, therefore, either in negotiating and executing the MSA or in deciding not to execute the Amended Adherence Agreement, is direct state action falling completely outside the scope of the Sherman Act. This conclusion is supported by the plaintiff's choice to sue the defendant Attorneys General in their official capacity. *See Will v. Mich. Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45, (1989)* (finding that a suit against a state official in his or her official capacity is a suit against the state). Other courts have held that ***HN14***[] the acts of the Attorneys General in negotiating **[**48]** and entering into the MSA are direct state action. *See Sanders, 504 F.3d 903*; *Sanders v. Lockyer, 365 F. Supp. 2d 1093, 1099 (N.D. Cal. 2005)*.

The plaintiff also alleges that the state's enforcement of the MSA's discriminatory terms, including refusing to list the plaintiff on a list of approved manufacturers and attempts to take possession of the plaintiff's escrowed funds "violate[] Plaintiff's legal rights." Am. Compl. P 196. This claim, to the extent it suggests a potential violation of the Sherman Act, likewise targets direct state action, outside the scope of the Sherman Act.

The plaintiff's allegations that the MSA was created as part of a conspiracy entered by the Settling States with the PMs or that these actors conspired to prevent enactment of the Amended Adherence Agreement have no effect on the state's entitlement to immunity. *See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* ("[W]e affirm our rejection of any interpretation of the Sherman Act that would allow Plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" (quoting *Hoover, 466 U.S. at 580*)). The motives of the state **[**49]** in taking the action it took are simply irrelevant to the court's inquiry. *See Hoover, 466 U.S. at 579-80* ("[W]here the action complained of . . . was that of the state itself, **[*780]** the action is exempt from antitrust liability regardless of the State's motives in taking the action.").

---

their LMFN rights. Even when the court construes all facts in favor of the plaintiff, the plaintiff has not argued that the MSA itself authorizes what the PMs have done. *See* Am. Compl. P 197, 198, 199, 203. And it certainly has presented no facts to show that the MSA authorizes a violation "in all cases."

On the contrary, the plaintiff admits that the MSA does not give the plaintiff's competitors the ability to decide whether or on what terms a company will have access to the MSA. Counsel for the plaintiff analogized the MSA to a bridge to the market, with the "Attorneys General . . . sitting in the tollbooth controlling the gate. But standing over their shoulders . . . [are] the manufacturers" influencing the decision-making of the Attorneys General. TR 130, ln 17-24. The facts of the present case, as presented by the plaintiff, **[**46]** are simply that the states have allowed the PMs to influence their decision. And that decision, as indicated above, is direct state action for which the state remains immune. Thus, the plaintiff's "essential facilities" claim cannot constitute an allegation that the MSA should be pre-empted by the Sherman Act, nor would it succeed.

[19] The state is not incapable of entering into an agreement, or passing a law, that presents constitutional problems. The alleged constitutional defects of the agreement, however, do not implicate the Sherman Act and will be addressed by the court in a subsequent section of this opinion.

In summary, the negotiation, execution, and enforcement of the MSA and the associated decisions of the Attorneys General, as challenged by the plaintiff, are acts of the sovereign state. While such acts are not immune from *every* kind of challenge, they are immune from challenge as violations of the antitrust laws.

Given the court's conclusion that the states are entitled to *Parker v. Brown* state-action immunity for any antitrust claims made by the plaintiff, the court will not reach the additional arguments for dismissal made by the defendant Attorneys General. The court now turns to one challenge to which the states' acts remain vulnerable: the plaintiff's claims that the MSA violates the U.S. Constitution.

B. Constitutional Claims (counts two, three, four, and five of the plaintiff's amended complaint).

The plaintiff seeks relief on the following constitutional grounds: (1) *Equal Protection Clause*; (2) *Due Process Clause*; **[**50]** (3) *Commerce Clause*; and (4) Compact Clause. The plaintiff brings these claims against all of the defendant Attorneys General. [20]

1. Plaintiff Waived Constitutional Challenges to Provisions of the MSA.

The defendant Attorneys General argue that through the operation of section XV of the MSA, the plaintiff has waived any constitutional challenges to the MSA. In order to resolve this issue, the court must first determine whether the language of the provision encompasses the types of constitutional claims currently before the court. If so, the court then must determine whether the plaintiff made a valid waiver of those claims.

a. The waiver encompasses the plaintiff's *Equal Protection*, *Due Process*, and *Commerce Clause* claims.

The plaintiff is bound to the MSA through the Adherence Agreement entered into by the plaintiff and the Settling States in 2004. *See* Am. Compl., Exhibit B. The Adherence Agreement is a contract. The MSA, likewise, is a contract. *See, e.g., Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150, 152 (6th Cir. 1992)* **[**51]** (finding that ***HN15***[] a settlement agreement is a contract)(citations omitted). ***HN16***[] In interpreting a contract, the court is guided by well-established principles of contract interpretation. The court will apply Kentucky law on contract interpretation. [21]

Kentucky law on contract interpretation recently has been summarized succinctly as follows:

> ***HN18***[] Under Kentucky law, contract interpretation is a question of law for the Court to determine. *Davis v. Siemens Med. Solutions USA, Inc., 399 F.Supp.2d 785, 792 (W.D. Ky. 2005)*. To interpret a contract, the Court looks to its language to **[*781]** determine the parties' intentions. *See Abney v. Nationwide Mut. Ins. Co., 215 S.W.3d 699, 703 (Ky. 2006)*. **[**52]** "Where no ambiguity exists in the contract" the Court looks "only as far as the four corner [sic] of the document to determine that intent." *Id.* Whether the contract is ambiguous is a question of law for the Court to determine. *Id.* "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 385 (Ky. Ct. App. 2002)*.

*Dodd v. Dyke Industries, Inc., 2008 U.S. Dist. LEXIS 34786, 2008 WL 1884081, at *5 (W.D. Ky. April 28, 2008)*.

[20] The plaintiff does not argue that the Settling States' refusal to enact the Amended Adherence Agreement violated its constitutional rights. All of the plaintiff's constitutional claims pertain to the MSA itself.

[21] The court does not sit in diversity jurisdiction for this action and therefore applies federal choice-of-law rules. ***HN17***[] Federal choice-of-law rules dictate that the court must apply the law of the jurisdiction having the most significant relationship with the action. *See, e.g., In re Gaston & Snow, 243 F.3d 599, 605 (2d Cir. 2001)*. Neither party has suggested that it matters for the resolution of this issue which state's law of contract interpretation the court uses. The court therefore will be guided by Kentucky law on contracts.

Section XV of the MSA is entitled "Voluntary Act of the Parties" and provides as follows:

> The Settling States and the Participating Manufacturers acknowledge and agree that this Agreement is voluntarily entered by each Settling State and each Participating Manufacturer as the result of arm's-length negotiations, and each Settling State and each Participating Manufacturer was represented by counsel in deciding to enter into this Agreement. Each Participating Manufacturer further acknowledges that it understands that certain provisions of this Agreement may require it to act or refrain from acting in a manner that could otherwise give rise to state or federal constitutional **[**53]** challenges and that, by voluntarily consenting to this Agreement, it (and the Tobacco-Related organizations (or any trade associations formed or controlled by any Participating Manufacturer)) waives for the purposes of performance of this Agreement any and all claims that the provisions of this Agreement violate the state or federal constitutions. Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations or obligations expressly agreed to in this Agreement or the Consent Decree.

The plaintiff asserts that this provision does not operate as a waiver of its present constitutional claims because it is only "a waiver of a PM's constitutional rights with respect to requirements or restrictions explicitly imposed by the MSA with respect to the PM's own actions." DE 239, p. 18. Noting that the first clause of the second sentence of section XV references actions of the PM itself, the plaintiff further elaborates that "MSA [section] XV does not waive the PM's rights to challenge the actions **[**54]** of others relating to the grandfathered SPMs' unjustified favoritism under the agreement." *Id.* The plaintiff contends that this waiver is primarily aimed at obtaining from the PMs a waiver of any *First Amendment* challenges to the MSA. *Id.*

The plaintiff's arguments fail. As a matter of law, this provision is unambiguous and operates as a broad waiver of the PMs' constitutional rights. The provision explicitly states that a Participating Manufacturer "waives for the purposes of performance of this Agreement any and all claims that the provisions of this Agreement violate the state or federal constitutions." MSA § XV. The phrase "any and all claims" could not be broader. Had the parties intended the provision to extend only to the PMs' obligations under the contract that could implicate the PMs' rights under the *First Amendment*, the provision could have provided expressly that the PMs waived any and all claims that the provisions of the agreement violated the *First Amendment* and its counterparts in state constitutions. The provision does not limit its scope in this **[*782]** manner, and the court must take the meaning of the provision as it is presented by the words used in the document.

As pointed **[**55]** out by the plaintiff, the waiver extends only so far as the MSA makes requirements upon a participating manufacturer, as expressed by provisions of the agreement that a participating manufacturer must abide by in order to perform the agreement. However, the plaintiff's *Equal Protection*, *Due Process*, and *Commerce Clause* claims all implicate "provisions of [the] Agreement" that affect the plaintiff's performance under the contract. The court will consider each in turn, pointing to the provision of the MSA that requires the actions challenged by the plaintiff's claims.

I. Equal Protection claim

First, according to count two of the plaintiff's complaint, "[t]he MSA's unequal application of its purported back-payment requirements, grandfather exemptions and escrow requirements violates the rights of General Tobacco under the *Equal Protection Clause of the Fourteenth Amendment*." Am. Compl. P 209. The "grandfathered exemptions" are provided for by section IX(I) of the MSA, wherein the agreement specifically explains that a Subsequent Participating Manufacturer has payment obligations under the agreement "only in the event that its Market Share in any calendar year exceeds the greater of (1) **[**56]** its 1998 Market Share or (2) 125 percent of its 1997 Market Share . . . . " MSA § IX(I). Because the plaintiff's market share in 1998 was zero, and those SPMs the plaintiff terms "grandfathered SPMs" had a market share in those years, its payment obligation accordingly is higher than those other, older, SPMs. The plaintiff's claim of an *Equal Protection Clause* violation therefore involves the plaintiff's obligations under this provision of the agreement. To be more explicit, this provision of the agreement requires the plaintiff to act (that is, make payments) in a way that the plaintiff now wants to argue is a violation of its right to equal protection of the laws under the federal constitution. This claim is waived by section fifteen of the MSA. Similarly, the plaintiff's claim regarding its back-payment requirements results from the requirement of a provision of the MSA that it act in a certain manner. *See* MSA § II(jj). In its provisions, the MSA also provides directions as to the PMs' obligation to make payments to an escrow account. [22] *See* MSA § IX(a). The language of the plaintiff's complaint makes clear that its claim for violation of the *Equal Protection Clause* arises from **[**57]** provisions of the MSA, as it attributes the allegedly disparate treatment it suffers directly to the "MSA's unequal application" of certain requirements. Am. Compl. P 209. Because all of those provisions require certain action of or restraint by PMs, the plaintiff has waived constitutional challenges to them.

[*783] *ii. Due Process claim*

Second, the plaintiff's Due Process claim implicates the same provisions as its Equal Protection claim. The plaintiff first takes issue with the "MSA's payment structure," arguing that the MSA has deprived the plaintiff of its substantive due process rights. Am. Compl. P 214. This payment structure is created by provisions of the MSA, as discussed in the previous paragraph. Therefore, this claim is waived by section fifteen, as such provisions are provisions that require the plaintiff to "act or refrain from acting in a manner that could otherwise give rise to . . . constitutional challenges." MSA § XV. The plaintiff's procedural due process claim also is waived. *See* Am. Compl. P 216. The plaintiff's argument that it has not received appropriate process regarding the MSA's requirements that it make certain payments implicates the MSA provisions that require it to make payments.

iii. Commerce Clause claim

Third, the plaintiff's claim for relief under the *Commerce Clause* is also waived because it involves provisions of the MSA that require it to act or refrain from acting for the purpose of performing the agreement. **[**59]** The plaintiff alleges that the MSA violates the *Commerce Clause* due to its requirement that payments be "collected nationally and then apportioned among the Settling States" and therefore "each Settling State imposes a fee on each PM based upon sales not just in that State, but also in all the Settling States." Am. Compl. P 221. As indicated by the language of the plaintiff's complaint, this claim involves a requirement made on the plaintiff by the provisions of the MSA. *See* MSA § IX(a) (specifying the procedure by which all participating manufacturers are to make payments to a single designated escrow agent); *Id.* § IX(c)(2)(A) (directing that funds paid by OPMs will then be allocated among the Settling States according to certain formula); *Id.* § IX(i)(1) (C)) (directing that payments made by SPMs will be allocated and distributed in the same manner as those made by the OPMs). This claim, then, also concerns requirements made of the plaintiff by provisions of the MSA. The plaintiff's second claim under the *Commerce Clause*, that the terms provide "preferential treatment to SPMs that were conducting business in the Settling States in 1998 to the detriment of later market entrants," involves **[**60]** the provisions of the MSA regarding the calculation of SPMs' market share for the purposes of performance of the agreement as discussed above in regards to the plaintiff's *Equal Protection Clause* claim. The plaintiff has also waived this claim.

Other courts have touched upon this provision of the MSA. *See* *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 116 Cal. App. 4th 1253, 11 Cal. Rptr. 3d 317, 329 (Cal. Ct. App. 2004)* (finding that injunction imposed on tobacco company consistent with the advertising restrictions company had agreed to in the MSA and therefore finding the company had waived its constitutional challenged to the injunction); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 107 Cal. App. 4th 516, 132 Cal. Rptr. 2d 151, 164 (Cal. Ct. App. 2003)* (finding tobacco company had waived constitutional claim challenging interpretation of provisions of the MSA restricting commercial

---

[22] The plaintiff's Equal Protection challenge to the requirement that it make payments into the escrow account on a quarterly basis does not challenge a provision of the MSA; rather, it attacks a requirement that is specific to the plaintiff and is detailed in the Adherence Agreement, which makes the MSA run against the plaintiff. *See* Am. Compl., Exhibit B, P 10. Even if the plaintiff had not waived such a constitutional challenge, it would fail on its merits. The parties agree that ***HN19***[] any Equal Protection claim calls for rational-basis review. The defendant Attorneys General have stated a rational basis for requiring quarterly, rather than annual, payments into escrow: "[T]he States have learned since the signing of the MSA that quarterly deposits of both escrow and MSA payments encourage compliance." DE 149, p.25. The plaintiff's factual allegations do not contradict the soundness **[**58]** of this rationale. The claim is therefore without merit.

speech because "those express contract terms remained express provisions subject to Reynolds's knowing and intentional waiver of the right to contest their constitutionality"). While the present case has called for a more expansive interpretation of the waiver provision, this court's findings are consistent with the findings of these **[**61]** courts.

[*784] Because the court finds that the waiver of section fifteen extends only so far as a participating manufacturer's obligations created by the MSA, the plaintiff's claim that the existence of the MSA, that is, the MSA in its entirety and not the specific requirements any of its provisions make upon a participating manufacturer, is a violation of the Compact Clause is not waived. This claim will be discussed below.

b. The plaintiff's waiver was knowing, intelligent, and voluntary.

The court now considers whether the plaintiff's waiver of these three constitutional claims is a valid waiver. ***HN20***[] To be valid, a waiver of constitutional rights must be made "voluntarily, intelligently, and knowingly." *Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007)* (quoting *Fuentes v. Shevin, 407 U.S. 67, 94-95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972))*; *see also* *D.H. Overmyer v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972)* (holding that in order for a waiver of constitutional rights to be valid, it must be made with an awareness of the consequences of the waiver). The law presumes against the waiver of constitutional rights, a presumption which only clear evidence to the contrary can overcome. *See* *Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)* **[**62]** (citations omitted). In assessing the validity of a waiver of constitutional rights, the court should consider the circumstances in which the waiver was made. *See* *Fuentes, 407 U.S. at 95*; *see also* *Overmyer, 405 U.S. at 186* (finding significant to determination of validity of waiver that the waiving corporation was represented by counsel).

The terms of section fifteen recite that the waiver was made voluntarily, with representation by counsel. In agreeing to the provision, then, the plaintiff agreed that it was entering the agreement voluntarily. The provision also states that the signing PM was represented by counsel. The plaintiff does not contest either that it entered the agreement voluntarily or that it was represented by counsel. The plaintiff argues that due to the facts alleged in connection with its claim, it was fraudulently induced to enter into the agreement, so that it could not have effected a knowing waiver.

In its allegations of fraudulent inducement, the plaintiff alleges that "the Settling States made material misrepresentations or omissions in order to induce General Tobacco to join the MSA, all the while knowing that the Settling States would hold General Tobacco to **[**63]** the MSA's purported discriminatory and onerous terms and requirements not required of the grandfathered SPMs." Am. Compl. P 247. In its response to the defendants' motion to dismiss, the plaintiff alleges three misrepresentations: (1) that the plaintiff requested specific information about the extent of the exemptions granted to the grandfathered SPMs but was denied access to the information on grounds that it was confidential; *see* Am. Compl. P 164; (2) that the plaintiff sought assurance that the Settling States were enforcing their Escrow Statutes and was so assured; *see* Am. Compl.P 165; and (3) that the Settling States represented to the plaintiff that the LMFN provision of the MSA would not affect the states' ability to grant the plaintiff entry into the MSA; *see* Am. Compl. P 166. *See* DE 239, p. 37.

HN21[] A valid waiver can also be defined as the "intentional relinquishment or abandonment of a known right." *See* *Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)*. Accepting as true all of the plaintiff's allegations, no fact **[*785]** emerges that changes the voluntary, intelligent, and knowing nature of the plaintiff's waiver. Any misrepresentations by the states as to how diligently states were enforcing **[**64]** their Escrow Statutes or the impact of the LMFN clause have no relevance to the plaintiff's understanding of what rights it was giving up by signing on to the MSA. By alleging it did not know the extent of the exemptions granted to the SPMs, the plaintiff apparently asserts that it did not know the 1997 and 1998 market shares of the other SPMs. This figure affects the exact amount that SPMs owe under the MSA, but it does not affect the knowledge the plaintiff had at the time it entered into the agreement: that the SPMs paid according to a formula dependent on their 1997 or 1998 market share. The treatment of the SPMs is delineated fully in the terms of the MSA. The fact of the disparate treatment is apparent on the face of the document. The plaintiff knew that the MSA calculated the SPMs' payment obligations based upon this figure. It also knew that, per the terms of its agreement, it was deemed to have a 1997 and 1998 market share of zero. *See* Am. Compl., Exhibit B, p. 3. Upon learning the exact market share claimed by each SPM, the plaintiff did not acquire a new constitutional challenge of which the plaintiff had been unaware without knowing the exact figures. Its not having known **[**65]** each SPM's claimed market share does not affect the validity of the plaintiff's waiver.

Furthermore, the waiver at issue was initially executed by the original PMs, as part of a settlement of ongoing litigation between the states and the OPMs. The waiver at issue was originally granted by the OPMs in exchange for the release of claims. In exchange for entering into the MSA and agreeing to the waiver, the plaintiff was similarly released from future claims of misconduct. ***HN22***[] "It is a well established principle that the law, and public policy, favor the settlement of disputes without litigation." *Echols v. Nimmo, 586 F.Supp. 467, 468 (D.C. Mich. 1984)* (citations omitted). What the parties have agreed to as a fair resolution of the relevant claims should not be disturbed lightly. The plaintiff has presented no persuasive argument that this waiver in the settlement agreement should be disturbed by the court.

2. Plaintiff's Compact Clause Claim.

In count five of its amended complaint, the plaintiff alleges that the MSA is an interstate compact in violation of the Compact Clause. ***HN23***[] The Compact Clause forbids any state from "enter[ing] into any Agreement or Compact with another State" without congressional **[**66]** consent. *U.S. Const. art. I, § 10, cl. 3*. "Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause." *Cuyler v. Adams, 449 U.S. 433, 440, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981)*. This clause applies only to "any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *United States Steel, 434 U.S. at 468* (quoting *Virginia, 148 U.S.503, 519, 13 S. Ct. 728, 37 L. Ed. 537 (1893))*. Therefore, the court's central concern in any Compact Clause inquiry is whether the agreement at issue enhances state power to the detriment of the federal government's power. *See* *United States Steel, 434 U.S. at 473*. The Compact Clause does not "circumscribe modes of interstate cooperation." *U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460, 98 S. Ct. 799, 54 L. Ed. 2d 682 (1978)*.

The plaintiff argues that the MSA encroaches on federal power by regulating interstate commerce through the establishment **[*786]** of a complex national tax and regulatory scheme; regulating access to the national cigarette market; and encroaching on federal supremacy with respect to antitrust laws. The plaintiff asserts that as a result of the MSA, the Settling States have **[**67]** enlarged their collective power and influence at the expense of the federal government.

The "encroachments" upon federal power alleged by the plaintiff are only the results of the enhanced bargaining power the Settling States enjoy as a result of the proliferation of the MSA. ***HN24***[] An increase in the states' collective bargaining power does not result in an accompanying decrease of federal power. See *Star Scientific v. Beales, 278 F.3d 339, 360 (4th Cir. 2002)* (discussing *Multistate Tax Comm'n, 434 U.S. at 473 (1978))*. Importantly, "[e]ach participating state could have independently settled its litigation with the participating manufacturers and enacted both the Qualifying Statute and the Model Act." *PTI, Inc. v. Philip Morris, Inc., 100 F.Supp. 2d 1179, 1198 (C.D. Cal. 2000)*. **[**68]** That the effectiveness of each state's individual agreement is increased because fifty-one other states or territories made an identical agreement does not mean that the federal government's power has suffered a concomitant decrease. Such a conclusion implies that the amount of power and influence in the United States is fixed and that the increase of a state's power must necessarily imply a decrease in federal power.

Nothing in the MSA steals power from the federal government. Importantly, "the Master Settlement Agreement does not derogate from the power of the federal government to regulate tobacco. Sections X and XVIII(a) of the agreement specifically anticipate that Congress may, in the future, pass laws regulating tobacco and provides for adjustments of the [MSA's] terms if that occurs." *Star Scientific, Inc., 278 F.3d at 360* (dismissing claim that the MSA violates the Compact Clause); *see also* *PTI, Inc., 100 F.Supp. 2d 1179* (same). This claim therefore will be dismissed.

Based on the above reasoning, all constitutional claims brought against the defendant Attorneys General will be dismissed. [23] As conceded by the plaintiff, the dismissal of these claims means that the plaintiff's **[**69]** claim for relief under *42 U.S.C. § 1983* (count six of the Amended Complaint) must also be dismissed.

C. Fraudulent Inducement (count seven of the plaintiff's Amended Complaint).

In count seven of its complaint, the plaintiff alleges that the Settling States fraudulently induced its agreement to join the MSA by making material representations or omissions. The defendant Attorneys General claim entitlement to sovereign **[*787]** immunity from this claim, pursuant to the *Eleventh Amendment*. The plaintiff counters that the defendants waived their immunity due to entering into the MSA.

HN25[] "The *Eleventh Amendment* bars a suit against state officials when 'the state is the real substantial party in interest.'" *Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)* (citations omitted). It follows, therefore, that a suit against a state official in his official capacity is a suit against the state, for it "is not a suit against the official but rather is a suit against the official's office." *S&M Brands, 527 F.3d at 507* (quoting *Will v. Mich. Dept. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989))*.

"The [Supreme] Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action **[**71]** is not one against the State." *Pennhurst, 465 U.S. at 102*; *see* *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*. The plaintiff's constitutional claims fall within this exception. [24] The plaintiff's claim for fraudulent inducement, however, is a claim for relief under state law. Importantly, the exception provided for by *Ex parte Young* "rests on the need to promote the vindication of federal rights." *Pennhurst, 465 U.S. at 102* (citations omitted).

HN26[] A state, and accordingly an official sued in his official capacity, therefore retains immunity from claims that an official has violated *state* law.

> A federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles **[**72]** of federalism that underlie the *Eleventh Amendment*.

Id. at 105.

HN27[] "There are three exceptions to a State's sovereign immunity: (a) when the State has consented to suit; (b) when the exception first set forth in *Ex parte Young . . .* applies; and (C)) when Congress has properly abrogated a State's immunity." *S & M Brands, Inc., 527 F.3d at 507* (citing *Kovacevich v. Kent State Univ., 224 F.3d 806, 817 (6th Cir. 2000))*. The plaintiff contends that the first exception applies to the present case.

---

[23] The nonresident Attorneys General requested this court to dismiss the claims against them pursuant to *Fed. R. Civ. Pro. 12(b)(2)* and *12(b)(3)* and contingently joined the Attorney General of Kentucky's motion to dismiss pursuant to lack of subject-matter jurisdiction and *Rule 12(b)(6)*. DE 208. Given the court's conclusion as to the plaintiff's constitutional claims, the court finds it unnecessary to reach the issues of whether venue in this district is appropriate and whether it has personal jurisdiction over the nonresident Attorneys General. Regardless of how the court chose to rule on that motion, the claims against the nonresident Attorneys General would be dismissed because the plaintiff has failed to state any claim under the U.S. Constitution for which the court can grant relief, and so all of its constitutional claims against all defendant Attorneys General will be dismissed. Defendant attorney general Peter Nickles (District of Columbia) has represented to the court through plaintiff's counsel that he received process, so his motion to dismiss for improper service, as well **[**70]** as the remaining motion to quash, will be denied as moot.

[24] And, indeed, no party has claimed that they do not. The court makes this point merely to distinguish between the applicability of the sovereign-immunity doctrine to this claim by the plaintiff and not to its other claims against the states.

HN28[] Just as the federal government's waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," *U.S. v. King, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)*, so must a state's waiver of its sovereign immunity be clear and unequivocal. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 692, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)*.

Pursuant to the terms of the MSA, by entering into the agreement, the parties agreed that certain disputes with the state may be heard in the court in which the consent decree was entered. The MSA, in its definitions, defines "Court" as the court where the consent decree entered. MSA § II(p). In Kentucky, the consent decree was entered in Fayette Circuit Court. The plaintiff argues **[**73]** that because at other places in the document "court" with a lower-case "c" is used, and because the state **[*788]** could be subject to suit in the federal courts for challenges to the MSA related to federal law, the state has waived sovereign immunity and has consented to this court's jurisdiction over this pendent state-law claim.

HN29[] No waiver is required for the federal court to have jurisdiction over federal-law claims. *See 28 U.S.C. § 1331*. Any realization that state actions connected with the MSA could be challenged in federal court as violating federal law implies no accompanying consent for the federal court to hear state-law claims. Furthermore, the court does not find that the use of "court" rather than "Court" at places in the document operates as an express waiver of the state's sovereign immunity.

In addition, to the extent that the plaintiff has argued that the state has entered into a commercial arrangement, this allegation, even if true, would not abrogate the state's *Eleventh Amendment* immunity. *See College Sav. Bank, 527 U.S. at 692* (*HN30*[] state cannot constructively waive its sovereign immunity). The plaintiff also argues that the defendant consented to federal-court jurisdiction because **[**74]** the MSA is a contract between States and that federal court is the only court with jurisdiction to hear disputes between states. This point is irrelevant, as the present dispute is not a dispute between states. Similarly, it is not relevant that the MSA provides for the arbitration of certain disputes and that resulting awards would be subject to enforcement by federal courts pursuant to the Federal Arbitration Act, *9 U.S.C. § 9*. That the state may be subject to federal-court jurisdiction for those limited types of cases does not affect whether the state is subject to the court's jurisdiction over the present state-law claim. Because the court finds no waiver of sovereign immunity sufficiently explicit to create subject-matter jurisdiction over this claim, the claim will be dismissed.

IV. Conclusion

Accordingly,

IT IS ORDERED:

(1) The motion to dismiss complaint filed by defendants Lorillard Tobacco Co., Philip Morris, Inc., and R.J. Reynolds Tobacco Co. (DE 154) is **GRANTED.**

(2) The motion to dismiss filed by defendants Commonwealth Brands, Inc., Imperial Tobacco Limited/ITL, Japan Tobacco International USA, Inc., King Maker Marketing, Lane Limited, Liggett Group, LLC, Lignum-2, Inc., P.T. **[**75]** Djarum, Premier Manufacturing Inc., Santa Fe Natural Tobacco Co., Sherman's 1400 Broadway N.Y.C., Inc., Top Tobacco, LP, and Vector Tobacco, Inc. (DE 156) is **GRANTED.**

(3) The motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim by defendant Jack Conway, Attorney General of Kentucky (DE 149) is **GRANTED.**

(4) The motion to dismiss for lack of personal jurisdiction and improper venue and contingent joinder in defendant Conway's motion to dismiss by the Attorneys General of the remaining forty-five states, five territories, and the District of Columbia (DE 208) is **DENIED as moot.**

(5) The motion to dismiss for improper service of process by defendant Peter Nickles (DE 210) and the motion to quash purported service on defendant Jeremiah W. Nixon(DE 215) are **DENIED as moot.**

(6) The court has not entered final judgment in this matter, as two defendants who have been served have failed to appear. If the plaintiff moves to dismiss its action against those defendants, the court will grant the motion and enter final judgment. If no action is taken within a year, **[*789]** the court will, absent cause, dismiss the action against those defendants for failure to prosecute this **[**76]** case against them and will enter final judgment at that time.

(7)The plaintiff's motion for preliminary injunctive relief (DE 2) is **DENIED as moot.**

Signed on January 5, 2009

/s/ Jennifer B. Coffman

Jennifer B. Coffman, Judge

United States District Court

Oregon v. Legal Servs. Corp.

United States Court of Appeals for the Ninth Circuit

October 23, 2008, Argued and Submitted, Portland, Oregon; January 8, 2009, Filed

No. 06-36012

Reporter

552 F.3d 965 *; 2009 U.S. App. LEXIS 345 **

STATE OF OREGON, Plaintiff-Appellant, v. LEGAL SERVICES CORPORATION, Defendant-Appellee, UNITED STATES OF AMERICA, Intervenor-Appellee.

Prior History: [1]** Appeal from the United States District Court for the District of Oregon. Robert E. Jones, District Judge, Presiding. D.C. No. CV-05-01443-REJ/PP.

Oregon v. Legal Servs. Corp., 2006 U.S. Dist. LEXIS 89872 (D. Or., Dec. 4, 2006)

Disposition: VACATED and REMANDED, with instructions.

Core Terms

regulation, funds, legal services, recipients, allegations, restrictions, private party, providers, quasi-sovereign, cases, standing to sue, parens patriae, conditions, subject matter jurisdiction, federal government, district court, concrete

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

The jurisdiction of the federal courts is limited to cases and controversies. *U.S. Const. art. III, § 2*. Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. *Fed. R. Civ. P. 12(h)(3)*. An objection that a federal court lacks subject matter jurisdiction may be raised at any time, even after trial and the entry of judgment. The objection, made under *Fed. R. Civ. P. 12(b)(1)*, may be raised by a party or by the court on its own initiative.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN2[] **Case or Controversy, Standing**

A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought. The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. The plaintiff bears the burden of proof to establish standing with the manner and degree of evidence required at the successive stages of the litigation. When the plaintiff defends against a motion to dismiss at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, because courts presume that general allegations embrace those specific facts that are necessary to support the claim.

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

HN3[] **Standing, Elements**

The irreducible constitutional minimum requirements for standing were described in Lujan as follows: (1) the plaintiff must have suffered an injury in fact, an invasion of a legally protected interest which is: (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not. the result of the independent action of some third party not before the court; (3) it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN4[] **Public Enforcement, State Civil Actions**

The United States Supreme Court has recognized that states are not normal litigants for the purposes of invoking federal jurisdiction, and have interests and capabilities beyond those of an individual by virtue of their sovereignty. The Court focused principally on the state's sovereign interest in its territory and its ability to preserve clean air for its citizens. The Court has elsewhere characterized a state's unique prerogatives as a parens patriae action stemming from a quasi-sovereign interest defined rather vaguely as a set of interests that the state has in the wellbeing of its populace. However, the Supreme Court has also recognized that the concept of special state standing due to the quasi-sovereign interest risks being too vague to survive the standing requirements. Therefore, a quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the state and the defendant. Furthermore, interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the state's aiding in their achievement. In such situations, the state is no more than a nominal party. If a state is only a nominal party without a real interest of its own, then it will not have standing under the parens patriae doctrine.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Governments > State & Territorial Governments > Claims By & Against

HN5[] **Standing, Particular Parties**

Generally, a state has been granted standing under the parens patriae doctrine in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious gases. In other cases, states have been granted standing to represent the economic interests of their residents. As the United States Supreme Court noted, the common thread among these cases is each state's quasi-sovereign interest in the health and well-being of its residents and a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. In contrast, the Court has expressly found that a state does not have standing to protect her citizens from the operation of federal statutes.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Governments > State & Territorial Governments > Claims By & Against

HN6[] **Standing, Particular Parties**

In recognizing that a state may have standing by virtue of its quasi-sovereign interest in its citizens, the United States Supreme Court has noted that a state's interest must be in some way distinguishable from that of its citizens: In order to maintain such an action, the state must articulate an interest apart from the interests of particular private parties. The doctrine that a plaintiff must have an independent means of standing is one of a set of prudential principles adopted by the Supreme Court to augment the requirements of Article III. Those judicially self-imposed limits on the exercise of federal jurisdiction function to further limit the role of the courts, but they can be modified or abrogated by Congress. Without the prudential requirements, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions, and Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. In addition to the requirement that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties, the Supreme Court has disapproved of considering abstract questions of wide public significance amounting to generalized grievances.

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

HN7[] **Standing, Elements**

Although the courts do not address the merits of a plaintiff's claim for the purpose of determining standing, the courts do analyze the characterization of the injury itself to determine whether or not it is concrete and particularized, actual or imminent, and fairly traceable to the challenged action of the defendant.

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Governments > State & Territorial Governments > Claims By & Against

HN8[] **Congressional Duties & Powers, Reserved Powers**

The *Tenth Amendment* reserves any power not expressly delegated to the federal government to the states. Only states have standing to pursue claims alleging violations of the *Tenth Amendment* by the federal government. However, to bring a claim under the *Tenth Amendment*, a state must first allege facts relating to a relevant injury.

Constitutional Law > Congressional Duties & Powers > Reserved Powers

HN9[] **Congressional Duties & Powers, Reserved Powers**

The United States Supreme Court's language in Dole allows for the possibility of a *Tenth Amendment* claim in cases where the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion. In that case, as in all other cases where the doctrine of coercion has been addressed, the state was the direct subject of both federal grants and federal restrictions.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN10[] **Case or Controversy, Standing**

There is no effective way federal courts could ever limit parens patriae standing were a state allowed to bring suit on behalf of its citizens solely by virtue of its interest that its citizens benefit from voluntary federal grants. Allowing such cases would make the parens patriae doctrine too vague to survive the standing requirements of *U.S. Const. art. III, § 2, cl. 1*.

Counsel: Hardy Myers, Mary H. Williams, Stephen K. Bushong, and Jacqueline Sadker, Oregon Department of Justice, Salem, Oregon, for the plaintiff-appellant.

William S. Freeman, Cooley Godward Kronish LLP, Palo Alto, California; Alan Levine, Rachel B. Kane, and Allison Hersh, Cooley Godward Kronish LLP, New York, New York, for the defendant-appellee.

Peter D. Keisler, Karin J. Immergut, Barbara L. Herwig, and Matthew M. Collette, United States Department of Justice, Civil Division, Washington, D.C., for the intervenor-appellee.

Judges: Before: A. Wallace Tashima and Milan D. Smith, Jr., Circuit Judges, and George Wu, * District Judge. Opinion by Judge Milan D. Smith, Jr.

Opinion by: Milan D. Smith, Jr.

Opinion

MILAN D. SMITH, JR., Circuit Judge:

[*966] Plaintiff-Appellant the State of Oregon (Oregon) appeals the district court's dismissal **[*967]** of its claims under *Federal Rule of Civil Procedure 12(b)(6)*. Oregon brought suit against the Legal **[**2]** Services Corporation (LSC) for an alleged violation of its rights under the *Tenth Amendment to the United States Constitution*. LSC has required the recipients of its funding to maintain legal, physical, and financial separation from organizations that engage in certain prohibited activities. Oregon alleges that this restriction has effectively thwarted its ability to regulate the practice of law in the State of Oregon and to provide legal services to its citizens. The district court dismissed the suit on the basis that Oregon's allegations of injury were not recoverable, and Oregon appealed. Because we conclude that Oregon lacks standing, we vacate the district court's dismissal of this action on the merits and remand with instructions that the action be dismissed for lack of subject matter jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statutory Background: The Program Integrity Regulation

* The Honorable George Wu, United States District Judge for the Central District of California, sitting by designation.

LSC is a private nonprofit corporation established by the United States for the purpose of providing financial support to individuals who would otherwise be unable to afford legal assistance. 42 U.S.C. § 2996b(a). To accomplish this purpose, LSC provides federal funds to local legal assistance **[**3]** programs throughout the United States. *Id*. § 2996e(a). *See generally* Legal Services Corporation Act of 1974 (LSC Act), Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996-2996l).

By regulation, LSC places certain restrictions on the use of its funds. *Id*. § 2996e(b)(1). These restrictions include, for example, a prohibition on the use of LSC funding for such activities as lobbying, participating in class action lawsuits, and advocating for the redistricting of political districts. 45 C.F.R. §§ 1612.3, 1617.3, 1632.3. Additionally, LSC requires its recipients to maintain "objective integrity and independence from any organization that engages in restricted activities." *Id*. § 1610.8(a). [1] Requirements for this "objective integrity" are codified in what is now denominated the "program integrity" rule or regulation. The requirements include: (1) legal separation of the recipient from the unrestricted organizations; (2) no transfer of LSC funds between the recipient and the unrestricted organization; and (3) the recipient's physical and financial separation from the unrestricted organization. [2] *Id*.

[*968] Whether an LSC fund recipient is sufficiently physically and financially separated from non-compliant legal services providers is determined on a case-by-case basis, based upon the totality of the circumstances. *Id*. § 1610.8(a)(3). The program integrity regulation specifies that "mere bookkeeping separation of LSC funds from other funds is not sufficient." *Id*. Other factors, such as having separate personnel, separate accounting and timekeeping records, separate facilities, and distinguishing forms of identification are relevant but not all-encompassing. *Id*. Fund recipients must annually certify to the LSC that they comply with the program integrity regulation. *Id*. § 1610.8(b).

In this appeal, Oregon contends that the program integrity regulation violates its Tenth Amendment rights.

II. Factual and Procedural History: Conflict with Oregon's Guidelines

In April 2005, the Oregon State Bar amended its **[**6]** guidelines for Oregon's legal services program, directing service providers to integrate their operations and staff in places where separate organizations provide services to the same geographic area. While some of Oregon's service providers are LSC fund recipients, others are not and engage in restricted activities. Legal Aid Services of Oregon (LASO), a legal services provider, is a recipient of LSC funds, which account for approximately 45% of its $ 6.5 million annual budget. Oregon Law Center (OLC), another large legal services provider, is not an LSC fund recipient and engages in LSC-restricted activities.

In response to the State Bar's amended guidelines, LASO submitted a configuration proposal to LSC that would combine the LASO and OLC corporations into one non-profit corporation. Under the proposal, the newly constituted

---

[1] This regulation was promulgated in response to a constitutional **[**4]** challenge to LSC restrictions on recipients using non-LSC funds for otherwise constitutional activities. Shortly after the restrictions were amended in 1996 to prohibit certain legal activities, a district court in Hawaii enjoined the LSC from enforcing them "to the extent that they relate to the use of Non-LSC Funds." *Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LASH), 961 F. Supp. 1402, 1422 (D. Haw. 1997)*. The district court found that the plaintiffs had a significant likelihood of success in arguing that the restrictions constituted unconstitutional conditions on the receipt of a federal subsidy. *Id. at 1416-17*.

The new rule, codified at § 1610.8, allows recipients to affiliate with organizations that use non-federal funds to engage in restricted activities, subject to preserving "objective integrity" between the two organizations. In so doing, it overcame the constitutional concerns raised in *LASH. See* ***Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LASH II), 145 F.3d 1017, 1021-23 (9th Cir.)***, *cert. denied*, ***525 U.S. 1015, 119 S. Ct. 539, 142 L. Ed. 2d 448 (1998)***.

[2] These regulations were designed to mirror the program integrity rule promulgated pursuant to Title X of the Public Health Service Act, which withstood **[**5]** constitutional attack in *Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)*. *See* *62 Fed. Reg. 27,695-97 (May 21, 1997)*. LSC's current regulations have also withstood constitutional challenges. *See* ***LASH II, 145 F.3d at 1031***; *Velazquez v. Legal Servs. Corp. (Velazquez II), 164 F.3d 757, 773 (2d Cir. 1999)*.

corporation would have two divisions, one of which would be subject to the LSC restrictions and the other of which would not. The two divisions would also maintain separate financial books and records, and would notify the public of their distinct functions in letterheads, business cards, and signage. However, the two divisions of the proposed new entity would **[**7]** share personnel and equipment, and would operate in the same physical premises. LSC's Office of Legal Affairs reviewed the proposal and concluded that it would not comply with LSC's requirements for program integrity.

In September 2005, LASO and OLC filed a complaint against LSC in district court, alleging that the LSC restrictions violated their *First Amendment* rights. On the same day and in the same court, Oregon filed this action against LSC alleging that the program integrity regulation effectively thwarted Oregon's policies governing its legal services program, in violation of the *Tenth Amendment*. Oregon sought to enjoin LSC from enforcing the program integrity regulation in Oregon. The two suits were consolidated and assigned to a magistrate judge.

The magistrate judge recommended that the district court grant LSC's motion to dismiss as to all of LASO's claims except its as-applied challenge to the program integrity rule. The magistrate judge also recommended granting LSC's motion to dismiss Oregon's complaint, because the state itself was not regulated by the LSC and because Oregon's claims of coercion did not meet the high standard required under Ninth Circuit precedents. *See* ***[**8]*** *California v. United States, 104 F.3d 1086 (9th* ***[*969]*** *Cir. 1997)*; *Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989)*.

The district court adopted the magistrate judge's recommendations and re-severed the lawsuits. Oregon appealed its claims to this court.

JURISDICTION

HN1[] The jurisdiction of the federal courts is limited to "cases" and "controversies." *U.S. CONST., Art. III, sec. 2*. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *FED. R. CIV. P. 12(h)(3)*. An objection that a federal court lacks subject matter jurisdiction may be raised at any time, even after trial and the entry of judgment. *Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*. The objection, made under *Federal Rule of Civil Procedure 12(b)(1)*, may be raised by a party or by the court on its own initiative. [3] *Id*. While we have jurisdiction over this appeal under *28 U.S.C. § 1291*, we found reason to question whether the district court had subject matter jurisdiction over this case. As analyzed in this opinion, we conclude that Oregon lacks standing to bring a claim under the *Tenth Amendment* or the Spending Clause because it has not **[**9]** alleged a sufficiently concrete and particularized injury. We therefore vacate the district court's judgment and remand for an entry of dismissal for lack of subject matter jurisdiction.

DISCUSSION

I. Standing Requirements

HN2[] A plaintiff must demonstrate standing "for each claim he seeks to press" and for "'each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))*; *see also* *Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted"). The plaintiff bears the burden of proof to establish

---

[3] Neither the district court nor the parties alluded to any possible jurisdictional problem with Oregon's prosecution of this action. We therefore asked, at oral argument, for supplemental briefing on Oregon's standing to pursue this action.

standing "with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). When, as **[**10]** here, the plaintiff defends against a motion to dismiss at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because we "'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id*. (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

HN3[] The "irreducible constitutional minimum" requirements for standing were described in Lujan as follows:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Whitmore [v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)] (quoting Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . **[*970]** trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," **[**11]** that the injury will be "redressed by a favorable decision." Id. at 38, 43.

504 U.S. at 560-61 (footnote and some internal citations omitted). Before applying these requirements to the facts of this case, however, we must first consider what impact, if any, Oregon's status as a state as opposed to a private party has on the standing inquiry.

A. State Standing: Quasi-Sovereign Interests

HN4[] The Supreme Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction," and have interests and capabilities beyond those of an individual by virtue of their sovereignty. Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 1454, 167 L. Ed. 2d 248 (2007). The Court in *Massachusetts* focused principally on the state's sovereign interest in its territory and its ability to preserve clean air for its citizens. *Id*. The Court has elsewhere characterized a state's unique prerogatives as a *parens patriae* action stemming from "a 'quasi-sovereign' interest" defined rather vaguely as "a set of interests that the State has in the wellbeing of its populace." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

However, the Supreme Court has also recognized that "the **[**12]** concept [of special State standing due to the quasi-sovereign interest] risks being too vague to survive the standing requirements . . . . [Therefore, a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." Id. at 602. Furthermore, "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party." *Id*. If a State is only a nominal party "without a real interest of its own -- then it will not have standing under the *parens patriae* doctrine." Id. at 600.

HN5[] Generally, a state has been granted standing under the *parens patriae* doctrine in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious gases. *See* Massachusetts, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (Massachusetts had standing to sue the EPA for failing to issue rules regarding the emission of greenhouse gases); North Dakota v. Minnesota, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923) (North Dakota had standing to sue Minnesota for allegedly creating conditions leading to flooding of farmland); Georgia v. Tenn. Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907) **[**13]** (Georgia had standing to sue for an injunction to prevent the defendant copper companies from discharging noxious gases over Georgia's territory). In other cases, states have been granted standing to represent the economic interests of their residents. *See* Snapp, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (Puerto Rico had standing to sue defendant apple farmers for subjecting its workers to conditions more burdensome than those established for temporary foreign workers in violation of the Wagner-Peyser Act); *Georgia v. Pa. R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* (Georgia had standing to bring suit against railroads for conspiracy to fix freight rates in a manner that discriminated against Georgia shippers in violation of federal ***antitrust law***); *Pennsylvania **[*971]** v. West Virginia, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio Law Abs. 627 (1923)* (Pennsylvania had standing to sue for an injunction preventing West Virginia from giving other states a preferential right of purchase and curtailing the supply of gas carried to Pennsylvania).

As the Supreme Court noted in *Snapp*, the common thread among these cases is each state's quasi-sovereign interest in the health and well-being of its residents and a quasi-sovereign interest in "not being discriminatorily denied its rightful status **[**14]** within the federal system." *458 U.S. at 607*. In contrast, the Court has expressly found that a state does not have standing "to protect her citizens from the operation of federal statutes." *Massachusetts, 127 S. Ct. at 1455 n.17* (referencing *Massachusetts v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923)* (Massachusetts lacked standing to enjoin a Congressional act authorizing appropriations on a voluntary basis)).

B. Prudential Principles: No Reliance on the Claims of Third Parties

HN6[] In recognizing that a state may have standing by virtue of its quasi-sovereign interest in its citizens, the Supreme Court has been careful to note that a state's interest must be in some way distinguishable from that of its citizens: "In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties." *Snapp, 458 U.S. at 607*. The doctrine that a plaintiff must have an independent means of standing is one of a set of "prudential principles" adopted by the Supreme Court to augment the requirements of Article III. These "judicially self-imposed limits on the exercise of federal jurisdiction" function to further limit the role of the courts, but they can be modified **[**15]** or abrogated by Congress. *Allen, 468 U.S. at 751*; *see also* *Warth v. Seldin, 422 U.S. 490, 500-01, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (noting that without the prudential requirements, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions," and that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules").

In addition to the requirement that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," the Supreme Court has disapproved of considering "'abstract questions of wide public significance'" amounting to "'generalized grievances.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (quoting *Warth, 422 U.S. at 499-500*).

II. Oregon's Alleged Injury

Oregon alleges that LSC's restrictions "effectively infringe on Oregon's sovereignty in violation of the *Tenth Amendment* and principles of federalism established in the structure of the United States Constitution, and exceed **[**16]** federal authority under the Spending Clause." ***HN7***[] Although we do not address the merits of Oregon's claim for the purpose of determining standing, *Lujan, 504 U.S. at 561*, we do analyze the characterization of the injury itself to determine whether or not it is "concrete and particularized," "actual or imminent," and "fairly traceable to the challenged action of the defendant." *Id. at 560* (citations omitted). Oregon need only allege general factual allegations of injury resulting from LSC's conduct to resist a motion to dismiss for lack of standing. *Id. **[*972]** at 561*. Because Oregon's factual allegations do not rise to the level of a concrete, particularized, actual or imminent injury against the state itself, that is independent from alleged harm to private parties, we hold that the action must be dismissed for lack of subject matter jurisdiction.

Oregon alleges that LSC's restrictions fall outside Congress's spending authority. In addition, Oregon alleges that LSC uses its restrictions to coerce LASO into complying with federal regulations over state regulations because LASO cannot survive as an organization without federal funding.

Oregon further alleges that LSC's restrictions limit Oregon's **[**17]** ability to regulate LASO and its other legal services providers. Oregon cannot require LASO to combine its facilities with OLS because that would make LASO ineligible for federal funding, and would lead to LASO's dissolution. Oregon paints this situation as a restriction on its ability to make policy, and alleges that such a restriction violates the *Tenth Amendment*.

However, Oregon acknowledges that it is not regulated by LSC, and that it is completely free to make or change its policy in the face of LSC regulations. Oregon does not receive LSC funding, and so is unaffected by its existence or non-existence aside from the fact that parties within Oregon are recipients. Oregon would be in the same position it now occupies if the federal government, for whatever reason, decided to cease further LSC funding. Therefore, Oregon's only alleged injury is on behalf of its legal services providers. As pleaded, Oregon's injury is indistinguishable from LASO's.

A. Oregon Has No Independent Injury

1. *Tenth Amendment* *Coercion Claim*

Although Oregon claims an injury under the *Tenth Amendment* separate from LASO's, it has not alleged general facts sufficient to establish such a claim. ***HN8***[] The *Tenth Amendment* **[**18]** reserves any power not expressly delegated to the federal government to the States. Only states have standing to pursue claims alleging violations of the *Tenth Amendment* by the federal government. *Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 144, 59 S. Ct. 366, 83 L. Ed. 543 (1939)*; *see also* *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 234 (2d Cir. 2006)*. However, to bring a claim under the *Tenth Amendment*, a state must first allege facts relating to a relevant injury. In this case, we hold there is no such injury.

The Supreme Court made a similar ruling in *Mellon*, a case in which Massachusetts sought to enjoin Congress from enacting the Maternity Act, *Cong. Ch. 135, 67th Cong., 42 Stat. 224 (1921)*. The Maternity Act provided for an initial appropriation, followed by annual appropriations for a period of five years, to be apportioned among the states that elected to accept the funds and comply with the attached provisions. *Id*. § 2. The purpose of the act was "promoting the welfare and hygiene of maternity and infancy." *Id*. § 1. Massachusetts alleged that "the act is a usurpation of power not granted to Congress by the Constitution -- an attempted exercise of the power of local **[**19]** self-government reserved to the States by the *Tenth Amendment*." *Mellon, 262 U.S. at 479*.

The Court found that Massachusetts, which had not accepted the funds or the conditions, had no standing to allege an injury under the *Tenth Amendment*. The Court reasoned:

> What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the **[*973]** statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States. . . . But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

Id. at 482.

Similarly, in this case there is no burden or injury placed on Oregon. Like Massachusetts in *Mellon*, **[**20]** Oregon has not accepted federal funds, nor is it bound by the accompanying restrictions. Oregon is not injured by the federal government's decision to subsidize certain private activities, even if the government attaches impermissible conditions, as is alleged, to the recipients of those funds. Oregon is only affected by virtue of its interest in the effect of the grant and the conditions on its citizens; it has no independent claim of injury.

Oregon cannot claim injury simply on the basis that federal subsidies to private parties do not compliment Oregon's policies. The state has no standing to sue the federal government to provide voluntary federal subsidies to private parties, and certainly has no standing to sue the federal government to change its conditions for those federal subsidies. This is true even assuming, as we must, at the pleading stage of the litigation, that the federal government has gone beyond its authority under the Spending Clause to regulate private parties who accept its funds.

Such a ruling does not conflict with ***HN9***[] the Supreme Court's language in *Dole*, which allows for the possibility of a *Tenth Amendment* claim in cases where "the financial inducement offered **[**21]** by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *483 U.S. 203 at 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171* (quoting *Steward Machine Co. v. Davis, 301 U.S. 548 at 590, 57 S. Ct. 883, 81 L. Ed. 2d 1279*). In that case, as in all other cases where the doctrine of coercion has been addressed, the state was the direct subject of both federal grants and federal restrictions. *See, e.g., Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)*; *New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992)*; *Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)*; *California, 104 F.3d 1086*; *Nevada, 884 F.2d 445*. In this case, Oregon is not a recipient of funds, nor does it have authority to accept or refuse funds on behalf of its legal services providers, which are all private parties. Consequently, it cannot claim to be the subject of coercion in violation of the *Tenth Amendment*.

2. *"Interference" Claim*

Oregon argues in the alternative that it has been injured by LSC's regulations, which thwart Oregon's efforts at policy making with regards to Oregon's Legal Service Program. Oregon attempts to analogize its situation to cases recognizing a state's standing to defend its statutes when they are alleged to be unconstitutional or pre-empted by federal regulation. *See, e.g., Maine v. Taylor, 477 U.S. 131, 137, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986)*; **[**22]** *Wyoming ex rel. Crank v. United States, 539 F.3d 1236, 1242 (10th Cir. 2008)*. However, those cases are distinguishable, because in this case there is no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws have been invalidated as a result of the LSC restrictions.

[*974] The core of the dispute is whether Oregon should have the ability to control the conditions surrounding a voluntary grant of federal funds to specifically delineated private institutions. Because Oregon has no right, express or reserved, to do so, there is no judicially cognizable injury. Oregon may continue to regulate its legal service programs as it desires, but it cannot depend on voluntary financial support from LSC to LASO or any other legal services provider within the state if it makes choices that conflict with the LSC program integrity regulations.

B. Oregon Lacks Standing Under The Parens Patriae Doctrine

As detailed above, Oregon's only allegations of injury are generalized grievances about the probable consequences to legal services providers within Oregon as a result of conflicting state and federal policy goals. Oregon does not have standing to bring suit on behalf **[**23]** of these private parties, nor has Oregon proven it has standing under the *parens patriae* doctrine, because it has shown no independent quasi-sovereign interest.

Oregon claims a quasi-sovereign interest in regulating access to its civil justice system, alleging that this interest has been threatened by the LSC regulations. Looking beyond the fact that such an interest has never before been recognized, this court cannot accept such a claim as "an interest apart from the interests of particular private parties." *Snapp, 458 U.S. at 607*. The state's interest in the "health and well-being -- both physical and economic -- of its residents in general" is not at issue here, nor does Oregon allege that it is being "discriminatorily denied its rightful status within the federal system." *Id*. Moreover, we can see ***HN10***[] no effective way federal courts could ever limit *parens patriae* standing were a state allowed to bring suit on behalf of its citizens solely by virtue of its interest that its citizens benefit from voluntary federal grants. Allowing such cases would make the *parens patriae* doctrine "too vague to survive the standing requirements of Art. III." *Id. at 602*.

We likewise reject Oregon's attempt **[**24]** to link itself to *Bowen v. Public Agencies Opposed to Social Security Entrapment* by using the argument that, like the State in *Bowen*, Oregon's sovereignty has been diminished as a result of federal action. In *Bowen*, unlike here, the State was a party to a contract with Congress and Congress acted to breach the contract, resulting in actual injury. *477 U.S. 41, 50, 106 S. Ct. 2390, 91 L. Ed. 2d 35 (1986)*. There was therefore no question of standing, as is raised here.

CONCLUSION

Oregon has failed to allege generalized facts sufficient to show an actual injury for the purposes of establishing its standing in this case. Oregon is not directly affected by the allegedly unconstitutional LSC regulations, and is free to avoid any or all indirect effects of those regulations by simply increasing its own taxes to fund its desired policies. Oregon has also failed to show a sufficient basis for bringing suit on behalf of its citizens. Oregon has not shown a cognizable interest apart from the interests of LSC recipients who are also citizens of Oregon, and is, therefore, without standing to pursue its claims in this action. Accordingly, we VACATE the district court's dismissal of this action on the merits and REMAND with instructions **[**25]** that the action be dismissed for lack of subject matter jurisdiction. Each party shall bear its own costs.

VACATED and REMANDED, with instructions.

Freedom Holdings, Inc. v. Cuomo

United States District Court for the Southern District of New York

January 12, 2009, Decided; January 12, 2009, Filed

02 Civ. 2939 (AKH)

Reporter

592 F. Supp. 2d 684 *; 2009 U.S. Dist. LEXIS 1788 **; 2009-1 Trade Cas. (CCH) P76,504

FREEDOM HOLDINGS, INC. d/b/a NORTH AMERICAN TRADING COMPANY, and INTERNATIONAL TOBACCO PARTNERS, LTD., Plaintiffs, -against- ANDREW M. CUOMO, in his official capacity as Attorney General of the State of New York, and ROBERT L. MEGNA, in his official capacity as Commissioner of Taxation and Finance of the State of New York, Defendants.

Subsequent History: Request denied by *Freedom Holdings, Inc. v. Cuomo, 2009 U.S. Dist. LEXIS 4526 (S.D.N.Y., Jan. 21, 2009)*

Affirmed by *Freedom Holdings, Inc. v. Cuomo, 2010 U.S. App. LEXIS 21392 (2d Cir. N.Y., Oct. 18, 2010)*

Prior History: *Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 2005 U.S. App. LEXIS 8886 (2d Cir. N.Y., 2005)*
Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230, 2004 U.S. Dist. LEXIS 18296 (S.D.N.Y., 2004)

Core Terms

Escrow, cigarette, prices, market share, allocable share, manufacturers, sales, grandfathered, settlement, injunction, out-of-state, billion, public health, costs, anti trust law, Sherman Act, Plaintiffs', funds, tobacco, decisions, compete, parties, annual, carton, joined, proofs, cigarette manufacturer, preliminary injunction, payment obligation, per se violation

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

Public Health & Welfare Law > Healthcare > General Overview

Torts > Products Liability > General Overview

HN1[] **Tobacco Products, State Regulation**

See *N.Y. Pub. Health Law § 1399-nn(6)*.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

Public Health & Welfare Law > Healthcare > General Overview

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

Torts > Procedural Matters > Settlements > General Overview

Torts > Products Liability > General Overview

HN2[] **Tobacco Products, State Regulation**

The Contraband Statute requires every cigarette manufacturer selling cigarettes in New York to certify annually that it is either making payments under the Master Settlement Agreement as a Participating Manufacturers or complying with the Escrow Statute as a Non-Participating Manufacturers. A manufacturer that fails to certify under the Contraband Statute is denied state tax stamps, which allow a manufacturer to sell cigarettes without incurring regulatory and monetary penalties.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN3[] **Case or Controversy, Standing**

To establish standing to sue under Article III of the United States Constitution, a plaintiff must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury. The gist of the question of standing is whether the plaintiffs have a sufficient stake in the outcome of the controversy to assure genuine adverseness and clear presentation of the issues at stake. In a lawsuit challenging the legality of government action, it is typically easier for a direct object of the challenged action to establish standing than it is for one alleging the unlawful regulation. of someone else. However, such a plaintiff may nonetheless establish standing by demonstrating that the response of third parties to the challenged regulation threatens or causes an injury to the plaintiff, and that judgment for the plaintiff will redress the injury caused by third parties responding to the regulation.

Antitrust & Trade Law > Clayton Act > Claims

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN4[] **Clayton Act, Claims**

In addition to establishing Article III of the United States Constitution standing, a plaintiff seeking an injunction pursuant to § 16 of the Clayton Act, *15 U.S.C.S. § 26*, must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful. The antitrust standing analysis is more flexible and less demanding for claims for injunctive relief than it is for those seeking money damages, because one injunction is as effective as 100, and. 100 injunctions are no more effective than one.

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN5[] **Sherman Act, Jurisdiction**

A two-step analysis determines whether a state statute is preempted: First, a plaintiff must show that the statute creates a scheme that would be a per se violation of the Sherman Act if arranged privately, and second, a plaintiff must show that the state action doctrine of Parker v. Brown does not immunize the statute from preemption.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

To establish a per se antitrust violation arising from a state statute, a plaintiff must show that the statute mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Federal antitrust laws preempt state laws authorizing or compelling private parties to engage in anticompetitive behavior. Only authorized or compelled practices that have a pernicious effect on competition and lack. any redeeming virtue" are deemed per se antitrust violations.

Antitrust & Trade Law > Sherman Act > Jurisdiction

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

HN7[] **Sherman Act, Jurisdiction**

A court must find that a state is guilty of a per se antitrust violation before evaluating whether redemptive purpose exempts it from application of federal ***antitrust law***.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

The Midcal-Parker test provides that a state statute is exempt from antitrust preemption if (i) the restraint in question is clearly articulated and affirmatively expressed as state policy, and (ii) the policy is actively supervised by the state itself.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN9[] **Commerce Clause, Interstate Commerce**

The *Commerce Clause* empowers Congress to regulate Commerce. among the several States. *U.S. Const. art. I, § 8, cl. 3*. In its dormant application, it limits a state's power to take actions impacting interstate commerce. The *Commerce Clause* limits state regulatory power in three ways. First, a state law is per se invalid if it clearly discriminates against interstate commerce in favor of intrastate commerce. Second, under the Pike balancing test, a state law is invalid if it is nondiscriminatory but imposes a burden on interstate commerce incommensurate with the local benefits secured. Third, a state law is invalid if it has the practical effect of controlling commerce occurring entirely outside the state's borders. However, a state law is not invalid under the *Commerce Clause* if its only out-of-state impact is to elevate the price of goods in interstate commerce.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN10[] **Commerce Clause, Interstate Commerce**

A state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid under the *Commerce Clause*.

Counsel: [1]** For Freedom Holdings, Inc., doing business as North American Trading Company, International Tobacco Partners, Ltd., on behalf of themselves and all others similarly situated, Plaintiffs: David F. Dobbins, Sr, LEAD ATTORNEY, Patterson, Belknap, Webb & Tyler LLP, New York, NY; Walter Michael Luers, LEAD ATTORNEY, Law Offices of Walter M. Luers, LLC, Atlantic Highlands, NJ.

For Eliot Spitzer, in his official capacity as Attorney General of the State of New York, Defendant: Avi Schick, LEAD ATTORNEY, New York State Department of Law (EPB), Albany, NY; Christine E. Morrison, LEAD ATTORNEY, Eliot Spitzer, Attorney General of the State of NY, New York, NY; Dana Hope Biberman, LEAD ATTORNEY, NYC Law Department, Office of the Corporation Counsel, New York, NY; Julie Simone Brill, LEAD ATTORNEY, Vt Attorney General's Office, Montpelier, VT; Lewis Aaron Polishook, LEAD ATTORNEY, New York State Office of the Attorney General, New York, NY; Gary D. Wilson, PRO HAC VICE, Washington, DC.

For Arthur J. Roth, in his official capacity as Commissioner of Taxation and Finance of the State of New York, Defen-dant: Avi Schick, LEAD ATTORNEY, New York State Department of Law (EPB), Albany, NY; Christine E. **[**2]** Morrison, LEAD ATTORNEY, Eliot Spitzer, Attorney General of the State of NY, New York, NY; Dana Hope Biber-man, LEAD ATTORNEY, NYC Law Department, Office of the Corporation Counsel, New York, NY; Lewis Aaron Polishook, LEAD ATTORNEY, New York State Office of the Attorney General, New York, NY; Gary D. Wilson, PRO HAC VICE, Washington, DC.

For Nationwide Tobacco, Inc., 3B Holdings, Inc., Grand River Enterprises Six Nations, Ltd., Movants: Leonard Violi, LEAD ATTORNEY, Law Offices of Leonard Violi, LLC, Mamaroneck, NY.

Judges: ALVIN K. HELLERSTEIN, United States District Judge.

Opinion by: ALVIN K. HELLERSTEIN

Opinion

[*686] **OPINION AND ORDER GRANTING JUDGMENT DISMISSING COMPLAINT**

ALVIN K. HELLERSTEIN, U.S.D.J.:

In 1998, after many years of frustrating federal, state, and private litigation, the attorneys general of forty-six States entered **[*687]** into a Master Settlement Agreement with the major cigarette companies. The New York Supreme Court, reviewing the settlement, found that it went "well beyond what could have been achieved in plaintiffs' fondest dreams for the result after a protracted and risky trial," and that it "painstakingly accommodates the public interest" by compensating the State for past and future public health expenditures caused by cigarette smoking, while discouraging future cigarette consumption. *New York v. Philip Morris, Inc., 179 Misc. 2d 435, 686 N.Y.S.2d 564, 569 (N.Y. Sup. Ct. 1998)*, aff'd, *263 A.D.2d 400, 693 N.Y.S.2d 36 (N.Y. App. Div., 1st Dep't 1999)*.

Ten years have passed since the Master Settlement Agreement became effective. In that time, New York has reaped substantial benefits from it, consistent with the public purposes that animated the settlement. Most prominently, **[**3]** the State has received nearly $ 7.7 billion in compensation for health care costs, while the number of cigarettes sold each year in the United States has declined by 24%, from 484.5 cigarettes sold in 1997 to 365.8 billion cigarettes sold in 2007.

This lawsuit began in 2002, almost seven years ago. It has been to the Court of Appeals twice, resulting in three opinions. I expressed my views of the probable merits in largely denying Plaintiffs' motion for a preliminary injunction. Since then, and after remand from the Court of Appeals, the parties presented a full record to me and moved for judgment pursuant to *Fed. R. Civ. P. 52*. At my request, the parties supplemented the record at a three-day evidentiary hearing. I have now heard all relevant arguments, and issue this decision as a final determination of the issues.

Based on the supplemented record, the three opinions issued in this case by the Court of Appeals, and my own findings and conclusions issued in an opinion and order dated September 14, 2004, I hold as follows:

1. Plaintiffs have failed to show that the Master Settlement Agreement and its implementing legislation restrain the ability of non-participating cigarette manufacturers **[**4]** to compete.

2. Plaintiffs have failed to show that the Master Settlement Agreement and its implementing legislation violate the *Commerce Clause of the United States Constitution*.

3. Plaintiffs have failed to show that New York's Allocable Share Release amendment restrains competition or violates the *Commerce Clause*.
4. Plaintiffs have suffered no injury to their business or property, actual or threatened.
5. Plaintiffs are entitled to no legal or equitable relief.

Accordingly, for the reasons discussed in this opinion, I grant judgment to Defendants, dismissing the case against them, and dissolve the preliminary injunction that I previously granted.

I. The Prior Proceedings

At the outset of this case, I dismissed the Complaint, ruling that it failed to allege a legally sufficient claim for relief under either the federal antitrust laws or the *Commerce Clause of the United States Constitution*. Order of May 15, 2002. The Court of Appeals affirmed my ruling as to the *Commerce Clause* claim, but reversed my ruling as to the antitrust claim and ordered that portion of the Complaint reinstated on remand. *357 F.3d 205 (2d Cir. 2004)* (Freedom Holdings I), reh'g denied & opinion revised, *363 F.3d 149 (2d Cir. 2004)* **[**5]** (Freedom Holdings II). After remand and discovery, Plaintiffs moved for a preliminary injunction against enforcement of the Master Settlement Agreement and **[*688]** its implementing legislation in New York. I denied most of the motion, but enjoined the effectiveness of the recent Allocable Share Release amendment to the New York Public Health Law. *447 F. Supp. 2d 230 (S.D.N.Y. 2004)* (Freedom Holdings III). The Court of Appeals affirmed, holding that Plaintiffs had failed to show irreparable injury, except as regards the Allocable Share Release amendment. *408 F.3d 112 (2d Cir. 2005)*.

After the second remand, Plaintiffs moved to amend the Complaint to add a count alleging a *Commerce Clause* violation. I allowed the amendment because the Court of Appeals had recently reversed the dismissal of a similar *Commerce Clause* claim in *Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 169-73 (2d Cir. 2005)*.

At the close of discovery, both Plaintiffs and Defendants moved for summary judgment pursuant to *Fed. R. Civ. P. 56* or judgment pursuant to *Fed. R. Civ. P. 52*. I agreed to decide the case as if after a bench trial pursuant to *Rule 52*. After arguments, presentation of evidence, and submissions **[**6]** of updated economic data, I now deliver my findings and conclusions on a complete record.

In addition, I have reviewed, de novo, the extensive factual record before me in Freedom Holdings III, as reintroduced and supplemented to support the present motions. Except as specifically indicated below, I adhere to and incorporate here the findings and conclusions of Freedom Holdings III.

II. Summary of the MSA

In Freedom Holdings III, I presented an extensive summary of the MSA, its interconnecting provisions, and its purposes and applications. *447 F. Supp. 2d at 233-42*. As the parties have pointed out no error, I need not repeat that analysis in fresh detail. I incorporate it by reference, as the basis of this decision as well, and offer an abridged description here.

The Master Settlement Agreement ("MSA") resolved massive litigation brought by the Attorneys General of forty-six states (including New York), the District of Columbia, and several territories, against the four largest cigarette manufacturing and marketing companies, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Co., and Lorillard Tobacco Co. [1] The States alleged that cigarette smoking had caused them **[**7]** to incur billions of dollars in Medicaid and other public health costs, and sought recovery of those costs and injunctive relief to reduce future damage. They reached an agreement with the companies and entered into the MSA on November 23, 1998. The MSA required the four major cigarette companies, designated "Original Participating Manufacturers," or OPMs, to make substantial payments to the States pursuant to several formulas, immediately and over time. Collectively, they were to pay about $ 2.4 billion in the first year and about $ 225 billion over the next twenty-five years. In exchange, the States surrendered past, present, and future tobacco-related claims against the OPMs. The MSA contemplated that the OPMs would meet their payment obligations by increasing the prices of their cigarettes, thereby reducing future public cigarette consumption. The amount owed by each OPM would be adjusted annually to account for inflation and changes in the OPMs' relative **[*689]** market shares. See *Freedom Holdings III, 447 F. Supp. 2d at 234-35*.

In approving the settlement, the New York Supreme Court found that the MSA achieved New York's most important goals when it first filed suit. *New York v. Philip Morris, 686 N.Y.S.2d at 568*. Most plainly, the MSA compensated New York for past public health expenditures while promising a revenue stream to pay for future care. In addition, by charging more for cigarettes, the OPMs promoted the public health by discouraging present smokers from continuing and potential smokers from beginning. The MSA's other provisions also advanced the same public health goal by banning advertising and sales of cigarettes to minors, requiring greater disclosure of the health effects of tobacco and nicotine, and requiring the OPMs to fund educational and clinical programs that publicize and treat the health consequences of smoking. [2] The MSA "goes well beyond what could have been achieved in plaintiffs' fondest dreams for the result after a protracted and risky trial," the New York Supreme Court concluded, "and . . . painstakingly accommodates the public interest." *Id. at 569*; see *N.Y. Pub. Health Law § 1399-nn(5)*.

The MSA encouraged other cigarette companies to participate in the settlement as "Subsequent Participating Manufacturers," or SPMs. It provided a "grandfathered" benefit to companies that joined the MSA within sixty days of November 23, 1998, its execution date. These grandfathered SPMs incur payment obligations only if their share of the total cigarette market exceeds the greater of their 1998 share or 125% of their 1997 share. Those payment obligations, like those of SPMs that joined the MSA after the sixty day period, are determined according to an arithmetical formula that results in payments similar to those required of OPMs. [3] Together, the OPMs and SPMs are designated "Participating Manufacturers," or PMs.

---

[1] Philip Morris is now a wholly-owned subsidiary of Altria Group, Inc. Brown & Williamson and R.J. Reynolds have since merged, forming a new parent, Reynolds American, **[**8]** Inc.

[2] Indeed, the New York Supreme Court noted that litigation, or even legislation, could **[**9]** not have achieved some aspects of the MSA, like the OPMs' waiver of their *First Amendment* advertising and lobbying rights. *New York v. Philip Morris, 686 N.Y.S.2d at 568 & 569 n.6*; see *Freedom Holdings III, 447 F. Supp. 2d at 250*.

[3] The annual payment obligations of grandfathered SPMs and non-grandfathered SPMs are calculated differently. See MSA Art. IX(i). If a grandfathered SPM's sales increase, it pays a portion of the total SPM adjusted base payment (which is a volume-adjusted **[**10]** version of the total OPM base payment). This portion is determined by dividing the increase in the grandfathered SPM's market share by the current aggregate market share of OPMs. Thus:

The States and the OPMs anticipated that the design of the MSA was vulnerable to the actions of companies that chose not to join it, designated "Non-Participating Manufacturers," or NPMs. If NPMs could sell cigarettes at prices that did not reflect the settlement burden assumed by PMs, the entire structure of the MSA would be defeated, and the fundamental goal of reducing cigarette consumption would be frustrated. To solve this problem, the MSA provided for States to adopt legislation known as "Escrow Statutes," which **[*690]** require NPMs to make payments into state-specific **[**11]** escrow accounts that are somewhat less than, but roughly equivalent to, the payments required by PMs. These payments prevent NPMs from taking advantage of the MSA by significantly undercutting PMs on price, and assure the States that funds will be available to pay damages if the States prevail in lawsuits against NPMs. ***HN1***[] See *N.Y. Pub. Health Law § 1399-nn(6)* ("It is thus in the interest of the state to require that [NPMs] establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise."). Thus, the Escrow Statutes preserve the MSA and the public health benefits that it sought to foster.

If a State fails to enact or "diligently enforce" an Escrow Statute, it exposes itself to the MSA's "NPM Adjustment" provision, which can reduce OPMs' MSA payments. MSA Art. IX(d). If the OPMs prove that they collectively lost market share to the NPMs, that the MSA was a "significant factor" in that loss, and that the State in issue failed to enact or diligently enforce an Escrow Statute, the OPMs can reduce their payments by three times the amount of market share loss over **[**12]** 2%. MSA Art. IX(d)(1). To date, no NPM adjustment has been granted, although The Brattle Group, the firm tasked with making the "significant factor" determination, concluded in 2003, 2004, and 2005 that the MSA had been a "significant factor" in the OPMs' loss of market share. See Pl. Exh. 362, P 228. The Brattle Group's determination, however, must be paired with an arbitrator's finding that a State failed to "diligently enforce" its Escrow Statute, which has yet to occur.

In 2001, to aid enforcement of its Escrow Statute, New York passed its Contraband Statute. *N.Y. Tax Law §§ 480-b*, *481(1)(c)*, *1846*. ***HN2***[] The Contraband Statute requires every cigarette manufacturer selling cigarettes in New York to certify annually that it is either making payments under the MSA as a PM or complying with the Escrow Statute as an NPM. A manufacturer that fails to certify under the Contraband Statute is denied state tax stamps, which allow a manufacturer to sell cigarettes without incurring regulatory and monetary penalties.

The PMs deposit their annual payments into a national escrow account, from which each State receives its "allocable share." This share, fixed in the MSA, generally represents the State's **[**13]** proportional burden of past and future damages. *Freedom Holdings III, 447 F. Supp. 2d at 236*; see MSA Exh. A. Initially, Escrow Statutes provided that NPMs could claim a refund of their annual escrow payment to the extent that the amount they paid exceeded the State's allocable share of total national payments. This Allocable Share Release provision allowed NPMs to reduce their overall obligations by concentrating their sales within a single State or a few States, thereby becoming entitled to refunds from the States and lowering their marginal escrow payments significantly below the costs incurred by OPMs. For example, if an NPM sold cigarettes only in New York, which has an allocable share of 12.76%, it could receive a credit for all per-cigarette payments under New York's Escrow Statute that exceed 12.76% of its total sales, despite selling 100% of its cigarettes in the State.

The States, including New York, began to repeal the Allocable Share Release provisions of their Escrow Statutes, thereby eliminating the yearly refunds. In Freedom Holdings III, I enjoined New York from repealing its Allocable Share Release provision. See *N.Y. Pub. Health Law § 1399-pp*, **[*691]** as amended, 2003 N.Y. **[**14]** Laws 666, eff. Oct. 15, 2003. I was concerned, given the paucity of market data, that the repeal could "jeopardize the ability of the NPMs to compete with the SPMs and OPMs," and I considered that more experience was needed. *447 F. Supp. 2d at 246*. Since then, every MSA State but one has likewise amended its Escrow Statute to preclude any yearly recovery of escrowed funds, to prevent market leveraging by regional NPMs at the expense of PMs.

(current market share) -- (greater of 1998 market share or 125% of 1997 market share) current aggregate market share of OPMs

A non-grandfathered SPM also pays a portion of the total SPM adjusted base payment, but regardless of whether its market share increased, remained flat, or decreased. This portion is determined by dividing its actual market share (not just the increase) by the current aggregate market share of OPMs. See MSA Art. IX(i)(4).

III. Developments Since *Freedom Holdings III*

In this section, I present new developments and updated data from the four years since my decision in Freedom Holdings III. PricewaterhouseCoopers, the independent auditor appointed under the MSA, charts the annual tax costs of cigarettes from reports of federal excise taxes paid by manufacturers and sellers of cigarettes, as well as U.S. Customs data. Freedom Holdings III presented the relevant data, comparative statistics among OPMs, SPMs, and NPMs, which the parties have extended through 2007. See *447 F. Supp. 2d at 238*.

The updated reports reveal that the payment structure of the MSA does not favor the major cigarette companies over those companies that either did not join the MSA, or joined the MSA **[**15]** at some later date. See Table 1. The OPMs continue to pay more per carton ($ 5.31 in 2007), including payments to the four previously settled states, than do the non-grandfathered SPMs ($ 5.07), and both pay more than NPMs pay under the Escrow Statutes ($ 5.02). Grandfathered SPMs, viewed in isolation, have the lowest average payment obligation ($ 2.63), since they pay nothing for cigarettes sold up to their grandfathered threshold (the greater of their 1998 market share or 125% of their 1997 market share). However, for sales beyond this threshold, grandfathered SPMs pay about what non-grandfathered SPMs pay ($ 5.07), which is more than NPMs pay. Tr. 257-58, 276-77; [4] see Def. Exh. E, tbl. 3; Def. Exh. H, tbl. 3.

The reports also reveal that the MSA, as intended by the States, has produced a secular decrease in cigarette consumption. See Table 2. Both the total volume of annual cigarette sales and the volume of cigarettes sold annually by the OPMs have decreased steadily since the MSA's inception. The total number of cigarettes sold fell from 484.5 billion cigarettes in 1997 to 365.8 billion cigarettes **[**16]** in 2007, a decline of about 24%. Def. Exh. E, tbl. 1.

Finally, the reports reveal that the competitive dominance of the major cigarette companies has slipped significantly over the life of the MSA. See Table 2. In 1997, the OPMs controlled 97.1 % of the market, but their share fell to 85.9% in 2002 and has remained steady since then. Sales by SPMs represented 8.8% of the market in 2007, a drastic increase from their 2.5% share of the market in 1997. NPMs' share of the market rose from 0.4% in 1997 to a peak of 8.1 % in 2003, but declined somewhat to 5.4% in 2007. [5]

In 2007, New York was due about $ 905 million under the MSA. From all PMs, from 1999 through 2008, New York has received nearly $ 7.7 billion under the MSA. Tr. 261-65; see Def. Exh. F, tbl. 6.

[*692] In sum, the updated data offer no evidence that the MSA has either favored the OPMs or prejudiced the NPMs competitively. SPMs and NPMs continue to compete vigorously with **[**17]** OPMs for market share. Together, they have accumulated market share at the expense of the OPMs, which controlled 97.1 % of the market in 1997, but only 85.9% in 2007. NPMs controlled 0.4% of the cigarette market in 1997 and now control 5.4% of the market. Moreover, these market statistics understate NPM sales because many NPMs sell cigarettes through the Internet or Indian reservations to avoid federal excise tax collection, and such sales exist outside PricewaterhouseCoopers's data. Tr. 239-40, 317-18, 364-65.

Table 1

Average OPM, SPM, and NPM Payments per 200-Cigarette Carton (to nearest cent)

6

[4] "Tr." refers to the transcript of the evidentiary hearing held on November 18-20, 2008.

[5] General Tobacco, the largest NPM to become a non-grandfathered SPM, joined the MSA in July 2004, which accounts for the fact that the SPMs' total market share has expanded slightly at the NPMs' expense in the years since. Tr. 268-76, 314-15; Def. Exh. W, tbl. 1b.

YEAR	OPMs	Grandfathered SPMs [7]	Non-Grandfathered SPMs	NPMs
1999	$ 3.91	$ 0.48	$ 2.02	$ 1.94
2000	$ 4.39	$ 0.81	$ 2.39	$ 2.23
2001	$ 5.20	$ 1.31	$ 3.18	$ 2.99
2002	$ 5.05	$ 1.65	$ 3.34	$ 3.08
2003	$ 4.21	$ 1.87	$ 4.02	$ 3.90
2004	$ 4.28	$ 1.81	$ 4.07	$ 4.03
2005	$ 4.49	$ 2.12	$ 4.27	$ 4.16
2006	$ 4.59	$ 2.33	$ 4.35	$ 4.29
2007	$ 5.31	$ 2.63 [8]	$ 5.07	$ 5.02

Table 2

<u>OPM, SPM, and NPM Market Share (to nearest 0.1%) and Total Market Size (in billions of cigarettes, to nearest 100 million)</u>

9

Year	OPMs	Grandfathered SPMs 10	Non-Grandfathered SPMs	NPMs 11	Total Market Size
1997	97.1%	2.5%	0.0%	0.4%	484.5
1998	96.5%	3.0%	0.0%	0.5%	459.3
1999	93.9%	4.4%	<0.1%	1.6%	439.1
2000	91.5%	5.3%	<0.1%	3.2%	432.9
2001	89.4%	6.2%	0.1%	4.3%	426.3
2002	85.9%	7.2%	0.1%	6.7%	414.3
2003	84.5%	6.8%	0.7%	8.1%	399.9
2004	84.8%	6.5%	1.3%	7.3%	400.3
2005	85.3%	7.2%	1.8%	5.7%	384.3
2006	84.8%	7.8%	2.0%	5.3%	384.7
2007	85.9%	7.6%	1.2%	5.4%	365.8

[*693]

10 For 1997, 1998, and 1999, the figures for grandfathered SPMs include all such companies, regardless of when they joined the MSA.

---

[6] Def. Exh. E, tbl. 3.

[7] This column represents the average payment for all cigarettes sold by grandfathered SPMs--that is, sales both below and above the grandfathered threshold.

[8] For cartons sold above the SPMs' grandfathered thresholds, the marginal per-carton payment was $ 5.07 in 2007, matching **[**18]** the average per-carton payment of non-grandfathered SPMs. <u>See</u> Def. Exh. H, tbl. 3.

[9] Def. Exh. W, tbl. 1 a; Def. Exh. E, tbl. 1.

11 Theodore Martens of PricewaterhouseCoopers testified that his firm derives the data in this column by subtracting OPM and SPM volume totals from the total market volume as determined from federal excise tax data, ince PricewaterhouseCoopers is not authorized to access tax data for NPMs. Tr. 270-71.

IV. Discussion

A. Standard for Judgment

Both sides move on the complete record for judgment pursuant to *Rules 52* and *56 of the Federal Rules of Civil Procedure*, **[**19]** asking me to resolve such factual issues as I may find, treating the record as equivalent to that produced by a bench trial. Because both sides represent that they have presented all relevant evidence, because no questions of credibility require live testimony, and because expert witnesses testified at my request to clarify ambiguous points, I gave my consent. Therefore, this opinion presents my findings of fact and conclusions of law as if after a full trial.

B. Standing

HN3[] To establish standing to sue under Article III of the United States Constitution, a plaintiff must show "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 1453, 167 L. Ed. 2d 248 (2007)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. The "gist of the question of standing" is whether the plaintiffs have a sufficient stake in the outcome of the controversy to assure genuine adverseness and clear presentation of the issues at stake. Id.; see also *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*. In a lawsuit challenging **[**20]** the legality of government action, it is typically easier for a direct object of the challenged action to establish standing than it is for one alleging the "unlawful regulation . . . of *someone else*." *Lujan, 504 U.S. at 561-62*. However, such a plaintiff may nonetheless establish standing by demonstrating that the response of third parties to the challenged regulation threatens or causes an injury to the plaintiff, and that judgment for the plaintiff will redress the injury caused by third parties responding to the regulation. Id.; see *Allen v. Wright, 468 U.S. 737, 757-66, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*.

HN4[] In addition to establishing Article III standing, a plaintiff seeking an injunction pursuant to *§ 16* of the Clayton Act, *15 U.S.C. § 26*, must "allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-13, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. The antitrust standing analysis is more flexible and less demanding for claims for injunctive relief than it is for those seeking money damages, because "one injunction **[**21]** is as effective as 100, and . . . 100 injunctions are no more effective than one." *Id. at 111 n.6* (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 261, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972))*; see also *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443-44 (2d Cir. 2005)*; *Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 257-60 (2d Cir. 1989)*.

Plaintiff Freedom Holdings, Inc. ("Freedom Holdings") imports cigarettes manufactured abroad for resale to a Native American distributor in Salamanca, New York that does not affix tax stamps pursuant **[*694]** to New York's Contraband Statute. Accordingly, Freedom Holdings has never sold cigarettes tax-stamped pursuant to that law or made escrow payments pursuant to New York's Escrow Statute. See *N.Y. Tax Law §§ 480-b*, *481(1)(c)*, *1846*; *N.Y. Pub. Health Law § 1399-nn-pp*. Freedom Holdings claims that it wants to market and sell its Image brand cigarettes through other distributors in New York, and that it will do so if it prevails in this case.

Plaintiff International Tobacco Partners, Ltd. ("ITP") imports Cobra brand cigarettes from International Masis Tabac, an Armenian manufacturer, for resale to direct buying wholesalers in New York. ITP has opened an escrow account in New **[**22]** York on behalf of International Masis Tabac, and deposits the statutory escrow payments into that account. International Masis Tabac has declared that ITP bears responsibility for such payments, and thus is entitled to any funds released pursuant to New York's Allocable Share Release provision, although ITP sells only a fraction of its total sales volume in New York and has not sought any release of funds.

Plaintiffs seek a declaratory judgment that the MSA and its implementing legislation, the Escrow and Contraband Statutes, violate the *Commerce Clause of the U.S. Constitution*, § 1 of the Sherman Act, and § 16 of the Clayton Act. *U.S. Const. art. I, § 8*; *15 U.S.C. §§ 1*, *26*. Plaintiffs also seek a permanent injunction against enforcement of New York's Escrow and Contraband Statutes, along with fees and costs. See *N.Y. Pub. Health Law § 1399-nn-pp*; *N.Y. Tax Law §§ 480-b*, *481(1)(c)*, *1846*. Plaintiffs do not seek money damages. Second Suppl. & Am. Compl. PP 93-102 & Prayer for Relief.

The MSA and Escrow and Contraband Statutes impose obligations on manufacturers and licensed, tax-stamping wholesalers, but they do not directly obligate Plaintiffs, who are distributors and importers. See *N.Y. Pub. Health Law §§ 1399-nn-pp*; **[**23]** *N.Y. Tax Law §§ 480-b*, *481(1)(c)*, *1846*. Defendants argue that Plaintiffs therefore lack Article III standing to assert their claims. However, Plaintiffs' inability to sell cigarettes without making statutory escrow payments, directly or indirectly, satisfies the constitutional requirement of an injury in fact. This injury is redressible because an injunction against operation of the challenged statutes would allow Plaintiffs to sell cigarettes without making the allegedly anticompetitive and illegal escrow payments. See, e.g., *Lujan, 504 U.S. at 561-62*. The causal connection between the challenged state action and Plaintiffs' injury is sufficiently direct and non-speculative. Therefore, Plaintiffs have satisfied their burden to demonstrate standing under Article III.

Plaintiffs also have standing to sue for an injunction pursuant to § 16 of the Clayton Act. *15 U.S.C. § 26*. If Plaintiffs were seeking damages under *§ 4 of the Clayton Act*, arguing that the MSA creates an anticompetitive cartel that reduces output to charge higher prices, they would lack antitrust standing. Though such conduct would violate the law, Plaintiffs would benefit, not suffer, from both higher market prices and **[**24]** the chance to undersell members of the cartel to capture new market share. See *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 583, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. However, Plaintiffs seek injunctive relief, for which the standing inquiry is more flexible, reflecting greater concern for the public interest and reduced risk of duplicative recovery. See *Minorco, 871 F.2d at 260 n.6*. Plaintiffs allege that New York passed the Escrow and Contraband Statutes to further its agreement with the four **[*695]** major manufacturers to punish NPMs for competing with members of the MSA cartel. Because allegations of "[l]osses inflicted by a cartel in retaliation for an attempt . . . to compete" constitute a valid antitrust claim, Plaintiffs have established standing to sue under the Sherman and Clayton Acts. *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 783 (7th Cir. 1994)*; see also *Volvo N. Am. Corp. v. Men's Int'l Prof 'l Tennis Council, 857 F.2d 55, 67-68 (2d Cir. 1988)*.

C. Sherman Act Preemption

In Freedom Holdings I, the Court of Appeals held that Plaintiffs had stated a legally sufficient claim for relief that the Sherman Act, *15 U.S.C. § 1*, preempts New York's Escrow and Contraband Statutes. It explained **[**25]** that ***HN5***[] a "two-step analysis" determines whether a state statute is preempted: First, a plaintiff must show that the statute creates a scheme that would be a "per se violation" of the Sherman Act if arranged privately, and second, a plaintiff must show that the state action doctrine of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, does not immunize the statute from preemption. *Freedom Holdings I, 357 F.3d at 222-23*. Accepting the allegations of the Complaint as proved, the Court of Appeals held that the MSA reflects an agreement among private parties, aided and abetted by the States, to create a scheme for market control, that the scheme "mandates or authorizes conduct" or "places irresistible pressure" on parties to violate the antitrust laws, and that such conduct "in all cases" constitutes a "per se violation" of the Sherman Act. [12] It further held that Parker immunity was

---

[12] Accepting as proved the Complaint's allegation that the challenged statutes grant regulatory power to private actors, the Court of Appeals ruled that the Escrow and Contraband Statutes were not merely unilateral acts of state government, but "hybrid restraint[s]" vulnerable to preemption by the federal antitrust laws. *Id. at 223*; see *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345-46 n.8, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)*.

unavailable because New York had neither "clearly articulated" the "legitimate state policy goals" behind the MSA nor "actively supervised" the mechanisms that advance those goals to minimize "unnecessary anticompetitive effects." Id.; see *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. **[**26]** Accordingly, the Court of Appeals concluded that Plaintiffs had stated a legally sufficient claim for relief that the Sherman Act preempts the Escrow and Contraband Statutes.

I hold, based on my findings of fact and conclusions of law in Freedom Holdings III, and informed by renewed consideration of my legal analysis and updated data presented by the parties at an evidentiary hearing to clarify ambiguities, that Plaintiffs have failed to prove that the MSA and its implementing legislation in New York constitute a per se violation of the Sherman Act. I also hold that the *Parker* state action doctrine immunizes the Escrow and Contraband Statutes from Sherman Act preemption.

1. Per Se Violation

In Freedom Holdings III, I noted that the caselaw has developed two different understandings of what constitutes **[**27]** a per se violation of the antitrust laws. *447 F. Supp. 2d at 248-52*. The first understanding examines the restraint and its effects in the context of any redeeming social benefits, while the second looks only to the abstract character of the restraint. I concluded that Plaintiffs had not shown a likelihood of success on their antitrust preemption claim under either understanding. At a minimum, Plaintiffs must show that the MSA and its implementing legislation **[*696]** frustrate competition in the cigarette market. The Supreme Court has held that, ***HN6***[] to establish a per se antitrust violation arising from a state statute, a plaintiff must show that the statute "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Rice v. Norman Williams Co., 458 U.S. 654, 661, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*; see *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)* ("[F]ederal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior."). Only authorized or compelled practices that have a "pernicious effect **[**28]** on competition and lack . . . any redeeming virtue" are deemed per se antitrust violations. *Rice, 458 U.S. at 659 n.5*.

In their Second Supplemental and Amended Complaint, Plaintiffs allege that the MSA creates, and the Escrow and Contraband Statues enforce, an illegal output cartel engaged in market division and price-fixing. They argue that the MSA discourages the OPMs comprising the cartel from gaining market share relative to each other by increasing their payment obligations if they do so. Allegedly, the MSA thereby encourages OPMs to raise prices beyond the level necessary to accommodate their payment burdens, because they know that the other OPMs will follow their price increases rather than gain market share. Thus, Plaintiffs conclude that the OPMs can amass a fund for advertising and marketing that overwhelms the NPMs' ability to compete. The States, Plaintiffs allege, sponsor this scheme and protect the OPMs' market dominance because they reap enormous sums from annual payments under the MSA. Accordingly, Plaintiffs claim that the Escrow and Contraband Statutes bind the NPMs into a market in which they cannot compete. [13] Accepting the allegations as proved, the Court of Appeals **[**29]** found that Plaintiffs had "sufficiently alleged a per se violation of the Sherman Act" because the MSA, as described in the Complaint, is a "naked restraint on competition, albeit one subject to erosion by NPMs." *Freedom Holdings I, 357 F.3d at 226*.

The proofs do not sustain Plaintiffs' allegations. The MSA and the Escrow and Contraband Statutes neither inhibit competition nor lack redeeming virtue. See *Rice, 458 U.S. at 659 n.5*. The proofs reveal that the NPMs have retained pricing autonomy and gained substantial market share at the expense of the OPMs, and that ample evidence of the MSA's redeeming public health virtues belies any anticompetitive design.

---

[13] The Court of Appeals summarized Plaintiffs' allegations: "[T]he combination of the MSA, the Escrow Statutes, and the Contraband Statutes, allows OPMs to set supracompetitive prices that effectively cause other manufacturers either to charge similar prices or to cease selling. . . . NPMs are forced to charge these prices to cover the costs imposed by the Escrow and Contraband Statutes or go out of business in New York." *Freedom Holdings I, 357 F.3d at 226*.

The proofs do not show a "pernicious effect on competition" caused by the MSA **[**30]** and the Escrow and Contraband Statutes. See id. To the contrary, they show plainly that NPMs like Plaintiffs have not suffered any competitive injury as a result of the MSA. Since 1999, the NPMs have competed vigorously to increase their share of the domestic cigarette market from 0.4% in 1997 to 5.4% in 2007. Over the same term, the market share of the OPMs has declined from 97.1 % to 85.9%. These trends have occurred in a market whose total **[*697]** volume has contracted from 484.5 billion to 365.8 billion cigarettes sold annually, a contraction in sales and consumption that has advanced the public heath aims of the States considerably. [14] In Freedom Holdings I, the Court of Appeals considered that, by measuring PMs' payment obligations by their relative market shares, the MSA discourages growth and natural competition. The data, however, reveal that neither NPMs nor SPMs have acted as if discouraged.

The fact that NPMs have not suffered competitively, but rather prospered, over the life of **[**31]** the MSA is unsurprising because nothing in the MSA or its implementing legislation hinders NPMs in relation to PMs. The payment structure compelled by the MSA and the Escrow Statutes has not disadvantaged NPMs. Indeed, the proofs show that NPMs have actually paid less per carton ($ 5.02 in 2007) than have their competitors ($ 5.31 for OPMs, $ 2.63 with a marginal rate of $ 5.06 for grandfathered SPMs, and $ 5.07 for non-grandfathered SPMs). See *N.Y. Pub. Health Law § 1399-pp(2)* (fixing flat rate of $ 0.0188482 per cigarette). These figures undermine the argument that "NPMs are deterred from seeking increased market share because the high costs of compliance with the Escrow Statute preclude their competing through lower prices." *Freedom Holdings II, 363 F.3d at 152*; see *KT&G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114, 1133 (10th Cir. 2008)* ("In light of the fact that [OPMs, SPMs, and NPMs] all face roughly the same per-cigarette cost under either the MSA or the allocable share amendment, there is no indication that they will avoid increasing their own market share, nor is there any suggestion that they will not unilaterally make their own pricing and output decisions."). Nonetheless, **[**32]** Plaintiffs argue that the MSA disfavors NPMs because OPMs and SPMs may deduct their MSA payments from their income taxes, but NPMs may not similarly deduct their payments to state escrow funds. Those PMs, however, may not recover their payments once made, while NPMs receive annual interest earnings on escrowed funds and will recover, after twenty-five years, any funds not applied to judgments or settlements with the States. Alternatively, NPMs may become eligible to deduct their payments by disclaiming their rights to interest income and reversion of principal. *Freedom Holdings III, 447 F. Supp. 2d at 259*; see *Int'l Tobacco Partners, Ltd. v. Kline, 475 F. Supp. 2d 1078, 1083 n.8 (D. Kan. 2007)*. Thus, I found in Freedom Holdings III that nothing in the MSA or the Escrow and Contraband Statutes imposes a relative tax hardship on NPMs. Plaintiffs have offered no evidence to cause me to change my mind.

Many NPMs have joined the MSA, even as non-grandfathered SPMs. But Plaintiffs have presented no reason to infer from this trend that the MSA particularly burdens NPMs. No evident economic force drives NPMs to the MSA. NPMs that become SPMs pay no less to the States than what they paid under **[**33]** the Escrow and Contraband Statutes, and by joining the MSA they subject themselves to upward payment adjustments tied to any gain in market share. It is true that grandfathered SPMs pay the least per carton of all manufacturers, but, as I explained in Freedom Holdings III, they pay more than NPMs pay for each successive cigarette they produce, and it is that marginal **[*698]** cost, not the average cost, that drives manufacturers' pricing decisions. See *447 F. Supp. 2d at 257-58*. In his testimony, Professor Jonathan Gruber explained the basic microeconomics principle of marginal cost pricing to maximize a firm's profits, and stated that, in the competitive cigarette industry, a manufacturer will price its products at or above its marginal cost, not its average cost, for each unit produced. Tr. 325-31. Gruber further testified that there is no reason why a cigarette manufacturer, whether OPM or grandfathered SPM, would price its product below its marginal cost of production, even if that manufacturer is a member of a cartel. Tr. 337-38. The "increased marginal costs to the SPMs above the grandfathered levels can be viewed as a means of recouping those funds which were lost to the states through **[**34]** the grandfather provision." *Freedom Holdings III, 447 F. Supp. 2d at 258*. Thus, whatever benefit an SPM such as Liggett Group or Commonwealth Brands enjoys due to the grandfathering provision is not reflected in its pricing decisions, and so has no bearing on marketplace

---

[14] Plaintiffs also contend that the decline in cigarette consumption began before the MSA, but no one can say that the MSA did not provide a major impetus to cause the decline to continue and accelerate.

competition. Grandfathered SPMs make the same per-carton payment on marginal sales above their grandfathered thresholds as non-grandfathered SPMs make on every carton they sell, and that payment exceeds the escrow payment required of NPMs. [15] The MSA attracts NPMs by offering certainty, not shelter from market forces, as SPMs gain immunity from potentially devastating future litigation with the States. By contrast, NPMs have chosen to accept uncertainty and the benefit of lower payment obligations under the Escrow and Contraband Statutes, including the potential recovery of some or all of their escrow payments.

The MSA has not caused Plaintiffs or other NPMs to surrender pricing autonomy. Through the testimony of Christopher Nelson, Chief Financial Officer of Freedom Holdings, and Jeffrey Avo Uvezian, President of ITP, Plaintiffs concede that their pricing decisions are made independently and that they are not compelled to follow price leadership by their larger competitors. Tr. 109-10; Nelson Dep. 180-81. Likewise, Kevin Altman, who set prices for two NPMs, CigTec and JJA Distributors **[**36]** LLC, testified that both companies made independent pricing decisions that were not dictated by OPMs or SPMs. Tr. 87-88. The aggregate historical data of SPM and NPM market shares, reproduced above, support this testimony. Under the MSA and the Escrow and Contraband Statutes, the OPMs exercise no power, direct or indirect, over the cigarette prices charged by NPMs. Indeed, independent NPMs have taken competitive advantage of higher prices charged by the large cigarette manufacturers. Only the Escrow Statutes impact NPMs' cost structure. See *KT&G Corp., 535 F.3d at 1129, 1133*; *Sanders v. Brown, 504 F.3d 903, 911 (9th Cir. 2007)* ("Nothing . . . **[*699]** forces the NPMs to either peg their prices to those of participating manufacturers, or to refrain altogether from entering the market.") In essence, Plaintiffs allege that New York violates the antitrust laws by compelling NPMs to make payments to escrow funds that they would prefer not to make. This unhappiness, however, does not amount to an antitrust injury. Plaintiffs' grievance parallels that of any manufacturer against a flat tax, which entails the same compulsion, and New York has unquestioned authority to impose such a tax on all cigarette **[**37]** manufacturers. *Freedom Holdings I, 357 F.3d at 229*; see *Freedom Holdings II, 363 F.3d at 152*.

Further, Plaintiffs offer no evidence to support their theory that the MSA has stifled the OPMs' motivation to compete with each other on price. As Plaintiffs recognize, the OPMs, by raising prices beyond the level dictated by their MSA payments, expose themselves, even on their premium product lines, to market erosion by NPMs that sell nearer to their marginal cost, after accounting for escrow payment obligations. Second Suppl. & Am. Compl. PP 25-26. The parties disagree on the extent of price elasticity and brand salience in the cigarette market, but the data show, and Plaintiffs concede, that cigarette consumers respond to differences in price. As Plaintiffs assert, "the differential in wholesale prices between the fourth-tier cigarettes sold by NPMs . . . and the premium brands is now $ 17/carton." Id. P 46 n.4. NPMs may wield fewer resources for marketing and advertising than PMs and lack the economies of scale of the larger PMs. But NPMs can exploit any disproportionate price increase by PMs by selling cigarettes at lower prices, and have done so vigorously to the NPMs' market advantage. **[**38]** See Tr. 96, 125; see also *Sanders, 504 F.3d at 911* ("If the OPMs really are charging artificially high prices, and thus making artificially high profits, an NPM conceivably could compete on price by charging a 'normal' price and still make a 'normal' profit, even taking the escrow payment into account."). Thus, "apportionment [of market share] among OPMs is an internal matter which does not affect the ability of NPMs to compete in any material way." *Freedom Holdings III, 447 F. Supp. 2d at 257*.

I found in Freedom Holdings III, and I find again, that the States did not intend to create a scheme for market control in favor of the four major cigarette companies that became the OPMs, or in favor of any other cigarette companies.

[15] The Court of Appeals credited Plaintiffs' argument that the MSA's SPM payment formula penalizes SPMs that gain market share from OPMs, which allegedly compels SPMs to follow OPM price increases to avoid gaining market share at their expense. *Freedom Holdings II, 363 F.3d at 153*. It is true that the denominator **[**35]** of the ratio used in the formula causes the collective market position of the OPMs to affect what an individual SPM must pay, and that, as a result, if an SPM's share of the total market increases, the increase in the amount that it must pay is not directly proportional to its increase in market share, especially if the aggregate total market share of OPMs decreases in the same year. See *Freedom Holdings III, 447 F. Supp. 2d at 235-36*. However, the proofs show that SPMs target the "deep discount" market, and so would be unlikely to follow OPM price increases. See Tr. 94. Moreover, even if SPMs did follow OPM price increases, doing so would create a market opportunity for NPMs, not a competitive disadvantage.

Plaintiffs have presented no proof of such a purpose. The MSA contemplated that PMs would increase their prices, but such increases are consistent with the redeeming social purpose of deterring consumption and sales of cigarettes. The Escrow and Contraband Statutes, and, more recently, the Allocable Share Release amendments, have forced NPMs also to raise their prices for the same redeeming social purpose, to prevent the MSA from being destroyed, and to assure that **[**39]** future lawsuits by the States against the NPMs will not be frustrated by those companies' financial irresponsibility.

As I found in Freedom Holdings III, the States intended that their settlement with the four major tobacco companies have important social benefits, namely, reduction of tobacco consumption, restriction of tobacco advertising and marketing, and transfer of cigarette-induced health care costs from the States to the tobacco companies themselves. The New York Supreme Court, in approving the settlement between New York and the OPMs, found that the MSA achieved the State's critical objectives, more fully than if the lawsuit had gone to judgment. *New York v. Philip Morris, 686 N.Y.S.2d at 568-69*. The **[*700]** Court articulated these objectives in its findings: an injunction against cigarette sales to minors and advertisements targeting minors, greater disclosure of the health effects of tobacco and nicotine, and funding of educational and clinical programs that publicize and treat the health consequences of cigarette smoking. Id. It concluded:

> [T]he MSA adequately protect[s] the public interest . . . . [T]he economic and noneconomic benefits for New York State are substantial [and] are **[**40]** consistent with and advance the objectives of New York public policy as set forth in the amended complaint."

Id. at 568. Indeed, the massive flow of funds from the PMs has substantially contributed to the financial welfare of the settling States; between 1999 and 2008, New York alone received nearly $ 7.7 billion. As for the Escrow Statute, the New York Legislature elaborated on the state policy behind the MSA in its findings and explained how the Escrow Statute furthers that policy:

> It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts. . . . It would be contrary to the policy of the state if [NPMs] could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably.

N.Y. Pub. Health Law § 1399-nn(4), *(6)*.

I found at the preliminary injunction stage, *Freedom Holdings III, 447 F. Supp. 2d at 250*, **[**41]** and I find again on the basis of a full and complete record, that the States intended the MSA and the Escrow and Contraband Statutes not as "naked restraints on trade," but as means of achieving important public health goals and substantial fiscal benefits. In Freedom Holdings I, the Court of Appeals accepted Plaintiffs' allegations as if proved, for it was reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)*. However, Plaintiffs have failed to prove the allegations of their Complaint, and thus the foundation for the Court of Appeals' rulings does not exist. Plaintiffs have presented no credible proof that the MSA has created a cartel favoring participating cigarette manufacturers. Nor have they presented proof that the NPMs have suffered, or are likely to suffer, any antitrust injury.

I found in Freedom Holdings III, and I find again, that the MSA does not "mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . place[] irresistible pressure on a party to violate the antitrust laws in order to comply with the statute." *447 F. Supp. 2d at 251* (quoting *Rice, 458 U.S. at 661*). The continued strength of NPMs proves **[**42]** as much, and the absence of financial pressure on NPMs to join the MSA confirms it. Nothing in the Escrow or Contraband Statutes mandates or authorizes "illegal conduct in all cases," an essential ingredient of a per se antitrust violation. Id.; see *KT&G Corp., 535 F.3d at 1132-33*; *Tritent Int'l Corp. v. Kentucky, 467 F.3d 547, 557 (6th Cir. 2006)* (analyzing Freedom Holdings I and finding Kentucky statutes implementing the MSA not preempted by Sherman Act). The analogy to per se violations of the antitrust laws does not fit, as the proofs show neither anticompetitive effect nor lack of redeeming social purpose. See *Rice, 458 U.S. at 659 n.5*. Therefore, **[*701]** adhering to my findings and conclusions of law in Freedom Holdings III respecting Plaintiffs' antitrust claims, I hold that Plaintiffs have failed to establish that the MSA's terms, along with those of the Escrow and Contraband Statutes, constitute a per se violation of § 1 of the Sherman Act.

2. *Parker* State Action Immunity

Because I find no per se antitrust violation, I need not address whether New York's legislation is preempted by federal ***antitrust law***. See *Parker, 317 U.S. at 341* (holding that ***HN7***[] a court must find that a state is guilty **[**43]** of a per se antitrust violation before evaluating whether redemptive purpose exempts it from application of federal ***antitrust law***); see also *Rice, 458 U.S. at 662 n.9*. However, I assume for purposes of Parker analysis that Plaintiffs have proved a per se violation, see *Freedom Holdings I, 357 F.3d at 226*, and I will proceed on that assumption to analyze each prong of the Midcal-Parker test. See *Cal. Regional Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. ***HN8***[] This test provides that a state statute is exempt from antitrust preemption if "(i) the restraint in question is 'clearly articulated and affirmatively expressed as state policy,' and (ii) the policy is 'actively supervised' by the state itself." *Freedom Holdings I, 357 F.3d at 205* (quoting *Midcal, 445 U.S. at 105*). The Court of Appeals, assuming Plaintiffs' allegations as proved, held that the Escrow and Contraband Statutes do not qualify for Parker immunity because New York fails to satisfy both the "articulation" and "supervision" prongs. *Id. at 226-32*. It suggested, however, that failure to satisfy the first prong would not by itself preclude immunity, thus focusing the inquiry on whether New York actively supervises **[**44]** the workings of the MSA. *Freedom Holdings II, 363 F.3d at 156*.

The proofs make clear that New York satisfies both prongs. As I found in Freedom Holdings III, and as I find again, New York has clearly articulated its reasons for entering into the MSA and how the MSA's features advance its goals, and New York, through the yearly reporting mechanisms required by the MSA and the neutral analysis and reporting functions performed by PricewaterhouseCoopers, has actively supervised the MSA to assure that it continues to achieve its purposes without anticompetitive consequences.

Midcal requires, as its first prong, that New York "act in furtherance of legitimate state policy goals and [that] its acts must have a plausible nexus to those goals." *Freedom Holdings II, 363 F.3d at 156*. On the basis of the pleadings, the Court of Appeals held that New York had not explained how the provisions of the MSA, such as those linking OPM payment obligations to their market shares, actually further the public health. *Freedom Holdings I, 357 F.3d at 229-30*. The proofs make clear, however, that which the Court of Appeals failed to find. Because of higher cigarette prices, provoked by the substantial payments **[**45]** made by the cigarette companies to the States, cigarette sales have fallen by 24%, from 484.5 billion cigarettes in 1997 to 365.8 billion cigarettes in 2007. The 97.1% oligopoly enjoyed by the four major cigarette companies that were the OPMs in 1997 has been reduced to 85.9% in 2007, and smaller cigarette companies have entered and thrived in the market. New York alone, of the forty-six states that settled with the cigarette companies, has received nearly $ 7.7 billion from the PMs, and the potential for more from the many escrow accounts created for NPMs. In short, the purposes endorsed by the New York Supreme Court have come **[*702]** to pass. See *New York v. Philip Morris, 686 N.Y.S.2d at 568*. The MSA has brought about a substantial reduction in cigarette consumption and substantial reimbursements to the States for the public costs of cigarette consumption, all without adversely impacting non-participating manufacturers. New York has ensured, by implementing legislation pursuant to the MSA, that these beneficial achievements are not corrupted by allowing NPMs to sell cigarettes at prices unburdened by any payment obligation, and potentially to dodge liability by closing up shop and selling **[**46]** elsewhere. As I held in *Freedom Holdings III, 447 F. Supp. 2d at 260-61*, New York has articulated reasonable goals, linked to its public health needs, and its redeeming public purpose is inconsistent with a finding of a per se antitrust violation.

Likewise, the proofs show "active supervision" by New York sufficient to meet the second *Midcal* prong. The MSA provides for an auditing mechanism that requires PricewaterhouseCoopers to collect statistical information about cigarette manufacturer sales, costs, and market share and to report that information to the States and the public. Through this data, New York has closely tracked the actual workings of the MSA, including the competitive effects of the MSA regime. New York has also conducted detailed oversight through capturing the data produced by the Contraband Statute of all NPM sales in New York. See *N.Y. Tax Law §§ 480-b*, *481(1)(c)*, *1846*.

By this statistical oversight, New York has satisfied the requirements for *Parker* immunity. Since the statistics make clear that the MSA has not proven to be anticompetitive, there has been no requirement that New York intervene to prevent a cartelization of the market. Nor has there been any indication **[**47]** of price collusion, for, as all the NPM witnesses testified, cigarette pricing is autonomously and independently made, with higher than necessary pricing by the majors creating opportunities for smaller, independent cigarette sellers. Unlike the statute challenged in Midcal, which involved explicit price-fixing, see *Midcal, 445 U.S. at 100-01*, the statutes challenged here have not interfered with competition. The MSA has served legitimate health and welfare objectives without handicapping NPMs or creating any anticompetitive effects. Accordingly, I find that New York has satisfied both prongs of the Midcal-Parker state action immunity test.

D. The Injunction Against the Allocable Share Release Amendment

In Freedom Holdings III, I preliminarily enjoined New York from enforcing an amendment to the Allocable Share Release provision of its Escrow Statute. *447 F. Supp. 2d at 264-65*; see *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003. Informed by further briefing and evidence, I now deny Plaintiffs' request for a permanent injunction and dissolve the preliminary injunction.

Under the MSA, New York's allocable share, in relation to all other States that settled **[**48]** with the OPMs, is about 12.76%. New York receives that proportion of funds paid by all PMs annually. In contrast, New York receives a fixed amount from NPMs making escrow payments under its Escrow Statute, $ 0.0188482 (in 2007 and subsequent years) for each cigarette actually sold, or imported into, the State. *N.Y. Pub. Health Law § 1399-pp(2)(a)(v)*. However, because of the Allocable Share Release provision ("ASR"), *§ 1399-pp(2)(b)(ii)*, NPMs are entitled to a credit to the extent that the funds paid into escrow exceed New York's allocable share **[*703]** of all escrow payments made by the NPM into the escrows of all States. The ASR thus allows an NPM that concentrates its sales in one or a few states to offset by credit most of its escrow obligations, gaining a major competitive advantage over the OPMs and other PMs that market nationally. [16]

The OPMs complained of this undue competitive advantage, and sought refund or credit against their payments, invoking the NPM Adjustment provisions of the MSA. As described above, those provisions reduce the payments **[**49]** due by PMs by three times the amount of market share loss over 2%, if the PMs prove a collective loss of market share to NPMs, that the MSA was a "significant factor" in that loss, and that the State in issue failed to enact or diligently enforce an Escrow Statute. MSA Art. IX(d). An independent study conducted by The Brattle Group found in favor of the OPMs, concluding that "MSA disadvantages were a significant factor contributing to the Market Share Loss in 2005," as well as in prior years. Pl. Exh. 362, P 228. The States nonetheless maintained that no NPM Adjustment was appropriate because the States had effectively legislated to prevent the NPMs from undercutting the MSA. One such preventative measure was an amendment to the Escrow Statutes intended to prevent NPMs from abusing ASRs. This Allocable Share Release amendment, also known as an ASR repealer, allowed release of escrowed funds only at the close of the twenty-five year term or when necessary to pay judgments or settlements: NPMs could no longer obtain a yearly credit of funds paid into escrow to the extent that they exceed the State's allocable share.

In Freedom Holdings III, reacting to New York's just-passed ASR amendment, **[**50]** and without the benefit of the proofs discussed above and at the evidentiary hearing that I conducted, I enjoined implementation of the amendment. Without a record, I was concerned about possible effects on competition and the potential for evidence that the State or the public would suffer injury.

I am persuaded, however, by the evidence and further consideration, that my injunction should be dissolved. First, though Plaintiffs have presented evidence of the financial troubles of some regional NPMs after ASR repeals, they offer no proofs to show that, in the absence of the ASR, the MSA and Escrow and Contraband Statutes constitute a per se antitrust violation. The ASR encouraged NPMs to concentrate their sales within particular States, and

---

[16] Kevin Altman, who worked for two NPMs, testified that NPMs receive their credit very soon after they make their payment into escrow. Tr. 24.

thereby to defeat the Escrow and Contraband provisions of those States' laws. The ASR repeal has canceled that encouragement, leading NPMs in some instances to engage in "state-shifting" by refocusing their sales to States yet to repeal their ASRs, and then to the Internet and Indian reservations, where sales are not subject to escrow payments. See Tr. 97-102, 364-65. The ASR repeals have reduced the degree of competitive advantage enjoyed by NPMs **[**51]** due to the MSA. See Pl. Exh. 362, PP 83-87. But Plaintiffs have not shown that the MSA without the ASR disables them from competing in the cigarette market. With or without the ASR, NPMs enjoy pricing autonomy and need not follow price hikes by OPMs, particularly price hikes that overcompensate for the MSA payment burdens. See Xcaliber Int'l Ltd. v. Edmondson, No. 04-CV-0922-CVE-PJC, 2005 U.S. Dist. LEXIS 40448, 2005 WL 3766933, at *2 (N.D. Okla. Aug. 31, 2005) ("[A]ll cigarette manufacturers, even under the cost constraints imposed by the MSA and the Allocable **[*704]** Share Amendment, have choices as to price and output, and . . . make their decisions as to these issues unilaterally."); see also *Int'l Tobacco Partners, Ltd. v. Beebe, 420 F. Supp. 2d 989, 997 (W.D. Ark. 2006)*. With or without the ASR, NPMs have ample incentive to compete for market share and ample opportunity to do so, as their escrow payments, even if unrecoverable in the short term, are no more debilitating than the corresponding payments required of PMs. With or without the ASR, NPMs pay less per carton under the Escrow Statutes than the OPMs and non-grandfathered SPMs pay, and less per carton than the grandfathered SPMs pay for each marginal carton **[**52]** produced above their grandfathered thresholds. Just as Plaintiffs fail to show that NPMs suffer a special hardship compared to other manufacturers under the MSA as originally conceived, they fail to show that NPMs will suffer a special hardship under an MSA that denies them the ASR's yearly recovery of funds. See *KT&G Corp., 535 F.3d at 1128-29*.

Second, the ASR amendment furthers New York's aims in signing the MSA by protecting the State against the impact on public health costs of a disproportionate inundation of cigarette sales within the State. The public welfare purpose of the MSA is enhanced by repealing the ASR, which discourages NPMs from concentrating sales in particular States at the expense of the public health and welfare of such States, and ensures that such States, including New York, are compensated for every cigarette sold in the State. With my preliminary injunction in place, New York retains in escrow only 12.76% of any individual NPM's per-cigarette payments, regardless of whether that NPM sells 12.76%, 50%, or 100% of its cigarettes in New York. Likewise, with the injunction in place, New York is assured compensation for 12.76% of the total damage to the public health **[**53]** caused by that NPM, regardless of whether that NPM caused 12.76%, 50%, or 100% of its total damage in New York. The injunction creates an incentive for cigarette manufacturers to disseminate their product and its ruinous consequences within the State while recompensing the State's citizens only incompletely for the injury they sustain. By dissolving the preliminary injunction, I allow New York to join the vast majority of other States that have removed the ASR from their Escrow Statutes so as better to fulfill the purposes of the litigation that the MSA resolved.

The Centers for Disease Control and Prevention estimates that, in 2002, New York incurred $ 149.70 per carton in productivity costs related to smoking, as well as $ 57.00 per carton in cigarette-related Medicaid costs. [17] The ASR amendment requires all NPMs to pay their fair share of these costs without hindering them competitively against the PMs. Accordingly, I find by a preponderance of the credible evidence that, even after repeal of New York's Allocable Share Release provision, the MSA and Escrow and Contraband Statutes do not constitute a per se violation of the Sherman Act. No permanent injunction is justified, and the **[**54]** preliminary injunction is dissolved.

F. *Commerce Clause* Claim

HN9[] The *Commerce Clause* empowers Congress to "regulate Commerce . . . among the several States." *U.S. Const. art. I, § 8, cl. 3*. In its "dormant application," it limits "a state's power to take **[*705]** actions impacting interstate commerce." *Freedom Holdings I, 357 F.3d at 216*. The *Commerce Clause* limits state regulatory power in three ways. First, a state law is per se invalid if it clearly discriminates against interstate commerce in favor of intrastate commerce. Id. Second, under the "Pike balancing test," a state law is invalid if it is nondiscriminatory but

[17] Polishook Decl., Exh. G, at 11. Because these figures suggest that cigarettes represent a per-stick net drain on the public fisc, they undercut the notion that New York's "goals of serving public health and enhancing revenue conflict." Contra *Freedom Holdings I, 357 F.3d at 230*.

"imposes a burden on interstate commerce incommensurate with the local benefits secured." Id. (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001)); see Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). Third, a state law is invalid if it has the "practical effect" of controlling **[**55]** commerce occurring entirely outside the state's borders. Freedom Holdings I, 357 F.3d at 216 (citing Healy v. The Beer Inst., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)). However, a state law is not invalid under the Commerce Clause if its only out-of-state impact is to elevate the price of goods in interstate commerce. Id. at 220 (noting that "upstream pricing impact" alone does not violate Commerce Clause).

In Freedom Holdings I, the Court of Appeals rejected all of Plaintiffs' arguments that the Contraband Statutes implementing the MSA violate the dormant Commerce Clause. It held that Plaintiffs had failed to show that the Contraband Statutes have a "disparate impact on interstate commerce," as required by both the discrimination and Pike balancing test theories. Id. at 218. Likewise, under the extraterritoriality analysis, the Court held that Plaintiffs had failed to show that the Contraband Statutes "regulat[e] commerce occurring wholly outside the borders of New York" or have the "practical effect of control[ing] conduct beyond the boundaries of the State." Id. at 219. The Court found that the Commerce Clause, which "protects against inconsistent legislation arising from the projection of one state **[**56]** regulatory regime into the jurisdiction of another State," id. at 220 (quoting Healy, 491 U.S. at 337), had no reason to protect against the MSA, "a universal and practically uniform national system of payments by tobacco companies to states." Id. at 220 n.13. Plaintiffs argued that the Contraband Statutes regulate out-of-state commerce by fostering "artificially high prices" in the chain of distribution of cigarettes destined for New York, but the Court of Appeals found that effect to be "no more than the upstream pricing impact of a state regulation," noting that "out-of-state actors . . . remain free to conduct commerce on their own terms, without either scrutiny or control by New York State." Id. at 220-21. The Court of Appeals observed, from the relevant Supreme Court precedents, that the Dormant Commerce Clause was offended by state statutes that purported specifically to regulate out-of-state pricing decisions, or in-state pricing decisions that were required to relate to out-of-state prices. Id. at 221; see Healy, 491 U.S. at 326 (statute requiring seller to certify that in-state prices are no higher than any out-of-state prices); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575-76, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) **[**57]** (statute forbidding distiller to change out-of-state prices after posting in-state price); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935) (statute banning resale of out-of-state milk purchased at price below in-state minimum price). By contrast, the Escrow and Contraband Statutes set no particular price for in-state sales and mandate no relationship whatever between in-state and out-of-state cigarette prices.

I allowed Plaintiffs to amend the Complaint to reassert a Commerce Clause **[*706]** claim in light of Grand River Enters. Six Nations, Ltd. v . Pryor, 425 F.3d 158 (2d Cir. 2005), which the Court of Appeals decided one year after Freedom Holdings I. In Grand River, the Court, ruling on the allegations of the complaint and not on the proofs, reversed the District Court and ordered that the plaintiffs could lawfully claim that the Escrow Statutes "limit, burden and regulate directly interstate commerce wholly outside the respective states." Id. at 170 (citations omitted). The Court noted that, while the Freedom Holdings I complaint had identified as an extraterritorial effect price increases in the distribution chain of cigarettes sold to New York retailers, the Grand River complaint **[**58]** more broadly alleged a "uniform system of regulation that results in higher prices nationwide." Id. at 171. The Court of Appeals ruled that the plaintiffs had "successfully stated a possible claim that the practical effect of the challenged statutes and the MSA is to control prices outside of the enacting States by tying both the SPM settlement and NPM escrow payments to national market share, which in turn affects interstate pricing decisions." Id. at 173. In so holding, the Court stressed that it "[took] no position as to the ultimate viability of the dormant commerce clause claim," having accepted as true the facts alleged in the complaint and drawn all reasonable inferences in favor of the plaintiffs. Id.

On remand, the District Court denied the plaintiffs' request for a preliminary injunction, finding that they were not likely to succeed on any of their claims, including the dormant Commerce Clause claim. Grand River Enters. Six Nations, Ltd. v. Pryor, No. 02 Civ. 5068 (JFK), 2006 U.S. Dist. LEXIS 35614, 2006 WL 1517603, at *8-*10 (S.D.N.Y. May 31, 2006) ("Even if . . . the amount of an escrow refund 'is, in part, keyed to the amount an NPM would have paid if it had joined the MSA as an SPM[,]'. . . Grand **[**59]** River has not shown that this scheme may result in interstate price control.") (quoting Grand River, 425 F.3d at 172). Distinguishing the MSA and its implementing statutes from those defeated in price-parity cases like Healy and Brown-Forman, Judge Keenan emphasized that the New York legislation "neither makes cigarette prices or escrow payments in a particular State dependent on prices or escrow payments in other States, nor does it have any effect on price or escrow payments by NPMs in other states." 2006 U.S. Dist. LEXIS 35614, [WL] at *9; see also Int'l Tobacco Partners v. Kline, 475 F. Supp. 2d at 1089-92.

In the instant case, Plaintiffs, having copied the Grand River complaint, allege that the statutes implementing the MSA were intended to create, and have created, a uniform system of regulation that has resulted in higher prices nationwide for domestic cigarettes. Second Suppl. & Am. Compl. PP 97-102. They argue that New York's Escrow Statute controls out-of-state cigarette prices because the escrow payment that an NPM makes to New York depends, in part, on what the NPM would owe New York as an SPM, which depends in turn on the national market shares of the SPMs, which derive in part from the pricing of cigarettes **[**60]** sold outside New York. Plaintiffs reason that the MSA and New York Escrow and Contraband Statutes therefore violate the principle of Healy and are invalid under the dormant Commerce Clause.

In Healy, the Supreme Court reaffirmed its "established view that **HN10**[] a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." 491 U.S. at 332 (quotations omitted); see Freedom Holdings I, 357 F.3d at 219. The price affirmation statute in Healy required retailers **[*707]** to affirm that their in-state prices were no higher than prices charged in any other state, thereby imposing in-state consequences for out-of-state commercial decisions. The statute's practical effect was to project one state's regulatory regime into other states:

> The short-circuiting of normal pricing decisions based on local conditions would be carried to a national scale if a significant group of States enacted contemporaneous affirmation statutes that linked in-state prices to the lowest price in any State in the country. This kind of potential regional and even national regulation of the pricing mechanism for goods is reserved by the Commerce Clause **[**61]** to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes.

Healy, 491 U.S. at 340. Discussing Healy in Freedom Holdings I, the Court of Appeals warned that it invalidates only "regulation" or "control" of out-of-state commerce. Mere "upstream pricing impact" is not a violation of the dormant Commerce Clause, even if the impact is felt out-of-state where the stream originates. Freedom Holdings I, 357 F.3d at 220.

Plaintiffs in this case show no more than upstream pricing impact, if that. There has been no showing that mandated escrow payments by NPMs in New York affect the retail price of cigarettes elsewhere in the nation. NPMs make escrow payments in New York as security to satisfy judgments or settlements in litigation with New York. The Allocable Share Release provision does nothing to regulate, restrict, or control out-of-state behavior of NPMs or SPMs. "Each NPM or SPM must make its own unilateral decision with respect to price and output, and no state agent has the power to dictate the prices or outputs of any cigarette manufacturer." Grand River, 2006 U.S. Dist. LEXIS 35614, 2006 WL 1517603 at *9. [18] The phenomenon of a nationwide increase **[**62]** in cigarette prices following the advent of the MSA resulted, not from the "extraterritorial reach" of any one State's statute, but because many States enacted similar statues. [19] See Healy, 491 U.S. at 332. New York exerts no control, actual or "practical," over the price of cigarettes in any other State. See id.

As the Court of Appeals held in Freedom Holdings I, Plaintiffs must show more than the fact that New York's legislation indirectly affects out-of-state cigarette prices. They must show that commercial actors outside New York

---

[18] NPM witnesses in this case testified to the same effect, that their prices were set internally and not dictated by OPM or SPM prices. Tr. 87-88, 109-10.

[19] One commentator suggests that the coordinated, nationally-oriented character of state action resulting from the MSA might raise constitutional concerns under the Interstate Compact Clause, U.S. Const. art. I § 10, cl. 3; see generally Michael S. Greve, Compacts, Cartels, and Congressional Consent, 68 Mo. L. Rev. 285 (2003). The claim is not before me, and at least one court of appeals has rejected it. See Star Scientific, Inc. v. Beales, 278 F.3d 339, 360 (4th Cir. 2002).

are bound in some way by the **[**63]** dictates of New York statutes. *Freedom Holdings I, 357 F.3d at 221*. Because they have not made such a showing, I hold that Plaintiffs have failed to prove that the MSA and Escrow and Contraband Statutes are invalid under the dormant *Commerce Clause*.

V. Conclusion

Plaintiffs have shown no injury to their business or property, actual or threatened. They have failed to show that the Master Settlement Agreement and the Escrow and Contraband Statutes of New York are **[*708]** anticompetitive under the Sherman Act or invalid under the *Commerce Clause of the U.S. Constitution*, either before or after the Allocable Share Release amendment. The preliminary injunction against enforcement of New York's Allocable Share Release amendment is dissolved.

The Clerk shall terminate the motions (Docs. # 144 & # 160) and enter judgment for Defendants.

SO ORDERED.

Dated: January 12, 2009

New York, New York

/s/ Alvin K. Hellerstein

ALVIN K. HELLERSTEIN

United States District Judge

Omnicare, Inc. v. UnitedHealth Group, Inc.

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

January 16, 2009, Decided; January 16, 2009, Filed

No. 06 C 6235

Reporter

594 F. Supp. 2d 945 *; 2009 U.S. Dist. LEXIS 3170 **; 2009-1 Trade Cas. (CCH) P76,612

OMNICARE, INC., Plaintiff, v. UNITEDHEALTH GROUP, INC., PACIFICARE HEALTH SYSTEMS, INC., and RxSOLUTIONS, INC. d/b/a PRESCRIPTION SOLUTIONS, Defendants.

Subsequent History: Affirmed by *Omnicare, Inc. v. Unitedhealth Group, Inc., 2011 U.S. App. LEXIS 495 (7th Cir. Ill., Jan. 10, 2011)*

Prior History: *Omnicare, Inc. v. UnitedHealth Group, Inc., 524 F. Supp. 2d 1031, 2007 U.S. Dist. LEXIS 74983 (N.D. Ill., 2007)*

Core Terms

negotiations, contracts, e-mail, conspiracy, pharmacy, merger agreement, merger, network, due diligence, parties, Provider, Patient, entities, genuine issue of material fact, enrollees, merging, plans, terms, coordinated, stalking, argues, horse, sponsors, unjust enrichment, summary judgment, reimbursement rate, contends, prescription drug, form contract, Disclosure

LexisNexis® Headnotes

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

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

HN1[] **Summary Judgment, Supporting Materials**

Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

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

HN2[] **Summary Judgment, Evidentiary Considerations**

Unlike a motion to dismiss, a motion for summary judgment requires the opposing party to present evidence showing a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. A genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

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

HN3[] **Summary Judgment, Evidentiary Considerations**

Upon a summary judgment motion, a court will draw all reasonable inferences from the evidence in favor of the nonmoving party, but the nonmoving party still bears the burden of establishing the existence of a genuine issue of material fact.

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

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

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

15 U.S.C.S. § 1 of the Sherman Act is designed to prevent business entities from entering into collusive agreements. By its terms, *§ 1* prohibits every contract, combination, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] **Sherman Act, Claims**

In the usual case, a price-fixing conspiracy exists between sellers who agree to artificially set their prices above or below market prices. Illegal agreements may also be made between buyers who conspire to establish a price below market levels, a situation often referred to as a "buyers' cartel." To establish a successful *15 U.S.C.S. § 1* claim against a buyers' cartel, a plaintiff must prove: (1) the existence of a contract, combination, or conspiracy between buyers; (2) an unreasonable restraint of trade in the relevant market; and (3) an injury caused by the cartel.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN6[] **Regulated Practices, Private Actions**

An antitrust plaintiff can prove the existence of an agreement through direct or circumstantial evidence.

Evidence > Types of Evidence > Circumstantial Evidence

HN7[] **Types of Evidence, Circumstantial Evidence**

Direct evidence is evidence tantamount to an acknowledgment of guilt, while circumstantial evidence is everything else including ambiguous statements.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Inferences & Presumptions > Inferences

HN8[] **Sherman Act, Claims**

When relying on circumstantial evidence to establish the existence of a conspiracy, at least some of the evidence must tend to exclude the possibility that the alleged conspirators acted independently rather than in concert. This standard does not, however, require the plaintiff to exclude any possibility that the defendants acted independently. Rather, the standard merely establishes that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Therefore, while the plaintiff in an antitrust case faces no higher burden to defeat summary judgment than a plaintiff in another case, ***antitrust law*** does limit the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case.

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

HN9[] **Burdens of Proof, Nonmovant Persuasion & Proof**

At the summary judgment stage, merely pleading sufficient facts will not suffice to withstand a motion for summary judgment; rather, a plaintiff must make an affirmative showing of proof that a genuine issue of material fact exists that requires a trial.

Evidence > Authentication > General Overview

HN10[] **Evidence, Authentication**

Authentication of a document can be made by a witness with knowledge who testifies that a matter is what it is claimed to be. *Fed. R. Evid. 901(b)(1)*.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Types of Evidence > Circumstantial Evidence

HN11[] **Sherman Act, Claims**

Generally, courts will not second-guess business judgments made by a private actor. Some courts have, however, recognized that evidence that a defendant's action, if taken independently, would be contrary to its economic self-interest tends to exclude the likelihood of independent conduct and may therefore constitute circumstantial evidence in support of a Sherman Act claim sufficient to survive summary judgment.

Antitrust & Trade Law > Sherman Act > Defenses

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

HN12[] **Sherman Act, Defenses**

If business judgments generally deserve judicial deference, then successful business judgments deserve even greater deference.

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

Evidence > Relevance > Relevant Evidence

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

In an antitrust case, information about uncompetitive prices may be probative evidence suggesting the existence of a conspiracy.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN14[] **Regulated Practices, Private Actions**

Where evidence requires the drawing of inferences to find the existence of a conspiracy, that evidence is actually circumstantial and must be considered under the Monsanto/Matsushita framework. Accordingly, an antitrust plaintiff must offer at least some evidence that tends to exclude the possibility of independent action.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN15[] **Sherman Act, Claims**

The balance a court seeks to strike in determining when premerger discussions are anticompetitive is a sensitive one. On the one hand, courts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation. On the other hand, the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information. This standard could lead to "sham" merger negotiations, or at least allow for periods of cartel behavior when there is a substantial period of time between the signing of the merger agreement and the closing of the deal.

Evidence > Inferences & Presumptions > Inferences

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN16[] **Inferences & Presumptions, Inferences**

The inference of an antitrust conspiracy is significantly weakened where it is a target who is providing information to an acquirer.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN17[] **Antitrust, Antitrust Statutes**

Once price is agreed upon and an agreement to merge is reached, further information exchanges are more difficult to justify.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN18[] **Summary Judgment, Evidentiary Considerations**

A court should not take the place of the jury in weighing evidence at the summary judgment stage.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN19[] **Judges, Discretionary Powers**

A district court has discretion to determine whether to exercise its supplemental jurisdiction when the original basis for federal jurisdiction has been dismissed. *28 U.S.C.S. § 1367(c)(3)*. The court's decision should be guided by the values of judicial economy, convenience, fairness, and comity.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Evidence > Inferences & Presumptions > Presumptions

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

HN20[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The presumption recognized by the United States Court of Appeals for the Seventh Circuit is that district courts should usually relinquish jurisdiction over state claims when the federal claims are dismissed before trial. The usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial. This presumption, however, does not determine every case. Relinquishment of the state claims is not mandatory. Especially when difficult and unsettled state law issues are not implicated by the pendent claims, it is entirely acceptable for a federal court to decide those claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN21[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The presumption in favor of denial of supplemental jurisdiction when all federal claims are dismissed applies most strongly when the state law is "unsettled."

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN22[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The United States Court of Appeals for the Seventh Circuit has identified two common scenarios where the presumption in favor of dismissal of supplemental state law claims when all federal claims are dismissed may be refuted, first, where substantial federal judicial resources have already been expended on the resolution of the supplemental claims, and second, where it is obvious how the claims should be decided.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Governments > Legislation > Interpretation

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

The ***antitrust law*** of the Commonwealth of Kentucky is so similar to its federal counterpart, the Sherman Antitrust Act, and may be interpreted where appropriate with regard to federal law.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN24[] **Contract Conditions & Provisions, Forum Selection Clauses**

Generally, when a court obtains jurisdiction over an action as the result of a transfer of venue, the choice-of-law rules of the transferring court apply. However, the Van Dusen rule is intended to prevent defendants from seeking a transfer merely to obtain more favorable choice-of-law rules. Where a forum selection clause states that a particular state's courts shall have exclusive jurisdiction over the parties, applying the Van Dusen rule would more likely allow the plaintiff to manipulate the choice-of-law rules to be applied by filing the action in a different court. Applying the usual Van Dusen rule in the face of a forum selection clause encourages forum shopping by a party seeking to avoid the application of the contractually chosen forum. Thus, when a case has been transferred by means of a forum selection clause, the choice-of-law rules of the transferee forum should govern rather than those of the transferring forum.

Contracts Law > Contract Conditions & Provisions > General Overview

Torts > Procedural Matters > Conflict of Law > General Overview

HN25[] **Contracts Law, Contract Conditions & Provisions**

Even when a choice-of-law clause in a contract lacks the breadth to encompass a related tort claim, tort claims that are dependent upon the contract are subject to a contract's choice-of-law clause. One important factor in determining whether the tort claim "depends upon" the contract is whether the claim could exist without the contract.

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

HN26[] **Actual Fraud, Elements**

The elements of a fraud claim in Illinois are: (1) that the defendant made a false statement of material fact, (2) the defendant knew or believed it was false, (3) the defendant intended to induce plaintiff to act, (4) the plaintiff justifiably relied on the statement, and (5) the plaintiff was injured as a result.

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

HN27[] **Actual Fraud, Elements**

A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by the recipient.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN28[] **Civil Conspiracy, Elements**

To sustain a claim for conspiracy to defraud in Illinois, a plaintiff must show: (1) a conspiracy; (2) an overt act of fraud in furtherance of the conspiracy; and (3) damages to the plaintiff as a result of the fraud.

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

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN29[] Actual Fraud, Elements

To state a valid conspiracy to defraud claim, plaintiffs must allege facts establishing the elements of fraud under Illinois law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN30[] Types of Contracts, Quasi Contracts

A cause of action for unjust enrichment requires a showing that the defendant has unjustly retained a benefit to the plaintiff's detriment, and the defendant's retention of that benefit violates basic principles of justice.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN31[] Types of Contracts, Quasi Contracts

The Illinois Supreme Court has identified three situations where a defendant's retention of a benefit will be considered unjust: (1) the benefit should have been given to the plaintiff, but a third party mistakenly gave it to the defendant instead, (2) the defendant procured the benefit from a third party through some type of wrongful conduct, or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant. Illinois courts do not appear to have uniformly followed this guidance, however; some courts have required a more specific showing. In short, the law of unjust enrichment in Illinois is unclear.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN32[] Types of Contracts, Quasi Contracts

Where there is a specific contract that governs the relationship of the parties, a plaintiff cannot assert a claim for unjust enrichment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN33[] Types of Contracts, Quasi Contracts

When a plaintiff's particular theory of unjust enrichment is based on alleged fraudulent dealings and a court rejects the plaintiff's claims that those dealings, indeed, were fraudulent, the theory of unjust enrichment that the plaintiff has pursued is no longer viable.

Counsel: **[**1]** For Omnicare, Inc., Plaintiff: Aldo A Badini, Dewey & LeBoeuff LLP LLP, New York, NY; Andrew Jonathon Schaeffer, Carrie A. Shufflebarger, William T. Robinson, III, Greenebaum, Doll & McDonald - Covington, Covington, KY; Brian S. McGrath, George E. Mastoris, Harvey Kurzweil, Susannah P. Torpey, Dewey & LeBoeuf LLP, New York, NY; Eamon O'Kelly, Henry Joseph Ricardo, Lisa M Card, PRO HAC VICE, Dewey & LeBoeuf LLP, New York, NY; James T. Malysiak, Lee A. Freeman, Jr., Richard P. Campbell, Jenner & Block LLP, Chicago, IL; John D. Harkrider, Axinn, Veltrop & Harkrider LLP, New York, NY; Michael C. Thelen, Dewey & LeBoeuf LLP NY, New York, NY.

For UnitedHealth Group, Inc., Defendant: Athanasios Papadopoulos, James King Gardner, Neal, Gerber & Eisenberg, Chicago, IL; Byron Todd Jones, Christopher W. Madel, Jennifer G. Daugherty, Jennifer M. Robbins, Loren L. Hansen, Margaret M. Lockner, Michael V. Ciresi, Randolph C. Winton, Robins, Kaplan, Miller & Ciresi, LLP, Minneapolis, MN; Corey W Roush, Hogan & Hartson, Washington, DC; Erik Casey Beckett, Robins, Kaplan, Miller & Ciersi LLP, Minneapolis, MN; Frederick M. Erny, Dinsmore & Shohl, LLP - Cincinnati OH, Cincinnati, OH; Loretta E. Lynch, PRO **[**2]** HAC VICE, Hogan & Hartson, LLP, New York, NY; Martin R Lueck, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Robert Frederick Leibenluft, Hogan & Hartson LLP, Washington, DC; Sara A Poulos, Stephen P. Safranski, Thomas J Undlin, Robins, Kaplan, Miller & Ciresi, Minneapolis, MN; Steven M. Edwards, Hogan & Hartson, LLP, New York, NY.

For Pacificare Health Systems, Inc., Pacificare Health Systems, Inc., RxSolutions, Inc., doing business as Prescription Solutions, Defendants: Athanasios Papadopoulos, James King Gardner, Neal, Gerber & Eisenberg, Chicago, IL; Byron Todd Jones, Christopher W. Madel, Jennifer G. Daugherty, Jennifer M. Robbins, Loren L. Hansen, Margaret M. Lockner, Michael V. Ciresi, Robins, Kaplan, Miller & Ciresi, LLP, Minneapolis, MN; Corey W Roush, Hogan & Hartson, Washington, DC; Erik Casey Beckett, Robins, Kaplan, Miller & Ciersi LLP, Minneapolis, MN; Frederick M. Erny, Dinsmore & Shohl, LLP - Cincinnati OH, Cincinnati, OH; Loretta E. Lynch, PRO HAC VICE, Hogan & Hartson, LLP, New York, NY; Martin R Lueck, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Robert Frederick Leibenluft, Hogan & Hartson LLP, Washington, DC; Sara A Poulos, **[**3]** Stephen P. Safranski, Thomas J Undlin, Robins, Kaplan, Miller & Ciresi, Minneapolis, MN; Steven M. Edwards, Hogan & Hartson, LLP, New York, NY.

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

Opinion by: REBECCA R. PALLMEYER

Opinion

[*948] **MEMORANDUM OPINION AND ORDER**

Plaintiff Omnicare, Inc., is the nation's largest institutional pharmacy--that is, a provider of pharmacy services to persons in health care institutions. UnitedHealth Group ("UnitedHealth") and PacifiCare Health Systems, Inc. ("PacifiCare") are health insurers who provide prescription drug coverage to senior citizens under the Medicare "Part D" program. To qualify under that program, a health insurer must demonstrate to federal regulators that it can provide pharmacy services to individuals in long-term care facilities; a contract with an institutional pharmacy such as Omnicare is one way of doing so. Both UnitedHealth and PacifiCare entered into negotiations with Omnicare, and UnitedHealth signed an agreement with Omnicare before UnitedHealth was certified under the Medicare Part D program. During the same time period, UnitedHealth and PacifiCare were engaged in merger talks that culminated in a Merger Agreement between the two parties. PacifiCare **[**4]** broke off its negotiations with Omnicare a week after signing the Merger Agreement and then proceeded to obtain federal certification without Omnicare in its contract "network." PacifiCare later resumed contract talks with Omnicare, ultimately striking a deal far more favorable to it than the one UnitedHealth had achieved. Then, once the UnitedHealth-PacifiCare merger was complete, UnitedHealth abandoned its own deal with Omnicare and took advantage of the more favorable terms in PacifiCare's contract with Omnicare.

In this lawsuit, Omnicare contends that the merger violated antitrust laws and that Defendants are liable for fraud. The court denied Defendants' motion to dismiss, *see* *Omnicare, Inc. v. UnitedHealth Group, Inc., 524 F. Supp.2d 1031 (N.D. Ill. 2007)*, and the parties proceeded with discovery. Defendants now move for summary judgment on these claims and, for the reasons that follow, the motion is granted.

FACTUAL BACKGROUND

I. Medicare Part D

Medicare is a health insurance program administered by the federal government in order to provide coverage to elderly and disabled Americans. *See* *42 U.S.C. § 1395 et seq.* In 2003, Congress enacted the Medicare Prescription Drug, Improvement, **[**5]** and Modernization Act of 2003, which created a voluntary prescription drug benefit for seniors called Medicare Part D. *Pub. L. No. 108-173, 117 Stat. 2066 (2003)*. Under Part D, the Centers for Medicare & Medicaid Services ("CMS") make payments to Prescription Drug Plan ("PDP") sponsors--typically insurance providers. PDPs, in turn, pay prescription drug providers--retail and institutional **[*949]** pharmacies--for providing pharmacy services to the individuals enrolled in the PDP. *See* *42 U.S.C. § 1395w-115*. The PDP sponsors are compensated in two ways: through payments from CMS and through premiums paid by enrollees. *Id.* The prescription drug providers receive their payments pursuant to contracts with the PDP sponsors.

To participate in Part D, which went into effect on January 1, 2006, PDP sponsors were required to be approved by, and enter into a contract with, CMS. (Bagley Report P 17, App. 155 to Mem. in Supp.) CMS divided the United States into thirty-four "PDP regions," and a PDP sponsor had to be approved for each region in which it wished to operate. As part of its bid for CMS approval, a Part D sponsor needed to demonstrate that it had sufficient pharmacy providers in its network in **[**6]** the PDP region to service both retail customers and patients in long-term care facilities ("LTCs"). (3/16/05 Long-Term Care Guidance, App. 57 to Mem. in Supp.) PDPs were required to provide a list of contracts with pharmacies that serve LTCs in order to "ensure that all of [the sponsor's] future Part D enrollees who are institutionalized can routinely receive their Part D benefits through the plans' network of pharmacies" rather than through "out of network" pharmacies. (*Id.* at 4.) CMS referred to this requirement of nearby, in-network pharmacies providing services to LTC enrollees as the "convenient access" standard. (*Id.*) In addition, CMS required PDP sponsors to offer a contract to any pharmacy willing and able to participate in the sponsor's LTC network. [1] (*Id.*)

In **[**7]** 2006, 23 million out of 42 million eligible seniors participated in Medicare Part D. (Ex. A to Rubinfeld Decl. P 31, Attach. to Mem. in Opp'n.) Seniors can become enrolled in a PDP in one of two ways. First, seniors eligible for Medicare can simply choose to participate in Part D. Second, individuals who also qualify for Medicaid--another federal insurance program, one designed to provide coverage for individuals and families with low incomes--are automatically enrolled by the government. These low-income seniors, called "dual eligibles" because they are eligible for both Medicare and Medicaid, are enrolled in PDPs whose premiums are lower than an established cap set by CMS. (*Id.* P 34.) These enrollees are technically free to switch to any other plan that falls below the cost threshold established by CMS, but a number of factors--such as the physical impairment of these enrollees and bureaucratic obstacles--make this a rarely-used option. (Rubinfeld Decl. P 6(c), Attach. to Mem. in Opp'n.) Dual eligibles are fully subsidized by the federal government, which pays for both premiums and co-payments for the

[1] In addition to being certified as a PDP, insurers could also obtain certification as a Medicare Advantage Prescription Drug Plan ("MAPD"), which functions as an HMO in addition to providing prescription drugs. For 2006, 72% of Part D enrollees were enrolled in standalone PDPs, while 28% were enrolled in MAPDs. (Ex. A to Rubinfeld Decl. P 33, Attach. to Mem. in Opp'n.) Among LTC enrollees, MAPDs were even less common. (*Id.*)

drugs, and constitute up to 65% of LTC residents. (Ex. A to *id.* PP 34-35.) Overall, **[**8]** though, Omnicare concedes that all individuals living in LTCs, including both dual-eligibles and voluntary enrollees, comprise only about 3-5% of total PDP enrollees. (Mem. in Opp'n at 6 n.7.) Defendants' negotiations and resulting contracts with Omnicare, the largest LTC pharmacy in the nation, covered only LTC patients. (Omnicare's Supplemental Statement of Undisputed Material Facts PP 23, 31.)

II. Merger

UnitedHealth and PacifiCare, insurance providers who sought CMS certification as **[*950]** PDP sponsors in 2005, initiated merger discussions in January 2005. (Defs.' 56.1 P 16.) As talks between the two entities intensified in the weeks leading up to signing the Merger Agreement on July 6, they entered into two separate confidentiality agreements dictating how information deemed "confidential" or "highly confidential" was to be exchanged during the "due diligence" period. [2] (Defs.' 56.1 P 17.) Although there were some failures to comply with terms of the confidentiality agreements (Omnicare's Resp. to Defs.' 56.1 PP 17-19), the purpose for the agreements was apparent. The first confidentiality agreement, designed to protect confidential information, made that information available only to **[**9]** members of UnitedHealth's due diligence team and prevented them from sharing it with others outside that team. (Defs.' 56.1 P 17.) The second confidentiality agreement created a "clean room" for highly confidential material and permitted only members of UnitedHealth's "clean team," a subgroup of the due diligence team, to have access to the materials. (*Id.* P 18.) In addition, prior to the sharing of any information between the two parties, PacifiCare's outside antitrust counsel, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), developed a "data room" where Skadden attorneys reviewed all PacifiCare's documents to determine the propriety of sharing them with UnitedHealth. (*Id.* P 19.)

Although much of the due diligence process had no relationship to the companies' plans for Part D, several meetings and other exchanges of information concerning **[**10]** Part D did take place. On June 9, 2005, UnitedHealth and PacifiCare met specifically to discuss PacifiCare's Part D program. [3] (*Id.* P 22.) At the meeting, Jacqueline Kosecoff, an Executive Vice President at PacifiCare, made a presentation entitled "Part D Prescription Drug Program," which included general information regarding administrative expense estimates and information about RxSolutions, a wholly-owned subsidiary of PacifiCare responsible for negotiating contracts with pharmacies on PacifiCare's behalf. (Part D Prescription Drug Program, App. 31 to Mem. in Supp.) From Kosecoff's presentation itself and notes prepared after the meeting, it appears that no pricing information was provided in the presentation outside of an assertion that PacifiCare would follow "an aggressive pricing strategy." (*Id.;* 6/17/05 Memo, App. 26 to Mem. in Supp.) Tom Paul, a UnitedHealth official, noted in a summary prepared after the meeting that PacifiCare provided only "little information" that was "very general," and stated that, based on the meeting, "[t]here is insufficient information to draw any due diligence conclusions about this important program." (*Id.*) To that end, UnitedHealth sent PacifiCare **[**11]** a list of questions concerning Part D on June 22. (Defs.' 56.1 P 24.) In PacifiCare's response to the document, PacifiCare disclosed its "expected average **[*951]** brand discount off of AWP," [4] which was in fact the same rate that Omnicare ultimately agreed to in its contract with PacifiCare's agent, RxSolutions, in December 2005. (Part D Questions, Ex. 50 to Mem. in Opp'n, at UN008817.)

---

[2] Companies considering a merger frequently share "significant quantities of competitively sensitive information regarding their respective businesses in the course of investigatory 'due diligence'" in order for each party to determine whether the business deal makes sense. *See* ANTITRUST ADVISER § 3:74, at 3-270 (Irving Scher ed., 4th ed. 2007).

[3] The June 9 meeting included, from PacifiCare, Jacqueline Kosecoff (Executive Vice President), Greg Scott (CFO), and Chris Karkenny (official in Corporate Development); from UnitedHealth, officials included Ed Lagerstrom (head of Corporate Development), Jerry Knutson (CFO of Ovations, UnitedHealth's senior business component), Rick Jelinek (President of Ovations' Senior and Retiree Services), and Tom Paul (CEO of a UnitedHealth subsidiary). (Due Diligence Summary--Point Part D, Ex. 38 to Mem. in Opp'n; Omnicare's Resp. to Defs.' 56.1 P 23.)

[4] In the parties' submissions, the acronym "AWP" is alternatively used to refer to both an "Any Willing Provider" contract and a recognized industry rate known as "Average Wholesale Price." To avoid confusion, the court uses "AWP" only to refer to "Average Wholesale Price," **[**12]** and will write out the phrase "Any Willing Provider."

At a meeting between the parties on June 28, 2005, [5] approximately one week prior to the signing of the Merger Agreement, PacifiCare provided UnitedHealth with Part D information regarding "(1) product and distribution strategies, (2) benefit plan designs, and (3) financial assumptions," including PacifiCare's average low and average high plan pricing information from a sampling of regions. (Defs.' 56.1 P 23.) On July 2, Peter Frank, an outside actuary retained by UnitedHealth who does not appear to have formally been a member of UnitedHealth's due diligence team, met with PacifiCare officials to exchange information about the Part D program. (*Id.* P 25.) At this meeting, PacifiCare disclosed national average bid information for its Part D plans, and Frank provided corresponding information concerning UnitedHealth's Part D business. (*Id.*) The following day, Frank prepared a written summary of the meeting for UnitedHealth officials, in which he disclosed the profit margin PacifiCare expected in its Part D bids. (7/5/05 e-mail from Frank to Jelinek, App. 41 to Defs.' 56.1.) Frank also emphasized that his report was lacking in many specifics, **[**13]** including the names of the PacifiCare officials with whom Frank met "in case [the UnitedHealth officials receiving the report] may know any of them." (*Id.*) Frank further emphasized that "no information on regional bids or on distribution of expected enrollment by region is available. What you see [in the report] is most of what we have." (*Id.*) Frank also noted that he "prepared the report quickly under some time pressure to get a copy to the lawyers so that any potential competitively sensitive info could be removed from the report." [6] (*Id.*) Edward Lagerstrom, the head of UnitedHealth's Corporate Development at the time of the merger, agreed that UnitedHealth received limited information, stating in his deposition that UnitedHealth "wanted to be absolutely clear that [PacifiCare's PDP was not] going to lose a lot of money, but I did not need to see the long-term care contracts, particularly given that our antitrust attorney said that we could not see them. So we did not see them." (Lagerstrom Dep. at 218:8-14, App. 22 to Mem. in Supp.)

On July 6, 2005, the two parties signed the Agreement and Plan of Merger ("Merger Agreement"), which announced UnitedHealth's planned purchase of PacifiCare for approximately $ 8.8 billion. (Defs.' 56.1 P 6.) Section 5.01 of the Merger Agreement prohibits PacifiCare from entering into any contracts before the consummation of the merger, other than those entered into in the ordinary course of business, "without [UnitedHealth's] prior written consent . . . that involves [PacifiCare] **[*952]** or any of its Subsidiaries incurring a liability in excess of three million dollars." (Merger Agreement § 5.01(a)(x), Ex. 72 to Mem. in Opp'n.) The December 2005 contract between RxSolutions and Omnicare generated about $ 130 million in revenue for Omnicare, which would appear to trigger the requirement of the Merger Agreement that PacifiCare secure **[**15]** UnitedHealth's approval for the Omnicare contract. (Capell Decl. P 6, Attach. to Mem. in Opp'n.) However, Defendants have also provided a Company Disclosure Letter ("Letter"), referred to in § 5.01 of the Merger Agreement, [7] which appears by its terms to carve out an exception to the approval requirement. Specifically, the Letter provides that PacifiCare "and its Subsidiaries may enter into or amend any Contracts relating to their Part D standalone business" without seeking approval from UnitedHealth. (Company Disclosure Letter § 5.01(a)(1), Attach. to Phanstiel Decl., App. 47 to Mem. in Supp.)

The United States Department of Justice ("DOJ") reviewed the terms of the Merger Agreement to determine its potential effects on competition. (Defs.' 56.1 PP 7-8.) Subject **[**16]** to certain divestitures, none of which directly concerned Part D, DOJ approved the merger, and the transaction closed on December 20, 2005. (*Id.*)

III. PDP Approval & Negotiations with Omnicare

---

[5] The June 28 meeting consisted mostly of the same personnel involved in the June 9 meeting. A few additional individuals participated on June 28, however, **[**14]** including Lois Quam (CEO of Ovations), Peter Frank (outside counsel for UnitedHealth), and Howard Phanstiel (CEO of PacifiCare). (Due Diligence Summary--Point Part D, Ex. 38 to Mem. in Opp'n; Omnicare's Resp. to Defs.' 56.1 P 23.)

[6] The record does not reflect whether UnitedHealth's attorneys did in fact see the report or whether the attorneys made any changes to it.

[7] Specifically, the Merger Agreement states that PacifiCare may not enter into contracts (other than those required in the ordinary course of business) in excess of $ 3 million prior to the completion of the merger, "except as required by applicable Law . . . or provided in Section 5.01(a) of the Company Disclosure Letter and except as expressly contemplated by this Agreement." (Merger Agreement § 5.01(a), Ex. 72 to Mem. in Opp'n.)

In addition to working on the merger, both UnitedHealth and PacifiCare spent much of the 2005 calendar year developing their PDPs to obtain approval from CMS for 2006. As explained above, a critical component to achieving CMS approval was entering into contracts with prescription drug providers, both for retail and LTC customers. To assist in the negotiations with these pharmacies, potential PDP sponsors contracted with pharmacy benefit managers ("PBMs"), who would act as brokers, negotiating contracts with institutional pharmacies on behalf of potential PDPs. Walgreens Health Initiatives, Inc. ("WHI") served as the PBM for UnitedHealth (and other PDP sponsors) in negotiating contracts with certain pharmacies on behalf of UnitedHealth. (Defs.' 56.1 P 10.) PacifiCare utilized RxSolutions, an internal PBM that is a wholly-owned subsidiary of PacifiCare, to conduct its negotiations. (*Id.* P 3.)

Omnicare is the largest pharmacy servicing LTC facilities in the country. (Ex. A to Rubinfeld Decl. P 21, **[**17]** Attach. to Mem. in Opp'n.) In June 2005, Omnicare distributed its template pharmacy-network contract, which included a section called the "18 Patient Protections" (the "Patient Protections" or "Protections"). (Defs.' 56.1 P 37.) According to Omnicare, the provisions grew out of an awareness of Omnicare's importance in the LTC marketplace and were designed primarily "to address the specific health and safety needs of nursing home residents, who require a higher standard of care." (Mem. in Opp'n at 8.) The Protections did provide certain benefits to plan enrollees; for example, one provision provision granted residents up to 180 days to transition from drugs not included in the plan to drugs that are, and another provision required the PDP sponsor to waive certain requirements that could delay the provision of drugs to LTC residents. (Mem. in Opp'n at 8.) Omnicare further contends that the Patient Protections **[*953]** represent best clinical practices. Indeed, some potential defense witnesses acknowledged this in their depositions. (Bagley Dep 260:1-13, Ex. 96 to Mem. in Opp'n; Infante Dep. 158:17-19, Ex. 164 to Mem. in Opp'n.)

The parties differ greatly in their characterizations of the Patient **[**18]** Protections, however. Defendants argue that many of the Patient Protections in fact violate Medicare regulations and would render a PDP ineligible to receive reimbursement from CMS. (Infante Memo at 1, App. 133 to Mem. in Supp.) In the opinion of outside counsel Marie Infante, who was retained by UnitedHealth, the violations would render UnitedHealth ineligible to receive reimbursement from CMS under Part D for its provision of drugs to LTC patients. [8] (*Id.*) Among other objections concerning the scope of the coverage afforded by the Patient Protections, Infante wrote that the Protections also impermissibly shifted the obligation of the PDP to respond to inquiries from enrollees to Omnicare. (*Id.* at 1-3.) Defendants also argue that PDP sponsors "had a rational economic incentive" not to agree to the Patient Protection provisions because those provisions would increase the costs of providing prescription drugs to the LTC patients. (Defs.' 56.1 P 41.) Omnicare argues that the Protections were in fact in the economic interest of the sponsors because the sponsors had an interest in contracting with Omnicare (based on its large size). (Omnicare's Resp. to Defs.' 56.1 P 41.) Further, Omnicare **[**19]** contends, because the Protections were favorable to potential enrollees, their adoption would enhance the PDPs' efforts to market themselves to potential enrollees. (*Id.*)

A. WHI-Omnicare Agreement

On July 29, 2005, after two months of negotiations, WHI, acting as the PBM for UnitedHealth as well as four smaller PDPs, entered into a pharmacy-network agreement with Omnicare (the "WHI-Omnicare Agreement"). (Defs.' 56.1

---

[8] Omnicare suggests that Ms. Infante's conclusions were actually written as an advocacy piece prepared in response to UnitedHealth's request for the "strongest legal arguments" in favor of a finding that the Protections are unlawful. (Omnicare's Resp. to Defs.' 56.1 P 41; Ex. 163 to Mem. in Opp'n.) An e-mail from Infante to Tobin does state that Infante "decided to use the statutory framework because it provided the simplest way to outline *your strongest legal arguments.*" (Ex. 163 to Mem. in Opp'n (emphasis added).) The memorandum itself nowhere suggests that it was written with a predetermined result, however ("As requested, I have reviewed the Pharmacy Network Agreement . . . and conclude, for the reasons outlined below, that the prescription drugs provided under this agreement would not qualify for reimbursement under Medicare Part D." [Infante Memo at 1, App. 133 to Mem. in Supp.]), and both Infante and Tobin maintain that Infante's conclusions were not dictated by UnitedHealth. (Tobin Dep. 333:14-17, Ex. 159 to **[**20]** Mem. in Opp'n; Infante Dep. 96:2-17, Ex. 164 to Mem. in Opp'n.)

PP 11, 49.) In these pharmacy network contracts, the pharmacy is reimbursed for prescription drugs at a rate calculated as a percentage discount from the average wholesale price ("AWP"), plus a dispensing fee. (*Id.* P 39.) The PDP's economic interest is to obtain a large discount from AWP, and a small dispensing fee. (*Id.* P 40.) The Agreement also contained Omnicare's 18 Patient Protections, as did all the pharmacy-network agreements that Omnicare entered into prior to the August 1, 2005 deadline for PDPs to submit their LTC networks to CMS. (*Id.* P 42.) In addition, the WHI-Omnicare Agreement provided that it would apply to any pharmacy acquired by Omnicare, but did not contain a parallel provision extending its reach to any PDP acquired by UnitedHealth. (*Id.* P 52.) Omnicare contends **[*954]** that as a matter of interpretation, a PDP acquired by UnitedHealth would "automatically [be] covered **[**21]** under the WHI Agreement," but the Agreement contains no explicit provision providing for such a contingency. (Omnicare's Resp. to Defs.' 56.1 P 52.) Finally, Omnicare acknowledges that the Agreement did not contain any provision "that would have prevented [UnitedHealth] from withdrawing the [UnitedHealth] Part D plans from the WHI-Omnicare Agreement and switching them to another Part D pharmacy network." (*Id;* Omnicare's Resp. to Request to Admit No. 21, App. 56 to Mem. in Supp.)

B. RxSolutions-Omnicare Agreement

The negotiations between Omnicare and RxSolutions, PacifiCare's internal PBM, were considerably more complicated and drawn out. According to Defendants, PacifiCare's strategy was to set up its pharmacy networks using the RxSolutions template contract--called an "Any Willing Provider" contract--rather than using contracts prepared by pharmacies. Consistent with that strategy, in 2005, RxSolutions did not sign any contract that was prepared by a retail or LTC pharmacy. (Defs.' 56.1 P 56, 59.) The standard reimbursement rate provided in the RxSolutions "Any Willing Provider" contract was substantially more favorable for the PDP than the one established by the WHI-Omnicare Agreement, **[**22]** providing both a lower dispensing fee and a greater discount from AWP. (*Id.* P 57.)

On June 6, 2005, in the course of its negotiations on behalf of PacifiCare, RxSolutions sent a copy of its "Any Willing Provider" contract to Omnicare. (*Id.* P 59.) Later that day, Tim Bien, Omnicare's Senior Vice-President of Professional Services who was responsible for negotiating pharmacy-network contracts with PBMs, participated in a conference call with RxSolutions and PacifiCare in which Bien stated that he would send a copy of Omnicare's form contract to RxSolutions. (*Id.* PP 36, 60.) Bien did so on June 21. (*Id.* P 61; 6/21/05 e-mail from Smith to Anchondo, App. 73 to Mem. in Supp.) Both Omnicare and RxSolutions pushed for use of its own form contract as the basis for further negotiations; Robert Hill at Omnicare suggested that RxSolutions make revisions to Omnicare's form contract, but expressed a willingness for some flexibility by noting that the mark-up "will not commit Prescription Solutions to necessarily using Omnicare's form of agreement." (Defs.' 56.1 P 63; 6/24/05 e-mail from Hill to Cortes, Ex. 91 to Mem. in Opp'n.) By the time of their next conference call on July 6, Bien noted that **[**23]** the parties were still "way off on price," but PacifiCare agreed to suggest changes to the Omnicare form contract rather than continue to insist upon its own. (Defs.' 56.1 P 65; Bien Dep. 204:6-205:7, App. 18 to Mem. in Supp.) Rochele Cortes, a Pharmacy Contracting Manager at RxSolutions, did mark up the Omnicare form contract, noting in several places RxSolutions's position that various provisions, especially the Patient Protections, were either untenable from a business standpoint or violated CMS regulations; as of July 2005, Omnicare refused to agree to a contract that did not contain the Patient Protections. (Defs.' 56.1 PP 66-67; App. 75 to Mem. in Supp.)

According to Defendants, this impasse caused PacifiCare to conclude it would be unable to reach an agreement with Omnicare prior to the August 1 deadline and therefore broke off the negotiations. (Defs.' 56.1 P 68.) Omnicare contends in this lawsuit that PacifiCare's termination of negotiations was actually the result of a conspiracy with UnitedHealth, designed to obtain more favorable rates from Omnicare for both PacifiCare and UnitedHealth. **[*955]** (Omnicare's Resp. to Defs.' 56.1 P 68.) On July 14, about one week after PacifiCare and **[**24]** UnitedHealth signed the Merger Agreement, the negotiations between PacifiCare and Omnicare broke down. Rochele Cortes at RxSolutions sent Bien an e-mail stating, "We regret to inform you that based on the Omnicare agreement and the counteroffer rate . . . we will not be engaging in a contract at this time with your company for Medicare Part D. Please feel free to contact me with any comments or questions." (7/14/05 e-mail from Cortes to Bien, App. 78 to Mem. in Supp.) Bien responded by saying, "Thanks for letting me know. We stand ready to negotiate should you decide to do so." (7/15/05 e-mail from Bien to Cortes, App. 78 to Mem. in Supp.) The next day, RxSolutions Director of Network Relations David Chaney e-mailed Cortes, "This time next year, after we merge with United, they [i.e. Omnicare] will be begging to come in." (7/15/05 e-mail from Chaney to Cortes, App. 80 to Mem. in Supp.) Cortes responded, "Let them beg!" (7/15/05 e-mail from Cortes to Chaney, App. 80 to Mem. in Supp.)

After breaking off negotiations with Omnicare, PacifiCare determined that its LTC network was 80-90% complete (i.e. PacifiCare had contracted with pharmacies within 75 miles of 80-90% of the LTC facilities **[**25]** where it had enrollees). (Defs.' 56.1 P 72.) Defendants claim that PacifiCare intended to fill in the remaining gaps in its network with smaller, independent pharmacies; according to Omnicare, given how small these independent pharmacies were, that was not a realistic goal. (Omnicare's Resp. to Defs.' 56.1 P 72.) In August 2005, CMS declared that PacifiCare's existing LTC network was deficient and informed PacifiCare that it needed to contract with additional pharmacies. (Defs.' 56.1 P 77.) According to Cortes, PacifiCare considered approaching Omnicare to make up the gaps in its network; Omnicare disputes this, noting that after negotiations broke down in July, PacifiCare officials commented that Omnicare "shouldn't hold [its] breath" in waiting to hear back from PacifiCare. (Omnicare's Resp. to Defs.' 56.1 P 78; 7/15/05 e-mail from Chaney to Cortes, Ex. 100 to Mem. in Opp'n.) In any event, PacifiCare decided that, given the short time frame (three days) that CMS provided to PacifiCare to cure the gaps, PacifiCare could satisfactorily plug the gaps by contracting with Managed Health Care Associates, Inc. ("MHA"), an organization that represented a number of smaller LTC pharmacies **[**26]** and with whom PacifiCare had fewer outstanding disagreements than it had with Omnicare. (Defs.' 56.1 P 78.) Even with MHA in its network, CMS initially concluded that PacifiCare's LTC network was still deficient in one region, but after learning that PacifiCare in fact had seven LTC pharmacies in the region at issue (the District of Columbia), CMS approved PacifiCare as a national PDP on September 30, 2005. (*Id.* PP 80-81.) CMS also certified at least one other national PDP, Humana, without Omnicare in its network. (*Id.*)

Omnicare changed its strategy in late 2005 and early 2006 to accept contracts with PDPs that did not contain the Patient Protections. (Omnicare's Resp. to Defs.' 56.1 P 107.) The reasons for the change, according to Omnicare, were to enable Omnicare to provide coverage for as many of its LTC patients as possible, and to respond to increasing pressure from CMS to do so. (Bien Dep. 127:12-128:4, Ex. 79 to Mem. in Opp'n.) PacifiCare, on the other hand, argues the change in strategy was caused by a weaker negotiating position and a concern that Omnicare might lose clients if it did not contract with more PDPs. Defendants point to an e-mail Bien received from other Omnicare **[**27]** officials that **[*956]** stated, "Two [LTC] facility Executive Directors indicated it would be easier to change pharmacies than to change that many patients . . . [which] underlines the need that exists . . . to have a contract with [PacifiCare]." (11/30/05 e-mail from Evans to Bien, App. 104 to Mem. in Supp.) Omnicare denies that any threatened loss of business was significant and insists that no such concern had any bearing on its strategy shift in late 2005. (Omnicare's Resp. to Defs.' 56.1 P 99.) In any event, it is undisputed that the majority (fifteen out of twenty-one) of the contracts that Omnicare entered into between August 1, 2005 and April 1, 2006 were PDP-written contracts that did not contain the Patient Protections. (*Id.* P 43.) As of February 2006, the PDP-written contracts without the Protections governed over one-third of Omnicare's Part D business (including the RxSolutions contract, described below). (*Id.* P 83.)

Presumably in order to determine whether Omnicare should resume its efforts to contract with PacifiCare, on October 17, 2005, Bien at Omnicare e-mailed Craig Stephens, the Vice President in charge of UnitedHealth's Part D contracting, asking, "Is there a sense of when **[**28]** United will close the acquisition of PacifiCare? When the deal closes, will PacifiCare be contracted with Omnicare as a result of the acquisition? Thanks for your help on this." [9] (Defs.' 56.1 PP 48, 84.) Stephens did not reply to this e-mail before conferring with other UnitedHealth officials, including Ann Tobin, counsel at UnitedHealth. Forwarding Bien's e-mail, Stephens wrote to Tobin,

---

[9] The record does not reflect when or how Bien and Omnicare learned of the merger. Even if neither of the merging parties informed Omnicare of the merger prior to the signing of the Merger Agreement, Omnicare surely learned of **[**29]** the merger shortly thereafter, as news of the merger was widely reported, including on the front page of the *Wall Street Journal.* Vanessa Fuhrmans et al., *Two Health Plans Agree on a Deal for $ 8.1 Billion--UnitedHealth Adds Heft in California and Medicare with Move on PacifiCare,* WALL ST. J., July 7, 2005, at A1.

"Interesting--should we assume PacifiCare has not agreed with Omnicare?" (*Id.* P 85.) After another e-mail from Bien pressed him for a reply, Stephens finally wrote back on October 31, explaining that "PacifiCare's Part D offering for 2006 is a unique contract with CMS. If and when the deal closes, PacifiCare will follow their own Part D product strategy throughout the 2006 calendar year." (*Id.* P 87.) The next day, Bien forwarded this response to Omnicare CEO Joel Gemunder, noting his conclusion that "PacifiCare will not be included with the United Part D offering." (*Id.* P 93.)

Shortly thereafter, Omnicare did contact PacifiCare to resume negotiations. (*Id.* P 95.) PacifiCare asserts that, even though CMS had approved its LTC pharmacy-network without Omnicare, PacifiCare remained interested in negotiating with Omnicare in order to expand its network. (*Id.* P 96.) Omnicare argues that PacifiCare actually still *needed* Omnicare, because it was concerned that CMS might heighten the "convenient access" standard by requiring that a PDP's LTC enrollees reside even closer to the pharmacies that provided their drugs. (Omnicare's Resp. to Defs.' 56.1 P 96.) Specifically, Omnicare points to testimony from Angelo Giambrone, the RxSolutions Vice President of Industry and Network Relations, suggesting PacifiCare was concerned that CMS might be "raising the bar" regarding convenient access standards. (Giambrone Dep. 183:12-19, Ex. 86 to Mem. in Opp'n.) At Bien's **[**30]** request, in mid-November, Cortes again sent him the RxSolutions form contract, which PacifiCare claims it **[*957]** still wanted to use as the starting point for any negotiations. (Defs.' 56.1 PP 95, 97.) Together with the RxSolutions "Any Willing Provider" contract, Cortes sent an-email saying, "We will need to work with this document in order to proceed." (11/18/05 e-mail from Cortes to Bien, App. 102 to Mem. in Supp.) Omnicare claims that it understood that the form contract proposal was a "take it or leave it" proposition and not an invitation to commence negotiations; in particular, Bien testified that because of time restrictions--Omnicare wanted to finalize its Part D network before January 1, 2006--he asked PacifiCare and RxSolutions "for their best contract that they would give us, and I believe [the "Any Willing Provider" contract] was purported to be that." (Omnicare's Resp. to Defs.' 56.1 PP 97-98; Bien Dep. 434:13-435:7, App. 18 to Mem. in Supp.)

In any event, after receiving the RxSolutions form contract, Omnicare made no attempt to negotiate any of its terms--not even the reimbursement rate--and simply signed the contract on December 6, 2005. (Defs.' 56.1 PP 100-101.) Chaney at **[**31]** RxSolutions testified that he was surprised that Omnicare made no attempt to negotiate any terms. (Chaney Dep. 124:18-22, App. 67 to Mem. in Supp.) The reimbursement rate in the RxSolutions contract was substantially lower than the rates Omnicare negotiated with other national PDPs, including UnitedHealth--in fact, UnitedHealth's discount off of AWP in the WHI contract was only 75% of the discount provided in the RxSolutions contract, and UnitedHealth also paid a larger dispensing fee. (Rubinfeld Decl. PP 11-12, Attach. to Mem. in Opp'n.) Still, at least three small local PDPs, representing less than 1% of Omnicare's January 2006 revenues, did negotiate lower rates than the RxSolutions contract contained. (*Id.*) As described above, Bien had directly asked Stephens whether PacifiCare would become a party to UnitedHealth's contract as a result of the merger. Yet Omnicare negotiators apparently did not consider the flip side of that question, and the contract contained no provision that precluded UnitedHealth from participating, after the merger, in the agreement that RxSolutions negotiated on behalf of PacifiCare.

C. UnitedHealth Joins RxSolutions-Omnicare Agreement

Omnicare contends in **[**32]** this lawsuit that UnitedHealth's decision in February 2006 to withdraw from the WHI-Omnicare Agreement and join the RxSolutions contract had been planned by UnitedHealth and PacifiCare for a long period of time before the merger was finalized. Omnicare claims that UnitedHealth's basic strategy is summed up in a document referred to as the "stalking horse memorandum," first circulated between UnitedHealth and PacifiCare officials on September 6, 2005. [10] **[*958]** The two-page memo is titled "UnitedHealth Group's Pharmacy

---

[10] Several separate e-mails attached to Omnicare's brief contain copies of this memorandum. (*E.g.* Ex. 25; Ex. 44; Ex. 45; Ex. 211; Ex. 215; Ex. 216.) The basic document is the same in each exhibit, although some differences, including the precise placement of the "stalking horse" language, do appear. However, neither party appears to consider those differences material, and the court agrees that no substantive **[**34]** changes altered the meaning of this memorandum in any of the exhibits

Management Options." (Ex. 215 to Mem. in Opp'n, at UN034675.) Page 1 discusses UnitedHealth's past experiences with PBMs and presents some basic information about RxSolutions, including the fact that it operates solely as an "in-house" PBM for PacifiCare and a description of the services RxSolutions provides. (*Id.*) The top of page 2 reads, in bold, "Several strategic options need to be considered to capitalize on the value proposition Prescription Solutions can bring to United." (*Id.* at UN034676.) The memo then lists three strategic options: "1. Continue to outsource all of United's PBM services . . . . 2. Adopt a mixed strategy of outsourcing selected PBM services/functions **[**33]** to external vendors and in source [sic] selected services/functions to Prescription Solutions . . . . 3. Eventually consolidate all PBM services internally under Prescription Solutions." (*Id.*) Under the second option, the memorandum asked, "Is there a role for a central group to manage all PBM services for United whether they are in-sourced or out-sourced to obtain the best financial terms, contracts and service?", and suggested as a solution, "Use Prescription Solutions as a stalking horse to obtain the best service and contracts." (*Id.*) Omnicare contends that this reference to using RxSolutions as a stalking horse demonstrates UnitedHealth's intention to "surreptitiously obtain more favorable contracts for [UnitedHealth] from vendors such as Omnicare." (Mem. in Opp'n at 21.)

UnitedHealth has a different explanation for its eventual withdrawal from the WHI-Omnicare Agreement. According to Defendants, UnitedHealth began harboring legal concerns about the WHI-Omnicare Agreement in general, and the 18 Patient Protections in particular, as early as August 2005. (Defs.' 56.1 PP 117-18.) Indeed, on September 12, two months before negotiations between Omnicare and PacifiCare resumed, Tobin sent Stephens an e-mail saying that UnitedHealth "may be requiring WHI to renegotiate our Omnicare agreement." (*Id.* P 119). On November 9, Attorney Infante warned that **[**35]** there were legal problems with the WHI Agreement (as noted, Omnicare questions whether this decision was reached independently). (*Id.* P 121.) Around this same time, WHI's own senior attorney, Kelly Simenson, also concluded that the WHI-Omnicare Agreement, at least as it concerns UnitedHealth, conflicted with Medicare Part D regulations. [11] (*Id.* P 124.) On December 8, two days after Omnicare signed the RxSolutions contract, UnitedHealth expressed its concerns about the WHI Agreement to Omnicare, apparently for the first time. (*Id.* P 125.) Later that month, WHI forwarded a copy **[*959]** of the WHI-Omnicare Agreement to Omnicare, with proposed changes that WHI contended were necessary to bring the agreement into compliance with federal law and regulations. (*Id.* P 126.) Omnicare concedes that "one or two" other unnamed PDPs raised legal concerns about the Patient Protections, and that several PDPs--including MedImpact, Caremark, RxAmerica, Coventry, FirstHealth, and Independent Health--signed contracts with Omnicare that did not contain the Protections. (Omnicare's Resp. to Defs.' 56.1 P 131.) Bien believed that these objections regarding the Protections, including the claim that the Protections **[**36]** violated CMS regulations, were simply a negotiating tactic. (*Id.*) In early January 2006, UnitedHealth's outside counsel proposed an agreement, without many of the Protections, to replace the agreement negotiated on UnitedHealth's behalf by WHI. (Defs.' 56.1 P 130.)

---

provided by Omnicare. (*See* Quam Dep. 207:16-21, Ex. 8 to Mem. in Opp'n (witness had same understanding of "stalking horse" language when it was repositioned in the memorandum).)

None of these copies clearly state who originally authored the memorandum, but it circulated among several officials responsible for pharmacy network management at the two entities, including Lois Quam and Peggy Olson at UnitedHealth; Howard Phanstiel, CEO of PacifiCare; and Jacqueline Kosecoff, an Executive Vice President at PacifiCare. (Exs. 44, 45 to Mem. in Opp'n.)

[11] It is not altogether clear whether other PDP sponsors covered by the terms of the WHI-Omnicare Agreement also had concerns that the Agreement was inconsistent with federal regulations. At her deposition, Simenson expressed no opinion as to whether the WHI-Omnicare Agreement was noncompliant with Medicare regulations as to other PDP sponsors covered by the Agreement, but stated that part of the problem as it specifically related to UnitedHealth was that the Agreement allowed for more expansive benefit design than UnitedHealth's own policies did. (Simenson Dep. 44:3-16, App.135 to Mem. in Supp.) Even after UnitedHealth was dropped from the WHI-Omnicare Agreement, WHI continued to seek to make changes to that Agreement (presumably on behalf of other PDPs), although these changes appear to have been motivated by business reasons rather than concerns about illegality. (Defs.' 56.1 P 141.) The WHI-Omnicare Agreement continued **[**37]** in effect with respect to the other PDPs covered by it until December 31, 2008, the end of the initial term originally contemplated in the Agreement. (Ex. 19 to Mem. in Opp'n; Omnicare's Supplemental Statement of Undisputed Material Facts P 39.)

Defendants claim that UnitedHealth learned of the RxSolutions-Omnicare Agreement in January 2006. (*Id.* P 132.) Omnicare contends that the evidence recited above--especially the stalking horse memorandum--demonstrates that UnitedHealth both knew of and devised strategy around the RxSolutions contract months before this time. (Omnicare's Resp. to Defs.' 56.1 P 132.) Yet on January 11, 2006, Stephens at UnitedHealth e-mailed Giambrone, his counterpart at RxSolutions, asking, "Quick question--do you have a Part D network agreement with Omnicare for LTC pharmacy?" (Defs.' 56.1 P 132.) Later that day, Giambrone affirmed that RxSolutions/PacifiCare did have such an agreement: "Yes--Do you?" (*Id.*) Stephens responded twenty minutes later, "Yes--we do through WHI. Let's discuss on Friday." (*Id.*) According to Defendants, this correspondence marked the first time that UnitedHealth became aware of the RxSolutions contract with Omnicare. (*Id.*)

Following a **[**38]** meeting between Giambrone and Stephens on January 20, Stephens wrote an e-mail to Tobin exploring the possibility that UnitedHealth might benefit from PacifiCare's advantageous deal with Omnicare:

> I learned from Angelo [Giambrone of RxSolutions] yesterday that PHS has a favorable agreement in place with Omnicare. We need to understand if we can utilize the [RxSolutions] agreement for our business--this may offer a different approach we can take with Omnicare. Will you discuss/get copy from [PacifiCare's in-house counsel]?

(*Id.* PP 133-34.) In response, Tobin e-mailed PacifiCare's in-house counsel a couple of days later, requesting a copy of the RxSolutions-Omnicare Agreement. "Angelo suggested to Craig that it could be useful to us in finalizing our agreement with Omnicare or that we might even be able to use it," she wrote. (*Id.* P 135.) On February 22, 2006, Stephens verbally informed Bien that UnitedHealth would be utilizing the RxSolutions contract, effective April 1, 2006; he confirmed this in writing on February 28. (*Id.* P 137.)

IV. Omnicare files suit

Omnicare filed this action against Defendants on May 18, 2006 in the U.S. District Court for the Eastern District of Kentucky, the **[**39]** site of Omnicare's corporate headquarters and many potential witnesses. (Mem. Op. and Order [45] at 6.) The Kentucky district court transferred the matter to this court, relying on a forum selection provision of the WHI-Omnicare Agreement that provided for Illinois courts to have exclusive jurisdiction over disputes "arising under or in connection with" the Agreement. (*Id.* at 3.) Omnicare claims that, prior to the merger, UnitedHealth **[*960]** and PacifiCare conspired to have PacifiCare obtain the lowest possible price from Omnicare and then switch UnitedHealth's plan over to the more favorable PacifiCare-Omnicare contract. In its First Supplemental and Amended Complaint ("Complaint"), Omnicare alleges that Defendants violated the Sherman Act, as well as a parallel Kentucky antitrust statute, by "conspir[ing] to coordinate their negotiations with Omnicare in order to . . . fix and depress the prices paid by defendants to Omnicare for providing those services." (Am. Compl. P 6.) Omnicare further alleges that Defendants conspired to defraud Omnicare, fraudulently misrepresented their intentions to Omnicare, and were unjustly enriched by their fraud.

Defendants moved to dismiss the antitrust claims **[**40]** in the Complaint for failure to state a claim on which relief can be granted. This court denied the motion on September 28, 2007, holding that Omnicare had "pleaded facts which plausibly suggest that the merger agreement constituted a contract, combination, or conspiracy between UnitedHealth and PacifiCare under *section 1 of the Sherman Act.*" *Omnicare, Inc. v. UnitedHealth Group, Inc., 524 F. Supp. 2d 1031, 1039 (N.D. Ill. 2007)*. The court further held that Omnicare had pleaded sufficient facts to satisfy the other elements of the antitrust claims, namely, that Defendants' conduct resulted in an unreasonable restraint of trade, that Omnicare was a proper plaintiff to bring the suit, and that Omnicare had suffered an injury recognized by antitrust laws. *Id. at 1039-44*.

On June 20, 2008, Defendants moved for summary judgment on all claims. On the same date, Omnicare filed a Motion for Partial Summary Judgment Pursuant to *Rule 56* Or in the Alternative Motion to Strike, arguing that five affirmative defenses advanced by Defendants fail as a matter of law. The court addresses both summary judgment motions in this opinion.

DISCUSSION

HN1[] Summary judgment is appropriate when "the pleadings, the **[**41]** discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*. *HN2*[] Unlike a motion to dismiss, a motion for summary judgment requires the opposing party to present evidence "showing a genuine issue for trial." *FED. R. CIV. P. 56(e)*. A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. *HN3*[] The court will draw all reasonable inferences from the evidence in favor of the nonmoving party, *id. at 255*, but the nonmoving party still bears the burden of establishing the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

I. Federal Antitrust Claim

HN4[] Section 1 of the Sherman Act is designed to prevent business entities from entering into collusive agreements. By its terms, section 1 prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade." *15 U.S.C. § 1*. *HN5*[] In the usual case, a price-fixing conspiracy exists between **[**42]** sellers who agree to artificially set their prices above or below market prices. *See* *Int'l Outsourcing Servs., LLC v. Blistex, Inc., 420 F. Supp. 2d 860, 864 (N.D. Ill. 2006)* (citing *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 348, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*. Illegal **[*961]** agreements may also be made between buyers who conspire to establish a price below market levels, a situation often referred to as a "buyers' cartel." *Int'l Outsourcing Servs., 420 F. Supp. 2d at 864*. To establish a successful section 1 claim against a buyers' cartel, a plaintiff must prove: (1) the existence of a contract, combination, or conspiracy between buyers; (2) an unreasonable restraint of trade in the relevant market; and (3) an injury caused by the cartel. *See* *Denny's Marina v. Renfro Prods., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

Defendants argue that Omnicare cannot establish the existence of a genuine issue of material fact supporting its claim that Defendants violated section 1 of the Sherman Act. *See* *15 U.S.C. § 1*. Specifically, Defendants argue that Omnicare has not presented sufficient evidence to avoid summary judgment on each of the three elements of the claim outlined above. The court agrees with Defendants that Omnicare **[**43]** has not established a genuine issue of material fact that the Defendants engaged in a contract, combination, or conspiracy in restraint of trade. Although the parties also devoted substantial briefing to the other two elements, the failure to establish a genuine issue on the first element is dispositive of the entire claim, and the court therefore does not consider whether a genuine issue of material fact exists concerning an unreasonable restraint of trade or whether Omnicare was injured as a result of anticompetitive behavior.

HN6[] Omnicare can prove the existence of an agreement through direct or circumstantial evidence. *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 476 F.3d 442, 449 (7th Cir. 2007)*. *HN7*[] Direct evidence is "evidence tantamount to an acknowledgment of guilt," while circumstantial evidence is "everything else including ambiguous statements." *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 662 (7th Cir. 2002)*. *HN8*[] When relying on circumstantial evidence to establish the existence of a conspiracy, at least some of the evidence "must tend to exclude the possibility that the alleged conspirators acted independently rather than in concert." *Miles Distribs., 476 F.3d at 449* **[**44]** (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. This standard does not, however, require the plaintiff to exclude any possibility that the defendants acted independently. *See* *In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787 (7th Cir. 1999)*. Rather, the standard merely establishes that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita, 475 U.S. at 588* (citing *Monsanto, 465 U.S. at 764*). Therefore, while the plaintiff in an antitrust case faces no higher burden to defeat summary judgment than a plaintiff in another case, *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, ***antitrust law*** does "limit[] the range of permissible inferences from ambiguous evidence in a [section] 1 case." *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660 (7th Cir. Ill. 1987)* (quoting *Matsushita, 475 U.S. at 588*).

Omnicare argues that the voluminous evidence presented with this motion creates a genuine issue of material fact as to the existence of an illegal agreement between UnitedHealth and PacifiCare. First, **[**45]** Omnicare argues that the Merger Agreement between UnitedHealth and PacifiCare by its own terms establishes the existence of a conspiracy in restraint of trade. Second, Omnicare claims that PacifiCare's actions in its contract negotiations **[*962]** with Omnicare were economically irrational unless understood as the product of concerted action with UnitedHealth. Omnicare's final argument is that the information exchanged by the merging entities in the period leading up to the merger was competitively sensitive and creates substantial evidence from which a jury could find the existence of a conspiracy.

For the reasons explained here, the court concludes that the evidence on which Omnicare relies is at least as consistent with independent action by the Defendants as it is with an unlawful agreement. Accordingly, Defendants are entitled to summary judgment on Count I.

A. Merger Agreement

The main pillar of Omnicare's proof of a contract, combination, or conspiracy is the Merger Agreement signed by PacifiCare and UnitedHealth. In denying Defendants' motion to dismiss, this court held that "Omnicare has pleaded facts which plausibly suggest that the merger agreement constituted a contract, combination, **[**46]** or conspiracy between UnitedHealth and PacifiCare under section 1 of the Sherman Act." *Omnicare, Inc., 524 F. Supp. 2d at 1039*. ***HN9***[] At the summary judgment stage, however, merely pleading sufficient facts will not suffice to withstand a motion for summary judgment; rather, the plaintiff must make an affirmative showing of proof that a genuine issue of material fact exists that requires a trial. *See* *Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 607 (7th Cir. 2005)* (citing *Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988)*). An examination of the Merger Agreement itself--including the materials incorporated by reference into the agreement--shows that Omnicare has not made such a showing here.

Omnicare emphasizes a provision of the Merger Agreement (the "approval provision") that requires PacifiCare to obtain UnitedHealth's approval for any transaction, other than those entered into in the ordinary course of business, in excess of $ 3 million. Specifically, section 5.01 of the Merger Agreement prohibits PacifiCare from "enter[ing] into . . . any Contract . . . that involves [PacifiCare] or any of its Subsidiaries incurring a liability in excess of three million **[**47]** dollars." (Merger Agreement § 5.01(a)(x), Ex. 72 to Mem. in Opp'n.) In Omnicare's view, the approval provision sets such a low threshold that it essentially grants UnitedHealth control over all of PacifiCare's Part D contracts. In response, Defendants point to exceptions in the Merger Agreement that carve out the Part D contract entered into by RxSolutions from the approval requirement. Most notably, Defendants point to the Company Disclosure Letter ("Letter") referred to in section 5.01 of the Merger Agreement. Section 5.01 establishes the $ 3 million ceiling for PacifiCare transactions that do not require UnitedHealth approval, except as "provided in Section 5.01(a) of the Company Disclosure Letter." (*Id.*) That Letter specifically authorizes PacifiCare "and its Subsidiaries [to] enter into or amend any Contracts relating to their Part D standalone business . . . ." (Company Disclosure Letter § 5.01(a)(1), Ex. 73 to Mem. in Opp'n.) Omnicare has not challenged Defendants' interpretation of the provision: that it exempts PacifiCare from securing UnitedHealth's approval before entering into a Part D contract. Instead, Omnicare casts doubt on the Letter's authenticity, arguing that it **[**48]** is only a draft, and characterizes Defendants' tardy disclosure of the Letter as an "affront to this court." (Mem. in Opp'n at 37.) None of these reasons provide a basis on which the court is free disregard the letter.

[*963] ***HN10***[] Authentication of a document can be made by a "witness with knowledge" who testifies "that a matter is what it is claimed to be." *FED. R. EVID. 901(b)(1)*. PacifiCare's Chief Executive Officer and President at the time of the merger, Howard Phanstiel, confirmed the parties' interpretation of the Letter, testifying that he "understood that Part D contracts with providers, like institutional pharmacy provider Omnicare, Inc., were exempted" from the approval provision by the Company Disclosure Letter. (Phanstiel Decl. PP 4-5, App. 47 to Mem. in Supp.) Phanstiel further asserted that the Letter attached to his Declaration was a "true and correct copy" of the Letter, which sufficiently authenticates the Letter under *Rule 901(b)(1)*. (*Id.* P 5.) Contrary to Omnicare's suggestion, the copy of the Letter attached to Phanstiel's Declaration is not labeled as a "draft," and Omnicare has presented no other basis for the conclusion that it was not a binding part of the PacifiCare/UnitedHealth **[**49]** Merger Agreement. Omnicare's suggestion that the court should disregard the Letter because it is unexecuted is insufficient in this regard: the Letter is not a separate agreement that required separate execution by the parties, but rather is incorporated by reference into the Merger Agreement based on the explicit reference in § 5.01 of the Agreement. Finally, Omnicare argues that the Defendants' production of the Letter at this late stage in the proceedings, two years after the action was initially filed, is an "affront to the court." (Mem. in Opp'n at 37.) The court is also puzzled by Defendants' regrettable decision to withhold materially beneficial evidence until the summary judgment stage. Nonetheless, nothing in the record casts serious doubt upon the authenticity of the Letter, and the court will not exclude relevant evidence solely on the basis of effrontery.

Finding no basis on which to exclude the Company Disclosure Letter, the court must consider it in determining whether a genuine issue exists as to the existence of a conspiracy based on the Merger Agreement. In ruling on the motion to dismiss, the court concluded that the allegation that Defendants "coordinated their decisions **[**50]** regarding PacifiCare's entry into new agreements" was sufficient to state a claim. *Omnicare, 524 F. Supp. 2d at 1037*. Now at the summary judgment stage, Omnicare bears the burden of showing that a genuine issue exists as to whether such coordination actually took place. The Company Disclosure Letter explicitly excludes PacifiCare's Part D negotiations from requiring UnitedHealth's approval, and Phanstiel stated that, to the best of his knowledge, "PacifiCare did not ask for United's prior consent to enter into any pharmacy-network contract with Omnicare or any other pharmacy provider." (Phanstiel Decl. P 7, App. 47 to Mem. in Supp.) All that Omnicare offers in rebuttal is the text of § 5.01 of the Merger Agreement, but as noted above, the relevance of that text is undermined by the Company Disclosure Letter.

Omnicare also relies on two consent decrees that the United States entered into with companies accused of violating the Sherman Act to argue that the UnitedHealth-PacifiCare Merger Agreement is anticompetitive. According to Omnicare, the merger agreements in both cases contain similarly restrictive provisions, which DOJ relied upon in determining the existence of a conspiracy in **[**51]** restraint of trade. As an initial matter, the court notes that these decrees have no precedential value. More importantly, the provisions of the merger agreements involved in those other cases are clearly distinct from the approval provision of the UnitedHealth/PacifiCare agreement. The provision in the Merger Agreement between UnitedHealth and PacifiCare **[*964]** is a relatively common feature in merger agreements intended to insure that the acquired company (PacifiCare) does not assume any major liabilities for which the acquiring company (UnitedHealth) would be responsible after the merger. *See* ANTITRUST ADVISER, *supra* § 3:74, at 3-270. By contrast, the merger agreement in *United States v. Computer Assocs. Int'l, Inc., No. 01-02062, 2002 U.S. Dist. LEXIS 23039, 2002 WL 31961456 (D.D.C. Nov. 20, 2002)*, contained a provision preventing the acquired company from setting prices below a certain level. *2002 U.S. Dist. LEXIS 23039, [WL] at *9*. This provision could not be explained in terms of its possible effect on the proposed merger and appeared to be motivated almost entirely by anticompetitive interests. *Id.* (provision is "extraordinary and not reasonably ancillary to any legitimate goal of the transaction").

Nor does *United States v. Gemstar-TV Guide Int'l, Inc., No. 03-0198, 2003 U.S. Dist. LEXIS 12494, 2003 WL 21799949 (D.D.C. July 11, 2003)* **[**52]** establish that the UnitedHealth/PacifiCare agreement violates the Sherman Act. In fact, in the *Gemstar* case, DOJ explicitly sanctioned the use of terms that limit the acquirer's liability. *2003 U.S. Dist. LEXIS 12494, [WL] at *3* (permitting merging parties to agree to "forego conduct that would cause a material adverse change in the value of to-be-acquired assets during the Pre-consummation Period"). As numerous commentators, including Omnicare's expert and the general counsel of the Federal Trade Commission, have noted, these approval provisions are common practice in mergers, and the presence of one here does not constitute evidence of conspiracy. (Coates Report P 68, Attach. to Mem. in Opp'n; William Blumenthal, *The Scope of Permissible Coordination Between Merging Entities Prior to Consummation,* 63 Antitrust L.J. 1, 55-56 (Fall 1994).) In the absence of other evidence of a conspiracy, the threshold value of $ 3 million is not so low as to give rise to an inference of conspiracy.

In sum, the Merger Agreement by its own terms did not require UnitedHealth to approve PacifiCare's Part D contracts. [12] The commonly-adopted provision requiring the acquirer's approval of certain transactions therefore cannot provide **[**53]** the basis to conclude that a conspiracy in restraint of trade existed.

B. Economic Evidence

Omnicare next contends that economic evidence demonstrates that Defendants must have entered into an illegal agreement in restraint of trade. ***HN11***[] Generally, courts will not second-guess business judgments made by a private actor. *See* *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068, 1070 (7th Cir. 1978)*. Some courts have, however, recognized that evidence that a defendant's action, if taken independently, would be contrary to its economic self-interest "tend[s] to exclude the likelihood of independent conduct" and may therefore constitute circumstantial evidence in support of a Sherman Act claim sufficient to survive summary judgment. *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)*. Omnicare argues that PacifiCare's bargaining strategy makes no sense in the absence of a conspiracy **[**54]** because a contract with Omnicare was the only practical way for PacifiCare to provide drugs to many of its enrollees in LTC facilities serviced by Omnicare. If PacifiCare had not reached a secret agreement with UnitedHealth, Omnicare concludes, **[*965]** its bargaining behavior was so reckless that it endangered PacifiCare's reputation, its Part D certification by CMS, and even the merger itself. Omnicare also claims that the reimbursement rate it received in the PacifiCare contract is itself evidence of a conspiracy because it was significantly lower than prevailing market rates and could only have been extracted from Omnicare by anticompetitive behavior. The court addresses these arguments in turn.

1. PacifiCare's Bargaining Strategy

In mid-July 2005, PacifiCare had not yet been approved by CMS as a national PDP. Given Omnicare's widely-felt presence in the market, Omnicare argues that PacifiCare's decision to break off negotiations at that point in the CMS-approval process was reckless and made no economic sense. First, Omnicare argues that the decision risked PacifiCare's ability to get drugs to its enrollees living in nursing homes serviced by Omnicare, which would seriously harm PacifiCare's **[**55]** brand name with senior citizens. Second, the decision to break off negotiations also put PacifiCare's certification with CMS at risk. On March 16, 2005, CMS had explicitly told PacifiCare, "We would expect that the plan would seek to enter into a network contract with a pharmacy serving the LTC facility as soon as practicable." (3/16/05 Long-Term Care Guidance, Ex. 20 to Mem in Opp'n at 4.) According to Omnicare, by breaking off negotiations with the institutional pharmacy that was likely to service many of PacifiCare's dual eligibles and that possessed exclusive contracts with many of the LTC facilities, PacifiCare jeopardized its CMS certification and risked the loss of $ 64 million in Part D profits PacifiCare was expecting in 2006. Finally, Omnicare suggests that PacifiCare's economically-irrational decision to break off negotiations with Omnicare may even have put PacifiCare's planned merger with UnitedHealth at risk, if UnitedHealth thought the loss of the expected PDP profits made the merger no longer desirable. [13] Based on information available in PacifiCare's public financial statements, Omnicare argues that PacifiCare's strategy put at risk $ 64 million in Part D profits, **[**56]** a gain in its market capitalization of $ 1.2 billion, $ 243 million in merger-related costs that PacifiCare would have to realize as losses (for tax purposes) had the merger failed, and $ 60 million in executive bonuses to be paid upon completion of the merger; in exchange, PacifiCare stood to gain only $ 11 million based on better reimbursement rates in the Omnicare contract over three years. (Coates Decl. P5, Rubinfeld Decl. P 9, Attachs. to Mem. in Opp'n.) And, if UnitedHealth were to become a party to the RxSolutions contract, the newly-merged entity stood to gain

---

[12] The clear and unequivocal language of the Company Disclosure Letter makes it unnecessary to consider Defendants' arguments that two other provisions of the Merger Agreement demonstrate that the approval provision does not apply to PacifiCare's Part D contract with Omnicare.

[13] Omnicare has not provided any evidence that UnitedHealth in fact would have backed out of the merger if CMS did not certify PacifiCare's PDP.

somewhere between $ 130 and $ 300 million. These circumstances, according to Omnicare, create a genuine issue of material fact as the economic reasonableness of PacifiCare's decisions.

In defense of its business judgment, PacifiCare relies principally on the fact that its strategy succeeded--PacifiCare's PDP was certified by CMS without Omnicare and it eventually received a lower rate in its contract with Omnicare. This fact by itself, according to PacifiCare, undermines any challenge **[**57]** to its decision and defeats the contention that PacifiCare's decision to call Omnicare's bluff is inconsistent with independent action on the part of PacifiCare. The court agrees that the success of PacifiCare's strategy entitles it to very strong judicial deference, for ***HN12***[] if business judgments generally deserve deference, **[*966]** *see Brach v. Amoco Oil Co., 677 F.2d 1213, 1223 (7th Cir. 1982)*, then successful business judgments deserve even greater deference.

In fact, the record shows that PacifiCare's business strategy made sense even without the benefit of hindsight. At the time PacifiCare refused to sign the Omnicare contract and insisted on working from the RxSolutions standard contract, there were several other PDPs--including at least one other national PDP--that also refused to sign Omnicare's contract before the CMS bid deadline of August 1. In August 2005, CMS informed PacifiCare that its LTC pharmacy network was deficient and that PacifiCare needed to expand its network by contracting with additional pharmacies. Rather than returning to Omnicare, with whom PacifiCare believed there were a number of outstanding issues, PacifiCare thought it could sufficiently patch its pharmacy network **[**58]** by contracting with MHA. CMS ultimately approved PacifiCare's PDP with MHA, and not Omnicare, in its network. Similarly, Humana, another national PDP, contracted with enough other pharmacies to meet the CMS requirements without Omnicare in its network.

Omnicare believes its own centrality to a national PDP's LTC strategy make PacifiCare's insistence upon using its own form contract, initially at the expense of any agreement with Omnicare, irrational and thereby creates a genuine issue of material fact concerning the reasonableness of the strategy. The record undermines this assertion, as well. Omnicare's bargaining power with other PDPs in addition to PacifiCare was apparently greatly reduced as 2005 wore on; the reasonableness of PacifiCare's decision to use the RxSolutions contract is demonstrated by the fact that so many other PDPs insisted upon their own contracts that Tim Bien of Omnicare conceded that it "was the standard practice for PBMs" to insist on the PBM's own form contract. Fully 15 out of Omnicare's 21 contracts entered into between August 1, 2005 and April 1, 2006 used the PDP's form contracts, rather than the version proposed by Omnicare. [14] (Defs.' 56.1 PP 43, 45.) **[**59]** The record indicates that Omnicare simply was not as essential to CMS approval as it argues it should have been.

It appears from the record that CMS's approval of PacifiCare's PDP without Omnicare so strengthened PacifiCare's bargaining position that it was justified in again demanding that Omnicare sign PacifiCare's own "Any Willing Provider" contract. In early November, CMS distributed a document intended for PDPs that had already been certified, cautioning that "in order to facilitate plan compliance with the LTC convenient access standard, we strongly encourage plans to contract with LTC pharmacies serving all the LTC facilities in which their enrollees might reside as soon as practicable." (LTC Convenient Access Standard Statement at 1, Ex. 89 to Mem. in Opp'n.) One would expect this directive to entice PacifiCare **[**60]** to resume negotiations with Omnicare, but to suggest, as Omnicare does, that it substantially increased Omnicare's bargaining position is unjustified--if it had, one would expect that PacifiCare would have been eager to sign Omnicare's form contract rather than the other way around. Within one month of the CMS directive, PacifiCare did enter into a contract with Omnicare, **[*967]** and it did so from a superior bargaining position as a large CMS-certified PDP. Perhaps as a result, the reimbursement rates in that contract were substantially more favorable to PacifiCare than the rates PacifiCare and Omnicare had discussed earlier. In short, the contract that Omnicare signed--without making a counteroffer--was undisputedly favorable to PacifiCare and undermines Omnicare's assertion that Omnicare was in the stronger bargaining position.

---

[14] According to Bien, Omnicare's "shift in thinking" in agreeing to PDP form contracts after August 1 was caused by Omnicare's desire to protect its patients' interests by ensuring they would be covered under Part D, and not the result of a reduction in Omnicare's bargaining power. (Omnicare's Resp. to Defs.' 56.1 P 82; Bien Dep. 127:12-128:4, Ex. 79 to Mem. in Opp'n.)

At its core, Omnicare's theory would require the court to hold that a bargaining strategy that was ultimately successful and saved PacifiCare money was nevertheless illogical and contrary to its economic interest. It may not be impossible for a plaintiff to argue that a successful business strategy was economically irrational, but such an argument requires, at a minimum, **[**61]** a stronger showing than was made here, where PacifiCare demonstrated a rational basis for its actions and showed that other PDPs acted similarly. Granting due deference to the business decisions of PacifiCare, the court cannot conclude that its successful bargaining strategy was so irrational that it was inconsistent with independent action.

2. Reimbursement Rate

Omnicare next contends that the reimbursement rate provided in the Omnicare-RxSolutions contract was so low as to be proof of a conspiracy. ***HN13***[] Information about uncompetitive prices may be probative evidence suggesting the existence of a conspiracy. *See JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 778-79 (7th Cir. 1999)*. Omnicare has provided an expert's report concluding that the reimbursement rate paid by PacifiCare under the RxSolutions contract was significantly lower than other national PDP's rates paid to Omnicare. According to Omnicare, PacifiCare's ability "to extract a lower reimbursement rate from Omnicare than other PDPs that were more than five times [PacifiCare's] size simply makes no economic sense." (Mem. in Opp'n at 56-57.)

If PacifiCare was indeed successful in negotiating an unusually favorable rate, **[**62]** Omnicare has failed to produce any evidence that suggests this was a result of anything other than unsuccessful bargaining on Omnicare's part. When negotiations between PacifiCare and Omnicare resumed in November 2005, PacifiCare demanded that further negotiations take place on the basis of the RxSolutions contract, and sent Omnicare a copy. Rather than suggest any changes to the contract or the reimbursement rate, Omnicare signed the copy without negotiation. If PacifiCare's proposed lower rate had been problematic or unconscionable, one would expect Omnicare to protest or at least make a counterproposal. The record contains no indication that the rate was non-negotiable or that Omnicare otherwise felt some economic coercion to enter into the contract. Omnicare's characterization of the lower reimbursement rate as being "extracted" from Omnicare is inconsistent with evidence that the contract was willingly entered into by two sophisticated parties. Moreover, the rate at issue, while lower than the rates offered by other national PDPs, was higher than the rates Omnicare had agreed to with three local PDPs. These local PDPs admittedly made up a small portion of Omnicare's business, **[**63]** but the existence of these contracts--as well as Omnicare's silence regarding the rate--defeats the inference that PacifiCare's rate was so low as to be suspect on its face. If the contract really made no economic sense, as Omnicare now contends, one would not have expected Omnicare to enter into that contract so readily; even given Bien's stated concern that he **[*968]** was worried about Omnicare's ability to provide coverage to PacifiCare enrollees, some bargaining on price and other terms would still be expected. Far from being inconsistent with independent action, this evidence is entirely consistent with one company's finding itself in a superior bargaining position *vis a vis* a supplier and offering a contract to the supplier on terms favorable to itself. Therefore, nothing in the reimbursement rate paid by PacifiCare constitutes evidence of a conspiracy.

C. Premerger Communications and Information Exchange

Finally, Omnicare argues that communications that took place between UnitedHealth and PacifiCare prior to the completion of the merger on December 20, 2005 create a genuine issue as to the existence of a conspiracy. Omnicare asserts that this evidence is all direct evidence; in fact, **[**64]** the court sees none of it as "tantamount to an acknowledgment of guilt." ***HN14***[] Because the evidence requires the drawing of inferences to find the existence of a conspiracy, that evidence is actually circumstantial and must be considered under the *Monsanto/Matsushita* framework. *High Fructose Corn Syrup, 295 F.3d at 662*. Accordingly, Omnicare must again offer at least some evidence that "tends to exclude the possibility of independent action." *Monsanto, 465 U.S. at 768*.

At the outset, the court notes that virtually no case law establishes standards for determining when premerger discussions are anticompetitive. Some federal agencies have, however, expressed concern about the potential anticompetitive effects of premerger communications and coordination. *Accord* ANTITRUST ADVISER, *supra* § 3:74, at 3-271. DOJ and the Federal Trade Commission ("FTC") have entered into a handful of consent decrees with companies who illegally coordinated premerger activities; but these cases are not very instructive because they did not all concern alleged Sherman Act violations, and furthermore, were all "easy cases that involved egregious conduct." William Blumenthal, General Counsel, FTC, The Rhetoric of Gun-Jumping, **[**65]** Remarks Before the Association of Corporate Counsel, Annual Antitrust Seminar of the Greater New York Chapter (Nov. 10, 2005), at 2-3, available at *http://www.ftc.gov/speeches/05speech.shtm*. ***HN15***[] The balance the court seeks to strike here is a sensitive one. On the one hand, courts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation. On the other hand, the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information. This standard could lead to "sham" merger negotiations, or at least allow for periods of cartel behavior when, as here, there is a substantial period of time between the signing of the merger agreement and the closing of the deal. With this delicate balance, as well as the *Monsanto/Matsushita* framework, in mind, the court considers the evidence offered by Omnicare of premerger information exchange.

1. Late June/Early July 2005

As detailed above, UnitedHealth and PacifiCare first began discussions of a **[**66]** possible merger in January 2005, but talks between the two entities intensified in the weeks leading up to the signing of the Merger Agreement on July 6. In a series of meetings in June and July, the two parties exchanged strategic information, including Part D average pricing. Defendants emphasize that the information exchange **[*969]** took place between senior members of the merging entities, referred only to averages and ranges, did not mention the prices offered to Omnicare, and virtually never discussed long-term care networks or the contract terms offered to LTC pharmacies.

Omnicare disputes these characterizations of the talks. First, Omnicare disputes that these talks were exclusively among high-level officials of PacifiCare and UnitedHealth. This factor is relevant because high-level executives are less likely to be directly involved in developing the Part D proposals and less directly able to use any of the competitively sensitive information, to the extent such information was disclosed. Omnicare claims that "business operations employees" were involved in the June due diligence meetings. (Omnicare's Resp. to Defs.' 56.1 P 23.) Omnicare fails to define what exactly it means by "business **[**67]** operations employees," however, and a review of the attendees at the June due diligence meetings, listed above in the Statement of Facts, shows that it was attended primarily by CEOs, CFOs, and other senior executives of various UnitedHealth and PacifiCare business segments. (Due Diligence Summary--Point Part D, Ex. 38 to Mem. in Opp'n.) That these officials may have overseen aspects of Part D can hardly be surprising; indeed, it would be stranger if the executives at the Part D due diligence meetings had little or no connection to the Part D business. In addition, the UnitedHealth, PacifiCare, and RxSolutions officials who appeared to have the most direct contact with Omnicare--such as Rochele Cortes at RxSolutions or Craig Stephens at UnitedHealth--do not appear to have been present at these meetings. The blanket usage of the term "business operations employees" therefore has no bearing on whether UnitedHealth and PacifiCare officials improperly exchanged information during due diligence.

Even if those directly involved with negotiations with Omnicare and other pharmacies were not those directly involved in the due diligence meetings, Omnicare has demonstrated the existence of a genuine **[**68]** issue of material fact as to whether such personnel were provided with information in excess of what was permitted by the confidentiality agreements. A UnitedHealth official on the due diligence team, Jerry Knutson, testified that other UnitedHealth personnel not on the team were consulted about matters learned in due diligence. (Knutson Dep. 85:21-86:11, Ex. 32 to Mem. in Opp'n.) Knutson explained that these consultations were essential for the due diligence team to assess the relevance of the information the team was receiving. (*Id.* at 86:15-22.) The consultations nevertheless do create concerns that competitively sensitive information was leaked outside of the parameters set by the confidentiality agreement covering such information. Defendants deny having employed the information for any improper purposes, but, though Knutson's reasons for sharing the information may be benign, the risk remains that these officials could have used the information they obtained in anticompetitive ways to benefit their own businesses. Omnicare has thus established a genuine issue of material fact as to whether Plan D decision makers were involved in these discussions. Coupled with other evidence **[**69]** of improprieties during merger negotiations, this evidence might well be inconsistent with independent action. By itself, however, this issue does not support an inference of conspiracy because it is not inconsistent with the belief that the two entities were still acting independently.

Omnicare's other suggestions of impropriety are less convincing. Omnicare **[*970]** observes that during the course of due diligence, UnitedHealth was shown a PacifiCare document entitled "Form of Prescription Drug Services Agreement," which was also the title of the "Any Willing Provider" contract that RxSolutions ultimately signed with Omnicare. This contract template is not specific to Part D contracts, however, and, by itself, does not create a binding contract to provide LTC care under Part D. (Lagerstrom Decl. P 3, App. 206 to Defs.' Reply.) Nor does the PacifiCare form contain any Part D pricing information or make any reference to Omnicare or any other specific institutional pharmacy. (*Id.*) The fact that it is substantially the same form as the contract that Omnicare later signed is thus of little significance, because nothing in this document communicates anything about prices that PacifiCare was offering **[**70]** to LTC providers or other pharmacies under Part D. All that it shows is that RxSolutions possessed in June, and in fact used in December, a generic template to enter into an agreement with an institutional pharmacy. This fact is simply immaterial to this summary judgment motion.

Omnicare also points to the price information that was exchanged during the due diligence process as further evidence of anticompetitive behavior. Specifically, the Part D questionnaire that UnitedHealth sent PacifiCare asked for PacifiCare's expected average brand discount off of AWP. PacifiCare replied that the rate was AWP - [x]% for its Preferred Network, which was in fact the same rate that PacifiCare ultimately paid in the Omnicare contract. Omnicare does not argue that this price information was irrelevant to UnitedHealth's determination of an appropriate offer price for the merger, and the court agrees that the information had some importance to consummating the Merger Agreement. UnitedHealth's method of obtaining the admittedly relevant information appears to the court to be appropriately circumspect--rather than requesting all information about all relevant markets, UnitedHealth asked only for averages **[**71]** and ranges. Nor can Omnicare properly dispute the assertion of Ken Lagerstrom, head of UnitedHealth's Corporate Development, that "no Part D information that was available to us . . . relate[d] to specific contracts." (Lagerstrom Dep. 393:24-394:2, App. 22 to Mem. in Supp.) Omnicare claims that UnitedHealth's access to PacifiCare's "Any Willing Provider" contract undercuts this claim, but as noted above, that form is a contract template that does not provide specifics and Omnicare has not established any genuine issue as to the materiality of that form.

The natural question arising from this information exchange is, was this information exchange necessary for the due diligence process? *See* Michael C. Naughton, *Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions,* 20-SUM ANTITRUST 66, 68 (Summer 2006). Certainly, one could not expect that the two merging entities would not discuss Part D plans at all, so the exchange of some information relating to Part D does not automatically create a genuine issue as to the existence of a conspiracy. And, as discussed above, the pricing information that was exchanged--arguably the most competitively sensitive of any of the **[**72]** exchanged information--was provided late in the process (less than one month before the signing of the Merger Agreement) and was conveyed in the form of averages and ranges rather than specific bargained-for rates. In early June 2005, UnitedHealth officials were even complaining about the difficulty of assessing PacifiCare's "level of readiness to implement the Part D business and the level of business **[*971]** risk they are assuming." (Paul Memo at 2, App. 29 to Mem. in Supp.) Omnicare has failed to establish that the price and strategy information that was subsequently exchanged creates a genuine issue as to the existence of a conspiracy. Rather, the evidence suggests that the information exchange was as general as possible to enable UnitedHealth to evaluate PacifiCare's Part D readiness and its level of business risk. Even though it appears that UnitedHealth did not scrupulously enforce the segregation of its due diligence team from other members, that fact alone cannot alter the generally benign nature of the information exchanged. From the record, it appears that this exchange of information was necessary to due diligence and was performed in a reasonably sensitive manner.

Three additional **[**73]** pieces of evidence warrant further discussion. First, UnitedHealth's sharing of its own average price information with PacifiCare could be seen as unnecessary and circumstantial evidence of a conspiracy. Some commentators argue that ***HN16***[] the inference of a conspiracy is significantly weakened where it is the target (here, PacifiCare) who is providing information to the acquirer. *See* Blumenthal, *The Scope of Permissible Coordination Between Merging Entities Prior to Consummation, supra* at 5 (quoting a past general counsel of the FTC). Although the vast majority of the UnitedHealth-PacifiCare information exchange falls into this category, UnitedHealth did provide PacifiCare with UnitedHealth's own average bid information on July 2. (Defs.' 56.1 P 25.) The rationale for the acquiring corporation's providing price information--even average price information--to the acquired firm is weaker than for providing the target's information to the acquirer, but there is still a rational basis for it: just as the acquirer wants to know that it is not making a dangerous investment in acquiring the target, the target wants to have some assurance that the entity that is acquiring it is well-run and has **[**74]** a strong strategic vision for the future. *See generally* ANTITRUST ADVISER, *supra* 3:74, at 3-270. The other circumstances surrounding this information exchange also demonstrate its harmless nature. Peter Frank, an independent actuary hired by UnitedHealth, delivered the information to PacifiCare in a sealed envelope because the PacifiCare personnel with whom he was meeting had not disqualified themselves from PacifiCare's negotiations with CMS. As a precautionary measure, Frank had disqualified himself from participating in UnitedHealth's negotiations with CMS due to his receipt of PacifiCare's average bid information. [15] (Frank Dep. 127:3-9, App. 21 to Mem. in Supp.) Frank's intent was that the sealed envelope be passed along to individuals who had disqualified themselves from CMS negotiations but could analyze UnitedHealth's Part D data in a manner that would aid them in their decisions concerning the merger. For unexplained reasons, the record does not disclose who at PacifiCare did view this information, but under *Matsushita,* this is not evidence inconsistent with competitive behavior and thus cannot be the basis for finding a genuine issue of material fact as to the existence of **[**75]** a conspiracy.

Significantly, in all this evidence of meetings concerning Part D plans, the record contains only one reference to any discussion specifically concerning Omnicare: PacifiCare's CEO testified to having **[*972]** a conversation with Jacqueline Kosecoff, Executive Vice President of PacifiCare's Specialty Companies, about PacifiCare's difficulty in negotiating a contract with Omnicare, and Kosecoff mentioned that UnitedHealth was also having difficulties. (Phanstiel Dep. 93:18-94:2, Ex. 29 to Mem. in Opp'n.) Even assuming Kosecoff learned this information from a conversation with a UnitedHealth official, her statement does not support an inference that UnitedHealth and PacifiCare were engaged in a price-fixing conspiracy. Nothing in the statement suggests that pricing or strategy regarding negotiations with Omnicare were discussed between PacifiCare and UnitedHealth. For this reason, Omnicare's reliance on *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., 527 F. Supp. 2d 1257 (D. Kan. 2007)* is **[**76]** misplaced. Summary judgment was denied in that case because the defendants "communicated to each other (i.e., to their competitors) about their strategies." *Id. at 1304*. Neither Kosecoff's statement about UnitedHealth nor any of the preceding evidence about conversations between UnitedHealth and PacifiCare suggests that any such strategic discussions took place in the pre-Merger Agreement discussions.

Finally, Omnicare argues that the Company Disclosure Letter actually supports the conclusion that section 5.01 of the Merger Agreement constitutes evidence of a conspiracy. According to Omnicare, UnitedHealth would only have agreed to this exception to the approval provision if PacifiCare had already disclosed its Part D contracting strategy to UnitedHealth. In support, Omnicare points to a statement made by Lagerstrom that UnitedHealth "got a confidence level that [PacifiCare] would not lose money in their Part D program" based on "pricing information" PacifiCare delivered to UnitedHealth during due diligence in the weeks leading up to the signing of the Merger Agreement. (Lagerstrom Dep. 442:22-443:13, Ex. 34 to Mem. in Opp'n.) For the reasons given above, however, the pricing information **[**77]** PacifiCare disclosed was not so competitively sensitive that it was inappropriate to disclose during the days leading up to the signing of the Merger Agreement. The exception for Part D plans written into the letter simply cannot be understood as consistent only with a finding of a conspiracy between UnitedHealth and PacifiCare.

---

[15] At his deposition, Frank said that disqualification would have been unnecessary if he knew what PacifiCare was going to tell him. (Frank Dep. 127:15-23, App. 21 to Mem. in Supp.)

2. Communications Subsequent to Execution of Merger Agreement

Following the signing of the Merger Agreement, the record contains virtually no reference to communications between UnitedHealth and PacifiCare relating to Part D pricing or strategy in general, or LTC contracts and Omnicare in particular. This silence is consistent with Defendants' denials of any concerted activity, particularly since both parties' contracts with Omnicare were entered into after the signing of the Merger Agreement. *See* Blumenthal, *The Scope of Permissible Coordination Between Merging Entities Prior to Consummation, supra* at 5 (***HN17***[] "Once price is agreed upon . . . and an agreement to merge is reached, further information exchanges are more difficult to justify.") Omnicare makes much of the memorandum shared between high-level PacifiCare and UnitedHealth officials, suggesting that the combined **[**78]** postmerger entity use RxSolutions "as a stalking horse to obtain the best service and contracts." (UnitedHealth Group's Pharmacy Management Options, Ex. 215 to Mem. in Opp'n, at UN034676.) According to Omnicare, the "'stalking horse' memorandum" is an important exception to this lack of post-Merger Agreement communications and **[*973]** provides direct evidence of a conspiracy. [16]

Again, the stalking horse language is not an admission of guilt and is therefore not direct evidence of a conspiracy. The court must instead determine what value it has as circumstantial evidence of a conspiracy. The entire document is clearly written prospectively, with an eye towards integration of services after the merger is completed. The top of page 2, for instance, says that "several strategic options *need to be considered,*" not that one strategic option is currently being pursued. In fact, three separate strategic possibilities are listed: outsource all PBM services, outsource some PBM services, and outsource no PBM services. Only one of those options contains any reference to the stalking horse (and that reference is in a sub-sub-point), so it is difficult to conclude that one phrase in the middle of the document constitutes evidence of a conspiracy.

Omnicare notes with suspicion the underhanded tone implicit in the phrase "stalking horse," suggesting the phrase has a somewhat conspiratorial connotation. At his deposition, Phanstiel of PacifiCare was asked to provide a definition of the term, and responded as follows: **[**80]** "A stalking horse is a shield to conceal the hunter from the prey. Sometimes the phrase is used in the context of [a] decoy; sometimes the phrase is used in the context of creating confusion between the parties." (Phanstiel Dep. 65:19-23, Ex. 29 to Mem. in Opp'n.) Omnicare argues that UnitedHealth used RxSolutions as a stalking horse by figuratively hiding behind it, allowing RxSolutions to obtain a better rate and then taking advantage of that rate obtained by RxSolutions. According to Omnicare, this document makes no sense as a post-merger document because RxSolutions could not be used deceptively to benefit UnitedHealth once it was known that PacifiCare and RxSolutions were subsidiaries of UnitedHealth. But this is true only if Omnicare is correct about how a stalking horse strategy would operate: that is, using deceptive practices to enable the larger company to benefit from the more favorable terms offered to the smaller company. Given the context of the memo, however, particularly its focus on long-term strategic planning, this reading is not the most natural. Lois Quam, a UnitedHealth official involved in the discussions concerning the stalking horse memo, offered a less strained **[**81]** reading of the memorandum. Quam suggested that the stalking horse reference meant that UnitedHealth would keep RxSolutions as a subsidiary but not use it as its own PBM; rather, RxSolutions could be used to develop innovations "that could set a standard" that would make bargaining easier for UnitedHealth. (Quam Dep. 163:2-13, App. 207 to Reply Mem.) Omnicare's reading of the memorandum, while not completely implausible, is more difficult to square with the actual text that makes the document read as though it is a post-merger planning document. Indeed, the stalking **[*974]** horse memorandum was attached to an e-mail discussing PBM strategy that was sent out in January 2006, after the merger had been completed. (1/20/06 e-mail, App. 168 to

[16] Omnicare also suggests that this strategy to impermissibly use RxSolutions was discussed at the June 28, 2005 due diligence meeting between UnitedHealth and PacifiCare. A memorandum prepared after the meeting shows that the parties discussed ways to combine resources, and UnitedHealth concluded that "[t]he combined entities would be advantaged through the . . . [c]onsolidation and leverage of resources in regard to Pharmacy benefit administration (PBMs) [and] Pharmacy Network contracting . . . ." (Due Diligence Summary-Point Part D, Ex. 38 to Mem. in Opp'n, at UN282570.) The court sees no impropriety in this comment. UnitedHealth was considering ways to achieve better economies of scale after the merger and suggested that the PBM area was one area where this was possible. Omnicare's argument that this memorandum provides **[**79]** direct or indirect evidence of a conspiracy is unpersuasive.

Mem. in Supp.) This fact is inconsistent with Omnicare's theory that the merging parties planned for RxSolutions to function as a stalking horse only before the two companies merged.

HN18[] The court is sensitive to the concern that it should not take the place of the jury in weighing evidence at the summary judgment stage. *See High Fructose Corn Syrup, 295 F.3d at 655*. Nonetheless, guided by the standards established in *Monsanto* and *Matsushita,* the court concludes **[**82]** that Omnicare has failed to produce evidence of action by UnitedHealth and PacifiCare that is inconsistent with lawful conduct on the part of two competing entities engaged in legitimate merger discussions and planning. Notably, Omnicare was mindful of the UnitedHealth/PacifiCare merger plans at the time it entered into its agreement with RxSolutions, yet Omnicare apparently made no effort to include in that agreement a term that would have prohibited UnitedHealth from taking advantage of the lower rates for which RxSolutions had bargained. Not only is there no evidence that Omnicare attempted to negotiate such a provision, there is also nothing in the record that indicates that PacifiCare would have refused to accept it.

The court grants summary judgment in favor of Defendants on Count I of the Complaint.

II. State Law Claims

Omnicare's remaining claims against Defendants all arise under state law. The court has no independent jurisdiction for deciding these claims; diversity jurisdiction is lacking because Omnicare and PacifiCare are both incorporated in Delaware. (Defs.' 56.1 P 4; *28 U.S.C. § 1332(a)*, *(c)*). Omnicare asserts that the state claims are within the court's supplemental **[**83]** jurisdiction. (Am. Compl. P 18; *28 U.S.C. § 1367(a)*.) ***HN19***[] This court has discretion, however, to determine whether to exercise its supplemental jurisdiction when, as in this case, the original basis for federal jurisdiction has been dismissed. *28 U.S.C. § 1367(c)(3)*. The court's decision should be guided by "the values of judicial economy, convenience, fairness, and comity." *Groce v. Eli Lilly & Co., 193 F.3d 496, 501 (7th Cir. 1999)* (quoting *City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 173, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997))*.

Three of these four factors favor the court's retention of jurisdiction. First, the interest in judicial economy overwhelmingly favors this court deciding the state law issues. The parties have filed tens of thousands of pages in exhibits and numerous briefs--including substantial briefing on the state law claims--and this court has devoted a considerable amount of resources to understanding the factual and legal arguments presented by the parties. Having a state court review many of the same documents to achieve an understanding of the factual and legal issues would be grossly inefficient. Second, it would be more convenient to the parties to have this court, which already has **[**84]** all the relevant discovery materials and legal briefs before it, to issue an opinion on this matter rather than to await a refiling in state court, particularly given the amount of time it would take a new court to become acquainted with the facts. Third, this resolution would also be more fair to the parties, who have devoted over three and one-half years to this matter; tellingly, neither party has argued that this court should surrender jurisdiction on the state claims if it granted summary judgment on the federal anti-trust claim.

[*975] The remaining interest identified by the Seventh Circuit, and the only one that favors dismissal of the state causes of action, is that of comity. This interest is reflected in ***HN20***[] the presumption recognized by the Seventh Circuit that district courts should usually relinquish jurisdiction over state claims when the federal claims are dismissed before trial. *Groce, 193 F.3d at 501* ("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial."). This presumption, however, does not determine every case. *See, e.g., CropLife America, Inc. v. City of Madison, 432 F.3d 732, 734 (7th Cir. 2005)* **[**85]** ("relinquishment [of the state claims] is not mandatory . . . [and] both sides want us to decide the state-law claim rather than protract the litigation"); *Timm v. Mead Corp., 32 F.3d 273, 277 (7th Cir. 1994)* ("especially when difficult and unsettled state law issues are not implicated by the pendent claims, it is entirely acceptable . . . for a federal court to decide those claims"); *Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993)*. The presumption should not apply in this case. For one thing, the state law claims are not "novel or complex," *28 U.S.C. § 1367(c)(1)*; indeed, federal courts in this district routinely hear cases applying these state causes of action. *E.g., Gas Tech. Inst. v. Rehmat, 524 F. Supp. 2d 1058, 1070,* 1073-74 (N.D. Ill. 2007) (fraud and conspiracy to commit fraud); Munch v. Sears, Roebuck & Co., 2008 U.S. Dist. LEXIS 76822, 2008 WL 4450307, at *6 (N.D. Ill. Sept. 30, 2008) (unjust enrichment). While Omnicare's state law claims are rather complex, their complexity derives more from factual nuance than from legal nuance, and this court is in a superior position to apply the complex facts to settled Illinois law. *See* Brazinski, 6 F.3d at 1182 (**HN21**[] presumption applies **[**86]** most strongly when the state law is "unsettled").

HN22[] The Seventh Circuit has identified two common scenarios where this presumption in favor of dismissal may be refuted: first, "where substantial federal judicial resources have already been expended on the resolution of the supplemental claims," and second, "where it is obvious how the claims should be decided." *Williams Electronics Games, Inc. v. Garrity, 479 F.3d 904, 907 (7th Cir. 2007)*. The court first notes that Omnicare essentially concedes that its claim under the Kentucky ***antitrust law*** does not survive summary judgment if its federal antitrust claim fails, and the court concludes that the state claim should be construed the same as the federal antitrust claim. *See* Fieldturf, Inc. v. Sw. Recreational Indus., Inc., 235 F. Supp. 2d 708, 721 n.10 (E.D. Ky. 2002), *vacated in part on other grounds,* 357 F.3d 1266 (Fed. Cir. 2004) (granting summary judgment on federal and state antitrust claims because **HN23**[] "the ***antitrust law*** of the Commonwealth is so similar to its federal counterpart, the Sherman Antitrust Act, and may be interpreted where appropriate with regard to federal law, the Court shall dispatch [sic] with the claim under KY. REV. STAT. 367.175 **[**87]** upon its analysis of the federal antitrust claim"). The court therefore grants summary judgment on Count II of the Complaint, as resolution of the state antitrust claim is "obvious" given the court's disposition of the federal antitrust claim. As for the other state law claims--for fraud, conspiracy to commit fraud, and unjust enrichment--the court has clearly, as discussed above, expanded substantial judicial resources on their resolution.

In sum, the interests of judicial economy, convenience, and fairness all favor having this court determine the state law issues. The sole countervailing factor, comity, is not substantially implicated here **[*976]** because the state law claims are not novel, but are rather claims that courts in this district regularly encounter. The court therefore proceeds to consider these remaining counts.

A. Fraud

Omnicare alleges that UnitedHealth fraudulently misrepresented the post-merger intentions of UnitedHealth and PacifiCare. On October 17, 2005, Tim Bien of Omnicare sent UnitedHealth representative Craig Stephens an e-mail concerning the merger, inquiring, "When the deal closes, will PacifiCare be contracted with Omnicare as a result of the acquisition?" (10/17/05 **[**88]** e-mail from Bien to Stephens, Ex. 83 to Mem. in Opp'n.) Two weeks later, on October 31, Stephens replied in a two-sentence e-mail: "PacifiCare's Part D offering for 2006 is a unique contract with CMS. If and when the deal closes, PacifiCare will follow their own Part D product strategy throughout the 2006 calendar year." (10/31/05 e-mail from Stephens to Bien, Ex. 83 to Mem. in Opp'n.) Omnicare contends that this e-mail was materially false or misleading and that Omnicare relied upon the e-mail to its detriment by entering into negotiations with PacifiCare and ultimately agreeing to the "Any Willing Provider" contract that UnitedHealth later joined. Defendants move for summary judgment, arguing that no genuine issue of material fact exists that would allow Omnicare to establish the elements of the claim.

1. Choice of Law

Before analyzing the fraud claim itself, the court must determine whether Kentucky or Illinois law applies. **HN24**[] Generally, when a court obtains jurisdiction over an action as the result of a transfer of venue, the choice-of-law rules of the transferring court apply. *See* Van Dusen v. Barrack, 376 U.S. 612, 639, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964). Applying the rule to the present case, this court would **[**89]** apply Kentucky choice-of-law rules in determining which state's tort law should govern the fraud claim because the action was transferred to this court from a Kentucky district court. However, the *Van Dusen* rule is intended to prevent defendants from seeking a transfer merely to obtain more favorable choice-of-law rules. *See id.* In this case, where a forum selection clause in the WHI-Omnicare agreement states that Illinois courts "shall have exclusive jurisdiction over the parties," applying the *Van Dusen* rule would more likely allow the plaintiff to manipulate the choice-of-law rules to be applied by filing the action in a different court. *See* *Freedman v. Am. Online, Inc., 325 F. Supp. 2d 638, 652 (E.D. Va. 2004)* ("[A]pplying the usual *Van Dusen* rule in the face of a forum selection clause encourages forum shopping by a party seeking to avoid the application of the contractually-chosen forum.") Thus, because this case was transferred to this court by means of a forum selection clause, the choice-of-law rules of Illinois should govern rather than those of Kentucky.

The court accordingly applies Illinois law to determine whether the WHI-Omnicare Agreement's choice-of-law clause, which **[**90]** would apply the common law of Illinois to the fraud claims, governs this claim. In addition to its forum selection clause, the Agreement also states that the contract "will be construed and governed according to the laws of the State of Illinois." (WHI-Omnicare Agreement at 20, App. 58 to Mem. in Supp.) By its terms, this clause does not directly apply to Omnicare's fraud claim because the claim does not require the court to construe the Agreement. ***HN25***[] Even when a choice-of-law clause lacks the breadth to encompass a related tort claim, however, "tort claims **[*977]** that are dependent upon the contract are subject to a contract's choice-of-law clause." *Medline Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 862 (N.D. Ill. 2002)*. One important factor in determining whether the tort claim "depends upon" the contract is whether the claim could exist without the contract. *M. Block & Sons, Inc. v. IBM Corp., No. 04 C 340, 2004 U.S. Dist. LEXIS 12743, 2004 WL 1557631, at *4 (N.D. Ill. July 8, 2004)*; *Birnberg v. Milk St. Res. Assocs. Ltd. P'ship, No. 02 C 978, 2003 U.S. Dist. LEXIS 806, 2003 WL 151929, at *14 (N.D. Ill. Jan. 21, 2003)*. Here, the entire purpose behind Bien's initial e-mail--and presumably Stephens's response to it--was to determine whether **[**91]** PacifiCare would be swept into the WHI-Omnicare Agreement. The claim for fraud could not have existed without the Agreement, then, and so the claim is dependent upon the contract. Therefore, Illinois fraud law applies.

HN26[] The elements of a fraud claim in Illinois are: (1) that the defendant made a false statement of material fact, (2) the defendant knew or believed it was false, (3) the defendant intended to induce plaintiff to act, (4) the plaintiff justifiably relied on the statement, and (5) the plaintiff was injured as a result. *Ass'n. Benefit Servs., Inc. v. Caremark RX, Inc., 493 F.3d 841, 852 (7th Cir. 2007)* (quoting *Williams v. Chi. Osteopathic Health Sys., 274 Ill. App. 3d 1039, 1048, 654 N.E.2d 613, 619, 211 Ill. Dec. 151 (1st Dist. 1995))*. As explained below, Omnicare's claim falters on the first element: Omnicare cannot show that a genuine issue of material fact exists that UnitedHealth made a false statement of material fact.

2. False Statement of Material Fact

Defendants contend that summary judgment should be granted because nothing in Stephens's e-mail was false. [17] Omnicare does not seriously contest the literal truth of the statements in the e-mail, but nevertheless argues that the representations **[**92]** made by Stephens are actionable because they were materially misleading. ***HN27***[] "A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by the recipient." *Miller v. Lockport Realty Group, Inc., 377 Ill. App. 3d 369, 377, 878 N.E.2d 171, 179, 315 Ill. Dec. 945 (1st Dist. 2007)* (quoting *Soderlund Bros., Inc. v. Carrier Corp., 278 Ill. App. 3d 606, 619, 663 N.E.2d 1, 10, 215 Ill. Dec. 251 (1st Dist. 1995))*. Essentially, Omnicare asserts that UnitedHealth attempted to convey to Omnicare that UnitedHealth and PacifiCare were pursuing their Part D strategies separately, when in fact they were coordinating them. Omnicare's interpretation of the statement is more sinister than the court's, in two ways. First, the e-mail does not say that UnitedHealth and PacifiCare would remain entirely independent throughout 2006 in their Part D approaches, only that PacifiCare "will follow [its] own Part D product strategy." Stephens was responding to the question of whether PacifiCare would be a party to the WHI-Omnicare Agreement and stated that PacifiCare would follow its own strategy. As a reply to Bien's question, this statement is truthful, as PacifiCare **[**93]** eventually did reach its own agreement with Omnicare. Omnicare did not ask whether UnitedHealth would try to join a contract into which Omnicare and PacifiCare might enter; so Omnicare's suggestion that UnitedHealth meant to convey a message that UnitedHealth would not try to join a contract made between Omnicare and PacifiCare (who were not even negotiating with one another at this time) is unlikely and unsupported

[17] Defendants do not appear to dispute the materiality of the e-mail.

[*978] by the record. Stephens's reply clearly indicated that PacifiCare would not be a party to the WHI Agreement, and was therefore true both literally and in its intended message.

Second, Omnicare has not established the existence of a genuine issue of material fact that the merging parties were in fact coordinating their Part D strategies at this point in time. Omnicare's best evidence consists of general statements made by high-level officials of UnitedHealth and PacifiCare stressing their interest in combining networks and contracts to achieve economies of scale. (Erlandson Dep. 66:11-19, Ex. 63 to Mem. in Opp'n ("if contractually [UnitedHealth is] able to get access to PacifiCare networks, to the extent **[**94]** that they have better contracts . . . that would create value"). For the reasons already explained in Part I, there is nothing invidious about this, as presumably the entities decided to merge for the purpose of becoming more efficient. These statements are also so general that they do not directly implicate Part D coordination generally or Omnicare specifically. The closest Omnicare comes is pointing to an e-mail from UnitedHealth's Pfotenhauer on December 3, 2005. Discussing the upcoming merger, Pfotenhauer wrote,

> For Part D[,] I see one of our major foci next year to further examine the end to end production process and re-calibrate whether we still need as many outsourced vendors. Someone looking beyond Part D might see some additional synergies that would not be immediately discerned in Part D.

(12/3/05 e-mail from Pfotenhauer to Jelinek, Ex. 177 to Mem. in Opp'n.) Again, all this shows is that the merging entities hoped to increase efficiency after the merger, even with respect to Part D. This e-mail does not support a finding that the companies had already engaged in a coordinated plan vis a vis Omnicare. Indeed, it actually suggests the opposite, as all the references are to **[**95]** what people in the next year could accomplish, not what has already been done. If Omnicare cannot show that Defendants were coordinating their Part D strategies, then the e-mail quite simply cannot be fraudulent.

Omnicare also attempts to create a genuine issue of material fact concerning whether the merging entities had developed a coordinated Part D plan through circumstantial evidence of communications Stephens had with other UnitedHealth officials prior to replying to Bien's e-mail. Although Stephens generally replied promptly to Bien's e-mails, he did not quickly respond to this one, prompting Bien to send a second e-mail one week later, asking, "Craig, Can you give me anything on this? Tim." (10/25/05 e-mail from Bien to Stephens, Ex. 217 to Mem. in Opp'n.) Stephens still did not reply until October 31. In the interim, Stephens conferred with other UnitedHealth officials concerning the appropriate response to provide to Bien. According to Stephens, he delayed responding to Bien "because what he was asking for . . . would have required me to, you know, go down a path that I could not go down." (Stephens Dep. 291:14-18, Ex. 108 to Mem. in Opp'n.) Omnicare deems this vague statement **[**96]** conspiratorial and argues that it suggests that a secret agreement existed between UnitedHealth and PacifiCare that Stephens was afraid of exposing. Stephens clarified what he meant, however, stating that he did not want to give Bien "guidance as to what's going to happen post-acquisition with contracts when I have had no interaction with PacifiCare. And on top of that, I've been instructed to have no interaction with PacifiCare." (*Id.* at 291:20-25.) Furthermore, Stephens stated that no one he **[*979]** contacted suggested possible ways for him to respond to the e-mail. Nor did any of the other individuals to whom he spoke have any memory of giving substantive input to the response. [18] (*Id.* at 292:7-13; Pfotenhauer Dep. 117:19-118:24, Ex. 115 to Mem. in Opp'n.) Once pieced together, this evidence is insufficient to support a finding that UnitedHealth and PacifiCare had developed a coordinated strategy that Stephens was very carefully trying to avoid divulging.

Fundamentally, the fraud count is based upon UnitedHealth's failure to answer a question that Omnicare did not ask. In Bien's e-mail, Omnicare asked whether PacifiCare would become contracted with Omnicare as a result of the merger. If Omnicare wanted to know the degree to which the merged entities might coordinate their Part D planning and sharing of contracts, it could have asked a broader question concerning general post-merger plans for the combined entity. [19] Omnicare asked only whether PacifiCare would enter into the WHI Agreement (not whether

---

[18] In the case of Ann Tobin, UnitedHealth claimed attorney-client privilege to prevent her from answering. (Tobin Dep. 220:11-15, Ex. 109 to Mem. in Opp'n.) Omnicare does not appear to have challenged the assertion that communications with **[**97]** Tobin were privileged.

UnitedHealth might enter into any agreement Omnicare might reach with PacifiCare); Stephens replied that PacifiCare was following its own Part D strategy--a truthful statement, as PacifiCare ultimately entered its own contract with Omnicare and never used the WHI Agreement. Contrary to Omnicare's contention in the Complaint, the Stephens e-mail does not give "the impression that UHG would not attempt to transfer its Part D plans to PHS after the merger" because Bien's e-mail to Stephens clearly asked about the opposite situation: whether PacifiCare would enter into UnitedHealth's existing contract. (Am. Compl. P 11.) **[**98]** In fact, after receiving the Stephens e-mail, Bien forwarded the e-mail to Joel Gemunder, President and CEO of Omnicare, and wrote, "PacifiCare will not be included with the United Part D offering." (11/1/05 e-mail from Bien to Gemunder, Ex. 308 to Mem. in Opp'n.) Bien's understanding of the message was therefore in accord with what actually happened, namely, that PacifiCare and Omnicare would need to reach their own LTC agreement if they were to be contracted with one another. Nor was the intended meaning misleading. The clear import of the Stephens e-mail was that Omnicare would not automatically be contracted with PacifiCare as a result of the merger; if Omnicare and PacifiCare did not reach their own contract, then they would not do business together. Omnicare has made no showing to suggest that this was not true. Thus, even if Omnicare is unhappy with the results of its contracting with PacifiCare, it cannot protest the contract on the grounds of fraud. Neither the literal terms of the e-mail nor its intended meaning were false.

B. Conspiracy to Commit Fraud

Omnicare also contends that UnitedHealth and PacifiCare conspired to defraud Omnicare. ***HN28***[] To sustain a claim for conspiracy to defraud in Illinois, a plaintiff must show: "(1) a conspiracy; (2) an overt act of fraud in furtherance of the conspiracy; and (3) damages to the plaintiff as a result of the fraud." *Bosak v. McDonough, **[*980]** 192 Ill. App. 3d 799, 803, 549 N.E.2d 643, 646, 139 Ill. Dec. 917 (1st Dist. 1989)*. None of these elements are met. As stated above, Omnicare has failed to establish the existence of a genuine issue as to an agreement between UnitedHealth and PacifiCare regarding either Omnicare or LTC strategies generally. Furthermore, the second element of conspiracy requires an act of fraud which, as noted above in granting summary judgment on the fraud claim, Omnicare has also failed to establish. *See* *Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 878 F. Supp. 1156, 1162 (N.D. Ill. 1995)* (***HN29***[] "[T]o state a valid conspiracy to defraud claim[,] plaintiffs must allege facts establishing the elements of fraud under Illinois law."). And **[**100]** in the absence of fraud, Omnicare can show no injury caused by the fraud. The court thus grants summary judgment in favor of defendants on Omnicare's conspiracy claim.

C. Unjust Enrichment

In a separate count, Omnicare claims that it is entitled to recovery because Defendants were unjustly enriched by "the improper utilization by UHG and PHS of the noncompetitive reimbursement rate schedule contained within the PHS Any Willing Provider Contract." (Compl. P 96.) ***HN30***[] A cause of action for unjust enrichment requires a showing that "the defendant has unjustly retained a benefit to the plaintiff's detriment, and the defendant's retention of that benefit violates" basic principles of justice. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 160, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 (1989)*. ***HN31***[] The Illinois Supreme Court has identified three situations where the defendant's retention of a benefit will be considered unjust:

> (1) the benefit should have been given to the plaintiff, but [a] third party mistakenly gave it to the defendant instead . . . , (2) the defendant procured the benefit from [a] third party through some type of wrongful conduct . . . , or (3) the plaintiff for some other reason **[**101]** had a better claim to the benefit than the defendant . . . .

Id. at 161-62, 545 N.E.2d at 679 (internal citations omitted); *see also* *Assoc. Ben. Servs., 493 F.3d at 854* (citing *HPI*). Illinois courts do not appear to have uniformly followed this guidance, however; some courts have required a

---

[19] Of course, UnitedHealth may have declined to answer such a detailed question, to the extent that it had an answer at this point prior to the closing **[**99]** of the deal. Whether UnitedHealth would or could have answered such a question is, of course, a question the record does not answer.

more specific showing than suggested by the court in *HPI. See, e.g.,* *McKay v. Kusper, 252 Ill. App. 3d 450, 463, 624 N.E.2d 1140, 1150, 191 Ill. Dec. 762 (1st Dist. 1993)* (requiring "unlawful or improper conduct as defined by law" for unjust enrichment claim to succeed); *Lewis v. Lead Indus. Ass'n, Inc., 342 Ill. App. 3d 95, 105, 793 N.E.2d 869, 877, 276 Ill. Dec. 110 (1st Dist. 2003)* ("In order for a cause of action for unjust enrichment to exist, there must be some independent basis which establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty").

In short, the "law of unjust enrichment in Illinois is unclear." *Cohabaco Cigar Co. v. U.S. Tobacco Co., No. 98 C 1580, 1999 U.S. Dist. LEXIS 17210, 1999 WL 988805, at *15 (N.D. Ill. Oct. 22, 1999)*; *see also* *C.B. Mills v. Hawranik, No. 91 C 5797, 1994 U.S. Dist. LEXIS 3839, 1994 WL 113088, at *15 (N.D. Ill. Mar. 30, 1994)*. A lack of clarity in the state law would normally suggest that the court **[**102]** should decline to resolve the issue, *see* *28 U.S.C. § 1367(c)(1)*, but in this case the lack of clarity is immaterial for two reasons. First, the courts have clearly held that ***HN32***[] "where there is a specific contract that governs the relationship of the parties," a plaintiff cannot assert a claim for unjust enrichment. *Stathis v. Geldermann, Inc., 295 Ill. App. 3d 844, 864, 692 N.E.2d 798, 812, 229 Ill. Dec. 809 (1st Dist. 1998)* (citing *People ex rel. Hartigan **[*981]** v. E & E Hauling, Inc., 153 Ill. 2d 473, 497, 607 N.E.2d 165, 177, 180 Ill. Dec. 271 (1992))*. Omnicare had contracts with all of the defendants in this case and therefore cannot proceed under an unjust enrichment theory.

Second, and more fundamentally, there are simply no grounds to support recovery regardless of what standard of conduct applies. Omnicare claims that Defendants were unjustly enriched "[a]s a result of the illegal conspiracy between UHG and PHS, including, in particular, UHG's fraudulent misrepresentation in its October 31st e-mail, and the scheme to devise a fraudulent strategy for PHS to refuse to negotiate with Omnicare." (Am. Compl. P 96.) For the reasons already discussed in this opinion, however, none of these alleged misdeeds took place--there was **[**103]** no illegal conspiracy between UnitedHealth and PacifiCare; UnitedHealth made no fraudulent misrepresentation in the October 31st e-mail; and there was no fraudulent scheme that resulted in PacifiCare refusing to negotiate with Omnicare. Omnicare has failed to demonstrate the existence of a genuine issue of material fact regarding any of the factual predicates which would allow recovery under a theory of unjust enrichment. *Cf.* *Ass'n Ben. Servs., 493 F.3d at 855* (***HN33***[] "[W]hen the plaintiff's particular theory of unjust enrichment is based on alleged fraudulent dealings and we reject the plaintiff's claims that those dealings, indeed, were fraudulent, the theory of unjust enrichment that the plaintiff has pursued is no longer viable."). Therefore, under any theory of unjust enrichment, Defendants are entitled to summary judgment.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment on all claims in Omnicare's First Supplemental and Amended Complaint [556] is granted. Plaintiff's Motion for Partial Summary Judgment Pursuant to *Rule 56* Or in the Alternative Motion to Strike [571] is denied. Defendants' Motion to Strike Certain of Omnicare's Responses [641] is stricken **[**104]** as moot.

Dated: January 16, 2009

/s/ Rebecca R. Pallmeyer

REBECCA R. PALLMEYER

United States District Judge

Somerville v. Stryker Orthopaedics

United States District Court for the Northern District of California

January 16, 2009, Decided; January 16, 2009, Filed

No. C 08-02443 JSW

Reporter
2009 U.S. Dist. LEXIS 3052 *; 2009 WL 113369

GOLDENE SOMERVILLE, Plaintiff, v. STRYKER ORTHOPAEDICS ET AL, Defendants.

Subsequent History: Claim dismissed by, Motion granted by, in part, Motion denied by, in part, Motion granted by *Somerville v. Stryker Orthopaedics, 2009 U.S. Dist. LEXIS 80753 (N.D. Cal., Sept. 4, 2009)*

Core Terms

conspiracy, allegations, surgery, hip, Cartwright Act, products, motion to dismiss, knee, co-conspirators, replacement, antitrust, unnamed, factual allegations, unfair competition, out-of-pocket, orthopedic, kickback, surgeons, amend, costs, fails

Counsel: **[*1]** For Goldene Somerville, individually, and on behalf of all others similarly situated, Plaintiff: Brian S. Kabateck, Joshua H. Haffner, LEAD ATTORNEYS, Reza Sina, Richard Kellner, Kabateck Brown Kellner, LLP, Los Angeles, CA.

For Stryker Orthopedics, also known as Stryker Orthopedics, Inc., also known as Stryker Orthopedics, Howmedica Osteonics Corporation, Stryker Corporation, Stryker Sales Corporation, Defendants: Christopher Casey John McNamara, William M. Goodman, Kasowitz, Benson, Torres & Friedman LLP, San Francisco, CA; Jeffrey Speiser, Joel M. Silverstein, PRO HAC VICE, Stern & Kilcullen, LLC, Roseland, NJ; Michael Dinger, PRO HAC VICE, Stern & Kilcullen, Roseland, NJ.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Now before the Court is defendant Stryker Orthopaedics and its related corporations (collectively "Stryker")'s motion to dismiss. Having carefully reviewed the parties' papers, considered their arguments and the relevant legal authority, the Court hereby GRANTS Stryker's motion to dismiss.

BACKGROUND

According to the complaint, this action arises out of an allegedly pervasive kickback scheme orchestrated **[*2]** by defendant Stryker, one of the largest manufacturers of artificial hip and knee replacement devices. (Complaint at P

1.) The alleged scheme involved Stryker's use of phony consulting agreements with orthopedic surgeons to disguise kickbacks paid to doctors and/or hospitals in return for their use of Stryker products in patients undergoing hip and/or knee replacement surgery.

Plaintiff, Goldene Sommerville, underwent hip replacement surgery for her right hip in June 2003 and the left hip in May 2005. One or more of the Stryker products were implanted or otherwise used during the surgeries. (*Id*. at P 32.) [1] Plaintiff alleges that, as a result of the alleged kickback scheme, she incurred higher out-of-pocket costs, including an increase in co-payments and health care premiums, for hip and/or knee surgery. (*Id*. at P 49.) This purported class action seeks damages based upon theories of violation of the Cartwright Act and California's Unfair Practices Act. (*Id*. at P 3.)

The Court shall refer to additional facts as necessary in the remainder of this Order.

ANALYSIS

A. Legal Standard for Motion to Dismiss.

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. The court, however, is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*. Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988)*. Even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, a plaintiff must do more than recite the elements of the claim and **[*4]** must "provide the grounds of [its] entitlement to relief." *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007)* (citations omitted). In addition, the pleading must not merely allege conduct that is conceivable, but it must also be plausible. *Id. at 1974*.

B. Claim Under the Cartwright Act.

In order to set out a claim for violation of the Cartwright Act, *California Business and Professions Code § 16700, et seq*., a plaintiff must allege: (1) the formation and operation of a conspiracy; (2) illegal acts done pursuant to the conspiracy; (3) a purpose to restrain trade; and (4) damages caused by these acts. *See Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal. 2d 305, 318, 70 Cal. Rptr. 849, 444 P.2d 481 (1968)* ("General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof.") Without sufficient allegations of the existence of an unlawful trust, combination or agreement, there cannot be a violation of the Cartwright Act. *Id*. Furthermore, there can be no conspiracy between related entities, parents and their subsidiaries, because the agreement must be between separate, independent entities capable of combining **[*5]** their efforts to restrain trade. *See, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (dismissing antitrust conspiracy claim because a wholly owned subsidiary could not conspire with its parents because they have a "complete unity of interest" and "share a common purpose whether or not the parent keeps a tight rein over the subsidiary…")

Here, both parties agree that the named defendants, related parties and subsidiaries, cannot conspire amongst themselves. However, the complaint alleges that the Stryker defendants conspired with unnamed co-conspirators, surgeons performing orthopedic surgeries, in order to reap the rewards of the allegedly pervasive kickback scheme.

---

[1] Plaintiff Claire C. Haggarty in the related, and practically identically-pled suit, *Haggarty v. Stryker*, C08-160 JSW, underwent hip replacement surgery as well and her case is adjudicated by this Order. To the extent the **[*3]** facts differ, the Court will so note throughout.

Plaintiff alleges that the "scheme involves Stryker's use of phony consulting agreements with orthopedic surgeons to disguise kickbacks paid to doctors and/or hospitals in return for their use of Stryker products in patients undergoing hip and/or knee replacement surgery. It was through this scheme that Stryker was able to reduce competition and artificially inflate the price and cost of it [sic] hip and knee surgery products. Thus, Stryker not only created an environment where the choice **[*6]** of medical devices was not drive by safety, effectiveness or the needs of patients, but also one where patients actually had to pay more for the device than they otherwise should have paid." (Complaint at P 1.) The claim under the Cartwright Act alleges that "Stryker and its unnamed co-conspirators have violated California's Cartwright Act …, by forging one or more combinations to accomplish purposes prohibited by and contrary to the Cartwright Act. They engaged in one or more agreements, contracts, combinations, trusts, and or [*sic*] conspiracies to create and maintain market dominance, resulting in artificially high prices for Stryker hip and knee surgery products, including without limitation implant devices and related products, such as bone cement." (*Id*. at P 47.)

It is clear, therefore, from the allegations of the complaint, that Plaintiff alleges the conspiracy or agreement is between the various Stryker defendants and the various unnamed orthopedic surgeons (and, perhaps, hospitals) who engaged in the alleged scheme of promoting the manufacturer's orthopedic products, thereby increasing the costs. There can be, and there is no allegation that there exists a conspiracy among the **[*7]** various named defendants. Therefore, the sole issue is whether Plaintiff has pled sufficient allegations of the existence of an unlawful trust, combination or agreement between the various named Stryker entities and unnamed co-conspirators. *See* *Copperweld, 467 U.S. at 769-771*; *see also* *Chicago Title, 69 Cal. 2d at 318*.

In order to maintain a cause of action under the Cartwright Act, Plaintiff must "not only allege and prove the existence of an unlawful trust or combination, but also has to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination." *Chicago Title, 69 Cal. 2d at 318* (citation omitted). "General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof." *Id*. Even conceding "the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement … as to any specific overt acts done by defendants in pursuance of that design and purpose." *Id*. (citation omitted).

The complaint fails to allege the time, place or the co-conspirators actually involved **[*8]** in the alleged conspiracy. There are no factual allegations regarding the contents or terms of the alleged agreements or outlining any concerted action among any unnamed co-conspirators and defendant Stryker and its related companies. There is some allusion to hospitals in the complaint and institutions in the briefing on this motion, but no factual allegations suggesting the existence of an agreement or concerted action among any hospitals or institutions and the various Stryker defendants. There are no facts indicating the identities of any of the surgeons or institutions either involved in Plaintiff's case or any other instance. There are no factual allegations indicating when or where Stryker entered any of the alleged illegal agreements with the unnamed co-conspirators. There are no factual allegations indicating the terms of any such agreements. Without any specific allegations of an agreement, the complaint fails to comply with *Federal Rule of Civil Procedure 8*. *See* *Twombly, 127 S. Ct. at 1971 n.10* (stating that a complaint that "mention[s] no specific time, place, or person involved in the alleged conspiracies" and "furnish[es] no clue as to … [who] supposedly agreed, or when **[*9]** and where the illicit agreement took place" does not comply with *Federal Rule of Civil Procedure 8*.) [2]

Plaintiff's claim under the Cartwright Act fails to allege any particular wrongdoing and therefore fails to state a cause of action. However, it is conceivable that Plaintiff could amend the complaint to add facts to support an antitrust conspiracy claim. Therefore, the Court GRANTS Stryker's motion to dismiss the Cartwright Act claim with leave to amend.

C. Claim Under *California Business and Professions Code Section 17200*.

[2] To the extent Plaintiff relies on the Congressional testimony, it is not clear that such testimony actually referenced Stryker, as opposed to the other four hip and knee replacement products manufacturers. (*See* Supplemental Declaration of William M. Goodman, testimony of Gregory E. Demske, at 4.)

California's Unfair Competition Law, *California Business & Professions Code § 17200* ("*17200*"), establishes three varieties of unfair competition - acts or practices that are unlawful or unfair or fraudulent. Because the law is stated in the disjunctive, it contemplates three distinct categories of unfair competition and a plaintiff must plead the specific rubric under which **[*10]** the proscribed conduct falls. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*.

When "a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*.

Because the Court has found that Plaintiff's antitrust claim fails, the state unfair competition claim fails as well on the same basis. The complaint, as currently drafted, does not specify conduct that threatens an incipient violation of an ***antitrust law***.

In addition, Plaintiff alleges that the alleged conspiracy caused her to suffer financial injury by incurring out-of-pocket costs, including an increase in co-payments and health care premiums, for hip and/or knee surgery. (Complaint at P 49.) The only specific amount Plaintiff asserts **[*11]** she incurred during her two hip replacement surgeries in June 2003 and May 2005 was the payment of "approximately $ 1,500 or more in out-of-pocket expenses for the surgeries." (*Id*. at P 32.) [3] It is unclear from the complaint as drafted whether or what portion of those out-of-pocket expenses are attributable to increased costs of the replacement products and whether or if any of that increased cost is passed along to Stryker.

As currently drafted, the complaint does not establish either an antitrust violation or injury. Accordingly, the Court GRANTS Stryker's motion to dismiss the cause of action for violation of California's unfair competition law. [4]

D. Class Action Claims.

Lastly, Plaintiff must establish that she is actually a member of the class she purports to **[*12]** represent. According to the complaint, the class consists of "[a]ll individuals who are, or at the relevant time were, residents of California who either were uninsured *or had a private health care insurance policy pursuant to which they paid a percentage of the total costs of surgical procedures*, and who had hip or knee implant surgery during the Class Period that involved the use of Stryker products." (Complaint at P 33 (emphasis added).) The complaint does not explicitly set out that Plaintiff has a private health care insurance policy. Even more troubling, however, is that the complaint fails to set out whether the out-of-pocket expenses incurred by Plaintiff represent a fixed co-payment or a percentage of the surgeries. Should Plaintiff seek to amend her complaint, such facts must be alleged in order to qualify as a member of the class she purports to represent.

CONCLUSION

For the foregoing reasons, the Court GRANTS Stryker's motion to dismiss with leave to amend. Plaintiff shall file an amended complaint in compliance with this Order by no later than February 6, 2009. Stryker shall have twenty days thereafter to file their responsive pleading. If Plaintiff fails to file an amended **[*13]** complaint by February 6, 2009, the Court will dismiss this action with prejudice.

IT IS SO ORDERED.

---

[3] Plaintiff Haggarty, in the related suit, alleges that she incurred $ 3,600 in out-of- pocket expenses for her surgeries. (Haggarty Complaint at P 30.)

[4] The Court is not persuaded by Stryker's argument that the Court should abstain from adjudicating whether an injunction would be appropriate relief for a well-drafted claim under California's unfair competition law. The Court does not find the issue mooted as a matter of law.

Dated: January 16, 2009

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

Teague v. Bayer AG

Court of Appeals of North Carolina

August 26, 2008, Heard in the Court of Appeals; January 20, 2009, Filed

NO. COA07-1108

Reporter

195 N.C. App. 18 *; 671 S.E.2d 550 **; 2009 N.C. App. LEXIS 58 ***; 2009-1 Trade Cas. (CCH) P76,477

MITCHELL TEAGUE, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. BAYER AG; BAYER POLYMERS,LLC, n/k/a BAYER MATERIALSCIENCE, LLC; BAYER CORPORATION; CROMPTON CORPORATION; UNIROYAL CHEMICAL COMPANY, INC., n/k/a CROMPTON MANUFACTURING COMPANY, INC.; THE DOW CHEMICAL COMPANY; E.I. DUPONT DE NEMOURS & COMPANY; DUPONT DOW ELASTOMERS, L.L.C.; DSM COPOLYMER, INC.; DSM ELASTOMERS EUROPE, B.V.; EXXON MOBIL CHEMICAL, a division or subsidiary of EXXON MOBIL CORP., Defendants-Appellees.

Subsequent History: Review denied by *Teague v. Bayer AG, 363 N.C. 381, 2009 N.C. LEXIS 1328 (N.C., June 17, 2009)*

Prior History: [*1]** Buncombe County. No. 05 CVS 90.

Teague v. Bayer AG, 2007 NCBC LEXIS 14 (2007)

Disposition: Reversed and remanded.

Core Terms

purchaser, indirect, trial court, consumers, damages, anti trust law, settlement, antitrust, motion to dismiss, manufacturer, courts, factors, notice, products, prices, Chemical, cases, full faith and credit, present case, speculative, Elastomers, violations, argues, fixing, shoe, second amended complaint, antitrust statute, lack of standing, standing to sue, class member

LexisNexis® Headnotes

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

The purpose of a motion to dismiss pursuant to *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)* is to test the legal sufficiency of the pleading against which the motion is directed. *Rule 12(b)(6)* generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN2[] **Case or Controversy, Standing**

The North Carolina Constitution confers standing on those who suffer harm: All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law. *N.C. Const. art. I, § 18*.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN3[] **Case or Controversy, Standing**

Although North Carolina courts are not bound by the "case or controversy" requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar "standing" requirements apply to refer generally to a party's right to have a court decide the merits of a dispute.

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

HN4[] **Standing, Injury in Fact**

The irreducible constitutional minimum of standing is defined as as: (1) "injury in fact" - an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

HN5[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)*. The courts in North Carolina use the term "standing" to refer generally to a party's right to have a court decide the merits of a dispute. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied.

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

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

HN6[] **Private Actions, Standing**

Standing is often an issue in an indirect purchaser case, where there are contentions that injury is conjectural and damage awards are speculative. An indirect purchaser is one who purchases a product from some intermediary party rather than directly from the manufacturer.

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

HN7[] **Purchasers, Indirect Purchasers**

Although indirect purchaser suits are barred in federal antitrust cases, states can permit indirect purchaser suits under state antitrust laws. A state may allow an indirect purchaser to sue under the State's own ***antitrust law***.

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

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

HN8[] **Private Actions, Standing**

Indirect purchasers have standing under *N.C. Gen. Stat. § 75-16* to sue under the antitrust laws of North Carolina.

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

HN9[] **Private Actions, Standing**

Antitrust laws are intended to protect competition and, thus, standing is generally limited to consumers or competitors.

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

HN10[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6)* requires a court to determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted. The complaint is to be liberally construed in ruling upon a *Rule 12(b)(6)* motion, and it should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN11[] **Private Actions, State Regulation**

Complex antitrust cases invariably involve complicated questions of causation and damages.

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

HN12[] **Purchasers, Indirect Purchasers**

Fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to establish an effective private cause of action for aggrieved consumers in North Carolina. Allowing indirect purchasers to sue for N.C. Gen. Stat. ch. 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations.

Constitutional Law > Relations Among Governments > Full Faith & Credit

HN13[] **Relations Among Governments, Full Faith & Credit**

See *U.S. Const. art. IV, § 1*.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

HN14[] **Full Faith & Credit, Full Faith & Credit Statutes**

A judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of *28 U.S.C.S. § 1738*.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

HN15[] **Full Faith & Credit, Full Faith & Credit Statutes**

See *28 U.S.C.S. § 1738*.

Counsel: Wimer & Jobe, by Michael G. Wimer; and Forman Rossabi Black, P.A., by Amiel J. Rossabi, for Plaintiff-Appellant.

Mayer Brown LLP, by Mary K. Mandeville, Gary A. Winters, and Michael S. Passaportis, for Defendant-Appellee DSM Copolymer, Inc.; Pinto Coates Kyre & Brown PLLC, by Richard L. Pinto, for Defendant-Appellee Exxon Mobile Chemical, a division or subsidiary of Exxon Mobil Corp.

Judges: McGEE, Judge. Judges McCULLOUGH and STROUD concur. Judge McCullough concurred in this opinion prior to 31 December 2008.

Opinion by: McGEE

Opinion

[552]** Appeal by Plaintiff from order entered 11 May 2007 by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 26 August 2008.

[*19] McGEE, Judge.

Plaintiff filed suit under *N.C. Gen. Stat. §§ 75-1* and *75-1.1* on 2 April 2004 alleging Defendants engaged in price fixing of ethylene propylene diene monomor elastomers (EPDM). Plaintiff filed his complaint as a putative class action on behalf of similarly situated North Carolina consumers. Plaintiff filed an amended complaint on 23 December 2004 that removed Defendants DSM N.V., DSM Elastomers Holding Company, Inc., and DSM

Elastomers, Inc. from **[***2]** the complaint and added claims that Defendants concealed the alleged conspiracy and illegal conduct from consumers. The case was designated as a complex business case on 15 March 2005 and Special Superior Court Judge Ben F. Tennille was assigned to preside over the case.

[*20] **[**553]** Pursuant to *N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)*, Defendants Bayer Corporation, Bayer MaterialScience LLC (f/k/a Bayer Polymers LLC), Crompton Corporation, Crompton Manufacturing Company, Inc., The Dow Chemical Company, E.I. du Pont de Nemours and Company, DuPont Dow Elastomers L.L.C., and DSM Copolymer, Inc. filed a motion on 24 January 2005 to dismiss Plaintiff's first amended complaint for failure to state a claim for relief. Defendants Dow Chemical Company, E.I. DuPont de Nemours & Company, and DuPont Dow Elastomers, L.L.C. (collectively, DDE Defendants) entered into a multistate settlement of the indirect purchaser claims filed against them by consumers in the District of Columbia and twenty-eight states, including North Carolina. Circuit Court Judge John McAfee in Claiborne County, Tennessee approved this settlement on 21 June 2005. Plaintiff filed a motion to dismiss the claims against the DDE Defendants on **[***3]** 26 September 2005.

The trial court heard the remaining Defendants' motion to dismiss Plaintiff's first amended complaint on 21 November 2005 and entered an order allowing Plaintiff to again amend his complaint. Plaintiff filed a second amended complaint on 12 December 2005.

In his second amended complaint, Plaintiff alleged he purchased EPDM roofing materials and a pond liner, as well as at least one vehicle with EPDM components, between 1994 and 2002. Plaintiff's second amended complaint also stated that EPDM was not a consumer product but a component found in many consumer products and that the amount of EPDM in a given product will vary depending on the nature of that product. For example, Plaintiff alleged "[t]he EPDM roofing [material] purchased by Plaintiff and other Class Members is believed to contain at least 90% EPDM" and "[t]he tires, window molding, hoses, and other rubber products purchased by Plaintiff and the other Class Members [are] believed to include 1% or more EPDM."

Plaintiff alleged that between 1994 and 2002, Defendants manufactured, marketed, sold, and/or distributed throughout the United States virtually all EPDM produced in the United States during that time. **[***4]** Plaintiff further alleged in his second amended complaint that Defendants engaged in price fixing of EPDM by agreeing to restrict output and raise prices for the sale of EPDM sold in the United States and elsewhere. Plaintiff claimed that this agreement forced Plaintiff and other consumers to pay higher prices for EPDM while Defendants earned profits exceeding a normal rate of return. **[*21]** Plaintiff alleged that he and other North Carolina class members absorbed all of the portion of the price affected by the price fixing agreement because middlemen passed on 100% or more of the overcharge from Defendants.

Defendants Bayer Corporation, Bayer MaterialScience LLC, and Bayer AG (collectively Bayer Defendants) agreed to a multistate settlement of indirect purchaser claims on or about 27 October 2005, including the claims of indirect purchasers in North Carolina. Plaintiff filed a motion on 5 April 2006 for leave to dismiss with prejudice the claims against the Bayer Defendants.

Defendants DSM Copolymer, Inc., Chemtura (f/k/a Crompton) Corporation, Uniroyal Chemical Company, Inc., and Exxon Mobile Chemical renewed their motion to dismiss Plaintiff's second amended complaint on 9 January 2006.

In **[***5]** an order entered 11 May 2007, the trial court granted Plaintiff's motion to dismiss claims against the DDE Defendants and the Bayer Defendants, and ordered that notice of the settlement with the DDE Defendants and the Bayer Defendants be published in the Asheville *Citizen-Times* and the Raleigh *News & Observer.* The trial court also granted the moving Defendants' *Rule 12(b)(6)* motion to dismiss for lack of standing. Plaintiff appeals from the 11 May 2007 order of the trial court.

Following Plaintiff's appeal to our Court, Plaintiff filed a motion with our Court on 18 November 2008 to dismiss his claims with prejudice against Defendant Exxon Mobil Chemical after settlement with this Defendant. We grant Plaintiff's motion to dismiss the claims with prejudice against Defendant Exxon Mobil Chemical, a division or subsidiary of Exxon Mobil Corp.

[554]** On appeal, Plaintiff argues that the trial court erred by dismissing Plaintiff's claims pursuant to *N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)* when Plaintiff had standing to sue under *N.C. Gen. Stat. §§ 75-1* and *75-1.1*, and also erred in requiring publication of additional class notice.

I.

In his first assignment of error, Plaintiff argues the trial court **[***6]** erred in dismissing his complaint pursuant to *N.C.G.S. § 1A-1, Rule 12(b)(6)* for failure to state a claim for relief because Plaintiff lacked standing.

[*22] ***HN1***[] The "purpose of a motion [to dismiss] pursuant to *N.C.G.S. § 1A-1, Rule 12(b)(6)* is 'to test the legal sufficiency of the pleading against which [the motion] is directed.'" *Eastway Wrecker Serv., Inc. v. City of Charlotte, 165 N.C. App. 639, 647, 599 S.E.2d 410, 415 (2004)* (internal citations omitted). "*Rule 12(b)(6)* '"generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery."'" *Meadows v. Iredell County, 187 N.C. App. 785, ___, 653 S.E.2d 925, 927 (2007)* (internal citations omitted). "One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted." *Id. at ___, 653 S.E.2d at 927* (citing *Krauss v. Wayne County DSS, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997)* ("The 12(b)(6) motion was made on the basis that [the] plaintiff did not have standing[.]")).

As our Supreme Court recently stated, "[a]s a general matter, ***HN2***[] the North Carolina Constitution confers standing on those **[***7]** who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . '" *Mangum v. Raleigh Bd. of Adjust., ___ N.C. ___, ___, 669 S.E.2d 279, 281-82 (2008)* (quoting *N.C. Const. art. I, § 18*).

HN3[] "Although North Carolina courts are not bound by the 'case or controversy' requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar 'standing' requirements apply 'to refer generally to a party's right to have a court decide the merits of a dispute.'" *Meadows, 187 N.C. App. at 787, 653 S.E.2d at 927-28* (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)*, *disc. review denied, 356 N.C. 675, 577 S.E.2d 628 (2003))*.

> In *Neuse River,* this Court defined ***HN4***[] "[t]he 'irreducible constitutional minimum' of standing" as: (1) "injury in fact" - an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, **[***8]** that the injury will be redressed by a favorable decision.

Meadows, 187 N.C. App. at 787, 653 S.E.2d at 928 (quoting *Neuse River, 155 N.C. App. at 114, 574 S.E.2d at 52*). "Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims." *Id. at 787, 653 S.E.2d at 928*.

[*23] In the case before us, the trial court quoted *Slaughter v. Swicegood, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004)* in its order, stating that ***HN5***[] "[a] motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to *Rule 12(b)(6)*." The Courts in our state use the term "standing" to "refer generally to a party's right to have a court decide the merits of a dispute." *Neuse River, 155 N.C. App. at 114, 574 S.E.2d at 52*. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied. *Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)*. The trial court in the present case correctly noted that ***HN6***[] standing is often an issue in an indirect purchaser case, such as the **[***9]** case before us, where there are contentions that injury is conjectural and damage awards are speculative. An indirect purchaser is one who purchases a product from some intermediary party rather than directly from the manufacturer. *See Hyde v. Abbott Laboratories,* ***[**555]*** *123 N.C. App. 572, 574, 473 S.E.2d 680, 681-82 (1996)*.

The United States Supreme Court addressed the issue of standing for indirect purchasers under federal ***antitrust law*** in *Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, and in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In *Hanover Shoe,* the plaintiff shoe manufacturer sued the defendant, a manufacturer of shoe machinery, for treble damages alleging the defendant created a monopoly over its more complicated and important shoe machinery by leasing, but refusing to sell, the machinery. *Hanover Shoe, 392 U.S. at 483, 20 L. Ed. 2d at 1236*. The defendant argued that the plaintiff shoe manufacturer suffered no injury because it simply passed the illegal overcharges on to its customers. *Id. at 487-88, 20 L. Ed. 2d at 1238*. The Supreme Court rejected the so-called "passing-on" defense and held that a direct purchaser **[***10]** was entitled to damages even if it did pass on the higher prices to its customers. *Id. at 488-89, 20 L. Ed. 2d at 1238-39*.

In *Illinois Brick,* the State of Illinois brought suit as an indirect purchaser against manufacturers and distributors of concrete block. *Illinois Brick, 431 U.S. at 726-27, 52 L. Ed. 2d at 713*. At issue was whether an indirect purchaser plaintiff could use the "passing on" theory offensively to show injury inflicted by the defendant's violations of federal antitrust laws. *Id.* The Supreme Court held that indirect purchasers did not have standing to sue under the federal antitrust laws. *Id.*

[*24] ***HN7***[] Although indirect purchaser suits were barred in federal antitrust cases by *Illinois Brick,* the U.S. Supreme Court later held that states could permit indirect purchaser suits under state antitrust laws in *Associated Gen. Contractors v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d. 723 (1983)* (*AGC*). *See also* *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*(A state may allow an indirect purchaser to sue under the state's own ***antitrust law***.). In *AGC,* the plaintiff labor union sued the contractor's association under *§ 4 of the Clayton Act* alleging the contractor's association **[***11]** had conspired with nonunion contractors and subcontractors to adversely affect the trade of the unionized firms and the unions themselves. *Id.; 15 U.S.C. § 15 (2004)*. In holding that the union was not a proper plaintiff under *§ 4 of the Clayton Act*, the Supreme Court identified several factors to be considered in determining standing under federal ***antitrust law***. *Id.* These factors include: (1) whether the plaintiff is a consumer or a competitor in the market in which trade was restrained; (2) whether the injury alleged is a direct or indirect impact of the restraint alleged; (3) whether there exists an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (4) whether the damages claim is highly speculative; and (5) whether the plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages. *AGC, 459 U.S. at 539-44, 74 L. Ed. 2d at 738-42*.

The issue of whether suit by an indirect purchaser is allowed in North Carolina was decided by our Court in *Hyde v. Abbott Laboratories* when we held that ***HN8***[] indirect purchasers have standing under *N.C. Gen. Stat. § 75-16* to sue under **[***12]** the antitrust laws of North Carolina. *Hyde, 123 N.C. App. at 584, 473 S.E.2d at 688*. In *Hyde,* the plaintiffs were consumers of infant formula manufactured by the defendants. *Id. at 573-74, 473 S.E.2d at 681-82*. In the plaintiffs' class action suit, they alleged that the defendants violated several of North Carolina's antitrust laws by "'engaging in a continuing conspiracy to fix the wholesale price of infant formula sold within the United States, including North Carolina.'" *Id. at 573, 473 S.E.2d at 681*. The plaintiffs also alleged that this "illegal conspiracy caused an increase in wholesale prices paid by the parties who purchased the infant formula directly from the manufacturer ([]direct purchasers) above that which the direct purchasers would have paid absent any conspiracy." *Id.* Our Court stated that the plaintiffs in *Hyde* were "indirect purchasers from the defendant manufacturers **[**556]** because they purchased infant formula through parties other than the [defendant] manufacturer." *Id. at 574, 473 S.E.2d at 681-82*. In *Hyde,* the trial **[*25]** court granted the defendants' motion to dismiss for lack of standing, but on appeal our Court reversed, holding indirect purchasers have standing to sue **[***13]** under the antitrust laws of North Carolina. *Id. at 584, 473 S.E.2d at 688*.

In the present case, Plaintiff argues that *Hyde* established standing for all indirect purchasers, and that the trial court ignored this Court's holding in *Hyde* by imposing limits on the rights of indirect purchasers to sue under the North Carolina antitrust statutes. In contrast, Defendants contend that while *Hyde* established that indirect purchasers have standing, *Hyde* did not delineate the scope or limits of that standing and the well-established doctrine of proximate cause requires that there be limits to this standing. They argue that to adopt Plaintiff's interpretation of *Hyde* would mean that every indirect purchaser claiming to be injured under the antitrust statutes would have a cause of action no matter how attenuated the causal connection between the antitrust violation and the alleged injury. Defendants contend this outcome would be inconsistent with the principles of proximate cause and could result in an unmanageable surge in antitrust litigation.

Defendants point out that in a prior order entered by Judge Tennille in *Crouch v. Crompton Corp., 2004 NCBC 7, P 47, 2004 WL 2414027 (N.C. Super. Ct. Oct. 26, 2004)*, **[***14]** Judge Tennille had stated that *Hyde* did not set forth the scope and breadth of standing under the North Carolina antitrust statutes. In *Crouch,* the trial court stated there was a need for certain boundaries for indirect purchaser standing and it applied a slightly modified five factor *AGC* test. *Crouch, 2004 NCBC 7 PP 66-74*. In the case before us, the trial court applied these same five factors to determine whether Plaintiff had standing.

Plaintiff argues that the *AGC* factors are not applicable to the issue of standing for indirect purchasers in antitrust cases and that *AGC* is distinguishable from the present case. Plaintiff correctly distinguishes *AGC* from the case before us in several relevant ways, including that the plaintiff in *AGC* was not an indirect purchaser. The U.S. Supreme Court held in *AGC* that the plaintiff union was not a person injured by reason of an antitrust violation. *AGC* involved competitors rather than consumers. Also, the plaintiffs in *AGC* alleged breach of a collective-bargaining agreement and not antitrust violations. *See AGC, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723*.

Defendants contend the modified *AGC* five factor test applied by the trial court in this case is a logical **[***15]** and appropriate standard by **[*26]** which to distinguish actual injuries resulting from violations of North Carolina antitrust statutes from those complaints that are too remote and attenuated. Defendants argue that trial courts in several other states have considered this issue and have applied the *AGC* factors in determining which indirect purchasers have standing to sue under their state antitrust laws. Defendants cite the following cases where trial courts in other states applied the *AGC* factors to dismiss indirect purchaser claims brought by retail customers against Visa and MasterCard. The retail customers alleged that the credit card companies' tying arrangements with retail stores caused prices to increase. *See Fucile v. Visa U.S.A., Inc., No. S1560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004)*; *Southard v. Visa U.S.A., Inc.,* No. LACV 031729, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004), *aff'd, 734 N.W.2d 192 (Iowa 2007)*; *Knowles v. Visa U.S.A., Inc., No. CV-03-707, 2004 Me. Super. LEXIS 227, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004)*; *Tackitt v. Visa U.S.A., Inc.,* No. CI03-740, 2004 WL 2475281 (Neb. Dist. Ct. Oct. 19, 2004). However, in these actions, damages alleged by the plaintiffs were through **[***16]** an alleged inflated cost of goods sold by merchants who were injured by Visa's and MasterCard's inflated cost of financial services. The plaintiffs were not consumers or competitors in the allegedly restrained market, nor were the plaintiffs indirect purchasers in that the plaintiffs did not end up with a product supplied by the defendants. ***HN9***[] Antitrust laws were intended to protect competition and, thus, standing is **[**557]** generally limited to consumers or competitors. There was no connection between the plaintiffs' purchases of consumer goods and the defendants' alleged unlawful tying of debit services in the Visa and MasterCard suits. Therefore, the courts denied indirect purchaser standing to the plaintiffs in several of these actions. *See Anderson Contracting, Inc. v. Bayer AG,* CL 95959, 18 (Iowa Dist. Ct. 31 May 2005) ("Neither *Associated General Contractors* nor *Southard* involved a product, and thus price-fixing was not at issue, as it is in the present case.").

Plaintiff cites a recent Iowa District Court decision in which the court rejected the *AGC* factors in determining an indirect purchaser's standing, because *AGC* did not involve price fixing and because the plaintiffs in *AGC* were competitors **[***17]** rather than purchasers. *Id.* As stated above, *AGC* is distinguishable from the present case and we hold the *AGC* factors do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes.

[*27] Plaintiff has alleged in his complaint that he is a consumer who purchased EPDM roofing material and a pond liner manufactured, marketed, distributed, or sold by one or more of Defendants, as well as at least one vehicle with EPDM components. Plaintiff's allegations of standing show he is a consumer and a purchaser of EPDM. According to the complaint, Plaintiff alleges EPDM comprises 80 to 85 percent of ethylene-propylene elastomers. Plaintiff therefore has alleged that EPDM is a significant component of at least one of the products that he purchased. Plaintiff contends there exists a causal connection between the Defendants' alleged price fixing and the Plaintiff's injury. Plaintiff has alleged in his complaint, that because EPDM is a significant component part of the products at issue in this case, an increase in the price of EPDM could have a ripple effect, thereby increasing the price of the product for Plaintiff, the ultimate consumer.

Defendants **[***18]** contend there are multiple inputs at multiple steps in the EPDM distribution chain, and the allegedly price-fixed product is transformed into a new product in at least one such step. These multiple variables, Defendants argue, render injury and damages impossibly speculative, and therefore the causal chain cannot be established. Defendants cite *Crouch v. Crompton Corp., 2004 NCBC 7, P 30, 2004 WL 2414027, *18-25 (N.C. Super. Ct. Oct. 26, 2004)*, a case in which the trial court expressed strong concerns about stretching ***antitrust law*** to cover damages in cases like these. In *Crouch,* the trial court analyzed the complexity and costliness of adjudicating an antitrust case based on rubber compounds and chemicals that form a component of tire products at issue. The trial court in *Crouch* was concerned in part about the lack of express statutory language granting indirect purchaser standing or any definitive ruling by our Supreme Court on indirect purchaser standing. However, our Court and the courts in our state are clearly bound by the prior opinion of our Court in *Hyde* dealing with indirect purchaser cases, unless and until it is overturned by our Supreme Court or by enactments of the General **[***19]** Assembly, which has not occurred in the more than twelve years since *Hyde* was decided by our Court. See *In the Matter of Appeal from Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).*

The issue now before our Court is a *Rule 12(b)(6)* motion analysis. ***HN10***[] A motion to dismiss under *Rule 12(b)(6)* requires us to determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be **[*28]** granted[.]" *Harris v. NCNB, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)* (citation omitted). The complaint is to be liberally construed in ruling upon a *Rule 12(b)(6)* motion, and it should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Jenkins v. Wheeler, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356*, *disc. review denied, 311 N.C. 758, 321 S.E.2d 136 (1984)*. In a *Rule 12(b)(6)* determination we must decide whether Plaintiff, as an indirect purchaser of products containing EPDM, has antitrust standing to recover damages under Chapter 75. What is at issue is Plaintiff's right of access to the courts, not the merits **[***20]** of his allegations. A trial court will be better **[**558]** suited to assess whether Plaintiff will be able to prove causation based on the alleged antitrust violation at the class certification and summary judgment stages. *See Investors Corp. v. Bayer AG,* S1011-04 CaC. (Vt. Super. Ct. 1 June 2005). At a *Rule 12(b)(6)* stage in this action, Plaintiff has alleged sufficient facts in his complaint to show a right of recovery. *See Davis v. Messer, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906 (1995)*.

The injury that Plaintiff alleges appears to be within the type of injury that the General Assembly intended to address through our state's antitrust and consumer fraud law. If Plaintiff can demonstrate that the increased EPDM prices affected the price of the goods he purchased, then he will have established the type of injury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits.

Defendants challenge the speculative nature of Plaintiff's damages claim. *See AGC, 459 U.S. at 542, 74 L. Ed. 2d at 741*. Plaintiff argues he "will prove his damages through expert testimony using accepted economic analysis[.]" Defendants contend this simple statement of what Plaintiff **[***21]** states he will do at trial is not convincing enough to refute the specific and well-supported concerns of the trial court as to the speculative nature of Plaintiff's damages.

We agree with the trial court's statement that calculation of Plaintiff's damages would be a "daunting task." In *Hanover Shoe,* the Supreme Court observed how tracing a cost increase through several levels of a chain of distribution "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Hanover Shoe, 392 U.S. at 493, 20 L. Ed. 2d at 1241*. It is correct that the fact that EPDM is a component part and not an end product is not a complete bar to recovery; however, this consideration **[*29]** does make calculating Plaintiff's damages more difficult. *See Illinois Brick, 431 U.S. at 759, 52 L. Ed. 2d at 733*.

Defendants contend that courts would have to isolate the effect of the alleged conspiracy on the price of EPDM and rule out the numerous other factors that could cause a price increase in these products such as inflation, prices of other inputs, transport costs, product demand, and market conditions. Thus, a rigorous economic analysis would be required to determine **[***22]** whether increased prices were the result of the alleged price fixing or the result of some other factor.

The U.S. Court of Appeals for the Ninth Circuit has recognized, ***HN11***[] "Complex antitrust cases . . . invariably involve complicated questions of causation and damages." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997)*. Even if the present case proves to be no exception, that is not sufficient reason to dismiss for lack of standing. As the trial court found, considering several products containing EPDM adds to the complexity of apportioning damages in this case. The analysis described above would have to be conducted for every product at issue in order to accurately calculate Plaintiff's damages. Our Court recognized in *Hyde* that a suit by indirect purchasers under our antitrust laws would be complex. However, ***HN12***[] "fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to 'establish an effective private cause of action for aggrieved consumers in this State.'" *Hyde, 123 N.C. App. at 584, 473 S.E.2d at 687-88* (quoting *Marshall, 302 N.C. at 543, 276 S.E.2d at 400*).

As our Court concluded in *Hyde,* "allowing **[***23]** indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations." *Id. at 584, 473 S.E.2d at 688*. We therefore hold that Plaintiff has standing to bring this antitrust and consumer fraud action. We reverse the order of the trial court dismissing Plaintiff's claims.

II.

In his second assignment of error, Plaintiff argues the trial court erred in requiring publication of additional class notice of the settlement with the DDE Defendants and the Bayer Defendants in the Asheville *Citizen-Times* and the *The News & Observer* of Raleigh. Plaintiff specifically contends the **[**559]** trial court failed to give **[*30]** full faith and credit to the order of Judge John McAfee of the Circuit Court of Tennessee, finding the notice of settlement given to the Bayer settlement class members "complied fully with the laws of the State of Tennessee, due process, and any other applicable rules of the Court."

Plaintiff cites *Freeman v. Pacific Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184 (2003)*, in support of his argument. In *Freeman,* the plaintiffs argued that notice **[***24]** given to them pursuant to a final settlement order of a class action lawsuit pending in Kentucky was inadequate and that the notice did not meet due process standards. *Freeman, 156 N.C. App. at 585, 577 S.E.2d at 186*. The plaintiffs argued that the Kentucky settlement was not entitled to full faith and credit in North Carolina. This Court's review was limited to whether the Kentucky court had already litigated the due process and jurisdictional issues. We determined that the Kentucky judgment was entitled to full faith and credit. *Id. at 586-90, 577 S.E.2d at 186-89*. Therefore, the notice given pursuant to the Kentucky order was adequate and binding on the North Carolina Courts. *Id.*

Judge McAfee in the case before us determined that "[n]otice given to the Bayer Settlement Class members was reasonably calculated under the circumstances to inform the Bayer Settlement Class" and that such notice "complied fully with the laws of the State of Tennessee [and] due process[.]" The record in this case thus shows that the Tennessee court addressed the notice and due process issues in its order. The United States Constitution directs that ***HN13***[] "[f]ull faith and credit shall be given in each state to **[***25]** the public acts, records, and judicial proceedings of every other state." *U.S. Const. art. IV, § 1*. The United States Supreme Court has also held that ***HN14***[] "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of [*28 U.S.C. § 1738*]." *Matsushita Elec. Indus. v. Epstein, 516 U.S. 367, 374, 116 S. Ct. 873, 134 L. Ed. 2d 6, 17 (1996)*. *28 U.S.C. § 1738 (2007)* provides that ***HN15***[] "[t]he records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . from which they are taken."

We hold the trial court erred in failing to give full faith and credit to the order of the Tennessee court. The decretal section of the trial court's order requiring additional publication in North Carolina newspapers of the class settlement is reversed. Reversed and remanded.

[*31] Judges McCULLOUGH and STROUD concur.

Judge McCullough concurred in this opinion prior to 31 December 2008.

Lambert v. Bd. of Comm'rs

United States District Court for the Eastern District of Louisiana

January 22, 2009, Decided; January 22, 2009, Filed

CIVIL ACTION NO: 05-5931 SECTION: R(4)

Reporter

2009 U.S. Dist. LEXIS 124097 *

JAMES KELLY LAMBERT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED VERSUS BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, ET AL.

Prior History: *Lambert v. Bd. of Comm'rs of the Orleans Levee Dist., 2009 U.S. Dist. LEXIS 124047 (E.D. La., Jan. 22, 2009)*

Core Terms

salvage, vessels, boat, plaintiffs', Marine, consumer, summary judgment, anti trust law, depository, antitrust, damages, price fixing, deprivation, prices, standing to bring, contractor, purchasers, compensated, negotiorum, Hurricane, gestor, color, insurance company, antitrust claim, nonpurchasers, nonmoving, alleges, parties, leases, summary judgment motion

Counsel: **[*1]** For James Kelly Lambert, individually and on behalfof all others similarly situated, Donald J Scott, W Robin Lovelock, individually and on behalf of all others similarly situated, Plaintiffs: Adam Stewart Lambert, LEAD ATTORNEY, Andre P. Guichard, Adam S. Lambert, Attorney at Law, New Orleans, LA; Louis Roy Koerner, Jr., Koerner Law, Houma, LA.

For Board of Commissioners of the Orleans Levee District, Defendant: Thomas P. Anzelmo, LEAD ATTORNEY, McCranie, Sistrunk (Metairie), Metairie, LA; Andre Jude Lagarde, U.S. Attorney's Office (New Orleans), New Orleans, LA; Kyle P. Kirsch, McCranie Sistrunk (New Orleans), New Orleans, LA.

For Marine Recovery and Salvage, LLC, Douglas Scott Carmouche, Michael George Mayer, Defendants: Glenn B. Adams, LEAD ATTORNEY, Chauntis T. Jenkins, Denia Sylve Aiyegbusi, Porteous, Hainkel & Johnson (New Orleans), New Orleans, LA.

For James P Huey, Defendant: Bradley Joseph Schlotterer, LEAD ATTORNEY, Brett P. Fenasci, Charles Rowand Talley, Karen Waters Shipman, Kean Miller (New Orleans), New Orleans, LA.

For George L Carmouche, Defendant: Brennan Cody Ardoin, LEAD ATTORNEY, Brennan C. Ardoin, Attorney at Law, Baton Rouge, LA.

For Resolve Marine Group, Defendant: **[*2]** Russell Keith Jarrett, LEAD ATTORNEY, Joseph I. Giarrusso, III, Liskow & Lewis (New Orleans), New Orleans, LA.

Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE.

Opinion by: SARAH S. VANCE

Opinion

ORDER AND REASONS

A number of summary judgment motions are before the Court. Defendants Marine Recovery and Salvage, LLC, Scott Carmouche, and Michael Mayer have filed four motions for partial summary judgment on plaintiffs' claims. (R. Docs. 207, 211, 214, & 217). Defendant Resolve Marine Group has separately moved for summary judgment on all of plaintiffs' claims. (R. Doc. 195). The Court rules as follows.

I. Background

Plaintiffs James Kelly Lambert, Donald Scott, and Robin Lovelock brought this case as a purported class action on behalf of similarly-situated persons who own vessels located in two Orleans Parish marinas operated by the Board of Commissioners for the Orleans Levee District. Plaintiffs name as defendants the Board of Commissioners for the Levee District; James P. Huey, the former President of the Levee District; Marine Recovery and Salvage, LLC ("Marine Recovery"); George Carmouche, a former attorney for the Levee District; Scott Carmouche; Michael Mayer; Resolve Marine Group ("Resolve"); and St. Tammany **[*3]** Pearl River Salvage. [1]

Plaintiffs allege generally that Hurricane Katrina damaged and/or destroyed many vessels located in the two marinas, but that many other vessels suffered little or no damage from the storm itself. After the storm, both the vessels that were damaged by the storm and the ones that did not suffer significant damage needed immediate attention to prevent further damage from sitting incorrectly in the water or sitting out of the water entirely. Plaintiffs allege that the Levee District imposed unnecessarily strict requirements on their ability to access their vessels in order to salvage them. Plaintiffs allege that defendants imposed these limitations, at least initially, to prevent vessel owners from salvaging their vessels on their own or through a marine salvage contractor of their choosing and to force vessel owners to pay exorbitant prices to certain of the defendants in order to have their vessels salvaged.

Plaintiffs assert a number of claims against the various defendants, including breach of contract, violation of Louisiana ***antitrust law***, violation of the Louisiana **[*4]** Unfair Trade Practices Act, a civil rights claim under *42 U.S.C. § 1983*, breach of a compensated depository contract, and negligence on the part of a negotiorum gestor.

B. Factual Background

The Levee District operates two marinas, the Orleans Marina and the South Shore Harbor Marina, on the south shore of Lake Pontchartrain. A large number of vessels docked at both of these marinas were damaged, tossed ashore, or sunk as a result of Hurricane Katrina, which swept through southeast Louisiana on August 29, 2005. On or about September 12, 2005, the Levee District allegedly gave Marine Recovery exclusive authority to oversee all salvage operations in the two marinas. Defendants Scott Carmouche (the son of defendant George Carmouche, a Levee Board attorney) and Michael Mayer allegedly formed Marine Recovery on September 8, 2005. Marine Recovery then entered into an allegedly exclusive contract with Resolve on September 29, 2005, to carry out the salvage operations. Plaintiffs allege that defendants designed this arrangement to provide Resolve with the exclusive right to conduct salvage operations in the two marinas, thus permitting it to charge inflated rates for its services. Resolve then **[*5]** paid Marine Recovery a percentage of the revenue from these overpriced salvage services and allegedly passed on kickbacks to certain other defendants and unidentified third parties.

Plaintiffs assert that throughout September and October 2005, Levee District personnel prevented vessel owners from accessing their vessels in order to move and/or salvage them. Levee District personnel allegedly told plaintiffs that only Marine Recovery and its designated agents were permitted to access the marinas in order to move vessels. Plaintiffs also assert that they were told that anyone who attempted to enter the marinas without the Levee District's permission would be arrested by the Levee Board Police.

[1] St. Tammany Pearl River Salvage was terminated from the case on October 30, 2006. (R. Doc. 86).

Plaintiffs allege that, during this period, Resolve salvaged and/or moved many vessels without permission from either the vessel owner or the vessel's insurer, that Resolve sent the owners of these vessels inflated bills for their services, and that these unauthorized salvage attempts often caused additional damage to the vessels.

On October 3, 2005, several insurance companies filed suit in civil district court in Baton Rouge, challenging both the exclusivity arrangement among the Levee District, **[*6]** Marine Recovery and Salvage, and Resolve, and the excessive salvage fees being charged by Resolve and St. Tammany Pearl River. The state court issued a temporary restraining order on October 4, 2005. The parties resolved the suit on or about October 13, 2005, when the Levee District agreed that it would no longer give Marine Recovery and Resolve exclusive access to the marina. Plaintiffs allege, however, that the Levee District nevertheless continued to give these entities exclusive access to the marinas until at least October 25, 2005.

On or about October 26, 2005, the Levee District posted on its website a new policy that allowed other salvage companies into the marinas in order to recover vessels. Under this policy, the Levee District would permit any salvage company to enter the marina and access vessels after the company complied with the following conditions: (1) that it provide the Levee District with proof of insurance showing the Levee District as an additional insured on the policy; (2) that it provide a list of vessels that were to be moved, including the name of each vessel's owner; and (3) that it provide written authorization from the insurance company insuring each vessel **[*7]** that it intended to move. Under the policy, once a company furnished this information, the Levee District would review the documentation and provide the contractor with written permission to enter the marinas. The policy required authorized contractors to schedule all salvage operations with the Baton Rouge office of the Levee District. A statement accompanying the revised marina access policy noted that the Levee District had already authorized two companies, Resolve and St. Tammany Pearl River, to conduct salvage operations in the marinas.

Plaintiffs allege that Marine Recovery, Resolve and St. Tammany Pearl River continued to have *de facto* exclusive access to the marinas, despite the revised policy. Plaintiffs allege that the Levee District did not require Resolve and St. Tammany Pearl River to comply with the new procedures, but it instead treated them as "favored" contractors because they had agreed to pay Marine Recovery a "commission" of 10 percent of their income from salvage operations in the marinas. Plaintiffs further allege that the "Byzantine" procedures mandated by the Levee District's revised policy on marina access were overly strict and time-consuming, which hindered **[*8]** other contractors in complying with them and gaining access to salvage vessels in the marinas.

On or about December 23, 2005, the Levee District again revised its policy on marina access. Under the current policy, a salvage contractor can operate in the marina if it provides proof of at least $ 1 million in liability insurance covering salvage operations, names the Levee District as an additional insured on the policy, and executes a hold harmless agreement in favor of the Levee District. In addition, the contractor must obtain the permission of the owner and/or insurer of each vessel that it intends to salvage and inform the Levee District of the identities of the vessels to be salvaged. Authorized contractors may then conduct salvage operations at the marina without the need to schedule operations with the marina managers.

C. Plaintiffs' injuries

1. J. Kelly Lambert

On September 27, 2005, Lambert first tried to enter Orleans Marina to retrieve some personal items from his houseboat, the M/V PHOENIX. He walked through the floodgate, but claims he was told by Beth Augustin, the assistant marina manager for the Orleans marina, that he could not enter through the floodgate, but had to use **[*9]** the walk gate in the future. Augustin also allegedly told him that Huey had to approve any salvor and that Marine Recovery was the only salvor currently approved. Lambert talked to a third-party salvor, FEMA contracor G.W. Gordy, who told him that his boat could be salvaged for $ 3,000. (Lambert Depo., p. 93, 66:16-67:9). Lambert testified that his chosen salvor could not salvage his boat since he was not pre-approved by the Levee Board. Lambert eventually contracted with Resolve, on October 22, 2005, to salvage the PHOENIX for the price of $ 6,795.

(R. Doc. 195-11, Exhibit AA). Lambert asserts that he sustained actual damages from the delay in salvaging his boat in the amount of $ 42,795.00. (R. Doc. 226-9).

2. Donald Scott

Donald Scott was the co-owner of a vessel, the ALOHA, that was moored in Orleans Marina when Hurricane Katrina hit. (Scott Depo., p. 30, 17:23-18:20). Scott was able to access his vessel on September 4, 2005, by using a ladder to climb over the wall around the marina. (Scott Depo., p. 31, 23:25-25:7). Scott claims he was not able to access the marina again until November 16, 2005. (Scott Depo., p. 32, 29:6-10). On that day, he spoke with Augustin about salvaging **[*10]** his boat. (Scott Depo., p. 32, 29:21-30:2). Scott proposed that he and his sons, who were certified scuba divers, could lift the boat, since it was only half-sunk. (Scott Depo., p. 32, 30:8-12). Augustin told him that the Levee District required salvors to carry $ 1 million in insurance and that the only companies allowed to salvage boats were Resolve and St. Tammany Pearl River. (Scott Depo., p. 32, 30:13-18, p. 34, 39:7-19). Scott could not get in touch with St. Tammany, so he contacted Resolve about salvaging his boat. Either Tim Erickson or Tim McGinnis initially quoted Scott a price between $ 5,600 and $ 6,000. (Scott Depo., p. 35, 41:2-7). After Scott complained that the price was too high since his boat was only partially sunk, Tim informed Scott that the price would be $ 1,500 if his insurance company found the boat to be a navigational hazard. Resolve talked to Scott's insurance company, and they refused to cover the salvage. (Scott Depo., p. 35, 44:6-22). The price then went back up to $ 5,600 to $ 6,000. Scott decided that he could not afford to salvage his boat at this price. On June 6, 2006, he ran an ad in a newspaper to sell his boat for $ 1.00. The purchaser encountered **[*11]** no problems when he salvaged the boat the next weekend with his two sons and two divers. (Scott Depo. p. 38, 55:21-56:19). Scott claims that he sustained damage in the amount of $ 25,000 since his vessel was worth $ 25,000 before the hurricane. (R. Doc. 226-9).

3. Robin Lovelock

Lovelock's sailboat, the HEATHEN, was docked at South Shore Harbor when Hurricane Katrina hit. Lovelock did not contact anyone about his boat, other than friends with boats in the marinas, until he returned to New Orleans near the end of October. (Lovelock Depo., p. 3, 19:21-20:7). When he returned, he found that his boat had been salvaged from the water and placed on the bulkhead of the parking lot in the marina. (Lovelock Depo., p. 3, 19:4-17). Resolve had mistakenly salvaged his boat (Lovelock Depo., p. 9, 45:11-14, 47:4-9) and never charged Lovelock for the salvage. (Lovelock Depo., p. 9, 46:1-4). Lovelock claims that because of the salvage job, he lost the autopilot, a stainless steel wheel, and an anchor, for a total property loss of $ 2,400.00. (Lovelock Depo., p. 10, 51:20-54:9). A surveying company provided by Lovelock's insurance company estimated that the wreckage of his boat was worth a total of $ **[*12]** 1,000. (Lovelock Depo., p. 6, 33:6-14). Lovelock's insurance company then paid him $ 35,000 under the hull policy, and after paying off $ 25,000 for the mortgage on the vessel, he was left with $ 10,000. (Lovelock Depo., p. 6, 34:7-17).

D. Procedural Background

Plaintiff Lambert originally brought the case as a purported class action in Civil District Court for the Parish of Orleans. (R. Doc. 1 at 11). Plaintiff filed a First Supplemental and Amending Class Action Complaint in state court and added Donald Scott as a named plaintiff. (R. Doc. 1 at 5). Defendants removed the case to federal court on November 22, 2005. On January 23, 2006, plaintiffs amended their class action complaint again, adding Robin Lovelock as a named plaintiff. (R. Doc. 18).

Plaintiffs first moved for class certification on February 21, 2006, and the Court denied the motion without prejudice until the motions to dismiss pending at the time were resolved. (R. Doc. 44). After the Court denied defendants' motions to dismiss, (R. Doc. 61), plaintiffs again moved for class certification on June 25, 2007. (R. Doc. 109). Judge Porteous heard oral argument on the motion on November 16, 2007. The case was transferred to **[*13]** Section R, and this Court denied the motion to certify on September 10, 2008. (R. Doc. 191).

The case is scheduled for bench trial on February 9, 2009. (R. Doc. 186). Before the Court are a number of motions for summary judgment. Defendant Resolve moves for summary judgment on all of plaintiffs' claims. (R. Docs. 195). Marine Recovery, Scott Carmouche, and Michael Mayer have filed four separate motions for partial summary judgment on the following claims: (1) plaintiffs' claims under the Louisiana Unfair Trade Practices Act (LUTPA), (2) plaintiffs' claims under *42 U.S.C. § 1983* and allegations of price gouging, (3) plaintiffs' claims under the Louisiana antitrust laws, and (4) plaintiff Lovelock's breach of deposit and negligence claim. (R. Docs. 207, 211, 214, 217).

II. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. *See* *FED. R. CIV. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient **[*14]** to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990)*; (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. The moving party bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *See* *Celotex, 477 U.S. at 325*; *see also* *Lavespere, 910 F.2d at 178*. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See* *Celotex, 477 U.S. at 324*. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial. *See* *id. at 325*; *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1996)*.

III. Discussion

The Court has motions for summary judgment before it from four defendants. [2] The Court's reasoning will be applicable to plaintiffs' **[*15]** claims against all seven defendants.

A. Louisiana antitrust laws

Defendants move for summary judgment on plaintiffs' claims under Louisiana antitrust laws codified in *Louisiana Revised Statutes §§ 51:122* and *51:123*. [3] These statutes are virtually identical to Sections 1 and 2 of the Sherman Antitrust Act, *15 U.S.C. § 1, et seq.*;, and federal analysis of the Sherman Antitrust Act is persuasive, though not controlling. *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So.2d 1149, 1154, 1158 (La. 1986)*.

Defendants assert that the record reflects that they did not attempt to restrain trade in violation of *section 51:122* since (1) other salvage companies were authorized to operate in the marinas when plaintiffs' vessels were salvaged, and (2) **[*16]** there is no evidence to support the allegations that Marine Recovery prohibited certain salvage companies to enter the marinas and perform salvage operations. They also aver that plaintiffs have not provided sufficient proof of a conspiracy to monopolize in violation of *section 51:123* since plaintiffs have not provided proof that the agreement between the Levee District and Marine Recovery was an attempt to create a monopoly of the salvage industry within the marinas.

---

[2] The other defendants, George Carmouche, James Huey, and the Levee District, have also filed motions for summary judgment. Because plaintiffs have yet to oppose those motions, the Court will consider them in a separate motion.

[3] Plaintiffs' memoranda suggest that they made claims under the Sherman Act as well as state antitrust statutes. Plaintiffs did not make these claims in any of their complaints, and thus the Court will not consider them.

The Court finds that not all of the plaintiffs have alleged an injury in fact sufficient to establish an antitrust claim. Louisiana ***antitrust law*** permits any person: "who is injured in his business or property by any person by reason of any act or thing forbidden by this Part, [to] sue . . . and . . . recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee." *La. Rev. Stat. Ann. § 51:137*; *see also* *Free v. Abbott Laboratories, Inc., 176 F.3d 298, 299 (5th Cir. 1999)*. This provision is also nearly identical to the federal antitrust enforcement provision, § 4 of the Clayton Act. [4]

Antitrust standing involves more than the "case or controversy" requirements of constitutional standing. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*; (citing *Flast v. Cohen, 392 U.S. 83, 94-101, 88 S. Ct. 1942, 20 L. Ed. 2d 947) (1968))*. Plaintiffs must show "antitrust injury, which is . . . injury of the type the antitrust laws were intended to prevent." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*; *see also* *Norris v. Hearst Trust, 500 F.3d 454, 465 (5th Cir. 2007)* ("plaintiff must prove more than injury causally linked to an antitrust violation"); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc., 123 F.3d 301, 306 (5th Cir. 1997)* (the standing inquiry "ensures that the plaintiff's demand for relief ultimately serves the purposes of ***antitrust law*** to increase consumer choice, lower prices and assist competition, **[*18]** not competitors"). The Fifth Circuit narrowly construes the meaning of antitrust injury. *See* *Anago, Inc. v. Tecnol Medical Products, Inc., 976 F.2d 248, 251 (5th Cir. 1992)*; (citing *Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 100 (5th Cir. 1988))*.

Plaintiffs have brought antitrust claims for price fixing under *section 51:122* and attempt to monopolize or conspiracy to monopolize under *section 51:123*. To establish injury in a price fixing case, plaintiffs may simply show proof of purchase at a price higher than the competitive rate. *Robinson v. Texas Auto. Dealers Ass'n, 387 F.3d 416, 422 (5th Cir. 2004)*; (citing *Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 676 (5th Cir. 1982))*. An illegal price-fixing scheme is presumed to damage all purchasers of a price-fixed product. *In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 526 (S.D.N.Y. 1996)*. Similarly, for monopoly claims, a consumer can obtain damages only if he shows that he actually paid more than the competitive level. *See* *In re Air Passenger Computer Reservation Systs., 727 F. Supp. 564, 569 (C.D. Cal. 1989)*; (citing P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 340.2b (1988 Supplement); *Wojcieszek v. New England Tel. and Tel. Co., 977 F. Supp. 527, 535 (D. Mass. 1997)*; **[*19]** *Simpson v. US West Comm., Inc. 957 F. Supp. 201, 206 (D. Or. 1997)*. Here, however, only Lambert paid the allegedly higher prices charged by Resolve. The Court will now consider whether Lovelock and Scott have sustained antitrust injury sufficient to establish standing.

Lovelock was not seeking salvage services when his boat was salvaged by Resolve without his consent. Neither party disputes that Lovelock never negotiated with Resolve for salvage work and was never charged for the salvage. Lovelock was simply not injured by any violation of the antitrust laws; the only damage he claims he sustained resulted from Resolve's allegedly negligent salvage job. This is not the type of injury the antitrust laws were intended to protect. Because Lovelock has not sustained a cognizable antitrust injury, he does not have standing to bring an antitrust claim.

Scott, however, was in the market for salvage services. Scott negotiated with Resolve, but opted not to have his boat salvaged after Resolve quoted him its prices. Although Scott never paid the higher prices, Scott contends that he was damaged because as a result of the inflated prices, he could not afford to salvage his boat and was forced **[*20]** to sell it for $ 1. The Court must consider whether a nonpurchaser who would have purchased goods or services but for the allegedly inflated prices has standing to bring an antitrust claim.

---

[4] Section 4 of the Clayton Act, *15 U.S.C. § 15 (1997)* states in part:

> [A]ny person who shall be injured **[*17]** in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Court concludes that Scott lacks standing to bring such a claim. Although the Court has found no Fifth Circuit or Louisiana cases involving the standing of nonpurchasers, the Tenth Circuit considered the issue in *Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981)*;. There, a Canadian corporation sued several United States potash producers because of its inability to purchase potash. *Id. at 865*. The court held that the corporation had no standing to bring a price fixing claim. The court explained that "[a] price fixing conspiracy is certainly 'aimed' at those who purchase the product at the inflated price; their injury is more direct and more proximately caused than those who are unable to purchase due to product scarcity." *Id. at 867*. The court further noted that granting standing to nonpurchasers could result in large recoveries for those only minimally hurt by antitrust violations. *Id*. The court reasoned:

> If nonpurchasers who have never dealt with a defendant could recover, a seemingly **[*21]** unlimited number of plaintiffs could assert a virtually unlimited quantity of lost purchases, perhaps exceeding the potential output of the entire industry. With a treble damages entitlement, the result could be multiple recoveries and total damage awards wholly out of proportion with the 'fruits of the illegality,' easily bankrupting the named defendants.

Id. at 868. This Court finds this reasoning persuasive and consistent with the views of the Fifth Circuit in a related context, as discussed, *infra*. Allowing nonpurchasers to recover would unduly broaden the spectrum of potential plaintiffs with price fixing and monopolization claims. Anyone who considered, or claimed to consider, purchasing a product or service would have standing to bring such claims. Damages would vary widely depending on the consequences of a potential consumer's inability to purchase. Courts would also be faced with complex causation issues. For instance, here the Court would have to determine whether Scott's inability to purchase salvage services for a period of less than two months caused damage to his boat above and beyond the damage it sustained from Hurricane Katrina and Rita.

The Fifth Circuit discussed **[*22]** similar prudential considerations in its determination that indirect purchasers did not have standing to bring price fixing claims under Louisiana ***antitrust law***. *See Free v. Abbott Laboratories, Inc., 176 F.3d 298, 300-01 (5th Cir. 1999)*. The Court explained that allowing only direct purchasers to sue would "reduce the dimensions of complexity" of the litigation. *Id. at 300*. The Court expressed concern that if indirect purchasers were allowed to sue:

> The focus of suits would shift from the amount of increased prices caused by defendants' anticompetitive conduct (a relatively straightforward inquiry) to the allocation of damages among parties in the line of distribution to ultimate consumers. Litigation would be prolonged, would become far more complex factually and strategically, and would benefit lawyers and determined defendants while reducing recoveries for plaintiffs.

Id. at 301. Here, the Court finds that similar concerns weigh against granting nonpurchasers standing in price fixing and monopolization suits. While Scott's injury may be related to an antitrust violation, it is not the type of injury the antitrust laws were intended to protect. Thus Scott does not have standing to **[*23]** bring an antitrust claim. Because neither Scott nor Lovelock have standing to bring a claim under the antitrust laws, the Court GRANTS defendants' motions with regard to these two plaintiffs.

As for the merits of Lambert's antitrust claims, the Court is unable to determine if summary judgment is appropriate because the parties have failed to brief certain issues pertinent to the claims. The Court will issue an order outlining the supplemental briefing it will require of the parties and defer its ruling on these claims until trial.

B. LUTPA

Defendants contend that plaintiffs have failed to show that defendants engaged in fraudulent and deceptive acts in violation of LUTPA. They further contend that plaintiff Lovelock cannot recover since he was not a consumer or business competitor of Marine Recovery or Resolve.

Under LUTPA, private parties who suffer an "ascertainable loss" because of another party's unfair or deceptive trade practices may bring suit to recover actual damages. *La. Rev. Stat. § 51:1409*. Although the text of *section*

1409 states that "*any person* who suffers any ascertainable loss may bring suit, the Fifth Circuit has given this statute a narrower reading, limiting relief **[*24]** to individual consumers or business competitors. *See* Orthopedic & Sports Injury Clinic v. Wang Labs, Inc., 922 F.2d 220, 226 (5th Cir. 1991); Delta Truck & Tractor v. J.I. Case Co., 975 F.2d 1192 (5th Cir. 1992); *cf.* Indest-Guidry, Ltd. V. Key Office Equipment, Inc., 997 So. 2d 796, 2008 WL 4792422 at *12-*13 (La. Ct. App. 2008); (finding that business entities as well as individual consumers can recover as "consumers" under the statute). The statute defines "consumer" as "any person who uses, purchases, or leases goods or services." La. Rev. Stat. § 51:1402(1). But the Fifth Circuit has restricted the definition of "consumer" under LUTPA to individuals who are participants in a "consumer transaction." Wang Labs, 922 F. 2d at 226. A "consumer transaction" requires trade or commerce with a natural person and the subject of the transaction must be intended for personal, family, or household use. *Id*.;. (quoting La. Rev. Stat. § 51:1402(3)). "Trade" or "commerce" means "the advertising, offering for sale, sale, or distribution of any services and any property." La. Rev. Stat. § 51:1402(9).

The Court finds that only Lambert qualifies as a consumer under the statute. Lambert indisputably purchased **[*25]** salvaging services from Resolve, and since he uses his boat for personal, rather than business purposes, he fits the definition of consumer under the statute. But Scott and Lovelock do not qualify as consumers. Neither Scott nor Lovelock "used," "purchased," or "leased" goods or services. Neither contracted with Resolve for salvaging services. Scott, in fact, did not contract with anyone for salvaging services and never received such services. Lovelock also did not contract with anyone - his boat was mistakenly salvaged by Resolve, and he was never charged for the service. Lovelock did not "use," "purchase," or "lease" salvaging services; he received the services without his consent. *See* Montegut v. Williams Comm., Inc., 109 F. Supp. 2d 496, 499 (E.D. La. 2000) (finding that plaintiffs did not have a LUTPA claim when defendants installed fiber optic cables on their land without their consent). Because Lovelock and Scott are not consumers under the statute, the Court finds that Lambert alone has standing to bring a LUTPA claim and GRANTS summary judgment with regard to Scott and Lovelock's LUTPA claims against defendants. The Court will defer ruling on the merits of Lambert's LUTPA **[*26]** claims until trial.

C. *Section 1983*

Defendants move for summary judgment on plaintiffs' claim under 42 U.S.C. § 1983 that defendants violated plaintiffs' civil rights by engaging in price fixing in violation of 15 § U.S.C. 2. Defendants first assert that plaintiffs do not have an action under section 1983 since they did not act under color of state law. They also contend that plaintiffs have not presented any evidence that defendants engaged in price fixing.

Section 1983 provides a private right of action to any person who is deprived of a federal constitutional or statutory right by a person acting under color of state law. *See* 42 U.S.C. § 1983. To state a claim under section 1983, a plaintiff must allege: (1) that the defendant deprived him of a right secured by the Constitution or federal law; and (2) that the deprivation occurred under color of state law. *See* Cornish v. Corr. Servs. Corp.., 402 F.3d 545, 549 (5th Cir. 2005); Brown v. Miller, 631 F.2d 408, 410 (5th Cir. 1980).

Plaintiffs' claims under section 1983 are not easily ascertainable. Plaintiffs' complaint, under the heading "Intentional delicts, denial of civil rights, and criminal acts," alleges:

> The actions set forth hereinabove **[*27]** were done intentionally and without privilege under color of law, and were done in order to keep petitioner and other persons similarly situated from salvaging, lifting, moving, or even accessing their personal property and were done with an intention to defraud the plaintiff and other persons similarly situated and to illegally profit the defendants and their political cronies.

(R. Doc. 1-1 at P42). Under that heading, the complaint further states:

> The plaintiff is further informed and alleges that the defendants conspired to charge the plaintiff and other vessel owners in the Orleans Marina and South Shore Harbor Marina exorbitant prices to move their vessels and further conspired to charge exorbitant prices for the services of MRS . . . The plaintiff alleges that these actions of the defendants also amount to illegal Price Fixing and illegal Price Gouging, as defined by law and

> that said acts and conspiracies were done intentionally by the defendants under color of law and that they also amount to a denial of civil rights under color of law.

(R. Doc. 1-1 at P43). Plaintiffs' motions for partial summary judgment are also far from helpful. In the motions, plaintiffs repeatedly refer **[*28]** to plaintiffs' right to acquire, use and dispose of private property under the Louisiana Constitution. *See* *La. Const. art. I, § 4(A)*. Violations of state law, however, whether constitutional or statutory, do not give rise to a *§ 1983* action. The Court surmises that plaintiffs have alleged a procedural due process claim for denial of their property rights.

The *Due Process Clause* prevents the state from depriving a person of life, liberty, or property without due process of law. *U.S. CONST. amend. XIV*. In deciding whether state action has violated an individual's right to due process, the court must address two questions: "whether the state action has deprived the individual of a protected interest - life, liberty or property," and if so, "whether the state procedures available for challenging the deprivation satisfy the requirements of due process." *Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984)*; *accord* *Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 556 (5th Cir. 1988)*; *Cuellar v. Texas Employment Comm'n, 825 F.2d 930, 934 (5th Cir. 1987)*.

Even assuming, *arguendo*, that plaintiffs' right to access their property is a protected property interest and that defendants acted **[*29]** under color of state law, the record reflects that plaintiffs were never denied access to their property. Lambert testified that when he first visited the marina after the hurricane, "the gate was open, I went in." (Lambert Depo., p. 51, 13:21-15:18). Lambert said that he went to the marina "quite often." He further testified:

> I can't say for sure that I went there every day, but I went there pretty often. It was still kind of a hassle to get in. I had to climb over the walk-through gate down at the end of the wall. they have the main gates closed. but I went over there pretty often. I had to over there and retrieve some personal things off my boat. And I went over there to do what I could to stabilize my boat.

(Lambert Depo., p. 53, 27:14-28:1). Thus Lambert's main complaint was that he was unable to access the marina through the main gates, which, while inconvenient, does not qualify as a deprivation of property that merits constitutional protection. Scott testified that he was able to access his vessel as soon as he returned to town on September 4, 2005. (Scott Depo., p. 31, 23:25-24:15). He explained that he entered by climbing over the wall with a ladder. (Scott Depo., p. 31, 25:5-7). **[*30]** Scott testified that he was subsequently unable to access the marina until November 16, 2005, but he said that the National Guard - not the Levee Board police or any other defendant - denied him access. Thus he also did not suffer a deprivation of property at the hands of the defendants. As for Lovelock, he never alleged that he was denied access to his vessel and testified that he was able to walk right up to his vessel in South Shore Marina when he returned to town. (Lovelock Depo., p. 5, 25:25-26:9). Because none of the plaintiffs were ever denied access to their vessels, but merely inconvenienced in their ability to access them, the Court finds that plaintiffs have not suffered the requisite deprivation of property to establish a due process claim.

D. Breach of a depository contract and negligence

Defendants move for partial summary judgment on plaintiffs' claims for breach of a compensated depository contract and negligence on the part of a negotiorum gestor. The defendants aver that no compensated depository contract existed between plaintiffs and them and that they were never negotiorum gestors for the plaintiffs. Plaintiffs have not opposed this motion.

1. Compensated depository [*31] contract

The Louisiana Civil Code provides: "[a] deposit is a contract by which a person, the depositor, delivers a movable things to another person, the depository, for safekeeping under the obligation of returning it to the depositor upon demand." *La. Civ. Code. art. 2926*. A contract of deposit is essentially a bailment, and takes place by the mutual consent of the person making the deposit and the person receiving it. *La. Civ. code. art. 2932*. The principal requirements of such a contract are delivery of the property and mutual consent. *Northern Assurance Co. of*

America v. Cotton, 658 So.2d 246, 248 (La. Ct. App. 1995);. A depository contractual relationship is different in nature from a lessor/lessee relationship. *See* *Guillot v. Kaplan Farmers Coop, Inc., 352 So.2d 402, 404 (La. Ct. App. 1977)* (finding that the nature of the contractual relationship in the case was that of a contractual deposit, not a lease).

The Court finds that no compensated depository contract existed between plaintiffs and any defendants. Plaintiffs' leases with the Levee District do not qualify as depository contracts, as the lessees expressly agreed to indemnify the Levee District for any damage to the vessels. **[*32]** (R. Doc. 254-8 at P4). Thus the Levee District was not obligated to keep plaintiffs' vessels safe. Other than the leases, neither Lovelock nor Scott contracted with any defendant and thus have no claim in this regard. Lambert's contract with Resolve does not qualify as a compensated depository contract, since Lambert never delivered his vessel to Resolve, a necessary requirement for a depository contract. Accordingly, the Court finds that the defendants are entitled to summary judgment on this claim.

2. Negligence on the part of the negotiurum gestors

Under Louisiana law, a quasi-contract is created when a person, the gestor, voluntarily undertakes to manage another's affairs, whether the person is aware of the benefit or not. *Coastal Envtl. Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So.2d 12, 20 (La. Ct. App. 2001)*. Such a "management of affairs" (negotiorum gestio) exists when "a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances." *La. Civ. Code art. 2292*. The manager is obligated to "exercise the care of a prudent administrator and is **[*33]** answerable for any loss that results from his failure to do so." *La. Civ. Code art. 2295*. A negotiorum gestio exists only when a manager is doing another's business, not his own business. *Coastal Envtl. Specialists, 818 So.2d at 21*.; (citing *Burns v. Sabine River Auth., 614 So.2d 1337, 1340 (La. Ct. App. 1993))*.

Here, plaintiff Lovelock alleges that defendants acted as negotiorum gestors when they moved his boat without his permission. Lovelock, however, has offered no evidence that defendants undertook to manage his affairs in the reasonable belief that he would approve of the actions. Only Resolve was involved in the salvage of Lovelock's boat, but in salvaging the boat, Resolve was not acting as a manager on behalf of Lovelock. Resolve was "doing its own business," salvaging boats, and merely salvaged Lovelock's boat in error. (*See* Lovelock Depo., p. 9, 47:4-9). Defendants are thus entitled to summary judgment on this claim.

IV. Conclusion

For the foregoing reasons, the Court GRANTS defendants' motions for summary judgment on plaintiffs' claims under *section 1983* and for breach of a compensated depository contract and negligence on the part of a negotiorum gestor. The Court also GRANTS **[*34]** defendants' motions for summary judgment on Scott and Lovelock's antitrust and LUTPA claims.

New Orleans, Louisiana, this 22nd day of January, 2009.

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

Hackman v. Dickerson Realtors, Inc.

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

January 23, 2009, Decided; January 23, 2009, Filed

No. 06 C 50240

Reporter

595 F. Supp. 2d 875 *; 2009 U.S. Dist. LEXIS 4886 **; 2009-1 Trade Cas. (CCH) P76,669

GREGORY HACKMAN d/b/a GREGORY HACKMAN REALTORS, and GREGORY HACKMAN REALTORS, Inc., an Illinois corporation, Plaintiffs, v. DICKERSON REALTORS, INC., an Illinois corporation d/b/a DICKERSON-NEIMAN REALTORS, WHITEHEAD, INC., an Illinois corporation d/b/a WHITEHEAD REALTORS, R. CROSBY, INCORPORATED, an Illinois corporation d/b/a PRUDENTIAL CROSBY REALTORS, McKISKI-LEWIS, INC., an Illinois corporation d/b/a TOM McKISKI REALTORS, LORI REAVIS, RAY YOUNG, MICHAEL DUNN, JESSICA LICARY, DIANE PARVIN, FRANK WEHRSTEIN, FRANK SHELEY, MARY WESTIN, LARRY PETRY, ROCKFORD AREA ASSOCIATION OF REALTORS, TERRIE HALL, and ILLINOIS ASSOCIATION OF REALTORS, Defendants.

Prior History: *Hackman v. Dickerson Realtors, Inc., 557 F. Supp. 2d 938, 2008 U.S. Dist. LEXIS 42121 (N.D. Ill., 2008)*

Core Terms

allegations, plaintiffs', Counts, second amended complaint, Sherman Act, dismissal with prejudice, motion to dismiss, anticompetitive, reasons, ethics, monopolize, antitrust, motions, amended complaint, do business, asserts, tortious interference, proceedings, conspiracy, defamation, conspired, Realtors, real estate agent, Illinois Act, infer

LexisNexis® Headnotes

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

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

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

A court must accept all well-pleaded facts as true. A court must view the allegations in the light most favorable to plaintiffs. Dismissal of a claim is proper only if plaintiffs have not, at minimum, made enough factual allegations to raise a right to relief above the speculative level. Nevertheless, a well-pleaded complaint may proceed even if it appears that a recovery is very remote and unlikely.

Antitrust & Trade Law > Sherman Act > Claims

HN2[ ] **Sherman Act, Claims**

A successful claim under § 1 of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

To state a claim under § 1 of the Sherman Act, a complaint must set forth enough factual matter (taken as true) to suggest that an agreement has been made.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

Plaintiffs are not required, at the pleading stage, to exclude every plausible interpretation of the facts that does not support their theory of liability. On the contrary, they need only assert plausible grounds to infer that an illegal agreement is made to state a claim based on § 1 of the Sherman Act.

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

HN5[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act provides that it is unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize interstate trade. *15 U.S.C.S. § 2*.

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

HN6[] **Scope, Monopolization Offenses**

To prove that there exists a conspiracy to monopolize, plaintiffs must show: 1) the existence of a combination or conspiracy, 2) overt acts in furtherance of the conspiracy, 3) an effect upon a substantial amount of interstate commerce and 4) the existence of specific intent to monopolize.

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

HN7[] **Scope, Monopolization Offenses**

The Illinois Antitrust Act provides, when the wording of the Act is identical or similar to that of a federal ***antitrust law***, the courts of Illinois shall use the construction of the federal law by the federal courts as a guide in construing this act. *740 ILCS § 10/11*. *740 ILCS § 10/3(2)* is clearly similar to § 1 of the Sherman Act, while *740 ILCS § 10/3(3)* is similar to *§ 2* of the Sherman Act.

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

HN8[] **Sherman Act, Scope**

See *740 ILCS § 10/3*.

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

HN9[] Sherman Act, Scope

740 ILCS § 10/3(1)(a) does not clearly parallel either § 1 or *§ 2* of the Sherman Act. On its face, this subsection prohibits agreements between competitors (neither provision of the Sherman Act contains this language).

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN10[] Judgments, Declaratory Judgments

A declaratory judgment is not appropriate as a means of avoiding anticipated future difficulties.

Counsel: [1]** For Gregory Hackman, doing business as Gregory Hackman Realtors, Gregory Hackman Realtors Inc, an Illinois corporation, Plaintiffs: David G. Sigale, LEAD ATTORNEY, Law Firm of David G. Sigale, P.C., Lisle , IL.

For Dickerson Realtors Inc, an Illinois corporation, doing business as Dickerson-Neiman Realtors, Ray Young, Michael Dunn, Frank Wehrstein, Frank Sheley, Mary Westin, Defendants: Adam S Long, Barrick, Switzer, Long, Balsley & Van Evera, Rockford , IL; Jason H. Rock, Richard K. Van Evera, Langhenry, Gillen, Lundquist & Johnson, LLC, Rockford , IL; Robert C. Pottinger, Barrick Switzer et al, Rockford , IL.

For Whitehead Inc, an Illinois corporation, doing business as, Whitehead Realtors, Defendant: Ian K Linnabary, Reno & Zahm LLP, Rockford , IL.

For R Crosby Incorporated, an Illinois corporation, doing business as Prudential Crosby Realtors, Jessica Licary, Defendants: Edward M. Maher, Lori E McGirk, Guyer & Enichen, P.C., Rockford , IL.

For McKiski-Lewis Inc, an Illinois corporation, doing business as Tom McKiski Realtors, Defendant: James E. Stevens, LEAD ATTORNEY, Tyler Alan Moore, Barrick, Switzer, Long, Balsley & Van Evera, Rockford , IL; Richard K. Van Evera, Langhenry, Gillen, **[**2]** Lundquist & Johnson, LLC, Rockford , IL.

For Lori Reavis, Defendant: Amy Lynn Silvestri, LEAD ATTORNEY, Silvestri Law Office, Rockford , IL.

For Melissa Smith, Defendant: Adam S Long, Barrick, Switzer, Long, Balsley & Van Evera, Rockford , IL.

For Diane Parvin, Defendant: Donald Quirk Manning, LEAD ATTORNEY, Jeffrey P Orduno, McGreevy Williams, P.C., Rockford , IL.

For Rockford Area Association Of Realtors, Illinois Association of Realtors, Defendants: David M Schultz, LEAD ATTORNEY, Clifford E. Yuknis, Hinshaw & Culbertson, Chicago , IL; John Paul Ryan, Hinshaw & Culbertson LLP, Chicago , IL; Thomas H Boswell, Hinshaw & Culbertson, Rockford , IL.

For Terri Hall, Defendant: John Paul Ryan, Hinshaw & Culbertson LLP, Chicago , IL.

For Larry Petry, Defendant: James E. Stevens, Tyler Alan Moore, LEAD ATTORNEYS, Barrick, Switzer, Long, Balsley & Van Evera, Rockford , IL; Richard K. Van Evera, Langhenry, Gillen, Lundquist & Johnson, LLC, Rockford , IL.

Judges: Elaine E. Bucklo, United States District Judge.

Opinion by: Elaine E. Bucklo

Opinion

[*877] **MEMORANDUM OPINION AND ORDER**

Plaintiffs Gregory Hackman d/b/a Gregory Hackman Realtors and Gregory Hackman Realtors, Inc. (collectively, "Hackman"), have filed a second amended complaint **[**3]** seeking to cure the pleading deficiencies I found in previous versions of the complaint. *See Hackman v. Dickerson Realtors, Inc., 520 F.Supp.2d 954 (N.D. Ill. 2007)* ("*Hackman I*") and *Hackman v. Dickerson Realtors, Inc., 557 F.Supp.2d 938 (N.D. Ill. 2008)* ("*Hackman II*"). Several defendants have filed motions to dismiss the newest version of the complaint. I resolve these motions as discussed below.

I.

This opinion assumes general familiarity with the facts set forth in my earlier opinions. Plaintiffs are real estate concerns doing business in the Rockford, Illinois area. Defendants are other local real estate agents and agencies and two professional associations: the Rockford Area Association of Realtors ("RAAR") and the Illinois Association of Realtors ("IAR"). Plaintiffs allege an anticompetitive scheme by defendants to drive plaintiffs out of the local real estate market in retaliation for plaintiffs' offering their clients a lower commission rate than the "going" rate offered by the agent and agency defendants. [1]

Like the previous two complaints, the second amended complaint sets forth six counts: Counts I and II allege, respectively, federal and state antitrust violations against numerous defendants. Count III seeks a temporary injunction against RAAR and IAR to stop an ethics hearing against Hackman. Count IV seeks a permanent injunction against RAAR and IAR concerning the same ethics proceedings, as well as a declaration that RAAR and IAR violated their internal procedures in handling these proceedings. Count V alleges defamation by several defendants and is not at issue in the pending motions. Count VI alleges tortious interference with business expectancy and contract.

Now before me are the following motions: defendant Hall's motion to dismiss Counts I, II, and VI; a joint motion by defendants RAAR and IAR to dismiss Counts I-IV and VI [2]; defendant Sheley's **[*878]** motion to dismiss Counts I, II, and VI; defendant Young's motion to dismiss Counts I and II; and defendant Westin's **[**5]** motion to dismiss Counts I, II, and VI.

The standards by which I must judge the sufficiency of the second amended complaint against the challenges raised by these motions is by now familiar: First, ***HN1***[] I must accept all well-pleaded facts as true. *Thompson v. Illinois Dep't of Prof'l Regulation, 300 F.3d 750, 753 (7th Cir. 2002)*. Second, I must view the allegations in the light most favorable to plaintiffs. *Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987)*. Dismissal of a claim is proper only if plaintiffs have not, at minimum, made enough factual allegations to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)* (citations omitted). Nevertheless, "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'" *Id., quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L. Ed. 2d 90 (1974))*.

II. Hall's motion and RAAR/IAR's joint motion

---

[1] Plaintiffs assert that the "going" rate is six or seven percent on pre-existing properties, while plaintiffs offer five percent on such properties. As discussed in my previous **[**4]** opinions, other realtors are affected by Hackman's rate because under the Multiple Listings Service ("MLS") rules, the buyer's and seller's agents typically split equally the commission earned on a sale. *See Hackman I, at 957*.

[2] Only Counts III and IV are asserted against IAR.

Terrie Hall was President of RAAR at times relevant to this action, and the parties do not dispute that she acted as an agent of RAAR with respect to all conduct attributed to her **[**6]** in the second amended complaint. Accordingly, my discussion below of Counts I, II, and VI, which are asserted against Hall and RAAR, applies to both motions to the extent they seek dismissal of those counts.

A. Count I

Count I asserts violation of the Sherman Act, *15 U.S.C. §§ 1* & *2*. As I held in *Hackman I*, ***HN2***[] "'A successful claim under *Section 1* of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.'" *Hackman I, at 963*, *quoting* *Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993))*. Hall and RAAR contend that the plaintiffs fail to allege the first of these elements, since the second amended complaint does not assert enough factual material to suggest plausibly that Hall knowingly participated in any illegal agreement. I disagree.

In *Twombly,* the Supreme Court held that ***HN3***[] to state a claim under *§ 1* of the Sherman Act, a complaint must set forth "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 127 S.Ct. at 1966*. In *Hackman II,* I dismissed plaintiffs' claim under *§ 1* of the Sherman Act **[**7]** because the allegations in the first amended complaint:

> fail to allege facts from which it could be inferred that RAAR reached an anticompetitive agreement with the other defendants. That is, I do not find, based on the allegations, that any agent acting on behalf or RAAR is alleged to have 'had a conscious commitment to a common scheme designed to achieve an unlawful objective' as required under *Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)*.

Hackman II, at 946. The second amended complaint, however, has overcome this defect. In particular, plaintiffs' allegations in PP 43 and 45 of their newest complaint assert that Hall had knowledge of the boycott pursued by the agency defendants, and that she engaged conduct that reasonably can be interpreted as furthering the alleged anticompetitive agreement. In P 43, plaintiffs allege that Hall was present for, and participated in, a late-2004 conversation at a broker's meeting hosted by RAAR, in which the agency defendants allegedly agreed not to do business with **[*879]** Hackman because of his lower commission rate. [3] In P 45, plaintiffs refer to a November 18, 2005 conversation between Hall and a Vice **[**8]** President of IAR, in which Hall and the IAR Vice President allegedly conspired to influence negatively the outcome of actions pending against plaintiffs. [4]

These allegations belie Hall's argument that the second amended complaint does not allege sufficient facts from which to infer that Hall was aware of, or agreed to, an illegal agreement. Hall's characterization of these allegations as "conclusory" and "contradictory" are unpersuasive. The allegations identify specific conversations that took place on specific (or reasonably specific) dates between Hall and one or more co-defendants. They also allege the general substance of these conversations, which, if presumed true, plausibly supports an inference of Hall's agreement with an anticompetitive scheme.

The fundamental defect of plaintiffs' earlier allegations against Hall and RAAR was that they did not allege, or **[**9]** even suggest, that Hall was aware of the agency boycott, so her conduct could not reasonably be construed as being in furtherance of that boycott. *See* *Hackman II, at 946*. The present complaint overcomes this defect, and it casts the remaining allegations against Hall in a new light.

Hall's argument that plaintiffs' allegations "do not plausibly exclude the possibility of independent action" is unavailing because turns the applicable standard on its head.***HN4***[] Plaintiffs are not required, at the pleading

---

[3] Plaintiffs allege in P 26 that Hall was also present for a similar conversation in late 1999, but these allegations are less specific.

[4] I understand from the allegations as a whole that these actions are related to the alleged illegal boycott, and that RAAR exercised some adjudicatory function with respect to these actions.

stage, to exclude every plausible interpretation of the facts that does not support their theory of liability. On the contrary, they need only assert "plausible grounds to infer" that an illegal agreement was made to state a claim based on *§ 1* of the Sherman Act. *Twombly, at 1965*. The second amended complaint achieves this. Plaintiffs have now sufficiently pleaded that Hall "had a conscious commitment to a common scheme" to coerce plaintiffs, using anticompetitive tactics, into raising their commission rates.

Plaintiffs' claim under *§ 2* of the Sherman Act is another story. ***HN5***[] *Section 2* of the Sherman Act provides that it is unlawful to "monopolize, or attempt to monopolize, or combine or conspire **[**10]** with any other person or persons, to monopolize" interstate trade. *15 U.S.C.A. § 2*. In *Hackman II,* I observed that "nowhere do plaintiffs allege that Dickerson (or any other defendant) exercised, attempted to exercise, or conspired to exercise monopoly power. The interpretation that the amended complaint asserts a Sherman *Section 2* claim is based on a particularly generous reading of plaintiffs' allegations." *Hackman II, at 947, n. 8*. Nevertheless, I analyzed plaintiffs' claim against Hall and RAAR as alleging their participation in a conspiracy to monopolize, and I will do so again here.

HN6[] To prove that Hall and RAAR conspired to monopolize, plaintiffs must show: "1) the existence of a combination or conspiracy, 2) overt acts in furtherance of the conspiracy, 3) an effect upon a substantial amount of interstate commerce and 4) the existence of specific intent to monopolize." *Hackman I, at 964* (*quoting* *Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d 532, 540-41 (7th Cir. 1986))*. In *Hackman II,* I dismissed plaintiffs' Sherman *§ 2* claim against Hall and RAAR because the first amended complaint did not allege "sufficient facts from which to infer that…Hall, or RAAR had an 'intent **[**11]** and **[*880]** purpose' to exercise monopoly power." [5] *Hackman II, 557 F.Supp.2d, at 947* (*quoting* *American Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S.Ct. 1125, 90 L. Ed. 1575 (1946))*. The same can be said of the second amended complaint.

The second amended complaint alleges--as did the previous complaints--that Dickerson (one of the agency defendants) "controls nearly 50% of the listings in the relevant area," and that Hall advised a Dickerson agent to send Hackman an allegedly anticompetitive letter. Even construing these allegations as asserting that Hall formed an anticompetitive agreement with a dominant market player, they fall short of alleging that any of the defendants had a specific intent to monopolize as required by *§ 2*. *See* *U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 846, 84 L. Ed 1129 at n. 59 (1940)* (price-fixing agreements that violate *§ 1* may or may **[**12]** not amount to unlawful monopolies under *§ 2*, since a *§ 2* violation requires proof of "an intent and a power" to monopolize, in addition to the existence of a "contract, combination or conspiracy" in violation of *§ 1*).

In any event, plaintiffs' *§ 2* claim against Hall and RAAR suffers from an additional flaw: neither Hall nor RAAR was a competitor in the Rockford area real estate market. Hall argues that a defendant cannot be found liable for conspiracy to monopolize a market in which it does not compete, citing several cases for this proposition: [6] *Aquatherm Industries, Inc., v. Florida Power & Light Co., 145 F.3d 1258, 1262 n. 4 (11th Cir. 1992)* ("no authority exists holding a defendant can conspire to monopolize a market in which it does not compete"); *Goodloe v. Nat'l Wholesale Co., Inc., No. 03 C 7176, 2004 U.S. Dist. LEXIS 13630, 2004 WL 1631728, at *6 (N.D. Ill., July 19, 2004)*(*citing Aquatherm*); and *Spanish Broadcasting Systems, Inc., v. Clear Channel Communications, Inc., 242 F.Supp.2d 1350, 1364 (S.D. Fla. 2003)*(same). Plaintiffs do not respond to this argument. Indeed, the entirety of their opposition to Hall's and RAAR's motions as to Count I focuses on their Sherman § 1 claim.

For the foregoing reasons, I grant Hall's and RAAR's motions to dismiss Count I to the extent that count asserts a violation of *§ 2* of the Sherman Act and otherwise deny the motions as to that count. Plaintiffs' claim under *§ 2* of the Sherman Act is dismissed with prejudice.

B. Count II

---

[5] In *Hackman I,* I dismissed this claim against RAAR (it was not then asserted against Hall) on the ground that the original complaint failed to allege that RAAR "agreed or conspired with other defendants to monopolize the market, only that other defendants used their position in RAAR to obtain a monopoly." *Hackman I, 520 F.Supp.2d, at 965*.

[6] Oddly, RAAR does not raise **[**13]** this argument, but I find it applicable to RAAR nevertheless.

My analysis of Count II against Hall and RAAR largely parallels my analysis of Count I. Count II of the amended complaint asserts violations of the Illinois Antitrust Act (the "Illinois Act") *740 ILCS § 10/3*, by Hall, RAAR, and other defendants. ***HN7***[] The Illinois Act provides, "when the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this act." *740 ILCS § 10/11*. Plaintiffs allege that Hall and RAAR (among others) violated *Sections 3(1)(a)*, *3(2)*, and *3(3)* of the Illinois Act. *Section 3(2)* is clearly similar to *§ 1* of the Sherman Act, while *Section 3(3)* is similar to *§ 2* of the federal statute. [7] **[*881]** Accordingly, I find that plaintiffs have stated a claim against Hall and RAAR under *§ 3(2)* of the Illinois Act, **[**14]** [8] but not under *§ 3(3)*.

HN9[] *Section 3(1)(a)* does not clearly parallel either *§ 1* or *§ 2* of the Sherman Act. On its face, **[**15]** this subsection prohibits agreements *between competitors* (neither provision of the Sherman Act contains this language). *See* *People ex rel. Scott v. Convenient Food Mart, Inc., 21 Ill.App.3d 97, 315 N.E.2d 124 (Ill.App.Ct. 1974)* ("The purpose of *[Section 3(1)(a)*] is to prevent Competitors from joining forces to fix prices.") Plaintiffs do not allege, however, that either Hall or RAAR is a competitor of Hackman.

For the foregoing reasons, Hall's and RAAR's motions are granted to the extent they seek dismissal of plaintiffs' claims under *Sections 3(1)(a)* and *3(3)* of the Illinois Act. Those claims are dismissed with prejudice. Count II survives against Hall and RAAR only to the extent it asserts a violation of *Section 3(2)* of the Illinois Act.

C. Counts III and IV (against RAAR and IAR)

In these counts, plaintiffs seek temporary and permanent injunctive relief against RAAR and IAR to prevent them from adjudicating one or more (it is not clear) ethics complaints allegedly pending against Hackman. Plaintiffs also seek a declaratory judgment that the manner in which RAAR and IAR have handled ethics complaints against Hackman violates these organizations' internal standards set forth in the Code **[**16]** of Ethics and Arbitration Manual of the National Association of Realtors (the "Manual").

I have twice dismissed these claims for lack of subject matter jurisdiction on the ground that plaintiffs did not sufficiently plead any connection between the alleged anticompetitive agreement and RAAR's or IAR's alleged mishandling of ethics complaints against Hackman. The second amended complaint, even read in the light most favorable to plaintiffs, does not overcome this defect as to IAR.

Plaintiffs allege that IAR improperly assumed jurisdiction of an ethics complaint filed against Hackman, and that IAR "is planning to schedule an ethics hearing at an unknown future date." Plaintiffs do not allege, however, that IAR was aware of, agreed with, supported, or encouraged any of the conduct giving rise to plaintiffs' federal claims. Notably, IAR is absent from plaintiffs' antitrust claims. Although the second amended complaint asserts that *Hall* was aware of the anticompetitive agreement when she allegedly discussed "fixing" the outcome of actions against

---

[7] The Illinois Act provides:

> ***HN8***[] *§ 3*. Every person shall be deemed to have committed a violation of this Act who shall:
>
> (1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:
>
> a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;
>
> . . .
>
> (2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or
>
> (3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce.

[8] I previously rejected RAAR's argument that it is not subject to liability under *Section 3(2)* of the Illinois Act based on its non-profit status, *Hackman I, at 966*, and I reject it again here.

plaintiffs with an IAR vice president, there are no factual allegations to suggest that *IAR* was a knowing participant in the alleged scheme. It **[**17]** is true that P 45 of the amended complaint states that Hall "conspired" with IAR's vice president; but that term is without any substantive content as to IAR. For these reasons, I **[*882]** conclude for a third time that I lack jurisdiction to hear plaintiffs' claims against IAR.

Counts III and IV against RAAR fail for other reasons. To begin with, plaintiffs plead themselves out of injunctive relief against RAAR with the allegation that IAR, not RAAR, now has (and has had since August 1, 2006) jurisdiction over the ethics proceedings allegedly pending against Hackman. Any action to prevent *RAAR* from adjudicating those proceedings is moot.

Plaintiffs' claim for declaratory relief also fails because plaintiffs have not alleged any actual controversy with RAAR. *See* *SBL Associates v. Village of Elk Grove, 247 Ill.App.3d 25, 617 N.E.2d 178, 186 Ill. Dec. 939 (Ill.App.Ct. 1993)*("actual controversy" required for claim under state Declaratory Judgment Act) [9]. Plaintiffs' objection to RAAR's transfer of the ethics proceedings to IAR is that an adverse finding by IAR could "potentially" subject Hackman to statewide, rather than merely local, censure. But ***HN10***[] a declaratory judgment is not appropriate as a means of avoiding "anticipated **[**18]** future difficulties." *Weber v. St. Paul Fire & Marine Ins. Co., 251 Ill.App.3d 371, 374 622 N.E.2d 66, 190 Ill. Dec. 656 (Ill.App.Ct. 1993)*; *see also* *Wisconsin Central, Ltd. v. Shannon, 539 F.3d 751, 759 (7th Cir. 2008)* (claim for declaratory relief requires "sufficient immediacy and reality").

Although plaintiffs dispute the propriety, under the Manual, of RAAR's transfer of the ethics proceedings, they allege no present violation of any legally cognizable interest based on the transfer. [10] Moreover, the only injury plaintiffs allege is entirely speculative: that they could "potentially" be subject to an adverse ruling by IAR at some point in the future. Furthermore, as noted above, there is no factual basis in the second amended complaint to suggest that an adverse ruling by IAR would be **[**19]** unfair to plaintiffs, since they do not assert that IAR participated in, or even knew about, the alleged anticompetitive scheme against Hackman. Finally, even assuming that a hypothetical adverse ruling by IAR would be unfair to Hackman in a way that violates some legally cognizable interest, any injury to plaintiffs would be attributable to IAR, not to RAAR.

For the foregoing reasons, I grant RAAR and IAR's motions to dismiss Counts III and IV.

D. Count VI

In Count VI, plaintiffs allege tortious interference with business expectancy and tortious interference with contract. In *Hackman II,* I dismissed Count VI against Hall and RAAR on the ground that the misconduct attributed to them lacked "a sufficient causal link with the **[**20]** injury claimed." *Hackman II, 557 F.Supp.2d., at 951*. Plaintiffs have overcome this defect.

Plaintiffs assert that Hall advised certain Hackman clients to file a complaint with the Office of Banks and Real Estate **[*883]** ("OBRE") in order to force Hackman to release them from their contract. According to the second amended complaint, Hall knew that Hackman had not engaged in wrongful conduct but advised Hackman's clients that because the cost of defending a complaint would exceed the commission he would earn on the sale of their property, Hackman would release them from their contract if they filed a complaint. Plaintiffs further allege that a complaint was filed, and that Hackman released the clients as a result.

---

[9] Plaintiffs cite only state authority in support of their claim for declaratory judgment. Regardless of whether state or federal law governs this claim, "a case of actual controversy" is required by the Constitution. *See* *Wisconsin Central, Ltd. V. Shannon 539 F.3d 751, 759 (7th Cir. 2008)* (ability to seek preemptive relief under Declaratory Judgment Act, *28 U.S.C. § 2201*, does not vitiate constitutional requirement).

[10] I note in passing that plaintiffs do not allege that the Manual creates any individual rights at all, or that it provides an individual right of judicial action to enforce its provisions. In fact, there appears to be merit to RAAR and IAR's claim that plaintiffs waived their right to judicial recourse for alleged non-compliance with the Manual, absent a claim that wilful or wanton conduct by RAAR or IAR resulted in a violation of some legally cognizable interest.

The foregoing allegations are sufficient to state a claim for tortious interference with contract. While it is true that plaintiffs do not expressly allege that Hackman's clients breached their contract, a reasonable interpretation of the claim is that the clients breached their duty of good faith and fair dealing by filing an OBRE complaint they knew to be groundless as a means of strong-arming Hackman into releasing them from their contractual obligations. [11]

Hall asserts that professional privilege immunizes her from liability for this claim. She argues that privilege exists if the defendant acted in good faith to protect an interest or uphold a duty. Because the clear implication of plaintiffs' allegations is that Hall was not acting in good faith, I reject this argument.

For the foregoing reasons, Hall's and RAAR's motions to dismiss Count VI are denied.

III. Sheley's Motion

At times relevant to this action, Frank Sheley was a real estate agent employed by defendant Dickerson. In *Hackman II, I* granted Sheley's motion to dismiss Counts I, II, and VI. Plaintiffs reassert these counts in their second amended complaint, and Sheley again moves to dismiss. His motion is granted.

A. Counts I and II

Plaintiffs claims against Sheley revolve around one particular transaction. Plaintiffs claim that after Sheley's clients declined an offer by Hackman's clients, Hackman had to insist before Sheley would present a counteroffer. Plaintiffs also allege that Sheley advised his own clients not **[**22]** to accept Hackman's offer because "Hackman's deals never close." The transaction was nevertheless consummated.

In *Hackman II,* I held that the factual matter set forth in the first amended complaint did not establish a reasonable likelihood that Sheley reached an anticompetitive agreement with any other defendant. *Hackman II, 557 F.Supp.2d at 953*. The second amended complaint still fails in this respect. The only novelty of the latest complaint, insofar as concerns plaintiffs' antitrust claims against Sheley, is that plaintiffs now state that Sheley "presumably received" a directive from defendant Dickerson not to do business with plaintiffs. This new allegation does not alter my earlier analysis.

Even assuming that the new allegation of Sheley's presumed receipt of this "directive" is sufficient to plead that Sheley knew about the anticompetitive agreement, the absence of such allegations in the first amended complaint was only part of the problem I identified in *Hackman II.* Equally important was the fact that "the very facts pled--that a transaction was completed between Hackman's and Sheley's clients--suggest that Sheley had not agreed to refuse to deal with Hackman." **[*884]** *Id.* Plaintiffs **[**23]** have not overcome this defect.

Plaintiffs argue that the allegations against Sheley are substantially identical to the allegations against defendant Licary, which I held sufficient in *Hackman II.* As I noted in that opinion, the sufficiency of plaintiffs' antitrust claims against Licary was "a closer call" than similar claims against Licary's employer. Nevertheless, I found that plaintiffs had pled sufficient factual material from which to infer Licary's agreement with and participation in the agency boycott. In particular, plaintiffs alleged that Licary was aware of the "vendetta" against Hackman, and that she had "caused" another real estate agent to cancel a deal with Hackman by telling the other agent that Hackman was dishonest and maligning his business integrity. Although both Sheley and Licary are alleged to have defamed Hackman, only Licary is alleged to have defamed Hackman to *another realtor,* who then declined to do business with Hackman. This allegation supports a claim of concerted action in a way that the allegations against Sheley do not.

For the foregoing reasons, Sheley's motion to dismiss Counts I and II is granted. These counts against him are dismissed with prejudice.

B. **[**24]** Count VI

---

[11] Because I find these **[**21]** allegations sufficient to state plaintiffs' claim against Hall and RAAR, I need not address whether any of the other allegations against them also supports their claim.

In *Hackman II,* I held that Count VI against Sheley was "patently untenable" in several respects. *Hackman II, at 953*. The only argument plaintiffs now raise in opposition to Sheley's motion is that because their latest allegations suffice to support antitrust claims against Sheley, they also support plaintiffs' tortious interference claim. Having rejected, above, the premise of plaintiffs' argument, I need not linger on its merits. Sheley's motion to dismiss Count VI is granted. Count VI against Sheley is dismissed with prejudice.

IV. Young's Motion

At times relevant to this action, Ray Young was a real estate agent employed by defendant Dickerson. Young moves to dismiss Counts I and II.

Plaintiffs' allegations against Young are similar to those against Sheley. In particular, plaintiffs allege that Young defamed Hackman to one of Hackman's clients, who then left Hackman and became Young's client. Plaintiffs further allege that Young, like Sheley, "presumably received" the directive from defendant Dickerson not to do business with Hackman. Plaintiffs do not allege that Young declined to do business with Hackman. Instead, plaintiffs again rely on a comparison to their allegations **[**25]** against Licary. This comparison fails for the same reasons discussed above in relation to Sheley's motion. Young's motion is granted, and Counts I and II against him are dismissed with prejudice.

V. Westin's Motion

At all relevant times, Mary Westin was a real estate agent and manager of defendant Dickerson. Plaintiffs allege that she said to a Hackman agent, "you seem to be a smart guy, why are you working for Hackman?" and made other unspecified derogatory remarks about Hackman. Plaintiffs further allege that the Hackman agent in question later quit Hackman's employ. Westin moves to dismiss Counts I, II and VI against her.

The only new element of plaintiffs' allegations against Westin is that she, like Sheley and Young, "presumably received" the directive not to do business with Hackman. The second amended complaint does not allege that Westin declined to do business with Hackman. Counts I and II against Westin fail for the same reasons they fail against Sheley and Young.

[*885] Count VI also fails for the very reasons I articulated in *Hackman II:*

> The allegations of the amended complaint directed to Westin are also insufficient to state a claim for tortious interference with contract. As defendant **[**26]** Westin correctly argues, to state a claim adequately, plaintiffs must allege not only that Westin interfered with an existing contract, but that she committed some impropriety in doing so. *Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 485, 230 Ill.Dec. 229, 693 N.E.2d 358 (1998)*. I find that plaintiffs' allegations fail to meet this requirement.
> Plaintiffs' allegations can reasonably read to allege two types of wrongful conduct on Westin's part. The first relates to the antitrust allegations directed to Westin. Because those claims fail to plead that Westin participated in an anticompetitive scheme, they also do not support an inference of impropriety. Plaintiffs also allege that Westin made "false and derogatory statements" about Hackman. Although a reasonable interpretation of these allegations is that they support a defamation claim, plaintiffs notably do not include Westin in Count V for defamation. The remainder of plaintiffs' allegations of wrongful conduct by Westin, such as the attribution of an improper motive for her statements to Hackman's agent, are simply too speculative and conclusory to support their claim.

Hackman II, at 954.

For the foregoing reasons, Westin's motion **[**27]** is granted. Counts I, II, and VI against her are dismissed with prejudice.

VI.

To summarize the disposition of the motions discussed above:

Hall's motion is granted in part and denied in part. Count I is now limited to plaintiffs' claim under *§ 1* of the Sherman Act, while their claim under *§ 2* of the Sherman Act is dismissed with prejudice. Count II is limited to plaintiffs' claim under *Section 3(2)* of the Illinois Antitrust Act, while their claims under *Sections 3(1)(a)* and *3(3)* are dismissed with prejudice. Count VI survives.

RAAR and IAR's joint motion is granted in part and denied in part. Count I against RAAR is now limited to plaintiffs' claim under *§ 1* of the Sherman Act, while their claim under *§ 2* of the Sherman Act is dismissed with prejudice. Count II against RAAR is limited to plaintiffs' claim under *Section 3(2)* of the Illinois Antitrust Act, while their claims under *Sections 3(1)(a)* and *3(3)* are dismissed with prejudice. Counts III and IV are dismissed.

Sheley's motion is granted. Counts I, II and VI are dismissed with prejudice.

Young's motion is granted. Counts I and II are dismissed with prejudice.

Westin's motion is granted. Counts I, II and VI are dismissed with prejudice.

/s/ **[**28]** Elaine E. Bucklo

Elaine E. Bucklo

United States District Judge

Dated: January 23, 2009

DSM Desotech Inc. v. 3D Sys. Corp.

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

January 26, 2009, Decided; January 26, 2009, Filed

No. 08 CV 1531

Reporter

2009 U.S. Dist. LEXIS 5980 *; 2009-1 Trade Cas. (CCH) P76,485; 2009 WL 174989

DSM DESOTECH INC., Plaintiff, v. 3D SYSTEMS CORPORATION and 3D SYSTEMS, INC., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part DSM Desotech Inc. v. 3D Sys. Corp., 2011 U.S. Dist. LEXIS 3292 (N.D. Ill., Jan. 12, 2011)

Prior History: Dsm Desotech Inc. v. 3D Sys. Corp., 2008 U.S. Dist. LEXIS 87473 (N.D. Ill., Oct. 28, 2008)

Core Terms

resins, allegations, machines, customers, monopolization, antitrust, market power, motion to dismiss, tying arrangement, Sherman Act, competitors, monopoly power, anticompetitive, large-frame, purchasing, consumers, anti trust law, licensing, products, seller's, Counts, unreasonable restraint, relevant market, specific intent, market share, older, probability, expectancy, warranty, patent

Counsel: **[*1]** For DSM Desotech Inc., Plaintiff: Jeffrey Brandon Burgan, LEAD ATTORNEY, Bruce Michael Gagala, Lawrence Scott Beall, Leydig, Voit & Mayer, Ltd., Chicago, IL; Andrew Stanley Marovitz, Britt Marie Miller, Thomas Vangel Panoff, Mayer Brown LLP, Chicago, IL.

For 3D Systems Corporation, Defendant: Michael Sennett, LEAD ATTORNEY, Andrea L. Caron, Niloy Ray, Paula W. Render, Jones Day (CH), Chicago, IL; Jonathan A. David, Lerner David Littenberg Krumholz & Mentlik LLP, Westfield, NJ; Sidney David, Lerner, David, Littenberg, Krumholz and Mentlik, Westfield, NJ.

For 3D Systems, Inc., Defendant, Counter Claimant: Niloy Ray, Jones Day (CH), Chicago, IL.

For 3D Systems Corporation, Counter Claimant: Michael Sennett, LEAD ATTORNEY, Niloy Ray, Paula W. Render, Jones Day (CH), Chicago, IL; Jonathan A. David, Lerner David Littenberg Krumholz & Mentlik LLP, Westfield, NJ; Sidney David, Lerner, David, Littenberg, Krumholz and Mentlik, Westfield, NJ.

For DSM Desotech Inc., Counter Defendant: Jeffrey Brandon Burgan, LEAD ATTORNEY, Bruce Michael Gagala, Leydig, Voit & Mayer, Ltd., Chicago, IL; Andrew Stanley Marovitz, Britt Marie Miller, Thomas Vangel Panoff, Mayer Brown LLP, Chicago, IL.

Judges: JOAN HUMPHREY LEFKOW, **[*2]** United States District Judge.

Opinion by: JOAN HUMPHREY LEFKOW

Opinion

MEMORANDUM OPINION AND ORDER

This case arises out of an eight-count complaint filed by plaintiff, DSM Desotech, Inc. ("Desotech"), against defendants, 3D Systems Corporation and 3D Systems, Inc. (collectively, "3DS"), for violations of federal ***antitrust law***, state ***antitrust law***, state tort law, and federal patent law. Before the court is 3DS's motion to dismiss Counts I through VII of Desotech's complaint, the antitrust and state law claims, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. For the reasons set forth below, 3DS's motion to dismiss [# 29] will be granted in part and denied in part.

BACKGROUND

3DS is a manufacturer of large-frame stereolithography ("SL") machines. SL is a process by which a physical object, such as a model, is created layer by layer from liquid resin that is solidified into shape with a laser. Because the end product created by the SL process is dependent in large part on the quality and specifications of the resins used to create it, a substantial amount of research and development is devoted to the creation of new types of resins. Desotech is a leader in the SL resin market and the holder **[*3]** of two equipment patents allegedly covering the resin recoating technology used in eight of the SL machines produced and sold by 3DS. 3DS likewise produces resins that can be used in the machines it sells.

Desotech alleges that since 2007, 3DS has engaged in unlawful tying, in violation of section 1 of the Sherman Act, *15 U.S.C. § 1*, and section 3 of the Clayton Act, *15 U.S.C. § 14*, (Counts I and II) by conditioning the sale and maintenance of its large-frame SL machines on the purchase of 3DS's resins. According to the complaint, 3DS "has expressly refused to sell and service its most recent large-frame SL machine--the Viper Pro SLA System--unless customers exclusively purchase resin from 3DS." Am. Comp. P 5.

According to Desotech, 3DS has begun informing customers that only "licensed" or "approved" resins can be used in the Viper Pro, though 3DS neither told customers about the resin limitation at the time of sale nor informed competing resin suppliers about the requisite approval process. To enforce this mandate, 3DS has included in the Viper Pro a radio frequency identification, or "RFID," feature which, if activated by 3DS, will prevent the machine from working should customers **[*4]** attempt to use competing brands of resin. Although customers were aware that the RFID component existed, they allegedly did not know this feature could be used to preclude the use of competing resins that they may want to use. Furthermore, 3DS did not attempt to activate the RFID feature until recent software updates were made to machines already purchased. Regarding those Viper Pro machines in which 3DS has not already activated the RFID feature, 3DS has told its customers that it soon intends to do so. 3DS has warned customers that if they refuse to allow the RFID feature to be activated or if they continue to use unapproved resin, the warranty supplied by 3DS at the time of purchase will be voided.

Desotech further alleges that although 3DS used to make several other large-frame SL machines that do not have an RFID component, 3DS has stopped manufacturing those models and, moreover, is attempting to systematically eliminate them from the market. For example, 3DS has allegedly reached an agreement with a leading SL machinery maintenance contractor, National RP Support, Inc. ("National RP"), to stop servicing those older large-frame machines for which no contractual servicing obligation **[*5]** exists. Desotech also asserts that 3DS is removing existing large-frame SL machines from the market by offering substantial incentives to customers to trade-in old machines and purchase a Viper Pro.

Desotech alleges that in addition to unlawful tying, 3DS's contracting and licensing practices amount to an unlawful restraint of trade and attempted monopolization of the SL resin market in violation of sections 1 and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2* (Counts III and IV, respectively), and the Illinois Antitrust Act, *740 Ill. Comp. Stat. 10/3* (Count V).

Desotech's complaint further alleges that 3DS has made false, misleading, and disparaging statements to Desotech customers about the quality and fitness for use of Desotech's resins, in violation of the Illinois Uniform Deceptive Trade Practices Act, *815 Ill. Comp. Stat. 510/2(a)(7)-(8)*, and that 3DS has tortiously interfered with prospective economic advantages reasonably anticipated by Desotech, in violation of Illinois state law.

3DS moves to dismiss all of the antitrust and state law claims set forth in the complaint.

STANDARD OF REVIEW

Defendants bring their motion under *Rule 12(b)(6)* for failure to state a claim upon which relief **[*6]** may be granted. The Supreme Court recently addressed the proper application of the federal notice pleading standards, particularly in regard to antitrust actions, in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In *Twombly,* the Court "retire[d]" the frequently quoted language of *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly, 127 S. Ct. at 1968-69* ("The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."). Instead, at the pleading stage, there must be "allegations plausibly suggesting" an antitrust violation; the mere possibility of later "unearthing direct evidence" through discovery is not enough to preclude dismissal. *Twombly, 127 S. Ct. at 1966, 1968*.

The Seventh Circuit has explained that despite "some language that could **[*7]** be read to suggest otherwise, the Court in *Twombly* made clear that it did not, in fact, supplant the basic notice-pleading standard." *Tamayo v. Blagojevich, 526 F.3d 1074, 1083 (2008)*; *see also* *Twombly, 127 S. Ct. at 1973, n.14* (expressly disclaiming the establishment of "any 'heightened' pleading standard" or broadening of the scope of *Fed. R. Civ. P. 9*); *Lang v. TCF Nat'l Bank, 249 Fed. Appx. 464, 466-67 (7th Cir. 2007)* (noting that notice pleading remains the pleading standard). A plaintiff still must provide only "enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief." *Lang, 249 Fed. Appx. at 466* (internal quotation marks and ellipses omitted) (citing *EEOC v. Concentra Health Care Servs., Inc., 496 F.3d 773, 776-77 (7th Cir. 2007)* (citing *Twombly, 127 S. Ct. at 1964*)).

For complaints involving complex litigation--for example, antitrust or RICO claims--a fuller set of factual allegations may be necessary to show that plaintiff's claims are plausible. *Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797, 803 (7th Cir. 2008)*. **[*8]** Nevertheless, a plaintiff's complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*, sufficient to provide the defendant with "fair notice" of the claim and its basis. *Twombly, 127 S. Ct. at 1964*. In addressing a *rule 12(b)(6)* motion, the court construes the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations and drawing all reasonable inferences in her favor. *Tamayo, 526 F.3d at 1081*.

DISCUSSION

I. Tying Claims (Counts I and II)

Desotech has filed two counts against 3DS for unlawful tying, the first under § 1 of the Sherman Act (Count I) and the second under § 3 of the Clayton Act (Count II). Although some older cases state otherwise, the standards for adjudicating tying claims under the two statutes are now recognized to be the same. *Sheridan v. Marathon Petroleum Co., 530 F.3d 590, 592 (7th Cir. 2008)*. In a tying agreement, a seller conditions the sale of a product or service on the buyer's purchase of another product or service from, or by direction of, the seller. *Id. at 592*. Of course, every refusal to sell two products separately cannot **[*9]** be said to restrain competition. *Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 322 (7th Cir. 2006)*. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market. *D.O. McComb & Sons, Inc. v. Memory Gardens Mgmt. Corp., Inc., 736 F. Supp. 952, 957 (N.D. Ind. 1990)*.

The Supreme Court has established that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or would have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated on other grounds by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. Where such "forcing" is present, "competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* In order to establish the per se illegality of a tying arrangement, a plaintiff must demonstrate that **[*10]** (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a not insubstantial amount of interstate commerce is affected. *Reifert, 450 F.3d at 316 (7th Cir. 2006)*. In addition, the Seventh Circuit has held that "an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in." *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207-08 (7th Cir. 1985)*; *accord* *Reifert, 450 F.3d at 316*.

Defendants contend that Desotech's complaint fails to adequately allege the first three elements of an unlawful tying arrangement. Because the court agrees that Desotech did not adequately plead the third element--that the tying arrangement forecloses a substantial volume of commerce--the other elements need not be addressed at this time.

The ultimate flaw in Desotech's tying claim is its failure to allege the existence of a coerced tying arrangement on the part of 3DS. As the Supreme Court has **[*11]** explained, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product" he does not want. *Jefferson Parish, 466 U.S. at 12* (emphasis added). If the consumer remains free to buy the tying product without also buying the product to which it is ostensibly tied, then no coercion has occurred. *See* *id. at 12 n.6* (citing *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 n. 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. Even if the defendant attempts to induce consumers into purchasing both products he sells by offering the bundle at discount prices, he has not engaged in illegal tying so long as the consumer remains free to purchase each item separately. *See* *Schor v. Abbott Labs., 457 F.3d 608, 610 (7th Cir. 2006)* (drug manufacturer did not effect a tying arrangement when selling a patented drug in combination with another drug at a discount because patented drug was also available for sale separately). This is because ***antitrust law*** is only concerned with behavior that has "a substantial potential for impact on competition." *Jefferson Parish, 466 U.S. at 16*. Furthermore, **[*12]** "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***." *Id.*

Many circuits thus require plaintiffs alleging tying claims to show not only that a defendant has market power but also that the defendant has wielded such market power to force consumers to alter their purchasing choices. *See, e.g.,* *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 85 (D.C. Cir. 2001)*; *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1577 (11th Cir. 1991)*. Although the Seventh Circuit does not explicitly require evidence of coercion as an independent element of tying claims, Judge Wood has recognized that demonstrating foreclosure of competition in the tied product market--the third element of the Seventh Circuit's test--is essentially equivalent to the "coercion element" required by other circuits. *Reifert, 450 F.3d at 323* (Wood, J., concurring). After all, if the defendant has not forced consumers into the tying arrangement alleged, it can hardly be said that such arrangements have substantially affected interstate commerce to the detriment of those consumers.

Here, Desotech's **[*13]** complaint fails to adequately allege coercion on the part of 3DS. Although Desotech states that 3DS "expressly refuses to sell and service" its newest line of SL machines unless customers purchase their resin exclusively from 3DS, Am. Compl. P 5, Desotech's allegations regarding particular customers fail to support such a conclusion.

Desotech alleges that 3DS told two Desotech customers, Express Pattern and Dynacept, that they could not use newer Desotech resins in their Viper Pro machines. Desotech further alleges that 3DS told Dynacept that if it continued to use "non-approved" Desotech resins in its Viper Pro machines, 3DS would withhold maintenance service and void existing warranties. Am. Compl. P 63.

Although such actions on the part of 3DS might be considered a breach of warranty (or otherwise anticompetitive, as discussed in further detail below), such allegations do not amount to a tie-in. *See, e.g., Va. Panel Corp. v. MAC Panel Co., 133 F.3d 860, 870-71 (D.C. Cir. 1998)* ("[V]oiding a warranty on a product already sold, while possibly a breach of warranty, cannot be a tying arrangement because the purchaser is not deciding whether to buy a product."). To the extent Desotech **[*14]** complains that 3DS is tying the sale of its machine to its resins, such assertions cannot be supported by 3DS's actions towards Express Pattern and Dynacept, both of which had already purchased their Viper Pros at the time the alleged tie-in was executed. *See N. Pac. Ry., 356 U.S. at 5-6* ("For our purposes a tying arrangement may be defined as an agreement by a party to *sell one product but only on the condition* that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.") (emphasis added).

Furthermore, to the extent that 3DS alleges that service or maintenance of the machines is the tying market at issue for these consumers, [1] Desotech has failed to identify, much less adequately allege, a market for such service, as would be required in order to allege that 3DS has market power in the tying market. [2] *Cf.* Am. Compl. P 82 ("*Large-frame SL machines (i.e., the tying product)* and resins for those machines (i.e., the tied product) constitute separate and distinct products.") (emphasis added).

Nor are Desotech's tying allegations saved by its pleadings with respect to Tangible Express or AP Pronto ("APP"), two other Desotech customers. Desotech alleges that as part of a transaction in which Tangible Express purchased six Viper Pro machines from 3DS, those companies executed a memorandum of understanding that "expressly required Tangible Express to purchase all of its resin for the six Viper Pro machines directly from 3DS." [3] Am. Compl. P 68. While this allegation clearly alleges a contract of exclusive dealing between 3DS and Tangible Express, Desotech does not allege that 3DS required such exclusive **[*16]** dealing as a condition on the sale of its Viper Pro machines. Similarly, Desotech alleges that in a recent deal between 3DS and APP, "3DS required APP to trade-in an older SL machine for a Viper Pro and to purchase its resins exclusively from 3DS rather than Desotech." Am. Compl. P 70. Desotech once again failed, however, to allege that such exclusive dealing was a precondition to the availability of 3DS's new Viper Pro. [4] It could be consistent with lawful behavior on the part of 3DS if it won those exclusive contracts through aggressive selling techniques or discounts on its products. *See Waldo v. N. Am. Van Lines, Inc., 669 F. Supp. 722, 731 (W.D. Pa. 1987)* ("[S]imply characterizing an exclusive dealing arrangement as a tying arrangement does not necessarily make it one.") (citations omitted). Indeed, nowhere does Desotech allege that either of these customers is unhappy with its current resin sourcing arrangements.

The closest Desotech comes to an adequate allegation of coercion is in its assertions regarding the interaction between 3DS and Lockheed Martin ("Lockheed"), another Desotech customer. Desotech alleges that in mid-2007, Lockheed Martin informed 3DS that one of its SLA 500 machines, a predecessor to the new Viper Pro, stopped

---

[1] Although the complaint never explicitly identifies maintenance of large-frame SL machines as a relevant "tying market," **[*15]** it repeatedly alleges that 3DS "*condition[ed] the* sale and/or *maintenance* of its large-frame SL machines on the purchase of its own SL resins." Am. Compl. PP 80, 90, 94.

[2] The complaint suggests that there are at least a few third-party maintenance contractors who could provide service to Viper Pro owners independent of 3DS. While one such contractor has allegedly agreed with 3DS not to provide service to Viper Pro owners who use Desotech resins, the court is unable to assess a maintenance/resin tying claim absent further factual detail about the market for SL machine service.

[3] Although 3DS submitted along with its motion to dismiss a copy of the memorandum of understanding, the court finds Desotech's allegations inadequate even without consideration of the submitted exhibit and, therefore, will not consider it at this time.

[4] In its response **[*17]** brief, Desotech asserts that the complaint alleges that "AP Proto, Lockheed and Tangible Express were *required* to purchase their resins exclusively from 3DS as a condition to buying their Viper Pro machines." Pl.'s Resp. at 14 (emphasis in original). Desotech did not, however, include such an assertion in its amended complaint. Furthermore, even if that language had been included in the amended complaint, it is not clear that such a "conclusory allegation," without more factual specificity as to each of the three customers, would be sufficient under *Twombly, 127 S. Ct. at 1966*.

working. [5] Desotech further alleges that "[a]fter a significant amount of pressure from 3DS, including 3DS's refusal to sell the Viper Pro machine to Lockheed unless Lockheed agreed to purchase resins exclusively from 3DS and to stop purchasing resins from Desotech, Lockheed agreed to purchase **[*18]** a Viper Pro to replace its SLA 500 machine." Am. Compl. P 66. Desotech also alleges that Lockheed is unhappy about this arrangement and has expressed to Desotech its desire to use Desotech's resins rather than 3DS's.

With these allegations concerning Lockheed, Desotech has given 3DS notice of its claim and identified a particular set of events from which 3DS could begin to prepare a defense. Most importantly, Desotech alleges that Lockheed did not want to purchase 3DS's resins, but that Lockheed was nevertheless required to if it wanted to continue to purchase and use 3DS's SL machines. Such allegations form the cornerstone of a successful tying claim. Still, these particular allegations alone cannot carry Desotech's burden on this motion to dismiss. As the Supreme Court made clear in *Jefferson Parish,* "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***," *466 U.S. at 16*, and, furthermore, Desotech alleges that Lockheed purchased only a single **[*19]** Viper Pro machine.

Because Desotech has failed to sufficiently allege the existence of an illegal tying arrangement, Counts I and II of its complaint will be dismissed without prejudice.

II. Attempted Monopolization (Count IV)

Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*. Desotech alleges that 3DS has attempted to monopolize the SL resin market. To prove attempted monopolization, a plaintiff must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *accord* *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989)*; *Nat'l Black Expo v. Clear Channel Broad., Inc., 2007 U.S. Dist. LEXIS 9783, 2007 WL 495307, at *8 (N.D. Ill. Feb. 8, 2007)*.

A. Dangerous Probability of Success

The "dangerous probability" **[*20]** element requires allegations that 3DS had sufficient market power to threaten actual monopolization within the relevant market. *Indiana Grocery, 864 F.2d at 1413*. As discussed below, Desotech's complaint sufficiently alleges that 3DS poses a dangerous probability of acquiring monopoly power in the SL resin market.

1. Market Power

Desotech alleges that 3DS has the market power to threaten actual monopolization. Specifically, Desotech alleges that 3DS has a "present and growing market share of over 50%" of the SL resin market, making it the single largest supplier. Am. Compl. P 9. Although 3DS cites *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995)*, for the proposition that "[f]ifty percent is below any accepted benchmark for inferring monopoly power from market share," 3DS has conflated the terms *monopoly* power and *market* power. Although the terms are synonymous in most respects and are sometimes used interchangeably, *see, e.g., Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 950 n.15 (9th Cir. 1996)*, "monopoly power" generally denotes some higher threshold of market power than does the term "market power" **[*21]** alone. [6]

---

[5] According to the complaint, 3DS has stopped manufacturing its older lines of SL machines, including the SLA 500.

See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) ("Monopoly power under *§ 2* requires, of course, something greater than market power under *§ 1*."); *Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 894 (10th Cir. 1991)* ("Monopoly power is also commonly thought of as substantial market power.").

With respect to a claim for attempted monopolization, a plaintiff need only show that 3DS currently has *market* power and that such *market* power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked. *See Star Fuel Marts, LLC v. Sam's East, Inc., 362 F.3d 639, 648 n.3 (10th Cir. 2004)* ("[A]n attempted monopolization claim requires . . . that the defendant have sufficient market **[*22]** power such that there is a 'dangerous probability' that an attempt to achieve monopoly power will succeed.") (internal quotation marks omitted) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 251, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. In *Lektro-Vend,* the court held that the defendant's alleged practices "raise[d] a dangerous propensity for creation of an actual monopoly." *Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527, 534 (C.D. Ill. 1975)*, *aff'd 545 F.2d 1050 (7th Cir. 1976)*, *rev'd on other grounds, 433 U.S. 623, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977)*. In reaching this determination, the court emphasized that the defendant maintained a "significant market share," "most probably over 20%." *Id.* The court also observed that "the number of competitors [had] been steadily declining" within the relevant market. *Id.; see also Hardy v. City Optical Inc., 39 F.3d 765, 767 (7th Cir. 1994)* (noting in a related context that 30% is "the minimum market share from which the market power required to be shown at the threshold of a tying case can be inferred").

Here, Desotech similarly alleges that since 3DS began the alleged unlawful behavior in mid-2007, 3DS's **[*23]** market share has been increasing and, consequently, the shares of Desotech and other resin dealers steadily decreasing. At this stage of the litigation, absent the aid of discovery, Desotech need not allege in exact numbers the percentage increase of 3DS's market share. Furthermore, "the Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly. It is the attempt which is the offense." *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 270 (7th Cir. 1981)*. As alleged by Desotech, the market for SL resin is highly concentrated, with 95% of the market represented by three suppliers--3DS (50%), Desotech (35%), and Huntsman (10%). If Desotech were forced out of the market, 3DS's market power would likely increase substantially.

3DS maintains that Desotech's allegations of market power are nevertheless inadequate because market share alone is insufficient to indicate market power. Even if 3DS's market share alone is an insufficient indicator of its capacity to control prices and exclude competitors, however, consideration of other factors relevant to the dangerous probability analysis--"the alleged offender's ability to **[*24]** achieve the forbidden result, his intent, and the nature of his overt actions," *Lektro-Vend, 660 F.2d at 271* (internal citations omitted)--indicate that Desotech has adequately alleged the dangerous probability element of its attempted monopolization claim.

For example, 3DS has allegedly leveraged its monopoly power in the market for large-frame SL machines to exclude competitors from the resin market by outfitting its machines with an RFID feature that will render the machine inoperable should the operator attempt to use unapproved resins. Further allegations indicate that 3DS has attempted to systematically remove from the market (or prevent from being serviced) older SL machines that lack the RFID feature. Such actions would undoubtedly increase 3DS's ability to control prices and exclude competitors in the SL resin market. Although 3DS asserts that it has instituted a licensing and qualification process by which competing resin producers might remain active, Desotech has plausibly alleged that the asserted licensing process is in fact a sham.

---

[6] Whereas the Seventh Circuit has long been comfortable defining monopoly power in simple terms--e.g., "power over price" or "the ability to cut back the market's total output and so raise prices," *Indiana Grocery, 864 F.2d at 1414*--it commented in a recent opinion that "'market power' is key, but its meaning requires elucidation." *Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 594 (7th Cir. 2008)*.

2. Relevant Market

The relevant market is defined as "the market area in which the seller operates, and to which the purchasers can practicably **[*25]** turn for supplies." *Nat'l Black Expo, 2007 U.S. Dist. LEXIS 9783, 2007 WL 495307, at *8* (quoting *Tampa Elec. Co. v. Nashville Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. The relevant market contains both product and geographical components. *Spectrum Sports, 506 U.S. at 459*. The definition of the relevant market is determined based on "the nature of the commercial entities involved and by the nature of the competition that they face." *United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970)*.

Desotech defines the relevant product market as "resins used in [large-frame SL] machines" and the relevant geographic market as "the United States." Am. Compl. PP 26, 27. As market definitions are questions of fact ordinarily determined at trial, *L&W/Lindco Prods. v. Pure Asphalt Co., 979 F. Supp. 632, 638 (N.D. Ill. 1997)*, Desotech has pled a relevant market sufficient to survive a motion to dismiss. *See Todd v. Exxon Corp., 275 F.3d 191, 203 (2d Cir. 2001)* ("At [the pleading] stage, it is sufficient that plaintiff has alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology **[*26]** courts prescribe to define a market for antitrust purposes.").

B. Predatory or Anticompetitive Conduct

The Supreme Court has characterized this element of the attempted monopolization offense as "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948))*. Predatory conduct has been broadly defined as conduct "that has no legitimate business justification other than to destroy or damage competition." *Great Escape, 791 F.2d at 541*. The Seventh Circuit has stated more generally, however, that when it comes to liability under *§ 2* of the Sherman Act, "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986)* (citing *Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986))*.

The conduct alleged by Desotech is plainly anticompetitive and intended to foreclose **[*27]** competition. 3DS cites Judge Posner's antitrust textbook for the proposition that "promoting customer satisfaction by restricting the supplies that can be used in a seller's equipment to those that meet the seller's qualification is procompetitive." Defs.' Memo. at 24 (citing RICHARD A. POSNER, ***ANTITRUST LAW*** 201 (2d ed. 2001)). But the allegations set forth in the complaint do not suggest that 3DS's restrictions on resins used in Viper Pro machines promote customer satisfaction. On the contrary, Desotech alleges that several of its customers have identified mechanical problems when using 3DS resins in their Viper Pros. For example, Lockheed is allegedly unable to use the Desotech resin that it has identified as ideal for its particular purpose; instead, it has been required to use 3DS resins which it has found to be disappointing and "insufficiently accura[te], with particularly bad 'differential shrink,' which is different dimensional changes based on the thickness of the part." Am. Compl. P 67.

Even if the court were to assume, however, that there are some 3DS consumers who are happier with the RFID-laden Viper Pro than they were with machines absent such a feature, 3DS's other alleged **[*28]** actions also foreclose competition. Desotech has alleged that the RFID licensing and qualification procedure is non-existent, which places 3DS in complete control of competition in the resin market for Viper Pros. Desotech has further alleged that because of this licensing inadequacy, 3DS has reduced the number of resins available to Viper Pro owners from over 40 to just a few.

Additionally, Desotech has alleged that 3DS is systematically preventing older SL machines from remaining on the market and that it is actively preventing current Viper Pro owners from disabling the RFID feature. According to Desotech, 3DS has stopped producing non-RFID machines altogether. While a company has no obligation to continue producing older lines of products it no longer deems profitable, Desotech alleges that 3DS is attempting to eliminate the secondary market for SL machines by removing its older products from commerce. *Cf.* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 334, 343-44 (1922) (finding that defendant had monopolized the shoe machinery market by, in part, purchasing "second-hand machinery mostly of its own manufacture" for the purpose of "curtail[ing] competition from second-hand **[*29]** shoe machinery"), *aff'd* 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954) (per curiam). If successful, such a scheme could further strengthen 3DS's control over competition in the SL resin market by eliminating from the market any older SL machines, which lack the RFID feature and thus allow for use of competing resins.

For example, Desotech alleges that maintenance contractor National RP has entered into a contract with 3DS that requires National RP "to cease servicing and refurbishing all SLA 500 machines not currently covered by an existing maintenance contract." Am. Compl. P 71. Such a contract has no obvious business justification other than increasing 3DS's market power in the SL machine and resin markets. National RP has also allegedly agreed with 3DS to stop servicing Viper Pro machines used with "non-approved" Desotech resins. Am. Compl. PP 63, 72. The procompetitive justifications for such a restriction are not readily apparent. For example, if a 3DS customer would rather void the warranty on its Viper Pro than be subject to restrictions on its choice of resin, what legitimate interest would 3DS have in preventing that customer from independently hiring a third-party maintenance **[*30]** provider such as National RP? Ultimately, Desotech will have the burden of proving that the anticompetitive harm from 3DS's conduct outweighs the procompetitive benefits. For purposes of this motion to dismiss, however, Desotech has sufficiently alleged predatory or anticompetitive conduct.

C. Specific Intent

Because "[a]ll lawful competition aims to defeat and drive out competitors," the "mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize." Great Escape Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986) (internal citations omitted). Rather, the acts from which the court can infer specific intent must be essentially predatory in nature. *Id.* Although the specific intent requirement is consistently listed in the Seventh Circuit as a separate inquiry from the predatory conduct element, the same evidence that is used to prove predatory conduct often establishes specific intent as well. *See, e.g., L&W/Lindco, 979 F. Supp. at 638-39*. As discussed above, Desotech has sufficiently alleged predatory conduct, and specific intent--"an intent to control prices and destroy competition," *id. at 639*--can be inferred **[*31]** from the same allegations. *See* Great Escape, 791 F.2d at 541 ("Specific intent may be inferred from predatory conduct . . . .").

D. Antitrust Injury

3DS's last argument for dismissal of Desotech's attempted monopolization claim is based on its contention that Desotech has failed to allege antitrust injury. To have a right of action under the antitrust laws of the United States, a "plaintiff must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (emphasis in original) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). In other words, it is not enough for a plaintiff to show injury in fact that is causally linked to the illegal conduct; the plaintiff must further show injury that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick Corp., 429 U.S. at 489.

The Seventh Circuit has interpreted this standard as requiring **[*32]** that a plaintiff "show that its loss comes from acts that reduce output or raise prices to consumers" in order to sufficiently plead antitrust injury. *See* Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992) (quoting Chi. Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992)); *accord* U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 626-27 (7th Cir. 2003). If "a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers . . .

a court is entitled to question whether a violation of ***antitrust law*** is being charged." *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984)*.

Desotech has plainly alleged antitrust injury. Desotech's complaint states that 3DS's anticompetitive behavior forecloses existing competition, discourages innovation, and "dissuades potential new entrants from entering the large-frame SL resin market." Am. Compl. P 77. It alleges further that as a result of 3DS's actions, resin purchasers "will have a substantially smaller selection of resins from which to make their end products." Am. Compl. P 78. Should Desotech ultimately prove these allegations and prevail **[*33]** in this litigation, Desotech's victory would also be a win for consumers.

For these reasons, the court denies 3DS's motion to dismiss Desotech's claim for attempted monopolization, Count IV of the amended complaint.

III. Unreasonable Restraint of Trade (Count III)

In Count III, its claim for unreasonable restraint of trade under section 1 of the Sherman Act, Desotech alleges that in addition to the tying allegations,

> 3DS's conduct in contracting and licensing with its customers constitutes an unreasonable restraint of trade and commerce, in violation of § 1 of the Sherman Act, *15 U.S.C. § 1*. In particular, 3DS's unilateral declaration that all machine warranties are void if a customer does not purchase its resins from 3DS and its failure to service a large frame SL machine until a customer switches resin orders to 3DS constitute an unreasonable restraint of trade.

Am. Compl. P 94.

In its memorandum in support of its motion to dismiss, 3DS does not specifically address the sufficiency of Count III. Although 3DS does argue that the complaint fails to make certain allegations that are "necessary for *all* of Desotech's antitrust claims," Defs.' Mem. at 15 (emphasis added), the court, in its analysis **[*34]** of the attempted monopolization claim, has already considered and rejected those general arguments.

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 2712, 168 L. Ed. 2d 623 (2007)*. Rule of reason analysis of claims arising under section 1 of the Sherman Act is similar to analysis of monopolization claims under *section 2*. *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 59 (D.C. Cir. 2001)*. Under either analysis, courts apply a balancing approach, weighing the anticompetitive harm of the conduct against the procompetitive benefit. *Id.* The essence of the rule of reason analysis under *section 1* is the requirement that the plaintiff "show that the challenged restraint has an adverse impact on competition in a relevant market." *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982)*. Having found (as discussed above) that Desotech sufficiently alleged a claim for attempted monopolization under *section 2*, the court finds that the same allegations also support, in large part, its claim under *section 1*.

Of course, in contrast **[*35]** to *section 2*, section 1 of the Sherman Act reaches only "unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities" and "does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (quoting *15 U.S.C. § 1*). Although Desotech's section 1 allegations are, by their own terms, premised largely on 3DS's "unilateral declaration," *id.* P 94, Desotech further alleges that "[t]he contracts and licenses between 3DS and its customers constitute concerted action." *Id.* P 95. Thus, Desotech's section 1 allegations are not based entirely on unilateral conduct and do not fail on that count. 3DS's motion to dismiss Count III is therefore denied.

IV. Illinois Antitrust Act (Count V)

Both parties agree that courts "shall use the construction of the federal law by the federal courts as a guide in construing [the Illinois Antitrust Act]" when "the wording [of the Act] is identical or similar to that of federal ***antitrust law***." *740 Ill. Comp. Stat. 10/11*. The language of *740 Ill. Comp. Stat. 10/3*, the provision of the Illinois Antitrust Act cited in Desotech's **[*36]** state antitrust count, is similar, in relevant parts, to the Sherman Act and the Clayton Act. The court will thus look to federal law interpreting the relevant language of those federal antitrust statutes for guidance in analyzing Desotech's claims under the Illinois Antitrust Act. *A & A Disposal & Recycling, Inc. v. Browning-Ferris Indus. of Ill., Inc., 664 N.E.2d 351, 352-53, 279 Ill. App. 3d 337, 215 Ill. Dec. 954 (Ill. App. Ct. 2d Dist. 1996)*. Because Desotech has stated valid claims for attempted monopolization under *section 2* of the Sherman Act and for unreasonable restraint of trade under section 1 of the Sherman Act, Desotech has likewise stated a valid claim under *740 Ill. Comp. Stat. 10/3*. 3DS's motion to dismiss Count V is therefore denied.

V. Illinois Uniform Deceptive Trade Practices Act (Count VI)

In Count VI, Desotech brings claims for commercial disparagement under *sections 2(a)(7)* and *2(a)(8) of the Illinois Uniform Deceptive Trade Practices Act (IUDTPA), 815 Ill. Comp. Stat. 510/2*. To state a claim for commercial disparagement under *section 2(a)(8)*, a plaintiff must allege that the defendant made specific statements "disparag[ing] the goods, services, or business of **[*37]** another by false or misleading representation of fact." *815 Ill. Comp. Stat. 510/2(a)(8)*; *accord* *Stenograph Corp. v. Microcat Corp., No. 86 C 10231, 1989 U.S. Dist. LEXIS 10105, 1989 WL 99543, at *4 (N.D. Ill. Aug. 21, 1989)*. Similarly, under *section 2(a)(7)*, a plaintiff must allege that the defendant "represent[ed] that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another." *815 Ill. Comp. Stat. 510/2(a)(7)*.

The complaint alleges that 3DS made various disparaging statements and misrepresentations to Desotech customers, including (1) that Desotech "had not done its 'due diligence'" with respect to certain of its resins, Am. Compl. P 54; (2) that those resins "were of insufficient quality to run on 3DS's large-frame SL machines" (though, Desotech further alleges, "3DS itself had previously distributed some of the exact same resins under its distribution agreement with Desotech"), *id.;* (3) that certain Desotech resins were not "licensed" or "qualified" for use in the Viper Pro, though such a licensing or qualification process apparently did not exist, *id.* PP 55, 56; and (4) that using Desotech resins in the Viper Pro would "cause the **[*38]** machine's software to 'time bomb out' and make the machine inoperable," *id.* P 61.

3DS contends that Desotech's allegation are "conclusory generalizations" that fail to specify any particular statements made by 3DS and, furthermore, are insufficient as a matter of law to show disparagement. 3DS argues, for example, that (1) the alleged statements by 3DS "neither '*criticize the quality* of one's goods or services,' nor describe the attacked service or product as 'substandard, negligent, or harmful,'" but "merely describe performance characteristics (and limitations) of the Viper Pro"; (2) Desotech "fails to show any '*false or misleading* representation of fact' regarding the Viper Pro or the use of newer [Desotech] resins"; and (3) Desotech "fails to allege that [3DS] incorrectly represented that the newer [Desotech] resins 'are of a particular standard, quality, or grade,' as it must to state a claim under [*815 Ill. Comp. Stat. 510/2(a)(7)*]." Defs.' Mem. at 29-30 (internal citations omitted) (emphasis in original). Construing the allegations in the light most favorable to the plaintiff, as the court must on a motion to dismiss, the court is not persuaded by any of these arguments; at best, **[*39]** they raise issues of fact that are more appropriately addressed at later stages of litigation. The court finds that Desotech's allegations under *sections 2(a)(7)* and *2(a)(8)* of the IUDTPA are sufficient and, accordingly, denies 3DS's motion to dismiss Count VI.

VI. Tortious Interference with Prospective Economic Advantage (Count VII)

In Count VII, Desotech asserts a claim for tortious interference with prospective economic advantage. To bring such a claim under Illinois law, a plaintiff must allege that "(1) he had a reasonable expectancy of a valid business relationship; (2) defendant knew about the expectancy; (3) defendant intentionally interfered with the expectancy and prevented it from ripening into a valid business relationship; and (4) the intentional interference injured the plaintiff." *Associated Underwriters of Am. Agency, Inc. v. McCarthy, 826 N.E.2d 1160, 1169, 356 Ill. App. 3d 1010,* 292 Ill. Dec. 724 (Ill. App. Ct. 1st Dist. 2005). Illinois law also requires that the plaintiff's business expectancy be with a third party. Ali v. Shaw, 481 F.3d 942, 944 (7th Cir. 2007) (citing Schuler v. Abbott Labs, 639 N.E.2d 144, 147, 265 Ill. App. 3d 991, 203 Ill. Dec. 105 (Ill. App. Ct. 1st Dist. 1993)).

3DS **[*40]** contends that Desotech has not sufficiently alleged the first element of the cause of action, a reasonable expectancy of a valid business relationship. 3DS cites MJ & Partners Restaurant Ltd. Partnership v. Zadikoff, 126 F. Supp. 2d 1130 (N.D. Ill. 1999), for the proposition that to establish the existence of a reasonable expectancy, Desotech must show that it had more than the "mere hope" of continuing its relationship, id. at 1138, and asserts that "[f]or three of the customers, Lockheed, Tangible Express and AP Proto, Desotech has merely alleged facts showing that it hoped to sell resins to those customers but the customers chose . . . to buy resins from [3DS] instead." Defs.' Mem. at 33. 3DS's arguments, however, rely on an unduly narrow reading of the complaint. For example, Lockheed allegedly expressed its desire to continue using Desotech resins but was coerced into an agreement to purchase resins exclusively from 3DS. Viewing those allegations in the light most favorable to the plaintiff, the court finds that Desotech has alleged facts sufficient to show that it had much more than a mere hope of continuing its relationship with Lockheed.

3DS also argues that "for the two remaining **[*41]** customers, Express Pattern and Dynacept, Desotech does not even allege that they stopped buying [resins] from Desotech" and that Desotech has thus failed to establish the third required element, a showing that defendants interfered with the expectancy. Defs.' Mem. at 33-34. Here, again, however, 3DS has taken an overly literal view of the allegations. For example, Desotech has alleged that as a result of 3DS's conduct, "Express Pattern can no longer use [Desotech's] new resin." Am. Compl. P 59. The logical bridge between (a) Express Pattern's no longer being able to use Desotech resin and (b) its ceasing to buy such resin is exceedingly short and one that the court is compelled to cross on this motion to dismiss. Furthermore, Desotech's allegations regarding other customers, such as Lockheed, who allegedly "agreed [with 3DS] . . . to stop purchasing resins from Desotech," *id.* P 66, also satisfy the third element.

3DS further argues that Desotech fails to "show the required element of malice because Illinois recognizes a competitive privilege that protects competitors from claims of tortious interference with prospective business advantage." Defs.' Mem. at 31. In an action for interference **[*42]** with prospective business advantage, a defendant may raise the competitor's privilege as an affirmative defense. Soderlund Bros., Inc. v. Carrier Corp., 663 N.E.2d 1, 8, 278 Ill. App. 3d 606, 215 Ill. Dec. 251 (1995). That privilege "allows one to divert business from one's competitors generally as well as from one's particular competitors provided one's intent is, at least in part, to further one's business and is not solely motivated by spite or ill will." Id. at 8 (citing Candalaus Chi., Inc. v. Evans Mill Supply Co., 366 N.E.2d 319, 51 Ill. App. 3d 38, 9 Ill. Dec. 62 (1977); Restatement (Second) of Torts § 768(1)(d) & cmt. b, at 40 (1979)). But as the court notes in *Candalaus,* a decision on which 3DS relies, the privilege does not apply to a defendant whose conduct "create[s] or continue[s] an illegal restraint of competition." 366 N.E.2d at 326-27 (quoting Restatement (Second) of Torts § 768, at 39)). The Seventh Circuit has similarly explained that the competitor's privilege does not apply where "circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage." A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1404-05 (7th Cir. 1992) **[*43]** (citing Fishman v. Estate of Wirtz, 807 F.2d 520, 546 (7th Cir.1987)).

As discussed above, Desotech has sufficiently alleged claims against 3DS for attempted monopolization and unreasonable restraint of trade under the Sherman Act. Because the same factual allegations form the basis for Desotech's tortious interference with prospective economic advantage claim, there is, at a minimum, an issue of fact as to whether 3DS's conduct was protected by the competitor's privilege. 3DS's motion to dismiss Count VII is therefore denied.

CONCLUSION AND ORDER

Defendants' motion to dismiss [# 29] is granted in part and denied in part. The motion is granted with respect to Counts I and II and denied as to Counts III through VII.

Plaintiff's tying claims, Counts I and II of the amended complaint, are hereby dismissed without prejudice. Desotech is granted leave to replead its tying claims by March 2, 2009.

The discovery stay previously entered pending resolution of defendants' motion to dismiss is hereby lifted. Discovery may proceed on all of the outstanding antitrust and patent claims, including the patent damages issues.

A status hearing and scheduling conference is set for March 31, 2009 at 9:30 a.m. **[*44]** In the meantime, the parties are directed to confer about--and, if possible, submit--an agreed proposed case management schedule for the antitrust claims (a scheduling order for the patent claims having already been entered on December 2, 2008). They are also directed to consider whether a settlement conference at this time would facilitate resolution of the case.

Dated: January 26, 2009

/s/ Joan Humphrey Lefkow

JOAN HUMPHREY LEFKOW

United States District Judge

End of Document

Patel v. Callies

United States District Court for the District of Idaho

January 26, 2009, Decided; January 26, 2009, Filed

Case No. 07-CV-474-WFD

Reporter

2009 U.S. Dist. LEXIS 149050 *

RAJESH PATEL, CHARULATA PATEL, ROBERT MURPHY, and GEORGIA MURPHY, Plaintiffs, vs. TRICIA A. CALLIES, RANDALL A. CALLIES, AURORESKY INVESTMENTS, LLC, and BOISE REALTY, INC., Defendants.

Core Terms

cause of action, pleadings, conspiracy, motion for judgment, continuity, amended complaint, Defendants', enterprise, racketeering, predicate act, closed-ended, open-ended, conspired, derivative action, entities, venturer, allegations, reckless, asserts, parties, limited liability company, winding up, racketeering activity, investment contract, gross negligence, wholly owned, violations, couple, mail, pattern of racketeering activity

Counsel: **[*1]** For Rajesh Patel, Charulata Patel, Robert Murphy, Georgia Murphy, Plaintiffs, Counter Defendants: Charles F Peterson, Jr, LEAD ATTORNEY, PETERSON LAW OFFICE, Boise, ID.

For Tricia A. Callies, Randall Callies, Auroresky Investments, LLC, Boise Realty, Inc., Defendants: Jeffrey A Strother, LEAD ATTORNEY, STROTHER LAW OFFICE, Boise, ID.

For Auroresky Investments, LLC, ThirdParty Plaintiff, Counter Claimant: Jeffrey A Strother, LEAD ATTORNEY, STROTHER LAW OFFICE, Boise, ID.

Judges: Honorable William F. Downes, United States District Judge.

Opinion by: William F. Downes

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

This matter comes before the Court on Defendants' respective Motions for Judgment on the Pleadings. The Court, having considered the parties motions and supporting memoranda, as well as having conducted a hearing on the matter, FINDS and ORDERS:

I. Background

The instant controversy arises out of an investment by Plaintiffs in an existing but undercapitalized commercial real estate development in Boise, Idaho (the underlying property will be referred to as the "Property" and the development itself as the "Project" for the purposes of this order). The Project **[*2]** was to be administered and developed by Defendant Tricia Callies, a real estate agent, through a limited liability company, Defendant Auroresky

Investments ("Auroresky"), which was to be newly formed for the Project. Auroresky was to hire Tricia Callies' husband and general contractor, Defendant Randall Callies, to construct six office buildings on the Property. The land and buildings were to be marketed by Defendant Boise Realty, Inc., an Idaho corporation wholly owned by Tricia Callies.

The Patels' and Murphys' investment originally took the form of a joint venture or investment contract under which each couple contributed $125,000 to Auroresky to become members of the L.L.C. In exchange, each couple was also "guaranteed" the return of their initial investment, as well as the distribution of an additional flat $125,000 from the profits of the Project. Plaintiffs assert that under the terms of the contract each couple was to receive its guaranteed $250,000 payment before any profits were distributed to any other recipient. Plaintiffs were also to receive a security interest in the Property to back their investment in Auroresky.

According to Plaintiffs' First Amended Complaint, each **[*3]** couple did receive a Deed of Trust from Auroresky purporting to convey a security interest in the Property. However, Plaintiffs allege that at the time of the conveyance, Auroresky did not hold title to the Property. Rather, Defendants Tricia and Randall Callies held title to the Property throughout the relevant time period. Thus the Plaintiffs' Deeds of Trust did not create any security interest whatsoever. Subsequent to Plaintiffs' investment, the Callies allegedly conveyed additional Deeds of Trust to various creditors in exchange for loans totaling several million dollars.

Separate and apart from their participation in the Auroresky investment, each couple also entered into contracts to purchase one of the six office buildings to be constructed on the property. Again, however, Plaintiffs allege that at the time they entered into their respective purchase contracts, Auroresky did not own fee simple title to the Property; it was still owned by the Callies. Further, Plaintiffs assert that Auroresky was not newly formed for the Project as the parties had agreed.

The Callies, through Auroresky, allegedly promised to provide weekly construction progress reports to Plaintiffs and three **[*4]** other purchasers who had contracted to buy office buildings on the project. However, Plaintiffs state that no progress reports were provided, and eventually it became clear that construction would not be completed by the forecast completion dates.

Finally, Ms. Callies allegedly informed Plaintiffs that Auroresky would be unable to complete the Project on budget and pay the Patels and Murphys their "guaranteed' returns. Plaintiffs assert that the Callies used or intended to use proceeds from the project to pay off personal debts and liabilities, including various financial encumbrances on the Property which predated Plaintiffs' investment, as well as encumbrances which post-dated their investment but which were secured by valid Deeds of Trust on the Property.

II. Legal Issues

In their First Amended Complaint, Plaintiffs claim they were fraudulently induced to invest in Auroresky and its development project through various intentionally false representations regarding the project, the return they were to receive on their investment, and the security interest in the property that they were to possess. The complaint states numerous causes of action, including state and federal racketeering **[*5]** violations, civil conspiracies, and derivative actions initiated by Plaintiffs as members of Auroresky.

At issue here, by virtue of Defendants' multiple Motions for Judgment on the Pleadings seeking dismissal of certain elements of the First Amended Complaint under *Fed. R. Civ. P. 12(c)*, are the following of Plaintiffs' causes of action:

(1) Fifth Cause of Action for Dissolution and Winding up of Auroresky.

(2) Sixth Cause of Action alleging violations of the Racketeer influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961, et seq.*

(2) Seventh Cause of Action alleging violations of the Idaho Racketeering Act ("IRA"), *Idaho Code §§ 18-701, et seq.*

(3) Eighth Cause of Action alleging a conspiracy under RICO, *18 U.S.C. § 1962(d)*.
(4) Ninth Cause of Action alleging a conspiracy under the IRA.
(5) Tenth Cause of Action alleging a common law civil conspiracy.
(6) Eleventh Cause of Action alleging "reckless and willful misconduct."
(7) Twelfth Cause of Action, a member derivative action by Auroresky, seeking a declarative judgment against Boise Realty declaring the listing agreement between the two null and void.

(8) Thirteenth Cause of Action, a member derivative action by Auroresky against Defendant Boise Realty seeking the return of a sales commission paid by Kaleidoscope Investments, **[*6]** LLC, upon the purchase of one of the project's buildings (Kaleidoscope is wholly owned by the Callies).
(9) Fourteenth Cause of Action, a member derivative action by Auroresky against Tricia and Randall Callies, doing business as Callies Construction, for breach of contract, breach of the covenant of good faith and fair dealing, and breach of statutory duties.

Defendant Auroresky also asserts, generally and without support, that Plaintiff's First Amended Complaint fails to plead fraud with sufficient particularity to satisfy the requirements of *Fed. R. Civ. P. 9(b)*.

Finally, Defendant Boise Realty asserts that it should be dismissed entirely from the suit since only the Twelfth and Thirteenth Causes of Action state claims against it, and since it believes these claims must be dismissed for failure to comply with a pertinent Idaho statute discussing limited liability companies and derivative lawsuits, and because Auroresky's proper inclusion in the lawsuit as a plaintiff would defeat diversity jurisdiction.

This order will address first those elements common to all defendants' motions for judgment on the pleadings, after which it will address those elements specific to individual defendants.

III. Standard of [*7] Review

Unlike motions made under *Fed. R. Civ. P. 12(b)(6)*, which must be made before a responsive pleading has been filed, *Rule 12(c)* allows parties to move for judgment on the pleadings *after* all pleadings have been filed, but before such time as a delay in trial might result. "A judgment on the pleadings is proper when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Torbet v. United Airlines, 298 F.3d 1087, 1089 (9th Cir. 2002)*.

When a *Rule 12(c)* motion asserts matters that could properly have been brought under *Rule 12(b)*, such as that the plaintiff has failed to state a claim for which relief can be granted, it is reviewed under the same standard as would ordinarily be applied to a *Rule 12(b)* motion. *See Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. Cal. 1989)*. A complaint attacked under *Fed. R. Civ. P. 12(b)(6)* may be dismissed if it does not contain a cognizable legal claim, or for failure to state sufficient facts to support a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984)*. A complaint need not contain detailed factual allegations, but the allegations must be sufficient to create more than a speculative right to relief. *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Although a court must take all factual allegations to be true, it need not accept as true a legal conclusion couched as a factual allegation. *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*; *Prometheus Dev'pt Co. v. Everest Props., 289 Fed. Appx. 211, 213 (9th Cir. 2008)*.

IV. Legal Analysis

A. Plaintiff's RICO claims

1. RICO's Basic Requirements [*8]

RICO allows civil claims for treble damages where a plaintiff can prove a defendant participated in an associated-in-fact enterprise, which engaged in a pattern of racketeering activity. *See* *18 U.S.C. §§ 1961(1)* and *1962(c)*. A RICO plaintiff must plead at least two "predicate acts" of racketeering activity to establish a pattern. *18 U.S.C. §1961(5)* (listing, *inter alia*, mail and wire fraud as valid RICO precursors). The predicate acts must further be "related" and "continuous." *N.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989)*; *Allwaste, Inc. v. Hinson, 65 F.3d 1523, 1527 (9th Cir. 1995)*. The Supreme Court has observed that "continuity" is a flexible concept, encompassing both open-ended continuity, in which the pattern of racketeering activity "projects into the future with a threat of repetition," as well as closed-ended continuity, in which there is no threat of future racketeering conduct, but the predicate acts extend over a "substantial period of time." *H.J., Inc., 492 U.S. at 241*.

While the "substantial period of time" required for closed-ended continuity is itself a flexible concept, the Court in *H.J., Inc.* made clear that "a few weeks or months" was insufficient where no future criminal conduct was threatened. *Id. at 241*. The Ninth Circuit has observed that in no case has the closed-ended continuity requirement been satisfied by a pattern of activity lasting less **[*9]** than a year. *Allwaste, 65 F.3d at 1528* (finding the closed-ended requirement met where the predicate acts occurred over as much as thirteen months, but explicitly refusing to create a bright line, one-year requirement).

Predicate acts that "specifically threaten repetition or that become a 'regular way of doing business' satisfy the open-ended continuity requirement." *Id.* (citations omitted). In *Sun Savings & Loan Association v. Dierdorff*, the Ninth Circuit found the open-ended continuity requirement fulfilled where a loan officer received kickbacks in exchange for approving loans on four occasions over a two month time span. *Sun S & L, 825 F.2d 187, 194 (9th Cir. 1987)* Crucial to the *Sun S & L* court's analysis was the fact that the alleged predicate acts posed a "threat of continuing activity because they covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months, and in no way completed the criminal scheme." *Id*; *see also* *California Architectural Bldg. Prods., Inc. V. Franciscan Ceramics, 818 F.2d 1466, 1469 (9th Cir. 1987)* (multiple acts of mail fraud over a five months span demonstrated a threat of ongoing criminal activity). Similarly, in *Ikuno v. Yip, 912 F.3d 306, 308 (9th Cir. 1990)*, the Ninth Circuit found open-ended continuity based on just two filings of false annual reports for a phantom commodity trading company because there was no indication that **[*10]** the filing of false reports would have ceased absent intervening circumstances. *Id. at 309* (racketeering activity ceased because defendant company went out of business). However, it is also clear that "isolated or sporadic predicate acts [ ] fail to satisfy the continuity requirement." *Sun S & L, 825 F.2d at 194*.

In this case, Plaintiffs allege various acts of mail and wire fraud, which they claim induced them to invest in Auroresky and its Project. Defendants' allegedly fraudulent acts included the sending of false materials—via both U.S. mail and email—relating to the ownership of the Property, Auroresky, invalid deeds of trust for the Property executed and delivered to Plaintiff, and invalid real estate purchase contracts for property not owned by Auroresky. (Pl.'s RICO Case Statement at 15-16.) Plaintiffs allege that the fraudulent communications commenced during the first quarter of 2006 and continued through at least November 1, 2007, a period of approximately twenty months. (*Id.*) It is not clear from the First Amended Complaint, nor from Plaintiff's RICO Case Statement, how many allegedly fraudulent communications occurred during that time.

Plaintiffs assert that their First Amended Complaint satisfies both the **[*11]** closed-ended and open-ended continuity requirements established in RICO case law. Insofar as Plaintiff has alleged various acts of mail and wire fraud extending over a period well in excess of one year, a "substantial time period" under any court's analysis, it would appear the closed-ended continuity requirement is in fact satisfied. However, it is less clear whether the open-ended continuity requirement has been satisfied, despite Plaintiffs conclusory assertion that Defendants' allegedly illegal activity has become a "regular way of conducting their ongoing business activities, even after the filing of the initial Complaint in this case." (Pl.'s RICO Case Statement at 17.) The First Amended Complaint and accompanying RICO Case Statement do seem to indicate that Defendants conducted the operations of Auroresky, at least for the purposes of developing the instant Property, in a fraudulent manner. However, the Court is left without any indication that this manner of conducting business infected any of the Defendants' other business ventures.

Consequently, the Court is hard-pressed to determine, given the record before it, whether open-ended continuity is actually present in this case. **[*12]** Mindful of the relatively low burden on Plaintiffs at this stage of the proceeding to simply raise their right to relief above the level of mere speculation, as well as the Court's parallel obligation to construe all factual allegations as true, the Court cannot, as a matter of law, conclude that Plaintiffs have or have not established open-ended continuity. Defendants' motion for judgment must accordingly be denied.

2. RICO Predicates Otherwise Actionable as Securities Fraud

While the list of criminal acts constituting RICO predicates under *18 U.S.C. § 1961* is extensive, the Private Securities Litigation Reform Act of 1995, *Pub. L. 104-67, § 107, 109 Stat. 737, 758 (Dec. 22, 1995)*, amended RICO, eliminating from its purview "any conduct that would have been actionable as fraud in the purchase or sale of securities." *18 U.S.C. § 1964(c)*; *Howard v. Greenberg, 208 F.3d 741, 750 (9th Cir. 2000)* ("We hold that Plaintiffs' securities fraud claims cannot be used to establish a RICO violation."). Securities and Exchange Commission Rule 10-b5 prohibits "the use of any means or instrumentality of interstate commerce, or of the mails . . . [to transmit] an untrue statement of a material fact . . . in connection with the purchase or sale of any security." The relevant section of the United States Code defines "security" to include "a certificate of **[*13]** interest or participation in any profit-sharing agreement" or an "investment contract." 15 U.S.C. § 78(c)(10).

The term "investment contract" has been interpreted to reach "novel, uncommon, or irregular devices, whatever they may appear to be . . ." *SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351, 64 S. Ct. 120, 88 L. Ed. 88 (1943)*. The classic definition of "investment contract," as set forth by the Supreme Court in *SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946)* is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ." Subsequent cases have honed *Howeys* definition considerably. Most simply put, to constitute an investment contract for the purposes of the Securities Exchange Act, three elements must be satisfied: there must be (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits produced by the efforts of others.[1] *Hocking v. Dubois, 885 F.2d 1449, 1455 (9th Cir. 1989)* (applying a test originally set forth by the Fifth Circuit in *Williamson v. Tucker, 645 F.2d 404 (5th Cir.)*, *cert. denied*, *454 U.S. 897 (1981))*.

The heart of the *Hocking/Williamson* three-prong test, where an investor is a partner or joint venturer, is whether:

> (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited **[*14]** partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

Holden v. Hagopian, 978 F.2d 1115, 1119 (9th Cir. 1992) (stating, however, that the three factors stated above are not exclusive, and that under "different facts or legal arrangements other factors could give rise to such a dependence on the promoter or manager."). The application of the foregoing test is a necessarily fact intensive inquiry, requiring an examination of the underlying investment agreement, the abilities and understand of the parties at the time of contract formation, etc. *See Koch v. Hankins, 928 F.2d 1471, 1477 (9th Cir. 1991)*; *Williamson, 645 F.2d at 424, n.14*. "The question of an investor's control over his investment is decided in terms of practical as well as legal ability to control.'" *Koch, 928 F.2d at 1478* (quoting *Hocking, 885 F.2d. at 1457*).

---

[1] Profits need not be actually "solely" expected from the efforts of a third party in the literal sense, but the "efforts made by those other than the investor [must be] the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *Hocking, 885 F.2d at 1455*.

In the instant case, Plaintiffs invested in an Idaho limited liability company, Defendant Auroresky Investments. It is not clear from the pleadings or from the memoranda before the **[*15]** Court what the terms of the investment agreement were; what the experience level of the Plaintiffs was; to what extent they were capable of or intent upon participating in the Project, or to what extent Plaintiffs relied upon the "unique entrepreneurial or managerial abilit[ies]" of the Callies for the success of the Project. Plaintiffs assert in their memoranda, however, that they were "experienced and knowledgeable in business affairs" and the terms of the underlying agreement granted them "management power and authority with regard to the Joint Venture's business." (Pl.'s Resp. to Callies' Mot. for Jdgmt on the Pldgs at 8.) Plaintiffs further claim that they expected profits on their investments solely from the rising Boise real estate market, rather than from any entrepreneurial efforts of the Defendants. (*Id.* at 9.) Additionally, Defendant Auroresky's counterclaim states that "Counterdefendants are all sophisticated investors and/or business persons. On information and belief, each has significant experience investing with real estate. Counterdefendants Murphys are licensed real estate agents and brokers in the State of California." (Def. Auroresky's Counterclaim at ¶ 10, 11, and 12.) **[*16]**

The Court is troubled, however, by various assertions contained in Plaintiffs' First Amended Complaint and RICO case statement, which indicate that at the time the instant suit was brought, Plaintiffs themselves believed their investment constituted a security regulated by the Securities Act of 1933 and the Idaho Uniform Securities Act. (*See* First Amended Complaint at 8; RICO Case Statement at 2.) In their memoranda and during this Court's November 19, 2008 hearing on the matter, Defendants asserted that the Court should find Plaintiff's references to securities regulations and fraud dispositive. Even to the extent that the Court must, for the purposes of a motion for judgment on the pleadings, take all factual allegations in a pleading to be true, it need not accept legal the legal conclusions of the parties, including whether or not various communications by Defendants were subject to regulation under state or federal securities law. Despite Plaintiffs' troubling references, the Court must adhere to binding Ninth Circuit law regarding what is and what is not a security rather than to potentially improvident or unsupported assertions made by Plaintiffs' previous counsel.

The Court cannot **[*17]** say with certainty, given the limited record before it at this early stage of litigation, whether or not Plaintiffs' investment in Auroresky constituted an "investment contract" subject to regulation as a security under current Ninth Circuit precedent. However, it would seem that Plaintiffs' allegations are sufficiently supported to raise their right to relief above the level of mere speculation. Consequently, the Court cannot grant judgment on the pleadings for the Defendant on Plaintiff's RICO-related causes of action.

3. Plaintiffs' "Theory of Enterprise" Under RICO

a. Auroresky as Defendant and Enterprise

As stated above, claims under RICO require individual persons to participate in an "associated-in-fact" enterprise to perpetrate a pattern of racketeering activity. *Cedric Kushner Promotions v. Don King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*. The *Cedric Kushner* Court stated that the "enterprise" cannot be the same person as the defendant simply referenced by a different name. *Id.* Rather, there must be "'some distinctness between RICO defendants and the RICO enterprise.'" *Id.* (quoting and agreeing with the Acting Solicitor General's *Amicus Curiae* brief); *see also* *Rae v. Union Bank, 725 F.2d 478, 480-81 (9th Cir. 1984)* ("If Union Bank is the enterprise, it cannot also be the RICO defendant" in the context of a **[*18]** *§ 1962(c)* claim). However, multiple individuals can associate to form a RICO enterprise, and still themselves be named as defendants. *River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1461 (9th Cir. 1991)*.

The foregoing courts' analysis is clearly supported by the statutory language of *18 U.S.C. § 1962*. For instance, *§ 1962(c)* proscribes "any person" from conducting or participating in an "enterprise's affairs through a pattern of racketeering activity." The plain language in this subsection[2] prohibits actions by an individual defendant under the umbrella of the enterprise; in each case, the person rather than the enterprise is contemplated as the defendant.

Defendant Auroresky argues that it cannot be named as a Defendant in the instant RICO action because it is in fact the enterprise overarching the alleged pattern of racketeering activity. However it is readily apparent that the Plaintiffs actually allege that the "associated-in-fact" enterprise, as required by RICO, consists of the Callies, Auroresky, Boise Realty, and other business entities owned by the Callies. At no point in the First Amended Complaint, nor in the RICO Case Statement, do Plaintiffs limit their discussion of the RICO enterprise to Auroresky. (*See, e.g.*, RICO Case Statement at 14, n.3. (Discussing the breadth of the **[*19]** "associated-in-fact" enterprise at issue in this case).) Consequently, the concerns expressed in *Cedric Kushner* and *Rae* regarding the conflict between an entity being named as both an enterprise and a defendant are not actually at issue here and Defendant Auroresky's Motion for Judgment on the Pleadings must accordingly be denied on this limited issue.

b. Auroresky as Victim and Defendant

Defendant Auroresky also notes that it is listed at various points in the pleadings as both the victim of the pattern of racketeering and as a defendant, titles which it claims are mutually exclusive. This issue is potentially dispositive on Plaintiffs' twelfth through fourteenth causes of action, which state derivative claims alleging damages to Auroresky as a result of various contracts with other business entities owned by the Callies, Because Section IV(E) of this order disposes of Plaintiffs' derivative actions on other grounds, this Court need not address whether it is possible for Auroresky to be both a victim and a defendant of racketeering activity.

B. Plaintiff's Claims Under the Idaho Racketeering Act ("IRA")

While the Idaho Racketeering Act does not contain any prohibition on the pleading **[*20]** of predicate acts otherwise actionable as securities fraud, it does require plaintiffs to show, in cases involving a single racketeering scheme, that the alleged predicate acts "themselves amount to, or constitute a threat of, continuing racketeering activity." *Mannos v. Moss, 143 Idaho 927, 935-36, 155 P.3d 1166 (Idaho 2007)*; *see also* *Spence v. Howell, 126 Idaho 763, 774-75, 890 P.2d 714 (Idaho 1995)* (citing *Eliopulos*). However, the Idaho Supreme Court has stated that the IRA generally mirrors its federal counterpart in content and structure, *State v. Nunez, 133 Idaho 13, 17, 981 P.2d 738 (1999)*, and has even specifically labeled IRA's pattern of racketeering requirement similar to that contained in RICO, *Eliopulos v. Knox, 123 Idaho 400, 408, 848 P.2d 984 (Idaho Ct. App. 1992)* (the first Idaho case to discuss the pattern of racketeering continuity requirement).

The Court notes that in *Eliopulos* the Idaho Court of Appeals discussed, in the context of federal RICO, *H.J., Inc. v. Northwestern Bell Telephone* Co., the U.S. Supreme Court opinion which first allowed single scheme RICO claims where either open-ended *or* closed-ended continuity was established. However, the *Eliopulos* Court did not actually address either type of continuity specifically, instead merely concluding that plaintiffs in that case had failed to establish it. In succeeding cases discussing IRA, all of which quote *Eliopulos*' reference to *H.J., Inc.* for the proposition **[*21]** that a threat of continuing racketeering activity is required, the Idaho Supreme Court still has not discussed closed-ended continuity for the purposes of establishing a pattern of racketeering. *See e.g., Mannos, 143 Idaho at 935-36*.

---

[2] References to "enterprise" in *§§ 1962(a)* and *(b)* are aimed not at the overarching "associated-in-fact" enterprise through which the pattern of racketeering is perpetrated, but a different enterprise which can be said to be the victim of the racketeering. *Nat'l Org. For Women v. Scheidler, 510 U.S. 249, 257-59, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)*. For instance, *§1962(a)* makes it illegal for "any person" to "invest . . . any part of such income [derived from racketeering activities] . . . in acquisition of any interest in, or the establishment or operation of, any enterprise [engaged in interstate commerce." Similarly, *§ 1962(b)* reads "It shall be unlawful for any person [engaged in racketeering activity] to acquire or maintain [] any interest [] or control of any enterprise [engaged in interstate commerce."

This Court finds the Idaho Supreme Court's lack of discussion—in the context of either federal or state racketeering law—of closed-ended continuity telling. Were the Idaho Supreme Court to consider the matter, this Court finds it highly likely that it would follow *H.J., Inc.* and its progeny and allow actions on single scheme patterns of racketeering where closed-ended *or* open-ended continuity had been established. Consequently, Plaintiffs' claims under the Idaho Racketeering Act cannot be dismissed for an alleged failure to show a threat of continued racketeering activity for the same reasons stated in Section A(1) of this order regarding federal RICO continuity. The Court notes, however, that it need not rest solely on its prediction of the behavior of the Idaho Supreme Court on this matter because it cannot say, as a matter of law based on the pleadings, that Plaintiffs have failed to state sufficient facts to indicate that the Callies' continued method of conducting business includes **[*22]** IRA predicate acts.

C. Plaintiff's *18 U.S.C § 1962(d)* RICO and Common Law Conspiracy Claims

All Defendants assert that Plaintiff's *18 U.S.C. § 1962(d)* conspiracy and common law conspiracy claims should be dismissed because they allege that Defendants Tricia and Randall Callies cannot conspire with their wholly owned entities These include Defendant Boise Realty (wholly owned by Tricia Callies), Kaleidoscope Investments, LLC (apparently jointly owned by Tricia and Randall Callies); Randi's Pants, LLC (apparently jointly owned by the Callies); Complete Property Management and Investment Realty, Inc. (apparently wholly owned by Tricia Callies), etc.[3]

To the extent this issue is raised by Defendant Boise Realty, it is clearly moot. In its simplest form, a conspiracy is simply an "agreement by two or more persons to commit an unlawful act." *Black's Law Dictionary* 305 (7th ed. 1999). The First Amended Complaint alleges not simply that Tricia Callies conspired with her wholly owned corporation, Boise Realty, or that the couple conspired as a unit with one of their companies. Rather the complaint alleges that Tricia Callies *and* Randall Callies, each as independent individuals, conspired with Boise Realty, Auroresky Investments, etc. **[*23]** Clearly the Callies are capable of conspiring with one another. Randall Callies is of course capable of conspiring with Boise Realty. Other combinations and permutations may also be read from the First Amended Complaint, many of which, like the examples listed previously, would constitute a conspiracy as defined in the law. That at least some conspiracy is possible in the case of each of the Callies and Boise Realty is sufficient to allow this case to go forward. Consequently, Boise Realty's Motion for Judgment on the Pleadings is denied to the extent it seeks dismissal of the conspiracy claims against it on the basis of impossibility.

Defendants' claims that Auroresky could not, as a matter of fact and law, conspire with its managing member, Tricia Callies, and her husband Randall Callies (also a member) is also easily disposed of. Defendants' reading of the complaint is that Auroresky is alleged to have conspired with its controlling owners, the Callies. This, Auroresky claims, is impossible since "Auroresky has no separate identity from the Callies nor can it be said to constitute a system of making decisions in furtherance of 'alleged criminal activities.'" (Auroresky Mot. to Dismiss **[*24]** at 5 (quoting *Wagh v. Metirs Direct, inc.*, *363 F.2d 821, 831 (9th Cir. 2003)*.) However, it is a basic tenet of corporate law that a corporation (or L.L.C.) possesses a separate legal identity from its owners, even where the entity is wholly owned by an individual. *See* *Cedric Kushner Promotions v. Don King, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)* ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.")

The Ninth Circuit has clearly stated that a corporation can conspire with its wholly owned subsidiaries, or with its managing officers in the RICO context.[4] *Webster v. Omnitron Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996)*, *cert.*

---

[3] Plaintiffs' First Amended Complaint references as many as nine Idaho corporations or limited liability companies wholly owned by one or both of the Callies, which they allege constituted an "enterprise" for the purposes of RICO. (First Amended Complaint at 24-27.)

[4] In another context—federal ***antitrust law***—the Supreme Court has stated exactly the opposite: a wholly owned entity cannot conspire with its owner. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776, 104 S. Ct. 2731, 81 L. Ed. 2d 628*

denied, *519 U.S. 865 (1996)*, citing *Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989)*. Plaintiffs in *Webster* brought a § 1962(d) RICO action against a corporation and its officers alleging they were conspiring to operate the corporation as a pyramid scheme. The defendants in the case argued that "a corporation cannot engage in a RICO conspiracy with its own officers and representatives," and indeed the *Webster* Court noted that numerous district courts agreed with that principle. *Webster, 79 F.3d at 787, n.9*. However, the Ninth Circuit ultimately disagreed, quoting the Seventh Circuit for the proposition that "'intracorporate conspiracies do threaten RICO's goals of preventing **[*25]** infiltration of legitimate businesses by racketeers and separating racketeers from their profits'" and that *§ 1962(d)* intracorporate conspiracy claims were permissible. *Id.*

The Ninth Circuit's ruling in *Webster* and the Seventh Circuit's in *Ashland Oil* were limited to whether an intracorporate conspiracy is actionable under RICO; they do not apply specifically to charges of intracorporate conspiracy in the common law context. However, the Ninth Circuit did address the matter in the context of simple criminal conspiracies in *Hughes Aircraft*, stating: "If we applied the intracorporate doctrine to this case, no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy. This result is illogical." *20 F.3d at 979*.

This Court finds that the result would be illogical if applied in the context of civil conspiracies, as well. To the extent Defendants' motions for judgment seek dismissal of Plaintiffs' *18 U.S.C. § 1962(d)* RICO conspiracy or common law conspiracy claims—found in the Eighth, Ninth, and Tenth Causes of Action in the First Amended Complaint—between Auroresky and the Callies, or between the Callies and Boise Realty, Defendants motion must be and is denied.

D. Plaintiffs' [*26] Claims Against Defendants Auroresky and the Callies for "Reckless and Willful Misconduct"

Plaintiffs' Eleventh Cause of Action accuses the Callies and Auroresky of "reckless and willful misconduct" in violation of the laws of the United States and the State of Idaho. Defendants assert that there is no such cause of action, and that it must be dismissed. Plaintiffs reply that "reckless and willful" is simply synonymous with gross negligence, a common law tort cause of action. In support of this proposition, Plaintiffs cite *Caffety v. State of Idaho, Dept. of Transportation, 144 Idaho 324 (Idaho 2007)*, a case involving the Idaho Tort Claims Act for claims against governmental entities, *Idaho Code § 6-904*. The Idaho Tort Claims Act indeed utilizes the terms "gross negligence" and "reckless, willful and wanton conduct" in parallel, however, it does so in the context of establishing an exception to governmental immunity, and does not create a cause of action. *Idaho Code § 6-904(B)*.

Similar usages of the terms elsewhere in Idaho law, but again, do not create causes of action relevant here. *See e.g., State v. Taylor, 59 Idaho 724, 735, 87 P.2d 454 (Idaho 1939)* ("Criminal negligence is gross negligence, such negligence amounts to wanton, flagrant, or reckless disregard . . . ."); *but c.f. Peterson v. Parry, 92 Idaho 647, 657 (1968)* (defining "gross negligence" within the context of a now superseded version **[*27]** of the Idaho guest statute, *Idaho Code § 49-1401*, as "knowing or having reason to know" one's actions created "an unreasonable risk of physical harm to another."). The Idaho Uniform Limited Liability Company Act mentions neither "gross negligence" nor "wilful and wanton misconduct" in discussing member liability for actions taken in the course of business operations. Instead, the statute holds L.L.C. member-directors to a standard of ordinary care in most cases,

---

(1984). However, the *Copperweld* Court was careful to limit the decision to the peculiar context of the Sherman Act, clarifying that it was not addressing "whether the term 'conspiracy' will bear a literal construction that includes parent corporations and their wholly owned subsidiaries." *Id.*

Additionally, many circuit courts have stated that neither a corporation nor its officers or employees can conspire in the context of a *42 U.S.C. § 1985* civil rights conspiracy cases unless the employees act in their individual capacities or outside the scope of their employment. *See Portman v. County of Santa Clara, 995 F.2d 898, 910 (9th Cir. 1993)* (collecting cases from eight circuits applying the so-called "intracorporate conspiracy doctrine"). However, the Ninth Circuit has never so ruled, instead reserving the issue. *Id.*; *United States v. Hughes Aircraft Co., 20 F.3d 974, 979 (9th Cir. 1994)*.

applying the more liberal, court-made "business judgment rule" to the extent "circumstances warrant." Idaho Code § 30-6-409, cmt. to subsec. 3.

Ultimately, the Court has found no portion of the Idaho Code, nor any reference in Idaho case law, recognizing either "reckless and willful misconduct" or even "gross negligence" as a civil cause of action in any context relevant here. *Fed. R. Civ. P. 8* requires plaintiffs to set forth in their complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Insofar as it is wholly unclear what legal basis exists for Plaintiff's Eleventh Cause of Action, Plaintiffs have failed to meet *Rule 8*'s requirements. The Court, however, construes Plaintiffs opposition to Defendants' motion for judgment on Cause of Action **[*28]** Eleven as a motion to amend, and "leave [to amend] shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. Plaintiffs may submit a second amended complaint curing the deficiencies found in the Eleventh Cause of Action within ten (10) days of the date of this order; failure to do so will result in dismissal of said cause of action.

E. Plaintiffs' (Purportedly In the Shoes of Auroresky) Derivative Claims Against Boise Realty and the Callies

Plaintiffs' Twelfth through Fourteenth Causes of Action assert derivative claims purportedly in the name of Auroresky against Boise Realty, Callies Construction, and the Callies. Defendant finds two faults with these causes of action: first that Plaintiffs did not adhere to the requirements of Idaho Code § 53-659 pertaining to derivative actions by members of Limited Liability Companies; and second, because Auroresky, an Idaho L.L.C., should actually stand as a plaintiff in the derivative action asserted on its behalf against the Callies, Boise Realty and Callies Construction, all of whom are Idaho citizens, this Court's diversity jurisdiction is defeated.

Idaho Code § 53-659 clarifies the authority of LLC members to sue on behalf of the business entity. It states "a suit on behalf of the limited **[*29]** liability company may be brought *only in the name of the limited liability company*. . . ." Idaho Code § 53-659 (emphasis added). Defendants assert that the quoted portion of the code is dispositive since Plaintiffs brought suit in their own name, rather than naming Auroresky as plaintiff.[5] Plaintiffs counter that Defendants cite no "legal authority in support of its position that Auroresky Investments, LLC must be named as a party plaintiff," and that Defendants' *Rule 12(c)* motion must be denied because "[b]are contentions, unsupported by explanation or authority are deemed waived." (Pl.'s Resp. to Auroresky's Mot. for Jdgmt on the Pldgs 10-11.) The Court notes at the outset that neither party's briefing on this issue is helpful. Defendants cite but a single element of the Idaho Code and provide no examples of the code's application. In contrast, Plaintiffs fail to address the merit of the issue raised by Defendants' citation, instead arguing that Defendants waived the applicability of Idaho Code § 53-659 by not supporting their position. In making this argument, Plaintiffs commit the same sin, setting forth only an unpublished California district court case, *McNearney v. U.S. Bankcorp, Inc, 2006 U.S. Dist. LEXIS 36479, 2006 WL 1582250 (E.D. Cal 2006)*, and a single paraphrased reference to a distinguishable Idaho Supreme **[*30]** Court case, *Balser v. Kootenai County Bd. of Comm'rs., 110 Idaho 37, 40, 714 P.2d 6 (1986)*, for the generalized assertion that citations to "unhelpful" or "general" legal authority are insufficient and constitute waiver.

It is true that a party waives arguments it fails to support. *FDIC v. Garner, 126 F.2d 1138, 1145 (9th Cir. 1997)*. To say, however, that Defendants fail to cite any legal authority or made only "bare contentions" is an exaggeration. It is true that they did not elaborate significantly, on Idaho Code § 53-659's application in the case law,[6] yet the statute appears plain on its face. Indeed, there is no ambiguity present in the clause requiring that L.L.C. derivative actions be brought *only* in the name of the company. The Court accordingly dismisses Plaintiffs' Twelfth through

[5] Plaintiffs attempt to apply Idaho Code § 30-6-902, which revises § 53-659. § 30-6-902 states that "A member [of an L.L.C.] may maintain a derivative action to enforce a right of a limited liability company if: (1) The member first makes a demand on the other members . . . and the other members do not bring the action within a reasonable time; or (2) A demand under subsection (1) would be futile." However, a subsequent section of the same chapter, § 30-6-1104 states that § 30-6-902 "governs only . . . [a] limited liability company formed on or after July 1, 2008," and thus does not apply to Auroresky.

[6] The Court notes that its research did not yield any published Idaho trial, appellate, or Supreme Court opinion applying the statute either.

Fourteenth Causes of Action without prejudice; Plaintiffs are free to bring the same actions a second time in state court pursuant to § 53-659.[7]

G. Does Plaintiffs' First Amended Complaint Satisfy the Particularity Requirements of *Fed. R. Civ. P. 9(b)*

Defendant Auroresky asserts that Plaintiffs' First Cause of Action, which alleges in its title "Fraud and Deceit against the Callies" but which at times states claims against Auroresky, and ultimately seeks relief from Auroresky, does not plead the elements of fraud with sufficient particularity to satisfy *Fed. R. Civ. P. 9(b)*.

Rule 9(b) requires plaintiffs **[*31]** alleging fraud to "state with particularity the circumstances constituting fraud." The Ninth Circuit has stated that *Rule 9(b)*'s requirement amounts to "requr[ing] the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber Distrib Co. V. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986)*. To satisfy this requirement, a plaintiff must state with particularity the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. *Odom v. Microsoft, 486 F.3d 541, 554 (9th Cir. 2007)*. Scienter, however, may be generally averred from the circumstances surrounding the alleged fraud. *Id.*

In this case, Plaintiffs allege throughout the First Amended Complaint that their investment in Auroresky was induced in part because it was to be secured by an interest in the underlying Property, but that the Deeds of Trust actually issued by Auroresky to that end were knowingly invalid because Auroresky did not possess fee simple title to the Property. (First Amended Complaint at 15, 20, 33, 34.) Although it may be that the First Cause of Action is misleadingly titled, the Court cannot comprehend how Defendant Auroresky can claim to have insufficient notice of the claims against it, nor that **[*32]** it is unable given the information in the pleadings to prepare a response.

The Court finds the requirements of *Rule 9(b)* met in this case, and denies Defendant Auroresky's motion for judgment to the extent it seeks dismissal of Plaintiffs' First Cause of Action.

H. This Court's Role in the Requested Dissolution and Winding Up of Auroresky

Plaintiff's Fifth Cause of Action seeks the dissolution and winding up under Idaho law of Defendant Auroresky. Defendant asserts that this Court should abstain from exercising its jurisdiction in this matter because state law provides a comprehensive procedure to accomplish such an endeavor. *See Pennsylvania v. Williams, 294 U.S. 176, 185-86, 55 S. Ct. 380, 79 L. Ed. 841 (1935)*. The Court notes first that *Williams* is factually distinguishable from the instant case. In *Williams*, state law provided for not just a procedure to accomplish the winding up of the banking institution in that case, but also directed specific state officers from the Pennsylvania Department of Banking to play a role. *Id. at 178*. Also, the only basis for jurisdiction in that case was diversity of citizenship of the parties.

In this case, at the present time, the Court possesses original jurisdiction not only due to Plaintiffs' RICO claims, but also due to diversity of citizenship. **[*33]** Further, Idaho law does indeed provide well-established procedures for the winding up of business entities; Idaho Code § 53-643 provides for *judicial supervision* of dissolution and winding up. Consequently, the same concerns which militated in favor of the district court in *Williams* exercising its discretion via abstention are not present here. Further, the Court is wary of preemptively abstaining from what might ultimately prove the only avenue for actual relief if the Plaintiffs are successful on any of their claims.

Consequently, Defendant Auroresky's motion for judgment is denied on this limited issue.

I. Boise Realty's Motion to be Dismissed Entirely

---

[7] Because Idaho Code § 53-659 is dispositive, the Court need not address Defendants' diversity jurisdiction arguments.

Finally, Boise Realty, which was added as a defendant to this action in the First Amended Complaint, seeks dismissal of the suit against it in its entirety. Boise Realty points out that only the Twelfth and Thirteenth Causes of Action state claims for relief against it (for a declarative judgment that the brokerage agreement between Boise Realty and Auroresky is invalid under Idaho law, and for the return of a brokerage commission paid to Boise Realty pursuant to the sale of a portion of the Property to Kaleidoscope Investments, L.L.C.). Indeed, while **[*34]** Boise Realty is mentioned in numerous places throughout the complaint as a co-conspirator with other defendants, and as a part of the associated-in-fact RICO enterprise, no other cause of action seeks relief against it. Boise Realty further asserts that its actions cannot be held to violate RICO or constitute a RICO conspiracy. What's more, Plaintiffs *admit* that they "are not presently seeking to recover damages from Boise Realty for its violations of *18 U.S.C. § 1962(d)*," but that the defendant is "the civil equivalent of an unindicted co-conspirator." (Pl.'s Resp. to Boise Realty, Inc.'s Mot. for Jdgmt on the Pldgs at 1.)

With the dismissal of Plaintiffs' twelfth and thirteenth causes of action pursuant to Section IV(E) of this order, the First Amended Complaint no longer states any claim for relief against Defendant Boise Realty. Consequently, this Court must grant the Defendant's motion for judgment on the pleadings and dismiss Boise Realty from the suit entirely.

V. Conclusion

For the foregoing reasons, Defendants' motions for judgment on the pleadings are DENIED in part and GRANTED in part. Specifically, the Court orders that:

(1) Defendant Auroresky's motion that this Court abstain from exercising **[*35]** jurisdiction on Plaintiffs' Fifth Cause of Action for Dissolution and Winding up of Auroresky is DENIED.

(2) Defendants' common motions for judgment on the pleadings on Plaintiffs' Sixth Cause of Action alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961, et seq.*, is DENIED.

(2) Defendants' common motion for judgment on the pleadings on Plaintiffs' Seventh Cause of Action alleging violations of the Idaho Racketeering Act ("IRA"), *Idaho Code §§ 18-701, et seq.*, is DENIED.

(3) Defendants' common motions for judgment on the pleadings on Plaintiffs' Eighth Cause of Action alleging a conspiracy under RICO, *18 U.S.C. § 1962(d)* is DENIED.
(4) Defendants' common motions for judgment on the pleadings on Plaintiffs' Ninth Cause of Action alleging a conspiracy under the IRA is DENIED.
(5) Defendants' common motions for judgment on the pleadings on Plaintiffs' Tenth Cause of Action alleging a common law civil conspiracy is DENIED.

(6) Auroresky's and the Callies' motions for judgment on the pleadings on Plaintiffs' Eleventh Cause of Action alleging "reckless and willful misconduct" is DENIED. Plaintiffs' opposition thereto is hereby construed as a motion to amend, which is GRANTED. Plaintiffs may file an amended complaint **[*36]** curing the deficiencies with the First Amended Complaint's Eleventh Cause of Action within ten (10) days of the filing of this order; if Plaintiffs fail to cure the deficiencies the cause of action will be dismissed.
(7) Defendants' common motions for judgment on the pleadings on Plaintiffs' Twelfth, Thirteenth and Fourteenth Causes of Action, member derivative actions by Auroresky, seeking a various relief from Boise Realty, and Tricia and Randall Callies, doing business as Callies Construction is GRANTED.

(8) Defendant Auroresky's motion for judgment on the pleadings alleging that Plaintiffs' First Amended Complaint does not plead fraud with sufficient particularity to satisfy the requirements of *Fed. R. Civ. P. 9(b)* is DENIED.
(9) Defendant Boise Realty's motion for judgment on the pleadings and dismissal as a party from the instant suit is GRANTED.

The Court is mindful, however, that the instant motions were considered under the comparatively lenient standards appropriate to *Fed. R. Civ. P. 12(b)(6)*, in which Plaintiffs need only state sufficiently detailed allegations to raise their right to relief above mere speculation. As such, the Court notes without commenting further on the merits that Defendants may well be justified **[*37]** in raising some of the same or similar arguments at later stages in this case.

DATED this 26th day of January, 2009.

/s/ William F. Downes

Honorable William F. Downes

United States District Judge

Sitting by Special Designation

Applera Corp. v. Mich. Diagnostics, LLC

United States District Court for the District of Massachusetts

January 27, 2009, Decided

CIVIL ACTION NO. 07-CV-10547-GAO

Reporter

594 F. Supp. 2d 150 *; 2009 U.S. Dist. LEXIS 6212 **; 2009-1 Trade Cas. (CCH) P76,481

APPLERA CORPORATION, Plaintiff v. MICHIGAN DIAGNOSTICS, LLC, Defendant.

Prior History: Applera Corp. v. Mich. Diagnostics, LLC, 2007 U.S. Dist. LEXIS 90916 (D. Mass., Dec. 11, 2007)

Core Terms

patents, infringement, counterclaim, allegations, declaratory judgment, products, parties, bad faith, patentee, second amended complaint, unfair competition, invalid, non-infringement, declaration, license, Lanham Act, amend, case or controversy, motion to dismiss, composition, fifty-five, inventions, expired, argues, rights, subject matter jurisdiction, fail to state a claim, inequitable conduct, patent infringement, actual controversy

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

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

HN1[] **Pleadings, Amendment of Pleadings**

Leave to amend a complaint should be given freely when justice so requires. Fed. R. Civ. P. 15(a)(2). This standard reflects the liberal amendment policy underlying Rule 15. Grounds for denial generally involve undue delay, bad faith, dilatory motive of the requesting party, repeated failure to cure deficiencies, and futility of amendment.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN2[] **Justiciability, Case & Controversy Requirements**

The Declaratory Judgment Act provides that in a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C.S. § 2201(a). The requirement that there be a case of actual controversy has been interpreted to refer to the type of "cases" and "controversies" that are justiciable under U.S. Const. art. III.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN3[] **Federal Declaratory Judgments, Scope of Declaratory Judgments**

There is no bright-line test, but the decisions of the U.S. Supreme Court have required that a dispute be definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be under a hypothetical state of facts. Under all the circumstances there must be a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Patent Law > Remedies > Declaratory Judgments

HN4[] **Federal Declaratory Judgments, Scope of Declaratory Judgments**

In the context of conduct prior to the existence of a license, declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement, without some affirmative act by the patentee. But U.S. Const. art. III jurisdiction may be met where the patentee takes a position that puts the declaratory judgment plaintiff in the position of either pursuing arguably illegal behavior or abandoning that which he claims a right to do. Where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license, an Article III case or controversy will arise.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Evidence > Burdens of Proof > Allocation

Patent Law > Remedies > Declaratory Judgments

HN5[] **Judgments, Declaratory Judgments**

A party claiming declaratory judgment jurisdiction must show that it existed at the time its counterclaims were filed.

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

HN6[] **Federal Unfair Competition Law, Lanham Act**

See *15 U.S.C.S. § 1125(a)(1)*.

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

Patent Law > Infringement Actions > Defenses > General Overview

HN7[] **Federal Unfair Competition Law, Lanham Act**

The protection otherwise afforded by the patent laws to a patentee's conduct in enforcing its patent may be lost if the patentee acts in bad faith. However, a claim for patent infringement, without more, cannot be the basis for an unfair competition claim under § 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*. There is no legal basis for a holding that inequitable conduct, or the assertion of a patent procured through inequitable conduct, constitutes unfair competition.

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

Patent Law > Infringement Actions > General Overview

HN8[] **Federal Unfair Competition Law, Lanham Act**

The initiation of a patent infringement suit is clearly not covered by the text of § 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, while a communication to the customers of the accused infringer, in certain instances, may be. While a patentee's statements as to its patent rights are conditionally privileged, they may be actionable if made in bad faith. To harmonize this tension between patent law and the Lanham Act, the Federal Circuit held that before a patentee may be held liable under *15 U.S.C.S. § 1125(a)* for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith.

Patent Law > Nonobviousness > General Overview

HN9[] **Patent Law, Nonobviousness**

A patented invention can be "based on" prior work and yet still include novel, non-obvious advances or refinements.

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

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

HN10[] **Federal Unfair Competition Law, Lanham Act**

In addition to alleging facts supporting bad faith, a plaintiff bringing a claim under § 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)(1)*, must allege (1) that the defendant made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiffs.

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

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

HN11[] Scope, Monopolization Offenses

A patent is an exception to the general rule against monopolies, but one who obtains a patent by knowingly and willfully misrepresenting facts to the U.S. Patent and Trademark Office can be stripped of the exemption from antitrust regulation. The enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present.

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

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

HN12[] Inequitable Conduct, Anticompetitive Conduct

A fraud allegation pursuant to Walker Process Equip., Inc. v. Food Mach. & Chem. Corp is subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*. In alleging fraud a party must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*.

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

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

HN13[] Heightened Pleading Requirements, Fraud Claims

Inequitable conduct, like fraud, has to be pled with particularity. *Fed. R. Civ. P. 9(b)*.

Counsel: **[**1]** For Michigan Diagnostics, LLC, Counter Claimant, Defendant: Roy J. Coleman, Kirk C. Teska, Iandiorio & Teska, Waltham, MA; David Oppenhuizen, Arnold S. Weintraub, LEAD ATTORNEYS, The Weintraub Group, P.L.C., Farmington Hills, MI.

For Applera Corporation, Counter Defendant, Plaintiff: T. Christopher Donnelly, Jill Brenner Meixel, LEAD ATTORNEYS, Adam B. Ziegler, Donnelly, Conroy & Gelhaar, LLP, Boston, MA.

Judges: George A. O'Toole, Jr., United States District Judge.

Opinion

[*153] OPINION AND ORDER

O'TOOLE, D.J.

I. Background

The plaintiff, Applera Corporation, acting through its division Applied Biosystems Group ("Applied Biosystems"), alleges in its amended complaint that the defendant, Michigan Diagnostics, LLC ("Michigan Diagnostics") has infringed three of its patents: U.S. Patent No. 6,514,717B2 (the '717 Patent), U.S. Patent No. 6,322,727B1 (the '727 Patent), and U.S. Patent No. 6,107,024 (the '024 Patent). These patents relate to kits used for detecting a substance in a sample through the generation of light (chemiluminescence) by activating and decomposing stabilized 1,2-dioxetanes. Applied Biosystems alleges that Michigan Diagnostics has directly and indirectly infringed these patents in violation of **[**2]** *35 U.S.C. § 271(a)-(c)*.

All three of these patents have apparently expired for various reasons. In its original complaint, Applied Biosystems acknowledged that the '717 Patent had expired, but alleged past infringement of that patent and ongoing infringement of the '727 Patent. After being informed by Michigan Diagnostics that the '727 Patent had expired, Applied Biosystems amended its complaint to allege only past infringement of that patent. It also added a claim for infringement of the '024 Patent, which has similarly turned out to have expired.

Applied Biosystems now seeks leave to file a second amended complaint which would modify its allegations as to the '024 Patent in light of its expiration, allege infringement by Michigan Diagnostics of five additional patents, and add a new defendant, Dr. Benjamin Giri, the co-founder and co-owner of Michigan Diagnostics. Michigan Diagnostics opposes the motion to amend.

[*154] In response to the existing complaint, Michigan Diagnostics has asserted counterclaims against Applied Biosystems. Invoking the Declaratory Judgment Act, *28 U.S.C. § 2201* ("DJA"), it seeks a declaration of non-infringement as to sixty-two Applied Biosystems patents. It also **[**3]** counterclaims for patent misuse, unfair competition under *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*, and Walker Process fraud in violation of the Sherman Act, *15 U.S.C. § 2*. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. Applied Biosystems has moved to dismiss these counterclaims.

Because it will aid the analysis of the counterclaims to know whether additional infringement claims are part of the case, I turn first to whether Applied Biosystems should be granted leave to amend its complaint.

II. Motion for Leave to File a Second Amended Complaint

As noted, Applied Biosystems proposes to amend its complaint to add infringement claims as to five new patents and to add Dr. Giri as a defendant. Its proposed second amended complaint alleges that Dr. Giri is personally liable for direct and indirect patent infringement, having been personally and actively involved in the infringing activities and in activities that he knew would induce others to infringe. It also contains veil-piercing allegations that Dr. Giri is liable for Michigan Diagnostics' infringement because it is a sham company and alter ego of Dr. Giri.

HN1[] Leave to amend a complaint should **[**4]** be given freely "when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. This standard reflects the liberal amendment policy underlying *Rule 15*. *O'Connell v. Hyatt Hotels of P.R., 357 F.3d 152, 154 (1st Cir. 2004)*. "Grounds for denial generally involve undue delay, bad faith, dilatory motive of the requesting party, repeated failure to cure deficiencies, and futility of amendment." *U.S. ex. rel. Rost. v. Pfizer, 507 F.3d 720, 733-34 (1st Cir. 2007)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*).

Michigan Diagnostics argues that Applied Biosystems has not provided a sufficient reason why it should be allowed to amend its complaint a second time. It particularly argues that Applied Biosystems has not proffered any exhibits that provide a basis in fact for its new infringement allegations or for its allegations against Dr. Giri. It faults Applied Biosystems for having "made no effort to determine the veracity of its accusations in the Second Amended Complaint" by, for example, deposing Dr. Giri. (Def. Michigan Diagnostics' Resp. to Applera Corp.'s Mot. for Leave to File Second Am. Compl. 9.) This argument puts the cart before the horse. Applied Biosystems need not prove its claims before **[**5]** making them, and to the extent this argument is directed at the futility of amendment it falls far short of the mark.

Michigan Diagnostics also contests Applied Biosystems' allegation that Dr. Giri "has been responsible for all of Michigan Diagnostics' research and development activities since its founding," (Pl. Applera Corp.'s Mem. in Supp. of its Mot. for Leave to File Second Amended Compl., Ex. A, pt. 1, P 4), and suggests that this is false because "Dr. Giri has been listed as a co-inventor on at least one of Michigan Diagnostics' published patent applications." (Def. Michigan Diagnostics' Resp. to Applera Corp.'s Mot. for Leave to File Second Am. Compl. 9.) This modest non-sequitur would be relevant, if at all, to the merits of Applied Biosystems' allegations, but such a dispute of fact does not counsel **[*155]** against granting Applied Biosystems leave to amend.

Michigan Diagnostics further states that Applied Biosystems' request for leave to amend is made in bad faith. Its argument in this respect is based principally on Applied Biosystems having twice alleged the ongoing infringement of patents that were actually expired. This latter observation point is fair enough, but there is no **[**6]** suggestion -- or better yet, information -- that any of the new infringement allegations repeat the problem.

The argument that the new claims are made in bad faith is that Applied Biosystems is asserting successive claims on new patents in order to draw out litigation. This same assertion is employed in support of the contention that Applied Biosystems has a dilatory motive and that amending the complaint will cause undue delay. However, the motion to amend is within the Court-approved schedule established on the basis of the parties' joint proposal and prior to the close of discovery and any summary judgment motions. Michigan Diagnostics has already counterclaimed seeking a declaration of non-infringement as to sixty-two Applied Biosystems patents, including four of the five new patents sued on in Applied Biosystems' proposed second amended complaint. Any "delay" occasioned by the need to address the new claims is not undue.

Accordingly, Applied Biosystems' motion is granted and it may file its second amended complaint as proposed.

III. Motion to Dismiss Counterclaims

Applied Biosystems has moved to dismiss Michigan Diagnostics' counterclaims. It argues that Michigan Diagnostics' counterclaim **[**7]** seeking a declaration of non-infringement fails to present a case or controversy and therefore must be dismissed pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure* for lack of subject matter jurisdiction. It further contends that Michigan Diagnostics' counterclaims for patent misuse, unfair competition, and Walker Process fraud each fail to state a claim upon which relief can be granted and must be dismissed pursuant to *Rule 12(b)(6)*.

A. Counterclaims for Non-Infringement of Additional Patents

In the first of its counterclaims, Michigan Diagnostics seeks a declaration of non-infringement as to sixty-two Applied Biosystems patents. With the filing of the second amended complaint, Applied Biosystems alleges the infringement of seven of these sixty-two patents. The other fifty-five are simply other patents held by Applied Biosystems. Applied Biosystems argues that this Court lacks subject matter jurisdiction over Michigan Diagnostics' counterclaims for a declaration of non-infringement of these additional patents because no justiciable case or controversy exists as to those fifty-five patents. I agree.

HN2[] The DJA provides that "[i]n a case of actual controversy within its jurisdiction **[**8]** ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*. The requirement that there be a "case of actual controversy" has been interpreted to refer "to the type of 'Cases' and 'Controversies' that are justiciable under Article III." See *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)* (citing *Aetna Life Ins. of Hartford, Ct. v. Haworth, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617 (1937))*.

[*156] Until recently, the Federal Circuit [1] employed a two-part test to determine the existence of a sufficient "case or controversy": (1) whether conduct by the patentee creates a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit; and (2) whether conduct by the declaratory judgment plaintiff potentially constitutes infringing activity or demonstrates concrete steps taken with the intent to conduct such activity. *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1379 (Fed. Cir. 2007)*; see e.g., *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (1988)*.

In 2007, the Supreme Court rejected the Federal Circuit's "reasonable apprehension of suit" test in *MedImmune, 549 U.S. at 126-32*. The specific question the Court considered was whether Article III and the DJA require "a patent licensee to terminate or breach its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed." *Id. at 120-21*. MedImmune was a drug manufacturer that agreed to a licensing agreement with a patentee, Genentech, allowing it to sell products the sale of which would otherwise infringe on one or more claims of Genentech's patents. *Id. at 121*. The Court held that subject matter jurisdiction existed despite the fact that "the continuation of royalty payments [by the licensee] makes what would otherwise be an imminent threat at least remote, if not nonexistent." See *id. at 128*.

In rejecting the "reasonable apprehension of suit" test, the Court stated that "[t]he rule that a plaintiff must destroy a large **[**10]** building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business, before seeking a declaration of its actively contested legal rights finds no support in Article III." *Id. at 134*. The Court noted that ***HN3***[] there is no bright-line test, but that:

> Our decisions have required that the dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be under a hypothetical state of facts."

Id. at 127 (quoting *Aetna, 300 U.S. at 240-41*). Under "all the circumstance…" there must be "a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941))*.

Following MedImmune, the Federal Circuit held in SanDisk that an Article III case or controversy giving rise to declaratory judgment jurisdiction existed based upon substantial and detailed pre-litigation discussions between the parties **[**11]** about infringement and licensing. See *480 F.3d at 1382*. The declaratory judgment plaintiff - Sandisk Corp. ("Sandisk") - and STMicroelectronics ("ST") were competitors in the flash memory storage business. *Id. at 1374*. The relevant interactions began when ST sent a letter to SanDisk requesting a meeting to discuss a possible cross-license agreement, listing eight patents owned by ST that it suggested "may be of interest." Id. A second letter from **[*157]** ST reiterated the request and listed four additional patents to be considered. Id. The parties had a number of business meetings at which possible infringement and possible cross-licensing were explored in some depth. *Id. at 1374-75*. At one meeting to discuss possible licensing, ST requested that the discussion be considered a settlement discussion under *Federal Rule of Evidence 408*. *Id. at 1375*. It then presented a slide show that referred to SanDisk's "unlicensed activities" and made a four-to-five hour technical presentation identifying the specific claims of each ST patent and how they might be infringed by SanDisk. Id. ST gave SanDisk a packet of materials that included a copy of fourteen ST patents, reverse engineering reports for SanDisk **[**12]** products, and diagrams showing how elements of ST's patent claims covered SanDisk's products. Id. For its part, SanDisk also made a presentation describing its own patents and explaining how ST's product infringed. Id. At the end of the meeting, ST's vice president of intellectual property and engineering told SanDisk's chief intellectual property counsel that "ST has absolutely no plan whatsoever to sue SanDisk." *Id. at 1376*. After further correspondence that involved SanDisk making a confidential cross-licensing offer and attempts to set up another meeting, SanDisk filed

[1] Federal **[**9]** Circuit law governs this inquiry because the underlying merits of the action involve patent infringement. See *Microchip Tech. Inc. v. The Chamberlain Group, Inc., 441 F.3d 936, 940 (Fed. Cir. 2006)*.

suit alleging infringement of one of its patents and seeking a declaratory judgment of non-infringement and invalidity of ST's patents. Id.

Considering MedImmune, the Federal Circuit said:

> HN4[] In the context of conduct prior to the existence of a license, declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement, without some affirmative act by the patentee. But Article III jurisdiction may be met where the patentee takes a position that puts the declaratory judgment plaintiff **[**13]** in the position of either pursuing arguably illegal behavior or abandoning that which he claims a right to do .... We hold that where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license, an Article III case or controversy will arise....

Id. at 1380-81. The court held that the interaction between SanDisk and ST sufficed to present a case or controversy. Id. at 1382. ST sought royalty payments "under its patents based on specific, identified activity." Id. It communicated a detailed infringement analysis, "which identified, on an element-by-element basis, the manner in which ST believed each of SanDisk's products infringed the specific claims of ST's patents." Id.

The court also held that the express statement that ST had no plan to sue SanDisk did not prevent the existence of a sufficient controversy, because ST had "engaged in a course of conduct that shows a preparedness and willingness to enforce its patent rights...." Id. at 1383. The fact that ST stated thereafter that it did not intend to sue constituted "the kind [] of 'extra-judicial **[**14]** patent enforcement with scare-the-customer-and-run tactics' that the Declaratory Judgment Act was intended to obviate." Id. at 1383 (quoting Arrowhead, 846 F.2d at 735).

In Sony Electronics, Inc. v. Guardian Media Technologies, LTD., 497 F.3d 1271, 1273 (Fed. Cir. 2007), declaratory judgment actions were brought by Sony Electronics, Inc. ("Sony") and other electronics companies against Guardian Media Technologies, **[*158]** Ltd. ("Guardian") seeking a declaration that two Guardian patents relating to the "V-Chip" parental television blocking device were not infringed and were invalid and unenforceable. As in Sandisk, there was a substantial and detailed correspondence between the parties prior to litigation. See id. at 1274-1281. Guardian sent the plaintiffs letters entitled "Notice of Patent Infringement," which identified both specific infringing products and specific claims of the patents said to be infringed. Id. at 1274, 1276, 1279. It provided claim charts for its two patents that described each claim it believed to be infringed and stated the basis for that belief, limitation-by-limitation. Id. at 1274, 1277. Guardian requested meetings, mentioned royalties and compensation for products **[**15]** previously sold, offered a license, and exchanged correspondence regarding invalidity and prior art. Id. at 1275-81. Each of the plaintiffs separately filed complaints under the DJA, which were consolidated by the district court. Id. at 1281. The district court granted Guardian's motion to dismiss for lack of subject matter jurisdiction on the ground that there was no actual controversy because Guardian had not expressly threatened to sue any of the plaintiffs for infringement, nor did its actions amount to an implicit threat. Id. at 1281.

The Federal Circuit vacated the district court's dismissal. Id. at 1289. It explained that "the Declaratory Judgment Act was intended to fix the problem that arises when the other side does not sue." Id. at 1284. The "parties had taken adverse positions" on the issues of infringement and validity. Id. at 1285. Guardian had "explicitly identified" the patents and the specific claims of those patents which it asserted were infringed, as well as the specific products it believed were infringing. See id. at 1285. The plaintiffs, in turn, had identified "specific prior art references" that they believed rendered the claims invalid. See id. at 1285-87. **[**16]** As to Sony, the court summarized that "[i]n short, because Guardian asserts that it is owed royalties based on specific past and ongoing activities by Sony, and because Sony contends that it has a right to engage in those activities without a license, there is an actual controversy between the parties within the meaning of the Declaratory Judgment Act." Id. at 1286. The court came to similar conclusions as to the other plaintiffs. Id. at 1286, 1287.

Here, Michigan Diagnostics acknowledges that it bears the burden as HN5[] the party claiming declaratory judgment jurisdiction to show that it existed at the time its counterclaims were filed. See Benitec Austl., Ltd. v. Nucleonics, Inc., 495 F.3d 1340, 1344 (Fed. Cir. 2007), cert. denied, *128 S. Ct. 2055, 170 L. Ed. 2d 811 (2008)*. It argues that an actual controversy exists because the parties have established adverse legal interests. Michigan Diagnostics alleges that Applied Biosystems "sent a letter to Michigan Diagnostics advising Michigan Diagnostics of its extensive patent portfolio and notifying Michigan Diagnostics that it may be infringing patents owned by [Applied Biosystems]." (Michigan Diagnostics LLC's Answer, Affirmative Defs., and Countercls. 8 P 10 **[**17]** [hereinafter Ans. and Countercls.].) It further notes that "[m]inor dialogue occurred between the parties and a meeting was tentatively scheduled in January, 2007, but it never occurred." (Id. P 11.)

Michigan Diagnostics has attached to its brief copies of letters between the parties which preceded this litigation. On July 13, 2006, Counsel to Applied Biosystems sent a letter to Dr. Giri of Michigan Diagnostics that stated:

> In view of certain activities of your company, including your commercially available **[*159]** enzyme triggerable dioxetanes, we believe you should review our U.S. patents listed on the enclosure to this letter. We have included the independent claims in the enclosure as well. These patents were originally assigned to Tropix Inc. and are now part of the Applied Biosystems patent portfolio.
> We propose a meeting to discuss your relevant products in light of our patents with a view toward entering into licensing discussions. We would appreciate receiving your response to this proposal by July 24, 2006.

(Pl. Michigan Diagnostics' Resp. to Def.'s Mot. to Dismiss Countercls. Ex. A. [hereinafter Def.'s Opp.].) This enclosure listed sixty-two patents: seven of the eight patents for which **[**18]** Applied Biosystems now brings infringement claims, and the fifty-five additional patents that are referred to in the counterclaim. Counsel for Michigan Diagnostics responded on August 16, 2006:

> We have now completed a review of approximately one-half of the patent portfolio which you were kind enough to send to us. As I had suggested during our initial telephone conversation, there does not appear to be an issue of infringement.
> The composition which Michigan Diagnostic sells and distributes is outside the claims of any of the patents reviewed to date.
> It appears that each of the Applied Biosystems reviewed patents are limited to a dioxetane where spiro-fused ring, where present, is "passive" or inactive. The Michigan Diagnostic dioxetane is not such a product. However, because of the proprietary nature of the composition, Michigan Diagnostic would only be willing to disclose this compound, to you, to corroborate what is set forth herein, on a confidential basis.
> If you are so inclined, then we will provide the structure to you.
>
> Further, as you indicated to me, you had not, as of the time we discussed the situation, determined or had any knowledge of the actual Michigan Diagnostic composition, **[**19]** only that it was a competitive product in the marketplace.
> Michigan Diagnostic is not seeking litigation nor does it want to engage in the same but, based upon our analysis, there simply does not appear to be any question of infringement at this time, with respect to the patents that have been reviewed to date.

(Id. Ex. B.) Applied Biosystems' counsel replied on August 31, 2006:

> We are currently reviewing your comments with respect to the composition of the products that Michigan Diagnostics sells and we are considering your offer to provide us with details of the structure of these compounds. In the meantime, please advise when you will have completed your review of the remainder of the patents.
> Finally, I would like to clarify the statements in the penultimate paragraph of the first page of your letter. While it is true that I personally have not conducted a determination of the actual Michigan Diagnostics composition, this should not be construed to infer or imply that Applied Biosystems has not conducted an evaluation. In fact, Applied Biosystems has conducted an evaluation of the Michigan Diagnostics products.

(Id. Ex. C.) Counsel for Michigan Diagnostics responded on September 15, **[**20]** 2006:

> .... As I have previously indicated, as soon as the balance of the patents are analyzed, we will supplement our position. However, the next to last sentence of your letter seems to indicate the Applied Biosystems has conducted an evaluation of the compositions of Michigan **[*160]** Diagnostics. Obviously, you may have a

> different view from that of my client and myself and it would certainly be most beneficial if you could provide us with your evaluation to see where, if any, there is disagreement between us. This would quite clearly facilitate the resolution of any potential problem.

(Id. Ex. D.) Counsel for Michigan Diagnostics wrote to the Senior Director of Licensing at Applied Biosystems on December 5, 2006:

> I had previously asked [Applied Biosystems' counsel] to identify which claims of which of your patents you believe the products of Michigan Diagnostic infringe. Once we know this, we can certainly be in a better position to evaluate your position. To suggest that Michigan Diagnostic products infringe all the claims of each patent seems untenable.

(Id. Ex. E.) On March 26, 2007, Applied Biosystems filed its first complaint in the present action.

The communications between the parties have **[**21]** not created a case or controversy as to whether the fifty-five additional Applied Biosystems patents not sued upon are infringed by Michigan Diagnostics. Michigan Diagnostics' previously quoted characterization of its interactions with Applied Biosystems as "[m]inor dialogue" is a fair one. (See Ans. and Countercls. 8 P 11) There is no "definite and concrete" dispute as to particular patents, except the seven patents as to which Applied Biosystems alleges infringement in its second amended complaint. See *MedImmune, Id. at 127* (quoting *Aetna, 300 U.S. at 240*). The correspondence between the parties itself bespeaks the lack of any specific dispute: "it would certainly be most beneficial if you could provide us with your evaluation to see where, if any, there is disagreement between us. This would quite clearly facilitate the resolution of any potential problem," (see Def.'s Opp. Ex. C.); "Once we know [which claims of which patents Applied Biosystems believes are infringed], we can certainly be in a better position to evaluate your position." (see id. Ex. D.)

Precisely. The "problem that arises when the other side does not sue," see *Sony, 497 F.3d at 1284*, is not a problem, or at least **[**22]** not the same problem, when the other side has not made any particularized suggestion of infringement and may *never* sue. Applied Biosystems broadly, and with some palpable bravura, suggested a review of its entire patent portfolio, but it did not make any specific allegations of infringement except within its pleading in this lawsuit. Nor has Michigan Diagnostics, after apparently conducting a review of Applied Biosystems' patents, argued that it might be infringing on any of these patents but for their invalidity. In short, it is far from clear that any dispute actually exists as to the fifty-five patents. As to them it may be fairly said that Michigan Diagnostics is essentially seeking an advisory opinion. There is no jurisdiction for that essay.

Accordingly, Michigan Diagnostics' counterclaim for a declaration of non-infringement must be dismissed for lack of subject matter jurisdiction as to the fifty-five patents not the subject of the infringement claims set forth in the second amended complaint because no case or controversy as to those fifty-five patents presently exists under Article III and the DJA.

B. Counterclaim for Unfair Competition Under the Lanham Act

Michigan Diagnostics **[**23]** alleges that Applied Biosystems, "knowing that its patents are either invalid … or that Michigan Diagnostics' compositions do not infringe … has undertaken the predatory practice of driving Michigan Diagnostics **[*161]** out of business by causing Michigan Diagnostics to defend against baseless patent infringement claims," (Ans. and Countercls. 11 P 29), that it "has undertaken this predatory practice of suing in order to maintain its monopoly position in the chemiluminescent chemical market by means other than competition on the merits," (Id. P 30), and that "[u]pon information and belief, [Applied Biosystems] has undertaken this course of conduct deliberately to impede Michigan Diagnostics' efforts to sell its chemical by using the internet to advise potential customers that Michigan Diagnostics is infringing [Applied Biosystems'] patents." (Id. at 12 P 31.) It avers that the alleged actions by Applied Biosystems constitute unfair competition in violation of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*. Applied Biosystems moves to dismiss this counterclaim because it fails to state a claim upon which relief can be granted and dismissal is appropriate under *Rule 12(b)(6)*.

Section 43(a) **[**24]** of the Lanham Act provides, in relevant part:

> HN6[] (1) Any person who, on or in connection with any goods or services … uses in commerce any … false or misleading description of fact, or false or misleading representation of fact, which--
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

HN7[] "[T]he protection otherwise afforded by the patent laws to a patentee's conduct in enforcing its patent may be lost if the patentee acts in bad faith." Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1343 (Fed. Cir. 1999) However, a claim for patent infringement, without more, cannot be the basis for an unfair competition claim under Section 43(a) of the Lanham Act. See id. at 1344, 1349. "[T]here is no legal basis for a holding that inequitable conduct, or the assertion of a patent procured through inequitable conduct, constitutes unfair competition." Pro-Mold & Tool Co., Inc. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1575 (Fed. Cir. 1996). **[**25]** Accordingly, to the extent the counterclaim is based on nothing more that Applied Biosystems' assertion of infringement claims, it fails to state a claim upon which relief under Section 43(a) can be granted.

Michigan Diagnostics argues, however, that the "gravamen" of its claim is marketplace activity, not the abuse of the administrative or judicial process. (Def.'s Opp. 10.); see Zenith, 182 F.3d at 1349. HN8[] "[T]he initiation of an infringement suit is clearly not covered by the text of § 43(a), while a communication to the customers of the accused infringer, in certain instances, may be." Zenith, 182 F.3d at 1349. While a patentee's statements as to its patent rights are conditionally privileged, they may be actionable if made in bad faith. Zenith, 182 F.3d at 1353. To harmonize this tension between patent law and the Lanham Act, the Federal Circuit held in Zenith that "before a patentee may be held liable under § 43(a) for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith." Id.

The unfair competition counterclaim does not adequately **[**26]** allege bad faith. It broadly asserts that when it brought its infringement suit and announced it to the market, Applied Biosystems knew its patents were invalid or that Michigan Diagnostics' **[*162]** products did not infringe the patents. Such a conclusory allegation of guilty knowledge is not sufficient as a matter of pleading. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Moreover, it would disturb the balance the Zenith court attempted to strike between the cause of action authorized under Section 43(a) of the Lanham Act and the enforcement of rights granted under patent law if a party were to be permitted to plead an unfair competition counterclaim merely by means of a broad allegation that the patentee "knew" it had no right to enforce its patent. See Zenith, 182 F.3d at 1352 ("[A] conflict seemingly arises when an accused infringer attempts to use 'the long reach of ***antitrust law***' to frustrate an honest patentee's right to enforce a patent.") (quoting **[**27]** Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 (9th Cir. 1979)). Pleading knowledge of non-infringement or invalidity in broad conclusory terms without specifics would enable an accused infringer to add a Lanham Act claim to almost every case. To forestall that eventuality, Zenith requires an allegation of bad faith. Id. at 1353. Twombly requires this allegation to include "enough facts to state a claim to relief that is plausible on its face," such that the claim crosses "the line from conceivable to plausible." See Twombly, 127 S.Ct. at 1974.

In Zenith, the unfair competition claim asserted facts which, taken as true, would support a conclusion of bad faith. It was alleged that the purportedly infringing products used a specific touch-screen technology that was different from the specific touch-screen technology disclosed in the patents. Zenith, 182 F.3d at 1343. The impossibility of infringement thus had to have been obvious to the patentee, and any representation to the contrary had to have been knowingly false and thus made in bad faith. See id. There are no similar specifics in Michigan Diagnostics' allegations. Although one of the letters attached to Michigan Diagnostics' **[**28]** brief in opposition to the motion to dismiss provides this type of information at a very general level, (see Def.'s Opp. Ex. B ("It appears that each of the

Applied Biosystems reviewed patents are limited to a dioxetane where spiro-fused ring, where present, is "passive" or inactive. The Michigan Diagnostic dioxetane is not such a product.")), similar allegations are not made in the counterclaim.

What the counterclaim alleges is that, as a result of both prior collaboration and prior litigation between the present parties and their respective predecessors, "the technology and patents involved herein are based in whole or in part on Dr. Giri's invention(s), the knowledge of which [Applied Biosystems] had possessed." (Ans. and Countercls. 8 P 9.) No details. No reference to any claims in any patent. No description of any particular product. The fact that Applied Biosystems' patents are "based on" earlier work is as consistent with their validity as with their invalidity. ***HN9***[] A patented invention can be "based on" prior work and yet still include novel, non-obvious advances or refinements. The vague allegations in this case are a far cry from the specific allegations found sufficient in Zenith. **[**29]** They are insufficient to plausibly plead that Applied Biosystems acted in bad faith in communicating to the market its assertions about infringement by Michigan Diagnostics.

More fundamentally, the unfair competition counterclaim does not allege the necessary elements of a claim under *§ 43(a)* of the Lanham Act. See *15 U.S.C. § 1125(a)(1)*. ***HN10***[] **[*163]** In addition to alleging facts supporting bad faith, a plaintiff must allege "(1) that the defendant ... made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services; (2) that the statement actually deceives or is likely to deceive a substantial segment of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the defendant caused the statement to enter interstate commerce; and (5) that the statement results in actual or probable injury to the plaintiffs." *Zenith, 182 F.3d at 1348, 1353*. Review of the counterclaim reveals that at least the second, third, and fifth necessary elements are omitted.

Michigan Diagnostics' counterclaim for unfair competition therefore must be dismissed pursuant to *Rule 12(b)(6)* for failing to state **[**30]** a claim upon which relief can be granted.

C. Counterclaim for *Walker Process* Fraud

HN11[] A patent is an exception to the general rule against monopolies, but one who obtains a patent by knowingly and willfully misrepresenting facts to the PTO can be stripped of the exemption from antitrust regulation. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. "[T]he enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present." *Id. at 174*.

HN12[] A Walker Process fraud allegation is subject to the heightened pleading requirements of *Rule 9(b)*. *Medimmune, Inc. v. Genentech, Inc., 427 F.3d 958, 967 (Fed. Cir. 2005)*, rev'd on other grounds, *546 U.S. 1169, 126 S. Ct. 1329, 164 L. Ed. 2d 46 (2007)*. "In alleging fraud ... a party must state with particularity the circumstances constituting fraud...." *Fed. R. Civ. P. 9(b)*. Michigan Diagnostics fails to plead its Walker Process fraud counterclaim with adequate factual particularity. It alleges that Applied Biosystems intentionally deceived the Patent and Trademark Office ("PTO"), and thus obtained its patents, by not informing the PTO "of its knowledge of Dr. Giri's **[**31]** inventions which were substantially incorporated into many of the [Applied Biosystems] patents." (Ans. and Countercls. 12 P 33.) But it does not identify which of the many Applied Biosystems patents were obtained in this manner, which inventions by Dr. Giri were incorporated, nor what disclosures should have been made.

Michigan Diagnostics offers only the circular explanation that the counterclaims pertain to "those patents which 'were invented by Dr. Giri while employed at Wayne State University" and 'inventions that the named inventor derived from Dr. Giri's work.'" (Def.'s Opp. 15 (citing Ans. PP 19-20).) This is plainly insufficient; there is a total absence of particularity.

The counterclaim for Walker Process fraud is therefore dismissed pursuant to *Rules 12(b)(6)* and *9(b)*.

D. Patent Misuse

Michigan Diagnostics also counterclaims for "patent misuse." Similar to its Walker Process fraud counterclaim, in this counterclaim it alleges that many of Applied Biosystems' patents are invalid and unenforceable by reason of their being obtained through fraud and/or inequitable conduct before the PTO. ***HN13***[] Inequitable conduct, like fraud, has to be pled with particularity. See *Fed. R. Civ. P. 9(b)*; **[**32]** *Cent. Admixture Pharm. Servs., Inc. v. Advanced Cardiac Solutions, P.C., 482 F.3d 1347, 1356 (Fed. Cir. 2007)*. Michigan Diagnostics **[*164]** specifies neither the particular patents that it believes were obtained through fraud or inequitable conduct, nor the prior art invented by Dr. Giri that should have been disclosed to the PTO. It therefore has failed to state a claim upon which relief can be granted, and the counterclaim for patent misuse must be dismissed pursuant to *Rules 12(b)(6)* and *9(b)*.

IV. Conclusion

For all the foregoing reasons, the plaintiff's Motion for Leave to File Second Amended Complaint (dkt. no. 66) and its Motion to Dismiss Defendant's Counterclaims (dkt. no. 28) are both GRANTED. The defendant's counterclaims are dismissed with the exception of Count I (the counterclaim for non-infringement) insofar as it seeks a declaratory judgment regarding the patents in suit under the second amended complaint.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.

United States District Judge

End of Document

In re Marine Hose Antitrust Litig.

United States District Court for the Southern District of Florida, Miami Division

January 28, 2009, Decided; January 28, 2009, Entered

Case No. 08-1888-MDL-GRAHAM/TURNOFF

Reporter

2009 U.S. Dist. LEXIS 154963 *

IN RE MARINE HOSE ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *In re Marine Hose Antitrust Litig., 531 F. Supp. 2d 1381, 2008 U.S. Dist. LEXIS 5244 (J.P.M.L., Jan. 23, 2008)*

Core Terms

amended complaint, motion to dismiss, Marine, Hose, allegations, antitrust, conspiracy, commerce, subject matter jurisdiction, domestic, leave to amend, export, antitrust claim, purchases, attendance, anti trust law, foreign nation, further order, guilty plea, courts, joined, oil, lack of subject matter jurisdiction, reasonably foreseeable, inter alia, immunity, prices, file opposition, give rise, import

Counsel: **[*1]** For Bayside Rubber & Products, Inc., Plaintiff: Alfred H. Davidson, IV, Patrick Barrett, LEAD ATTORNEYS, Barrett Law Office PLLC, Nashville, TN; Bruce Harris Fleisher, LEAD ATTORNEY, Biscayne Bank Tower, Coconut Grove, FL; Gaines C. McCorquodale, LEAD ATTORNEY, McCorquodale & McCorquodale, Jackson, AL; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Hollis Lee Salzman, LEAD ATTORNEY, Robins Kaplan LLP, New York, NY; M. Stephen Dampier, LEAD ATTORNEY, Law Offices of M. Stephen Dampier, PC, Fairhope, AL; Alexander Rundlet, Montoya Law, P.A., Miami, FL; Benjamin F. Johns, Joseph G. Sauder, PRO HAC VICE, Chimicles & Tikellis LLP, Haverford, PA; Jorge Schmidt, Law Offices of Jorge Schmidt, P.A., Miami, FL; Joseph C. McCorquodale, PRO HAC VICE, McCorquodale & McCorquodale, Jackson, AL; Lori A. Fanning, Marvin A. Miller, Miller Law LLC, Chicago, IL; Robert C. Josefsberg, Podhurst Orseck, P.A., Miami, FL; William V. Reiss, PRO HAC VICE, Labaton Sucharow LLP, New York, NY.

For Shipyard Supply, LLC, Plaintiff: Douglas A. Abrahams, Joseph C. Kohn, William E. Hoese, LEAD ATTORNEYS, Kohn Swift & Graf PC, Philadelphia, PA; Gregory Paul Hansel, Randall B. Weill, LEAD ATTORNEYS, **[*2]** Preti Flaherty Beliveau & Pachios LLP, Portland, ME; Hollis Lee Salzman, LEAD ATTORNEY, Robins Kaplan LLP, New York, NY; Katherine Warthen Ezell, LEAD ATTORNEY, Podhurst Orseck Josefsberg et al, Miami, FL; Manuel Juan Dominguez, LEAD ATTORNEY, Cohen Milstein Sellers Toll, PLLC, Palm Beach Gardens, FL; Alexander Rundlet, Montoya Law, P.A., Miami, FL; Joshua R. Carver, Preti Flaherty Beliveau & Pachios LLP, Portland, ME; Robert C. Josefsberg, Podhurst Orseck, P.A., Miami, FL; Victor Manuel Diaz, Jr., VM Diaz and Partners, LLC, Miami Beach, FL.

For Expro Gulf Limited, Plaintiff: Adam M. Moskowitz, LEAD ATTORNEY, The Moskowitz Law Firm, PLLC, Coral Gables, FL; Alexander Spicola Bokor, LEAD ATTORNEY, Kozyak Tropin & Throckmorton, Coral Gables, FL; Bruce E. Gerstein, Kevin S. Landau, LEAD ATTORNEYS, Garwin Gerstein & Fisher LLP, New York, NY; Dan Litvin, LEAD ATTORNEY, PRO HAC VICE, Garwin Gerstein & Fisher LLP, New York, NY; Hollis Lee Salzman, LEAD ATTORNEY, Robins Kaplan LLP, New York, NY; Linda P. Nussbaum, LEAD ATTORNEY, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP, New York, NY; Susan Morgan, LEAD ATTORNEY, Phelps Dunbar LLP, New Orleans, LA; Alexander Rundlet, Montoya Law, P.A., Miami, **[*3]** FL; Jan Bartelli, Garwin Gerstein & Fisher LLP, New York, NY; Robert C. Josefsberg, Podhurst Orseck, P.A., Miami, FL.

For Weeks Marine, Inc., individually and on behalf of a class of all those similarly situated, Consol Plaintiff: Alexander Rundlet, LEAD ATTORNEY, Montoya Law, P.A., Miami, FL; Hollis Lee Salzman, LEAD ATTORNEY, Robins Kaplan LLP, New York, NY; Richard A. Koffman, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll, Washington, DC; Robert Gerard Eisler, Seth Rich Gassman, LEAD ATTORNEYS, Cohen Milstein Hausfeld & Toll PLLC, New York, NY; Robert C. Josefsberg, Podhurst Orseck, P.A., Miami, FL.

For LOOP LLC, Intervenor Plaintiff: Alexander Rundlet, LEAD ATTORNEY, Montoya Law, P.A., Miami, FL; Hollis Lee Salzman, Robins Kaplan LLP, New York, NY; Jorge Schmidt, Law Offices of Jorge Schmidt, P.A., Miami, FL; Robert C. Josefsberg, Podhurst Orseck, P.A., Miami, FL.

For Christian Caleca, Defendant: Donald C. Klawiter, Jennifer Marie Driscoll, LEAD ATTORNEYS, Mayer Brown LLP, Washington, DC; Michael Abram Rosen, LEAD ATTORNEY, Fowler Rodriquez, Coral Gables, FL.

For Parker Hannifin Corporation, Defendant: Alan Graham Greer, LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Carmen Guerricagoitia **[*4]** McLean, John Michael Majoras, LEAD ATTORNEYS, Jones Day, Washington, DC; Jeffrey Allan Sudduth, Legon Fodiman PA, Miami, FL; Michael Welch, PRO HAC VICE, Jones Day, Washington, DC; Michelle L. Marks, PRO HAC VICE, Jones Day, Washington, DC.

For Parker ITR srl, Defendant: Alan Graham Greer, LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Carmen Guerricagoitia McLean, John Michael Majoras, LEAD ATTORNEYS, Jones Day, Washington, DC; Jeffrey Allan Sudduth, Legon Fodiman PA, Miami, FL; Michael Welch, Michelle L. Marks, PRO HAC VICE, Jones Day, Washington, DC.

For Bridgestone Industrial Products America, Inc., Defendant: Alain E. Boileau, LEAD ATTORNEY, City of Fort Lauderdale, Fort Lauderdale, FL; Hal D. Hardin, LEAD ATTORNEY, Nashville, TN; Harold Richard Donnelly, LEAD ATTORNEY, Nashville, TN; Jeffrey A. Kimmel, LEAD ATTORNEY, Meister Seelig & Fein LLP, New York, NY; Robert Hunt Schwartz, LEAD ATTORNEY, McIntosh Schwartz, P.L., Fort Lauderdale, FL; Bryan Robert Cleveland, Zumpano, Patricios & Winker, PA, Coral Gables, FL.

For Misao Hioki, Defendant: Christopher T. Casamassima, LEAD ATTORNEY, PRO HAC VICE, Kirkland & Ellis LLP, Los Angeles, CA; David Ian Horowitz, LEAD ATTORNEY, Kirkland **[*5]** & Ellis LLP, New York, NY; James H. Mutchnik, LEAD ATTORNEY, Kirkland & Ellis LLP, Chicago, IL; Bryan Robert Cleveland, Zumpano, Patricios & Winker, PA, Coral Gables, FL; David John Zack, Jeffrey Bruce Crockett, Coffey Burlington, P.L., Miami, FL.

For Manuli Oil & Marine (USA),Inc, Defendant: LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Daniel A. Goldschmidt, Fern Mechlowitz, Ian E. Browning, Robert M. Osgood, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell LLP, London EC4A 1AN; Lyle Eric Shapiro, LEAD ATTORNEY, Herskowitz Shapiro, PLLC, Miami, FL; Jeffrey Allan Sudduth, Legon Fodiman PA, Miami, FL.

For Manuli Rubber Industries S.p.A., Defendant: Alan Graham Greer, LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Daniel A. Goldschmidt, Fern Mechlowitz, Ian E. Browning, Robert M. Osgood, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell LLP, London EC4A 1AN; Lyle Eric Shapiro, LEAD ATTORNEY, Herskowitz Shapiro, PLLC, Miami, FL; Jeffrey Allan Sudduth, Legon Fodiman PA, Miami, FL.

For Yokohama Rubber Co., Ltd., Defendant: Benjamin D. Singer, Danielle Randazzo, Joseph P. Armao, Paul M. Alfieri, Robert Harrison Bell, LEAD ATTORNEYS, Linklaters LLP, New York, NY; Bryan Robert Cleveland, **[*6]** LEAD ATTORNEY, Zumpano, Patricios & Winker, PA, Coral Gables, FL.

For Val M Northcutt, Francesco Scaglia, Defendants: Fern Mechlowitz, Robert M. Osgood, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell LLP, London EC4A 1AN; Lyle Eric Shapiro, LEAD ATTORNEY, Herskowitz Shapiro, PLLC, Miami, FL; Alan Graham Greer, DayPitney/Richman Greer, Miami, FL.

For Vanni Scodeggio, Defendant: James M. Griffin, Kevin R. Sullivan, LEAD ATTORNEYS, King & Spalding LLP, Washington, DC; Susan D. Inman, King & Spalding LLP, LEAD ATTORNEY, Washington, DC; Andrea C. Clarke, PRO HAC VICE, King & Spalding LLP, Washington, DC; Jeffrey Allan Sudduth, Legon Fodiman PA, Miami, FL; Marc David Seitles, Seitles & Litwin, P.A., Miami, FL.

For Bryan Allison, Defendant: Ann-Marie Luciano, Christopher Fitzgerald Branch, James R. Martin, R. Bruce Holcomb, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Richard Aldo Serafini, Serafini Law Office, LLC, Fort Lauderdale, FL.

For David Brammar, Defendant: Alan Graham Greer, LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Christopher Fitzgerald Branch, James R. Martin, R. Bruce Holcomb, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Richard Aldo Serafini, Serafini **[*7]** Law Office, LLC, Fort Lauderdale, FL.

For Dunlop Oil & Marine LTD., Defendant: Alan Graham Greer, LEAD ATTORNEY, DayPitney/Richman Greer, Miami, FL; Christopher Fitzgerald Branch, James R. Martin, R. Bruce Holcomb, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Avi Benayoun, Greenberg Traurig, Fort Lauderdale, FL; Richard Aldo Serafini, Serafini Law Office, LLC, Fort Lauderdale, FL.

For Bridgestone Corporation, Defendant: Peter W. Homer, Homer & Bonner, LEAD ATTORNEY, Miami, FL; Boyd Cloern, Clifford Chance US LLP, Washington, DC; Bryan Robert Cleveland, Zumpano, Patricios & Winker, PA, Coral Gables, FL; Gregory J. Trask, Homer Bonner Jacobs, P.A., Miami, FL; James Weidner, Clifford Chance US LLP, New York, NY; Leiv Blad, Lowenstein Sandler LLP, Washington, DC.

For Trelleborg Industries, S.A., Defendant: Benedict P. Kuehne, LEAD ATTORNEY, Kuehne Davis Law, P.A., Miami, FL; David G. Meyer, LEAD ATTORNEY, Howrey LLP, Los Angeles, CA; James G. Kress, Richard E. DiZinno, LEAD ATTORNEYS, Howrey LLP, Washington, DC; Joseph Hyam Serota, LEAD ATTORNEY, Weiss Serota Helfman Pastoriza et al, Coral Gables, FL; Roxann E. Henry, LEAD ATTORNEY, PRO HAC VICE, Howrey LLP, Washington, DC; Walter **[*8]** M. Berger, LEAD ATTORNEY, Howrey LLP, Houston, TX; John Joseph Quick, Weiss Serota Helfman Pastoriza Cole & Boniske, P.L., Coral Gables, FL; Susan Dmitrovsky, Law Office of Benedict P. Kuehne, P.A., Miami, FL.

For Pirelli Itala, S.p.A., also known as, Pirelli Itala, Pirelli, S.p.A., Defendants: Christopher R.J. Pace, LEAD ATTORNEY, JONES DAY, Miami, FL; Lee Philip Teichner, LEAD ATTORNEY, Holland & Knight, Miami, FL; Leon Fresco, LEAD ATTORNEY, Holland & Knight LLP, Washington, DC; Marie L. Mathews, LEAD ATTORNEY, PRO HAC VICE, Weil Gotshal & Manges, New York, NY; Thomas J. Adair, LEAD ATTORNEY, PRO HAC VICE, Hartline Dacus Barger Dreyer & Kern LLP, Dallas, TX; C. Vernon Hartline, Jr., Jeffrey S. Patterson, PRO HAC VICE, Hartline Dacus Barger Dreyer & Kern LLP, Dallas, TX; Steven A. Reiss, PRO HAC VICE, Weil Gotshal & Manges, New York, NY.

For ITR, S.p.A., SAIAG, S.p.A., Comital SAIAG, S.p.A., Defendants: Joseph D. Pizzurro, Nancy E. Delaney, Timothy N. McCabe, LEAD ATTORNEYS, PRO HAC VICE, Curtis Mallet-Prevost Colt & Mosle, New York, NY; Susan Eileen Trench, LEAD ATTORNEY, Arnstein & Lehr, LLP, Miami, FL; Alan Graham Greer, DayPitney/Richman Greer, Miami, FL.

For Sumitomo Rubber Industries **[*9]** Ltd.,, doing business as, Sumitomo Rubber Group, Defendant: Alan Graham Greer, DayPitney/Richman Greer, Miami, FL; James P. Tallon, PRO HAC VICE, Shearman & Sterling, New York, NY; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; William King Hill, GUNSTER, Miami, FL.

For SRI Hybrid Ltd., Defendant: Alan Graham Greer, DayPitney/Richman Greer, Miami, FL; Scott N. Wagner, Bilzin Sumberg Baena Price & Axelrod, LLP, Miami, FL; William King Hill, GUNSTER, Miami, FL.

For Charles Gillespie, Defendant: Jeffrey Eric Foreman, LEAD ATTORNEY, Foreman Friedman, PA, Miami, FL; Alison Smith, PRO HAC VICE, McDermott Will & Emery LLP, Houston, TX; Catherine J. MacIvor, Foreman Friedman PA, Miami, FL.

Robert Furness, Defendant, Pro se, Pompano Beach, FL.

For Robert Furness, Defendant: M. Daniel Hughes, Fort Lauderdale, FL.

For Pirelli & C, S.p.A., Defendant: Christopher R.J. Pace, JONES DAY, Miami, FL.

For Jacques Cognard, Consol Defendant: Daniel Allan Lurvey, The Law Office of Daniel A. Lurvey, P.A., Miami, FL.

For Terminales Maritimas Patagonicas, Claimant: Jose M Umbert, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA.

Judges: DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE.

Opinion by: DONALD L. GRAHAM **[*10]**

Opinion

OMNIBUS ORDER ON MOTIONS TO DISMISS

THIS CAUSE comes before the Court upon several Motions to Dismiss. The Court has considered each motion, the pertinent portions of the record, and is otherwise fully advised in the premises. As set forth below, the motion posing jursidictional challenges is granted, in part, and denied, in part. The motions under *Rule 12(b)(6)* are also granted with Plaintiffs having leave to amend the complaint. Overall, the Court concludes the FTAIA bars Expro's claims. Therefore, it follows that this Court lacks subject matter jurisdiction on those claims. As to the remaining claims, the Court finds the First Amended Complaint [D. E. 180] generally satisfies the pleading standard set forth in *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, but fails to sufficiently plead as to the Defendants' individual conduct.

I. BACKGROUND

This a consolidation of seven antitrust actions transferred to this District by the Multidistrict Litigation Panel. Plaintiffs, Bayside Rubber & Products, Inc. ("Bayside") and Expro Gulf Limited ("Expro"),[1] allegedly purchased Marine Hose[2] from the Defendants. Defendants are domestic and foreign manufacturers and corporate executives alleged to be part of a conspiracy in restraint of trade to artificially **[*11]** raise the prices for Marine Hose in the United States, in violation of *Section 1* of the *Sherman Act*, *15 U.S.C. § 1*.[3] [See First Amended Consolidated Class Action Complaint, D.E. 180, hereinafter the "First Amended Complaint," at ¶ 56.] Filed as a proposed class action, the First Amended Complaint alleges that since 1985, Defendants engaged in anticompetitive activities that included, inter alia, attending meetings in the United States to discuss the sale of Marine Hose and to fix Marine Hose prices through extensive arrangements among various international corporations and their respective corporate officers. Plaintiffs further allege that as a result of the global conspiracy, they (and the proposed class) paid artificially inflated prices for Marine Hose and, consequently, suffered antitrust injury to their business or property.[4] [See First Amended Complaint ¶ 2.] While some Defendants answered the First Amended Complaint,[5] others filed motions to dismiss that, as discussed below, are ripe for disposition.[6]

---

[1] Bayside and Expro are the remaining Plaintiffs. Two other initial plaintiffs (Weeks Marine, Inc. and Shipyard Supply, LLC) have voluntary dismissed their claims. [See D.E. 172.]

[2] Marine Hose is a flexible rubber hose used primarily to transport oil between ships, terminals, buoys and tanks.

[3] *Section 1* of the *Sherman Act* provides, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

[4] The allegations at issue in the First Amended Complaint were also the subject of separately filed criminal complaints against numerous corporations and individuals as further discussed herein.

[5] The following Defendants answered the First Amended Complaint: Yokohama Rubber Co. Ltd. [D.E. 197], Misao Hioki [D.E. 212], Bridgestone Corporation [D.E. 214] and Jacques Cognard [D.E. 207]. The record also reveals that the Manuli Defendants

II. LAW & DISCUSSION

Because of the primary concern relating to jurisdiction, see e.g., *Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1328 n.4 (11th Cir. 1999)* ("A federal court not only has the power but also the obligation to inquire into jurisdiction whenever the possibility **[*12]** that jurisdiction does not exist arises."), the Court will first address the motions presenting jurisdictional challenges and then discuss the motions to dismiss for failure to state a claim.[7]

A. Motion to Dismiss under *Federal Rule of Civil Procedure 12(b)(1)* for Lack of Subject Matter Jurisdiction

Manuli Rubber Industries, S. P.A and Manuli Oil & Marine (U.S.A) Inc. (hereinafter, the "Manuli Defendants")[8] seek dismissal of the First Amended Complaint asserting, inter alia, that Plaintiffs lack standing to bring these antitrust claims and further contending the Court lacks subject matter jurisdiction over Expro's claims.

A motion to dismiss for lack of standing and an attack on the court's subject matter jurisdiction is brought under *Federal Rule of Civil Procedure 12(b)(1)*. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 807 n.8 (11th Cir. 1993)*; see also *In re Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 559 (D. Del. 2006)* (granting 12(b)(1) motion because FTAIA precluded foreign antitrust claims and plaintiff lacked standing). Because a jurisdictional challenge goes to the court's very power to hear a case, the court has "the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." Pop's Pancakes, Inc. v. NuCO2, Inc., 2008 WL 2901748, at *11 (S.D. Fla. 2008).

In this case, the Manuli Defendants pose a factual challenge to the Court's subject matter jurisdiction. [See D.E. 242 at 4.] Factual attacks challenge the **[*13]** existence of subject matter jurisdiction, in fact, irrespective of the pleadings and matters outside of the pleadings, such as testimony and affidavits are considered. *Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)*; *United States v. LSL Biotechnologies, 379 F.3d 672, 683 (9th Cir. 2004)* (finding that while federal complaints are generally construed liberally, it was proper for the district court to scrutinize the complaint more closely in order to determine whether it had subject matter jurisdiction even when the scrutiny involved taking preliminary evidence, weighing that evidence and deciding, as a matter of law, whether the facts alleged support jurisdiction); *Turicentro, S.A. v. American Airlines, Inc., 303 F.3d 293, 300 n.4 (3rd Cir. 2002)* (noting that on a factual challenge to jurisdiction, the court is not confined to the allegations in the complaint); *Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420, 424 (5th Cir. 2001)* (finding that, on a motion to

---

also filed answers to the First Amended Complaint [see D.E. 200 and 201], but later joined in the instant motion to dismiss on jurisdictional grounds [D.E. 242].

[6] Because certain entities were served later in the litigation and have only recently filed their pleadings, the motions to dismiss by certain Defendants are not yet ripe. The record also reveals that Defendants Peter Whittle and PW Consulting have failed to answer or otherwise respond while Defendant Uwe Bangert has yet to be served. [See D.E. 340.]

[7] Defendants have largely joined in each others motions and many raise substantially the same issues, which the Court will address in turn.

[8] In addition to the Manuli Defendants, the Motion to Dismiss [D.E. 242] initially included Defendants Parker Hannifin Corporation, Parker S.r.l and Giovanni Scodeggio (collectively, the "Parker Defendants"). Significantly, however, the Parker Defendants executed a settlement agreement with Plaintiffs and withdrew from the motion to dismiss. [See D.E. 296.] Consequently, the Court's ruling herein is inapplicable to the Parker Defendants.

The record also reflects that other Defendants filed notices of adopting the motion to dismiss for lack of subject matter jurisdiction, including Defendants Scaglia, Northcutt and Furness (the "Adopting Defendants"). Consequently, for ease of reference, the discussion refers to the Manuli Defendants, but also includes the Adopting Defendants as noted herein.

dismiss for lack of subject matter jurisdiction, the court may evaluate the complaint, the complaint supplemented by undisputed facts plus the court's resolution of disputed facts).[9]

1. The FTAIA and Expro's Claims

The Court will first address the issue of subject matter jurisdiction over Expro's claims. The Manuli Defendants argue that Expro's claims are barred by the Federal Trade Antitrust Improvements Act ("FTAIA"), which amended the *Sherman Act*.[10]See *Pub. L. 97-290, title IV, § 402, 96 Stat 1246 (1982)*. Significantly, the Sherman Act reaches conduct outside **[*14]** the borders of the United States, *but only when* the conduct is intended and does in fact produce a substantial effect on commerce in the United States. *United States v. Anderson, 326 F.3d 1319, 1329 (11th Cir. 2003)* (emphasis added). In 1982, Congress enacted the FTAIA to limit American court's jurisdiction over international commerce to transactions that affect the American economy. *Anderson, 326 F.3d at 1329*; *F. Hoffman-La Roche, Ltd. v. Empagran, S.A., 124 S. Ct. 2359 (2004)* ("*Empagran I*") ("The [FTAIA] excludes from the *Sherman Act*'s reach much anticompetitive conduct that causes only foreign injury."); *Den Norske, 241 F.3d at 421* ("The FTAIA, [was enacted to] clarify the application of United States antitrust laws to foreign conduct, limits the application of such laws when non-import foreign commerce is involved."). The Supreme Court in *Empagran I* explained the FTAIA exclusions as limiting anticompetitive conduct that causes only foreign injury "by setting forth a general rule that the *Sherman Act* shall not apply to conduct involving trade or commerce with foreign nations" and then creating "exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce or American exporters. *Empagran I, 124 S. Ct. at 2363* (internal quotations and citations omitted).

Courts have repeatedly recognized the complexities of the FTAIA. See, e.g. *CSR Limited v. CIGNA Corp., 405 F. Supp. 2d 526, 537 (D.N.J. 2005)* ("[T]he FTAIA restrictions are complex and [its] application requires careful scrutiny.); *Turicentro, 303 F.3d at 300-01* (describing the FTAIA as inelegantly phrased and using rather convoluted language); *Den Norske, 241 F. 3d at 423* ("The history of this body of case law is confusing and unsettled."). And, although passed more than two decades ago, it appears the FTAIA body of law is still developing. *LSL Biotechnologies, 379 F. 3d at 678* ("Federal courts did not shower the FTAIA with attention for the first decade after its enactment, but have more recently begun to interpret the previously obscure statute); *Accord Den Norske, 241 F. 3d at 423*. Indeed, research reveals that the 2004 *Empagran I* Supreme Court opinion has become the seminal case on FTAIA jurisdiction. *Empagran I, 124 S. Ct. at 2363* (focusing on the FTAIA's application where price fixing

---

[9] At this juncture of the litigation, the Court stresses that it does not purport to make conclusive factual findings on the merits. Rather, the factual discussion herein is made to the extent necessary for purposes of the Court's jurisdictional analysis and to evaluate the motions to dismiss.

[10] The FTAIA expressly states:

Section 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless -

(1) such conduct has a direct, substantial, and reasonably foreseeable effect -

> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce **[*15]** with foreign nations; or
>
> (B) on export trade or expert commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provision of *sections 1 to 7* of this title, other than this section.

If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(b), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a.

that is significantly foreign causes some domestic antitrust injury and independent foreign injury). Moreover, the Eleventh Circuit Court of Appeals has had only one occasion to discuss the FTAIA's jurisdictional requirements. See *Anderson, 326 F.3d at 1329* (finding the FTAIA inapplicable to government **[*16]** programs in appeal from criminal conviction for antitrust violations). Against this backdrop, this Court is tasked with reviewing the First Amended Complaint, the relevant case law and the underlying facts to determine whether it has subject matter jurisdiction over Expro's antitrust claims.[11]

As the first step in the analysis, the Court must determine whether the FTAIA applies to the facts of this case. The Manuli Defendants maintain that Expro's claims are subject to the FTAIA because they involve foreign commerce that was not import or export trade. [See D. E. 242 at 6.] In support of their argument, the Manuli Defendants emphasize that Expro is a foreign corporation, organized under the laws of Cyprus, with its principal place of business in South Africa. [See D.E. 242 at 6-7; D.E. 180 ¶ 10.] According to the First Amended Complaint, Expro purchased Marine Hose from Defendant Parker ITR, an Italian corporation, with its principal place of business in Veniano, Italy. [D. E. 180 ¶ 18.] The First Amended Complaint is without further detail as to the purchase of Marine Hose between Expro and Parker. That said, in seeking dismissal, the Manuli Defendants submitted documents demonstrating **[*17]** that Expro sent purchase orders from Cyprus to Italy, where the Marine Hose was manufactured. [See D.E. 242-3; 242-7.] The Marine Hose was ultimately shipped from Italy to Nigeria for use in Nigeria. [See D.E. 248-8.]

Plaintiffs do not dispute these facts. Rather, Plaintiffs submit that the FTAIA is inapplicable-irrespective of the foreign nationality of the parties and the international route that the Marine Hose traveled until its final destination in Nigeria. In support thereof, Plaintiffs emphasize that the focus of the FTAIA is on the transaction and not on the identity or nationality of the parties. [See D. E. 257 at 12.][12] Plaintiffs also rely on Defendant Parker's own records, which listed Expro as a U.S. customer [See D.E. 257, Exh. G.] Plaintiffs lastly argue that the contract between Expro and Parker was governed by U.S. law, which evidences the domestic nature of the transaction. [See D.E. 257 at 11, 13.]

In considering the First Amended Complaint, the undisputed facts and the evidence surrounding the purchase of Marine Hose, the Court concludes that the FTAIA applies. Here, the transaction involved foreign entities (*i.e.*, a Cyprus plaintiff against an Italian defendant) **[*18]** who contracted for the manufacture, delivery and payment of Marine Hose-all stages of a transaction taking place wholly outside of the domestic United States. While, for purposes of the FTAIA, the citizenship of the parties is irrelevant, see, e.g., *Turicentro, 303 F. 3d at 301 n.5* (noting that foreigners should also enjoy the protection of the antitrust laws in the domestic marketplace, just as citizens), the nature of the transaction is not. Indeed, were it not for the participation of Expro's Houston office, wherein discussions concerning the purchase and sale of Marine Hose occurred, the transaction here at issue would be more akin to the international transaction underlying *Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420 (5th Cir. 2001)*.

Specifically, *Den Norske* involved the claim of a Norwegian plaintiff against English and Dutch defendants for an alleged antitrust conspiracy to raise prices of oil in the United States. *Den Norske, 241 F.3d at 421*. Plaintiff in *Den Norske* argued that the injury suffered in the North Sea (the exclusive location of plaintiffs' oil and gas drilling platforms) was a prerequisite for the injury suffered in the United States. *Id. at 425*. In concluding that the FTAIA applied, the Fifth Court in *Den Norske* found that the commerce for heavy lift barge services in the North Sea was not United States commerce *with* ***[*19]*** foreign nations, but commerce *between* or *among* foreign nations and, therefore, it was doubtful "that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act." *Id. at 426* (emphasis in original).

---

[11] Bayside's claims are not challenged under the FTAIA. Notably, Bayside is an Alabama corporation with its principal place of business in Mobile, Alabama. [See D.E. 180 ¶ 9.]

[12] Plaintiff filed their response under seal although the Manuli Defendants maintain that the motion need not remain under seal. [See D.E. 242 at 1 n1.] Consequently, the references herein are to docket entry 257 which will be unsealed within ten (10) days of this Order unless the parties otherwise advise.

Here, the Expro transaction for Marine Hose is between Expro (a Cyprus corporation) and Parker (an Italian corporation) for Marine Hose that was undisputedly intended for a project in Nigeria. The fact that negotiations may have transpired and/or matters were approved in Expro's Houston, Texas office is transform this international transaction into one that is domestic in nature. *CSR Ltd., 405 F. Supp. 2d at 539* (finding the FTAIA applicable even where some of the alleged actions have some connection to activities in the United States). Ultimately, the evidence overwhelmingly demonstrates that the transaction involves trade or commerce with foreign nations and, therefore, Plaintiffs cannot escape the application of the FTAIA to Expro's antitrust claims.

Since the FTAIA applies, the Court must next turn to whether Expro's claims fall under one of the statutory exceptions. Under the exceptions to the FTAIA, the statute allows a court to hear Sherman Act claims involving non-import **[*20]** trade or non-import commerce with foreign nations only if the challenged conduct *both* (i) sufficiently affects American commerce, *i.e.*, it has a direct, substantial and reasonably foreseeable effect on American domestic, import or certain expert commerce *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e.*, the effect must give rise to a *Sherman Act* claim. *Empagran I, 124 S. Ct. at 2365* (emphasis added).

In this case, in analyzing the first element of the statutory exceptions, the relevant provision of the FTAIA is *section 6a(1)(B)*.[13] *Section 6a(1)(B)* requires a direct, substantial and reasonably foreseeable effect on *export* trade or commerce with foreign nations, of a person engaged in such trade or commerce in the United States. *15 U.S.C. § 6a(1)(B)* (emphasis added). The body of law concerning the "direct, substantial and reasonably foreseeable" statutory requirement under the FTAIA largely focuses on *import* trade or *import* commerce. See, e.g., *Turicentro, 303 F.3d at 302*. Nevertheless, to the extent the case law addresses how courts interpret the FTAIA, the Court finds it applicable to this purportedly "exporter" case.

For instance, courts have noted that the "direct, substantial and reasonably foreseeable" test was intended to serve as a simple, straightforward clarification of **[*21]** existing American law. *Turicentro, 303 F. 3d at 304* (internal quotations and citations omitted). It is the situs of the effects, as opposed to the conduct, that determines whether United States antitrust laws applies. Id. (internal citations omitted); *Den Norske, 241 F.3d at 428* (holding that the FTAIA precludes subject matter jurisdiction over claims of foreign plaintiffs against defendants where situs of the injury was overseas and the injury arises from effects in a non-domestic market); see also *CSR Ltd., 405 F. Supp. 2d at 526* (rejecting the notion that the direct, substantial and reasonably foreseeable requirement is met were defendant's actions were taken or overseen in the United States). In this case, although Plaintiffs argue that the "export trade exception to the FTAIA [applies] because the transaction was part of the U.S. export market for offshore oil and gas production" [see D.E. 257 at 14], the Court finds that Plaintiffs are hard pressed to prove this contention.

First, this Court finds significant that the allegations in the First Amended Complaint are wholly focused on the "purchase of Marine Hose in the United States." [See D.E. 180 ¶¶ 1, 2, 6, 47, 49.] However, in arguing that an FTAIA exporter exception applies, Plaintiffs interestingly stray away **[*22]** from the market for Marine Hose and argue the transaction at issue between Expro and Defendant Parker was part of the "U.S. export market for *offshore oil and gas production*." [See D.E. 257 at 14.] Plaintiffs then proceed to discuss the importance of Houston, Texas as the center for the export market for offshore oil and gas production services. Id. at 15-16. Unfortunately for Plaintiffs, the market for oil and gas services is not the product at issue in this case. Rather, according to the First Amended Complaint "this lawsuit is a class action on behalf of direct purchasers . . of *Marine Hose* . . who purchased *Marine Hose* in the United States" from Defendants. [D.E. 180 ¶ 1.][14] Having defined the case as one

---

[13] Plaintiffs do not argue the exception under *section 6a(1)(A)* (concerning domestic import trade or import commerce) and the Court finds no basis to consider *section 6a(1)(A)* applicable to the facts of this case.

[14] While it is possible for an exporter of services to meet the export trade exception, see e.g., *Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 712 (5th Cir. 1999)* (concluding that claims of exporter of telecommunications were not barred by FTAIA), this case is not about exporting services. See also *Emag Sols., LLC v. Toda Kogyo Corp., 2005 U.S. Dist. LEXIS 44512, 2005 WL 1712084, *11 (N.D. Cal. 2005)* (granting a motion to dismiss antitrust claims where plaintiffs failed to allege that foreign plaintiffs were American export competitors).

about the purchase of Marine Hose, Plaintiffs cannot now substitute the relevant market in an attempt to satisfy the FTAIA's requirements. Ultimately, Plaintiffs are unable to meet the statutory exception under *section 6a(1) (B)* and, therefore, Expro's claims are barred by the FTAIA.

Because the Court finds that Plaintiffs have failed to satisfy the first requirement for an FTAIA exception (*i.e.*, demonstrating a direct, substantial and reasonably foreseeable effect on export trade **[*23]** or commerce with foreign nations), the Court need not address the second requirement of the FTAIA contained in *section 6a(2)*. Suffice it to mention, however, that under *section 6a(2)*, Plaintiffs would also have to prove that the effect on domestic commerce gives rise to an antitrust claim. *15 U.S.C. § 6a(2)*. Notably, courts addressing this second element have set forth a stringent test. See *Empagran I, 124 S. Ct. at 2372* (interpreting *section 6a(2)* as referring specifically to plaintiff's claim or the claim at issue and not someone else's claim); *Dynamic Random Access Memory (DRAM) Antitrust Lit., 546 F.3d 981, 988 (9th Cir. 2008)* (holding that the "give rise" language of *section 6a(2)* requires direct or proximate causal relationship); *Den Norske, 241 F.3d 427* (recognizing that notwithstanding a connection between high domestic prices and high prices overseas, the FTAIA requires more than a "close relationship" between domestic injury and the plaintiff's claim; it demands that the domestic effect "give rise" to the claim); Empagran, S.A. v. F. Hoffman-Laroche, 417 F.32d 1267 (D.C. Cir. 2005) (on remand from Supreme Court, finding antitrust claims of foreign purchasers did not "give rise" to injury under FTAIA).

In sum, the Court finds Expro's claims are barred by the FTAIA and, consequently, this Court does not have subject matter jurisdiction over those claims. It follows that, having found no subject matter jurisdiction over Expro's claims, the Court also **[*24]** finds that Expro is unable to satisfy the requisite antitrust standing. See, e.g., *Den Norske, 421 F.3d at 431 n.32*. With Expro's claims barred, Bayside is the remaining plaintiff. The discussion as to Bayside follows.

2. Bayside's Claims and Standing

The Manuli Defendants challenge Bayside's claims for lack of standing. In order to determine whether a plaintiff has standing to bring an antitrust action, a court must examine the allegations in the complaint. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)* (citing *Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1387 (11th Cir. 1990)*). Standing in an antitrust case involves more than the "case or controversy" requirement that drives constitutional standing. Id. Rather, antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws. Id. (internal citations omitted) .

The Eleventh Circuit has developed a two-prong test for examining whether a plaintiff is the proper party for antitrust standing. *Todorov, 921 F.2d at 1449*. Specifically, a court should first determine whether the plaintiff suffered "antitrust injury" and, second, assess whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury. *Id*. The party invoking federal jurisdiction bears the burden **[*25]** of proving standing. Each element must be supported in the same as any other matter, *i.e.*, with the same manner and degree of evidence required at the successive stages of the litigation. When standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from defendant's conduct may be sufficient to show standing. *Bischoff v. Osceola Cty., 222 F.3d. 874, 878 (11th Cir. 2000)* (internal citations omitted).

In this case, the Manuli Defendants contend that Bayside has provided no documentary evidence to prove that it purchased Marine Hose as alleged in the First Amended Complaint. [See D. E. 242 at 17-19.] The Manuli Defendants further contend that the affidavits submitted by Bayside's executive and Bayside's responses to discovery stating that "[Bayside] made multiple purchases during the Class Period of Marine Hose" [see D.E. 242-15] are insufficient to meet Plaintiffs' burden. Id. In opposition, Bayside maintains that the sworn statements and pleadings demonstrate it is a direct purchaser of Marine Hose in the United States. Bayside specifically points to two sworn statements of Steve R. Gatlin, Bayside's Vice President, wherein Mr. Gatlin expressly states that "Bayside purchased marine hose up to 10 inches **[*26]** and greater in diameter from one or more of the named

Defendants" and further states that "[e] very one of these purchases of marine hose was invoiced and paid for in the United States."[15] [See D.E. 257, Exhs. B and C.]

While the Manuli Defendants attempt to undermine the evidence submitted concerning the alleged purchases by Bayside of Marine Hose, the Court finds that Bayside has met its burden on standing. First, the Court considers the First Amended Complaint, which expressly alleges that Plaintiffs are "all persons . . . who purchased Marine Hose in the United States from Defendants." [See D.E. 180 ¶ 47.] Taking the allegations of the First Amended Complaint as true, Bayside has alleged antitrust standing. The Court also considers persuasive the sworn statements as Mr. Gatlin who unequivocally states that, despite the inability to locate invoices for the purchases, Bayside purchased Marine Hose during the relevant period.[16] [See D.E. 257 at Exhs. Band C.] There is no basis for this Court to disbelieve such evidence. Lastly, and more importantly, as an allegedly direct purchaser of Marine Hose, the Court finds that Bayside's antitrust injury cannot be more direct. Consequently, at **[*27]** this juncture of the litigation, the Court must deny the motion to dismiss challenging Bayside's standing in this antitrust litigation.[17]

In sum, the Court finds that Bayside has met its burden to establish antitrust standing. Therefore, the motion to dismiss for lack of subject matter jurisdiction as to Bayside is denied and this litigation may proceed on Bayside's claims.[18]

B. Defendant Scaglia's Motion to Dismiss [D.E. 98, 184]

Defendant Francesco Scaglia, an Italian citizen, seeks dismissal of the First Amended Complaint on several grounds, including, inter alia, lack of personal jurisdiction, insufficient service of process, failure to state a claim and lack of subject matter jurisdiction. [See D.E. 98 at 1 and 184 at 2.] Plaintiffs filed opposition [D.E. 114] and Defendant Scaglia filed a reply [D.E. 12l].[19]

Of primary concern is Defendant Scaglia's request that this Court quash service of the summons and complaint pursuant to *Rule 12(b)(4)* and *(5)*. Defendant Scaglia maintains that, when served with the First Amended Complaint, he was exempt from the service of civil process because he was attending court in this District in connection with the antitrust criminal charges against him.[20] [See D.E. 98 at **[*28]** 12.] As an initial matter, the Court notes that because Scaglia was personally served in Florida with the summons and complaint, Florida statute *section 48.031* creates personal jurisdiction. See *Fla. Stat. § 48.031(1) (a)* ("Service of original process is made by delivering a copy of [the complaint, petition, or other initial pleading] to the person to be served."); see also *Campo*

---

[15] Mr. Gatlin also states that although he has attempted to locate invoices for the purchases, he has been unable to do so and that in the normal course of business, invoices from the mid-to-late 1980's were not retained by Bayside. [See D.E. 257 at Exh. B.]

[16] While a trier of fact may later conclude otherwise with respect to Mr. Gatlin's statements, at this stage of the litigation, this Court has no reason to doubt Mr. Gatlin's submissions and declines to do so solely because Bayside has been unable to locate invoices for transactions going back more than twenty years.

[17] The Manuli Defendants alternatively move for summary judgment on Bayside's claims. [See D.E. 242 at 17 n.6.] Because the Court finds that Bayside has satisfied standing for purposes of the motion to dismiss, the Court declines to reach the summary judgment arguments.

[18] Bayside is the sole remaining Plaintiff. Notably, however, Plaintiffs have separately filed a motion for class certification under *Federal Rule of Civil Procedure 23* that may impact the ultimate number of plaintiffs in this action. The Court will separately dispose of that motion in due course.

[19] Defendant Scaglia also joined in the Manuli Defendants' motion to dismiss for lack of subject matter jurisdiction [D.E. 243], which was disposed of in Section A of this Order.

[20] According to Defendant Scaglia, although initially arrested in Houston, Texas, he was ordered to appear in this District for proceedings in the antitrust criminal prosecution. [See D.E. 7.]

v. Tafur, 704 So.2d 730, 732 (Fla. Dist. Ct. App. 1998) (finding service was perfected when defendant personally served while visiting jurisdiction).

Nevertheless, the Court must consider Defendant Scaglia's argument on immunity from service of process because it is undisputed that he was served while in this District for the separate criminal prosecution. In this regard, Stewart v. Ramsay, 242 U.S. 128, 37 S. Ct. 44, 61 L. Ed. 192 (1916), holds that "suitors as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going." Stewart, 242 U.S. at 129. Significantly, however, Plaintiffs correctly contend that Defendant Scaglia is not entitled to immunity from service of process when this case arises out of the same misconduct at issue in the criminal proceedings that brought him to this district. See, e.g., ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1460 (10th Cir. 1995) (finding that defendant was not immune from service of process **[*29]** when the court action wherein he was served related to the same arbitration matter that he was attending); see also 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1080 (2008) (noting that "[there is generally no immunity from service of process when the suit in which the immunity is sought is part of, or a continuation of, the suit for which the person claiming immunity is in the jurisdiction.") Ultimately, the Court must deny Defendant Scaglia's request to quash service of the civil summons and complaint.[21]

Lastly, the Court considers Defendant Scaglia's request for dismissal pursuant to the Supreme Court's precedent in Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In connection therewith, Defendant Scaglia emphasizes that, according to the First Amended Complaint, he attended only one May 2007 meeting during which federal agents arrested several corporate executives. [See D.E. 180 ¶ 68.] With the exception of that one specific allegation, Defendant Scaglia argues that the remaining general allegations of a conspiracy are insufficient to state a claim.

As discussed in section C below, Plaintiffs have alleged sufficient facts of an overall antitrust conspiracy, but fail to allege how Defendant Scaglia **[*30]** (and others) joined the conspiracy. While a complaint attacked by Rule 12(b)(6) does not need detailed factual allegations, see Twombly, 127 S. Ct. at 1964, general allegations as to all of the Defendants are insufficient. See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 2008 WL 3916309, *4 (N.D. Cal. 2008); In re Parcel Tanker Shipping Servs. Antitrust Litig., 541 F. Supp 2d 487, 491-92 (D. Conn. 2008). Here, Defendant Scaglia is alleged to have attended a May 1, 2007 meeting in Houston, Texas, for the purpose of carrying out the conspiracy [D. E. 180 ¶ 68].[22] Mere attendance at one meeting within a twenty-plus year conspiracy, without more, is insufficient. Consequently, the Court must grant Defendant Scaglia's motion to dismiss. However, the Court will grant leave to amend (within ten days) the First Amended Complaint to allow Plaintiffs an opportunity to specifically allege the violative conduct undertaken by Defendant Scaglia.

Lastly, Defendant Scaglia joined in the motion to dismiss based on subject matter jurisdiction. [See D.E. 98 at 19-20 and D.E. 243] As set forth in section A above, the claims against all Defendants (including Scaglia) are dismissed to the extent that the FTAIA bars Expro's antitrust claims. In sum, Defendant Scaglia's motion to dismiss is granted as set forth herein.

C. Defendant Val M. Northcutt's Motion to Dismiss [D.E. 95, 193]

---

[21] Having found Defendant Scaglia was properly served via personal service under Florida statute section 48.031, the Court concludes that it has obtained personal jurisdiction over him. Campo, 704 So.2d at 732. Consequently, the Court need reach the alternative arguments concerning jurisdiction pursuant to Florida's long arm statute, section 48.193. [See D.E. 98 at 10-12 and D.E. 114 at 7-12.]

[22] Plaintiffs also allege that Defendant Scaglia was criminally charged with conspiring to suppress and eliminate competition for Marine Hose in the United States. [See D.E. 77]. The Court finds that a general allegation of a criminal indictment without underlying details as to the specific acts purported taken by the Defendant is of no consequence to the sufficiency of the complaint.

Defendant Val M. Northcutt seeks **[*31]** dismissal of the First Amended Complaint arguing, inter alia, that Plaintiffs have failed to sufficiently allege an antitrust violation against him individually.[23] [See D. E. 9, 193.] Plaintiffs filed opposition [D.E. 110, 228] Defendant Northcutt filed a reply [D.E. 119] and a notice of supplemental authority [D.E. 267][24]

Defendant Northcutt's motion to dismiss under *Rule 12(b)(6)* is largely premised on *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court decision discussing the pleading standard in motions to dismiss generally and, more specifically, in price-fixing conspiracy class actions. *Twombly, 127 C. St. 1955*. *Twombly* provides, in relevant part, that "while a complaint attacked by a *Rule 12 (b) (6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. 1964-65 (internal quotations and citations omitted). Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true (even if doubtful in fact). Id. Moreover, Sherman antitrust claims require a complaint with enough factual **[*32]** matter (taken as true) to suggest that an agreement was made. *Id. at 1966*. Indeed, "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreements reflects the threshold requirement of *Rule 8(a) (2)* that the plain statement possess enough heft to show that the pleader is entitled to relief." *Id. at 1966*.

In this case, Defendant Northcutt stresses that, although Plaintiffs have filed an 80-paragraph amended complaint, he is only mentioned three times throughout the pleadings.[25] In opposition, Plaintiffs maintain that, given the totality of allegations in the First Amended Complaint, the Court can infer that Defendant Northcutt participated in the conspiracy and Plaintiffs need not present particularized allegations. [See D.E. 110 at 8-9.]

After a careful review of the First Amended Complaint, the Court finds that Plaintiffs have sufficiently plead the alleged antitrust conspiracy so as to satisfy the "plausible inference of an agreement" for purposes of *Twombly*.[26] 127 S. Ct. at 1965-66; see, e.g., *In re OSB Antitrust Lit., 2007 U.S. Dist. LEXIS 56573, *9 (E.D. Pa. 2007)* (denying motion to dismiss where plaintiffs allegations plausibly raised the suggestion of an agreement, in violation of the antitrust laws). Nevertheless, while a complaint need not be detailed defendant by defendant, **[*33]** see, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 2008 WL 3916309, *4 (N.D. Cal. 2008)*, Plaintiffs have failed to allege that each individual Defendant joined the conspiracy and played some role. Id. Given the allegations of an international conspiracy, spanning more than twenty years, including more than ten corporations and numerous executives, the Court is concerned that general allegations as to all defendants are insufficient to provide notice of the claims.

Plaintiffs may have realized the deficiencies when, as an argument of last resort against dismissal as to Defendant Northcutt, they requested leave to amend the complaint to cure any deficiencies. [See D.E. 110 at 15 n.16.]

[23] Defendant Northcutt also joined in the Manuli Defendants' motion to dismiss for lack of subject matter jurisdiction [D.E. 297], which was disposed of in Section A of this Order. The record also indicates that Defendant Northcutt incorporated by reference the arguments of other Defendants seeking dismissal on various grounds. [See D.E. 106-109, 297.] To the extent not addressed in this section, the relevant issues are disposed of as discussed in connection with other Defendants in this action.

[24] According to the notice of supplemental authority [D.E. 267], Defendant Northcutt was found not guilty in the antitrust criminal proceedings, Case No. 07-60220-CR-HURLEY (S.D.Fla. Nov. 10, 2008).

[25] Defendant Northcutt is alleged to be an "executive at Defendant Manuli Rubber Industries," [D.E. 180 ¶ 38] who was indicted by the government and charged with conspiring to suppress and eliminate competition for Marine Hose in the United States [D.E. 180 ¶ 77].

[26] Plaintiffs specifically allege, inter alia, that the Defendants did the following: (i) in 1999, authorized and directed PW Consulting and Whittle to coordinate the Defendants' conspiratorial activities, paying them approximately $300,000 [D.E. 180 ¶ 58]; (ii) devised code names to conceal their involvement in the conspiracy . . .referring to the cartel as "the club or the "Technical Committee-Marine Hose" and (iii) held meetings in June 2000 (Key Largo), December 2000 (Bangkok), July 2002 (London) and May 2007 (Houston, Tx).

Pursuant to *Federal Rule of Civil Procedure 15(a)*, the Court may give leave to amend when justice so requires. *Fed. R. Civ. P. 15(a)*. Given the Court's concerns and lack of individualized allegations, the Court will grant Plaintiffs leave to amend (within ten days) the First Amended Complaint to more specifically plead how Defendant Northcutt (and others) joined the alleged price-fixing conspiracy. See e.g., *Flat Panel Antitrust Litig., 586 F. Supp. 2d 1109, 2008 WL 3916309, at *4* (finding that although purchasers satisfied pleading requirements for conspiracy claims under the *Sherman Act*, the court would grant leave to amend the complaint to more specifically plead as to the individual defendant).[27] In sum, **[*34]** Defendant Northcutt's motion to dismiss is granted, but Plaintiff is allowed leave to amend (within ten days) the First Amended Complaint to cure any deficiencies.

E. Defendant Robert Lewis Furness's Motion to Dismiss [D.E. 219]

Similar to the arguments made by Defendant Northcutt and others, Defendant Robert Lewis Furness seeks dismissal of the First Amended Complaint arguing, inter alia, that Plaintiffs have failed to sufficiently allege an antitrust violation by him individually.[28] [See D.E. 219.] Plaintiffs filed opposition [D.E. 251]. Similar to the other individual Defendants, the Court believes that Defendant Furness is entitled to relief.

As noted above, the Court finds that the First Amended Complaint meets the *Twombly* pleading requirements in so far as the allegations lead to the plausible inference of the existence of antitrust conspiracy. *Twombly, 127 S. Ct. at 1965-66*. Additionally, with respect to Defendant Furness, Plaintiffs have also alleged that Defendant Furness plead guilty to criminal charges for his role in the conspiracy. [See D. E. 180 ¶ 83.][29] Specifically, the First Amended Complaint alleges that "[o]n July 28, 2008 . . . Defendants Manuli Rubber Industries SpA and its former **[*35]** President, Furness had agreed to plead guilty to the criminal charges" . . . and Furness agreed to serve 14 months in prison and pay a $75,000 criminal fine. [See D.E. 180 ¶ 83.] Some courts have found that guilty pleas by defendants support an inference of participation in the conspiracy. See, e.g., *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)* (denying a motion to dismiss claims of an antitrust conspiracy where certain defendants plead guilty to criminal conduct). Here, however, the Court finds that the general allegation that Defendant Furness has agreed to plead guilty and serve jail time does not allege the particular conduct that he was admitting. In other words, the allegation stops short of providing the underlying details of Defendant Furness's conduct. Based on the foregoing, the Court grants Defendant Furness's motion to dismiss and allows Plaintiff leave to amend the complaint to cure the deficiencies noted herein.

F. Defendant Gillespie's Motion to Dismiss [D.E. 262]

Defendant Charles J. Gillespie seeks to dismiss the First Amended Complaint under *Rule 12(b)(1)* for lack of subject matter jurisdiction and pursuant to *Rule 12(b)(6)* for failure to state a claim upon which relief may be granted. [See D.E. 262.] Plaintiff filed opposition [D.E. **[*36]** 277] and Defendant Gillespie filed a reply [D.E. 295].[30]

---

[27] In opposing the Comital Defendants motion to dismiss, discussed *infra* in section G, Plaintiffs attempt to distinguish the ruling in *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 2008 WL 3916309, *4 (N.D. Cal. 2008)* as against the weight of authority [see D.E. 322 at 7-8]. Because the standard for antitrust pleadings at the motion to dismiss stage is still developing, the Court does not find the In re TFT-LCD decision entirely off the mark and, on the facts of this case, finds it persuasive.

[28] Defendant Furness also joined in the Manuli Defendants' motion to dismiss for lack of subject matter jurisdiction [D.E. 298], which was disposed of in Section A of this Order. Defendant Furness also incorporates by reference the arguments raised by other defendants. [See D.E. 219 at 3 and D.E. 298.] To the extent not addressed in this section, the relevant issues are disposed of as discussed in connection with the motions of other Defendants.

[29] Although the First Amended Complaint is misnumbered, paragraph 83 refers to that appearing on page 17 of docket entry 180.

[30] Defendant Gillespie also joined in the Manuli Defendants' motion to dismiss for lack of subject matter jurisdiction [D.E. 262 at 2], which was disposed of in Section A of this Order.

To the extent Defendant Gillespie challenges the First Amended Complaint on the basis of the FTAIA, his motion is granted as discussed in section A, *supra*. To the extent that Defendant Gillespie seeks dismissal of the antitrust claims based on *Twombly* and the requisite pleading standards, the Court finds that he is also entitled to relief.

As discussed above, the First Amended Complaint has sufficiently plead a plausible antitrust conspiracy overall. With regard to specific allegations as to Defendant Gillespie, however, he is alleged to have plead guilty to criminal charges. [See D.E. 180 ¶ 82.] Without more, a guilty plea is insufficient since Plaintiffs have failed to allege what specific conduct Defendant Gillespie has purportedly admitted in his plea, which would subject him to civil liability in this case. In sum, the Court must grant Defendant Gillespie's motion to dismiss, but allows Plaintiffs leave to amend the complaint in order to cure the deficiencies discussed herein.

G. Defendants I.T.R., SAIGA S.p.A. and Comital Saiga S.p.A.'s Motion to Dismiss [D.E. 301]

Defendants ITR, S.p.A., SAIGA, S.p.A. and Comital SAIGA, S.p.A. (collectively, **[*37]** the "Comital Defendants") filed a motion to dismiss the First Amended Complaint contending, inter alia, that (i) Plaintiffs fail to allege a connection between the Comital Defendants and the alleged conspiracy and (ii) the First Amended Complaint fails to satisfy the pleading standard set forth in *Twombly*. [See D.E. 301]. Plaintiffs filed opposition [D.E. 322] and the Comital Defendants filed a reply [D.E. 334].

Similar to other Defendants, the Comital Defendants argue that, despite numerous al legations against "Entity Defendants" concerning a conspiracy spanning over two decades, Plaintiffs in this case have failed to sufficiently allege an antitrust conspiracy specifically as against the Comital Defendants. The Comital Defendants note that, other than being listed as one of the "Entity Defendants," the First Amended Complaint contains no other mention of the Comital Defendants or their employees. [See D.E. 301 at 3.]

After a careful review of the First Amended Complaint, the Court finds that it is insufficient as to the individual actions of the Comital Defendants. While Plaintiffs correctly contend that the complaint need not contain defendant by defendant allegations, at a minimum, Plaintiffs **[*38]** must allege that each individual defendant joined the conspiracy and played some role in it. See, e.g., USB Antitrust Litig., 2007 U.S. Dist. LEXIS 565573, *13 (E.D. Pa. 2007). Plaintiffs here have made not such allegations against the Comital Defendants. Furthermore, unlike instances concerning other Defendants where Plaintiffs have identified employees and attendance at specific meetings and their conduct, there are no such allegations as to the Comital Defendants. Consequently, the Court must grant the Comital Defendants' motion to dismiss to the extent Plaintiffs have failed to allege any particular conduct as to the Comital Defendants. Based thereon, the Court will allow Plaintiffs leave to amend (within ten days) the First Amended Complaint to cure any deficiencies.

H. Settling Defendants' Motions to Dismiss

In addition to the motions discussed above, there are pending motions to dismiss of Defendants who have entered into proposed settlements with Plaintiffs (collectively, the "Settling Defendants").[31] Because Plaintiffs have filed an Amended Motion for Preliminary Approval of Proposed Settlements with the Settling Defendants [D.E. 301], at this time, the Court will refrain from determining on the merits the motions to dismiss of the Settling Defendants. **[*39]** Instead, the Court denies without prejudice the Settling Defendants' respective motions to dismiss. In the event that the proposed settlement is not approved, the Settling Defendants may renew their motions to dismiss and the Court will reconsider the matter as necessary and appropriate.

[31] The Settling Defendants include the following: (i) Dunlop Oil & Marine, Ltd., Bryan Allison and David Brammar; (ii) Trelleborg Industries S.A. and Jacques Cognard; (iii) The Yokohama Rubber Co, Ltd.; (iv) Parker ITR S.R.L., Parker Hannifin and Giovanni Scodeggio; and (v) Bridgestone Corporation, Bridgestone Industrial Products America and Misao Hioki. [See D.E. 319.]

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant Manuli's Motion to Dismiss for Lack of Subject Matter Jurisdiction [D.E. 242] is **GRANTED IN PART AND DENIED IN PART** as set forth herein. The claims of Expro are barred by the FTAIA. Consequently, this Court lacks subject matter jurisdiction over Expro's claims and they are hereby dismissed. To the extent that other Defendants have joined in this motion [D.E. 243, 297, 298], the joining Defendants are afforded the same relief. It is further

ORDERED AND ADJUDGED that Defendant Francesco Scaglia's Motion to Dismiss [D.E. 98, 184] is **GRANTED** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant Val M. Northcutt's Motion to Dismiss [D.E. 95, 193] is **GRANTED** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant Robert Furness's Motion to Dismiss Consolidated Complaint [D.E. 219] is **GRANTED [*40]** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendant Charles J. Gillespie's Motion to Dismiss [D.E. 262] is **GRANTED** as set forth herein. It is further

ORDERED AND ADJUDGED that Defendants I.T.R., SAIGA S.p.A. and Comital Saiga S.p.A.'s Motion to Dismiss [D.E. 301] is **GRANTED** as further set forth herein. It is further

ORDERED AND ADJUDGED that within ten (10) days from the date of the entry of this Order, Plaintiffs shall file an amended consolidated complaint in accordance with this Order. It is further

ORDERED AND ADJUDGED that the following motions are **DENIED WITHOUT PREJUDICE:** (i) Bridgestone Corporation's Motion to Dismiss [D.E. 191] and (ii) Trelleborg Industries S.A. and Jacques Cognard Motion to Dismiss [D.E. 207].

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of January, 2009.

/s/ Donald L. Graham

DONALD L. GRAHAM

UNITED STATES DISTRICT JUDGE

[Delta Turner, Ltd. v. Grand Rapids - Kent County Convention/Arena Auth.]

United States District Court for the Western District of Michigan, Southern Division

January 30, 2009, Decided; January 30, 2009, Filed

Case No. 1:08-cv-544

Reporter

600 F. Supp. 2d 920 *; 2009 U.S. Dist. LEXIS 6784 **; 2009-1 Trade Cas. (CCH) P76,530

DELTA TURNER, LTD., Plaintiff, v. GRAND RAPIDS - KENT COUNTY CONVENTION/ARENA AUTHORITY, a Michigan Municipal Authority, and SMG, a Pennsylvania General Partnership, Defendants.

Subsequent History: Certificate of appealability denied *Delta Turner, Ltd. v. Grand Rapids - Kent County Convention/Arena Auth., 2009 U.S. Dist. LEXIS 33647 (W.D. Mich., Mar. 4, 2009)*

Core Terms

Arena, immunity, antitrust, Competitor, allegations, municipality, antitrust claim, defendants', Musical, relevant market, anticompetitive, circumstances, supervision, Siphoning, effects, state action, private party, state policy, Sherman Act, authorizes, anticompetitive conduct, plaintiff's claim, state law, monopolize, contracts, Products, concerts, state action doctrine, anti trust law, monopoly power

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

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

HN1[] **Antitrust & Trade Law**

As a procedural device, *Fed. R. Civ. P. 12(b)(6)* establishes the trial court as the sentinel standing guard at the border between viable and deficient causes of action. This is a particularly important charge in antitrust litigation given the often obscure or weak antitrust premise and sometimes immense expense of mounting even a preliminary defense of the merits.

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

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

In deciding a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, a court must treat all well-pleaded allegations in the complaint as true and draw all reasonable inferences from those allegations in favor of the nonmoving party. A claim survives this motion where its factual allegations are enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Stated differently, the complaint must present enough facts to state a claim to relief that is plausible on its face.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations. The factual allegations in a complaint need not be detailed, but they must go beyond mere speculation of a legally cognizable cause of action. The complaint should give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Accordingly, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under a viable legal theory.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

Under the state action doctrine, antitrust laws generally do not apply to a state operating in its sovereign capacity, or to private conduct approved and supervised by the state as a matter of state policy. The test for determining whether the state action doctrine applies depends on the nature of the defendant (state legislature, state agency, local government body, private party) and the challenged conduct (legislative directive, agency ruling, private activity). At one extreme, if the challenged action is by the state legislature or state supreme court, then the exemption is classified as "complete," with no further inquiry. However, at the other end of the spectrum, when the defendant is a private party, a more stringent standard applies.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Parker State Action Doctrine, Local Governments & Private Parties**

In the context of federal antitrust claims and the state action doctrine, a private party defendant must demonstrate that the particular conduct challenged as anticompetitive was both authorized by the state as a matter of clearly articulated and affirmatively expressed state policy, and was subjected to active state supervision to protect against possible abuse. If the defendant is a municipality or other local government entity, an intermediate standard applies. Active supervision by a higher state body is not required since once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function. It is sufficient if the municipality is acting pursuant to a clearly articulated state policy reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN6[] Exemptions & Immunities, Parker State Action Doctrine

Regarding whether state action immunity applies to a municipality--the municipality must demonstrate that its anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service. A municipality need not point to a specific, detailed legislative authorization to assert state action immunity.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] Scope, Exemptions

In light of the national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. This immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN8[] Parker State Action Doctrine, Local Governments & Private Parties

In the context of federal antitrust claims and the state action doctrine, the general test (Midcal test), for whether state action immunity applies to a private party is two prong: (1) the party must show that it is acting pursuant to clearly articulated state policy reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes, and (2) the party must show active state supervision. The U.S. Supreme Court has further explained the applicability of the state action doctrine to private parties. A state policy that expressly permits, but does not compel, anticompetitive conduct may be clearly articulated within the meaning of Midcal. Nonetheless, a state may not merely give immunity to those who violate the Sherman Act by authorizing them to violate it. The second prong of the Midcal test prevents States from casting a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. This active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the state has demonstrated its commitment to a program through its exercise of regulatory oversight. Under subsequent decisions, the active supervision requirement can only be met by state supervision; municipal oversight is insufficient.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN9[] Parker State Action Doctrine, Local Governments & Private Parties

Antitrust immunity does not apply to a private actor to whom authority is delegated such that the private actor becomes the effective decision maker. Private defendants who are regulated by a municipality are entitled to protection under the state action exemption as long as the municipality is the effective decision maker.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Riverview line of cases informs that the basic question in antitrust cases that involve municipal and private actors is whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct. If the municipality or a municipal agent was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision. If the private actor was the effective decision maker, due to corruption of the decision-making process or delegation of decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state. When a private actor (such as a non-profit corporation) acts on behalf of the local government but makes independent decisions without the input, advice, involvement, or oversight of any governmental body, the antitrust immunity accorded to the governmental entity does not apply.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN11[] **Parker State Action Doctrine, Local Governments & Private Parties**

Under the second prong of the Midcal test, the state must exercise ultimate control over the challenged private anticompetitive conduct; the private entity must demonstrate both that the state has the power to exercise control over the private anticompetitive conduct and that the state in fact exercised its control. Another consideration may be whether the anticompetitive conduct at issue is regulatory-related or part of the commercial market.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

While it is true that for state action immunity the conduct need not be expressly authorized by the state/legislation, the suppression of competition must be the foreseeable or logical result of what the state authorizes.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN13[] **Remedies, Damages**

Under the Local Government Antitrust Act of 1984, a governmental entity may be entitled to immunity with respect to liability for damages, attorneys' fees and costs, but not injunctive relief when the claim is based on any official action directed by a local government, or official or employee thereof acting in an official capacity. *15 U.S.C.S. § 36(a)*. The Act leaves intact the availability of injunctive relief (including attorney's fees) in suits against municipalities, and does not affect a plaintiff's ability to sue private party defendants for damages as well as equitable relief.

Antitrust & Trade Law > General Overview

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

HN14[] **Antitrust & Trade Law**

In Twombly, the U.S. Supreme Court has tightened pleading requirements to discourage federal antitrust cases of questionable merit: a plaintiff must allege enough facts to nudge the claims across the line from conceivable to plausible. Factual allegations must be enough to raise a right to relief above the speculative level. However, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Antitrust & Trade Law > General Overview

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

HN15[] **Antitrust & Trade Law**

As Twombly makes clear, the pleading standard required for antitrust actions does not rest on the heightened pleading requirements under *Fed. R. Civ. P. 9*. Instead, it remains premised on the more liberal *Fed. R. Civ. P. 8(a)(2)*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. The complaint allegations must simply render the plaintiff's entitlement to relief plausible.

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

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

HN16[] **Sherman Act, Scope**

The Sherman Antitrust Act declares illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*. The Act also makes it a felony to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN17[] **Sherman Act, Claims**

To establish a *15 U.S.C.S. § 1* claim, a plaintiff must allege that defendants entered into an agreement, and (1) defendants' conduct occurred in a relevant market, (2) that defendants possessed market power in the relevant market, and (3) that there were anticompetitve effects. To establish a *15 U.S.C.S. § 2* monopolization claim, a plaintiff must allege (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, maintenance, or use of that power either by anticompetitive or exclusionary means.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN18[] **Antitrust & Trade Law, Sherman Act**

In the context of the Sherman Act, definition of the relevant market involves consideration of the product substitutability.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

A claim under *15 U.S.C.S. § 1* is subject to the "rule of reason." The rule of reason is a flexible standard that requires a general inquiry into whether, under all the circumstances, the challenged practice imposes an unreasonable restraint on trade: Relevant circumstances can include such diverse factors as the defendants' intent and purpose in adopting the restriction; the structure of and competitive conditions within the affected market; the relative competitive positions and market power of the defendants; the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practice; and apparent justifications for the restriction such as enhanced efficiencies, protection of product or service goodwill, and inducing dealer loyalty. No single such factor is decisive. Rather, the factfinder weighs all of the circumstances in deciding whether the challenged practice is, on balance, competitively unreasonable, with courts commonly phrasing the inquiry in terms of shifting burdens of proof.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

In the context of *15 U.S.C.S. § 1* and the "rule of reason", while a necessary first step for the rule of reason inquiry is generally the identification of the relevant market, this threshold requirement is not always essential. Rather, direct evidence of anticompetitive effects, such as reduced output or supracompetitive prices, can obviate the need for a more rigorous market analysis, provided that the rough contours of the market are sufficiently known and obvious for the trier to assess the plausibility of the claimed anticompetitive effects without going through a full-blown market inquiry.

Antitrust & Trade Law > Sherman Act > Claims

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

HN21[] **Sherman Act, Claims**

15 U.S.C.S. § 2 monopolization claims generally require proof of the relevant market as a first element. The inquiry has two dimensions: (1) identification of the cluster of products or services with which the defendant's product or service effectively competes, the "relevant product market," and (2) identification of the geographic area within which the defendant practicably competes in marketing its product or service, the "relevant geographic market." Further, the relevant product market traditionally emphasizes two factors, the extent of substitutability and the degree of cross-elasticity of demand. However, as with *15 U.S.C.S. § 1*, the relevant market inquiry ultimately requires consideration of various factors depending on the nature of the antitrust claim and the case-specific context.

Antitrust & Trade Law > Sherman Act > Claims

HN22[] **Sherman Act, Claims**

The case-specific context is critical to any reasoned analysis of an antitrust claim.

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN23[] **Elements, Causal Relationship**

A prima facie case under *42 U.S.C.S. § 1983* has two elements: (1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law.

Counsel: [1]** For Delta Turner, Ltd., a Michigan corporation, plaintiff: Douglas W. Van Essen, LEAD ATTORNEY, Aaron M. Halvas, Lee T. Silver, Silver & Van Essen PC, Grand Rapids, MI.

For Grand Rapids - Kent County Convention/Arena Authority, a Michigan Municipal Authority, defendant: Erin E. Gravelyn, LEAD ATTORNEY, Richard A. Glaser, Dickinson Wright PLLC (Grand Rapids), Grand Rapids, MI.

For SMG, a Pennsylvania General Partnership, defendant: Thomas J. Heiden, LEAD ATTORNEY, Timothy Bunker Hardwicke, Latham & Watkins LLP (IL), Chicago, IL; Edward Marcellus Williamson, Jason Daniel Cruise, Latham & Watkins LLP (DC), Washington, DC.

For Facilitative Mediator, mediator: Jon G. March, LEAD ATTORNEY, Miller Johnson PLC (Grand Rapids), Grand Rapids, MI.

Judges: HON. JANET T. NEFF, United States District Judge.

Opinion by: JANET T. NEFF

Opinion

[*925] This case presents an unusual application of federal antitrust principles to the entertainment industry. At issue is whether a "Preferred Promoter Agreement" (PPA) negotiated on behalf of defendants Grand Rapids - Kent County Convention/Arena Authority (CAA) and its manager, SMG, that includes a reciprocal agreement with the promoter Live Nation for sharing arena and promoter revenue from competitor **[**2]** events, violates antitrust laws. Pending before the Court are CAA's and SMG's separate Motions to Dismiss. For the reasons that follow, the Court grants in part, and denies in part, defendants' motions.

I. Summary of Analysis

Defendants have filed Motions to Dismiss pursuant to *FED. R. CIV. P. 12(b)(6)*. ***HN1***[] As a procedural device, *Rule 12(b)(6)* establishes the trial court as the sentinel standing guard at the border between viable and deficient causes of action. As emphasized in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; *550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, this is a particularly important charge in antitrust litigation given the often obscure or weak antitrust premise and sometimes immense expense of mounting even a preliminary defense of the merits.

[*926] The essential role of the Court in this case falls squarely within the fundamental *Rule 12(b)(6)* charge: the foremost question to be decided is whether plaintiff's allegations of antitrust violations meet the threshold for causes of action under *§ 1* or *§ 2* of the Sherman Act such that this case may proceed to the discovery stage. Defendants contend that plaintiff's claims must be dismissed since they fail outright in numerous respects. While plaintiff's **[**3]** antitrust case is by no means clear-cut, the Court is convinced after careful consideration of the pleadings, arguments and legal principles, that plaintiff's antitrust claims are not properly dismissed at this juncture. The Court recognizes that plaintiff faces the burden of proving the anticompetitve effects of the PPA to secure relief on its claims of antitrust violations. Nonetheless, the Court is convinced that plaintiff's burden can legitimately fail or succeed only with further development of the factual record and the proper application of the correct legal principles. This is particularly so given the lack of any factual record as to the genesis, purpose, and effect of the PPA.

In short, the Court finds, based on the parties' arguments, that plaintiff's antitrust claims are not merely speculative, but instead plausible, and thus, not subject to dismissal pursuant to *Rule 12(b)(6)*. To the contrary, the Court concludes that plaintiff's claim under *42 U.S.C. § 1983* does not "possess enough heft" to survive dismissal. *Twombly, 127 S. Ct. at 1966*. The Court also declines to exercise its discretion to grant plaintiff's request for a declaratory judgment declaring that the PPA is *ultra **[**4]** vires,* illegal, and unenforceable under state law. Plaintiff has failed to show that such relief is warranted. Finally, given that the parties have only briefly addressed the remaining state law claims, dismissal at this stage of the proceedings is unjustified.

II. Background and Facts

This case involves a dispute over contracts for event bookings at the DeltaPlex and Van Andel Arena in Grand Rapids, Michigan. Plaintiff Delta Turner owns and operates the Delta Plex. Defendant CAA owns, and defendant SMG manages, Van Andel Arena. At issue is a PPA that SMG entered into with Cellar Door Productions of Michigan, Inc. (Live Nation), which (1) gives SMG/CAA two-thirds of the net revenue from events at Van Andel Arena that are promoted or produced by a promoter other than Live Nation, and gives Live Nation the remaining one-third; and (2) requires that Live Nation pay SMG/CAA one-third of the net revenue from Live Nation events at competitor venues in the surrounding west Michigan area (DeltaPlex, Kellogg Arena in Battle Creek, Wings Stadium in Kalamazoo, and the LC Walker Arena in Muskegon). Plaintiff alleges that this latter feature of the PPA, referred to by plaintiff as "Competitor Arena **[**5]** Revenue Siphoning," is intended to monopolize arena events and revenues and thereby inhibit interstate commerce by (1) limiting the number of concerts and directing most or all of the concerts to Van Andel Arena, and (2) raising the costs of concerts, thereby generating more revenue for defendants. Plaintiff further alleges that the net effect of this contractual arrangement is that fewer concerts come to West Michigan or they come at a higher cost to Van Andel Arena competitors and the general public because Live Nation must increase ticket prices and/or reduce the rent paid to competitors to cover the "cut" to SMG/CAA.

Plaintiff initially filed a five-count complaint alleging federal and state antitrust violations, a violation of *42 U.S.C. § 1983*, and three state law claims. The Court stayed discovery in light of defendants' pending Motions to Dismiss. On October **[*927]** 3, 2008, plaintiff filed a First Amended Complaint, alleging seven counts: **Count 1**--Violation of Federal Antitrust Act (the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, and the Clayton Act *15 U.S.C. §§ 4*, *15*, and *22*) [against CAA and SMG]; **Count 2**--Violation of State Antitrust Act [against CAA and SMG]; **Count 3**--Violation **[**6]** of *42 U.S.C. § 1983* [against CAA and SMG]; **Count 4**--Declaratory Judgment--PPA's Competitor Arena Revenue Siphoning is Ultra Vires [presumably against CAA and SMG]; **Count 5**--Tortious Interference with Prospective Business Advantage [against CAA and SMG]; **Count 6**--Violation of Open Meetings Act and CFAA (Michigan Convention Facility Authority Act, *MICH. COMP. LAWS § 141.1401 et seq.*) [against CAA]; and **Count 7**-

-Violation of the Freedom of Information Act and CFAA [against CAA)]. Defendants have moved to dismiss all claims.

III. Issue

Whether defendants are entitled to dismissal of the alleged federal claims on the basis (1) of immunity under the *Parker* state action doctrine, *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; (2) of immunity under the Local Government Antitrust Act of 1984 (LGAA), *15 U.S.C. § 34 to § 36*; (3) of failure to meet the pleading standard of *Twombly;* (4) of failure to plead a claim under *42 U.S.C. § 1983* and qualified immunity; and (5) that the Court should decline to exercise its discretion to provide declaratory relief?

IV. Legal Standard

HN2[] In deciding a motion to dismiss for failure to state a claim under *FED. R. CIV. P. 12(b)(6)*, the court must treat all well-pleaded allegations **[**7]** in the complaint as true and draw all reasonable inferences from those allegations in favor of the nonmoving party. *Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008)*; *Moon v. Harrison Piping Supply, 465 F.3d 719, 723 (6th Cir. 2006)*. "A claim survives this motion where its '[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.'" *Zaluski v. United Am. Healthcare Corp., 527 F.3d 564, 570 (6th Cir. 2008)* (quoting *Twombly, 127 S. Ct. at 1959*). Stated differently, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Twombly, 127 S. Ct. at 1974*. [1]

HN3[] "'A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations.'" *Lambert, 517 F.3d at 439* (quoting *Golden v. City of Columbus, 404 F.3d 950, 958-59 (6th Cir. 2005))*. The factual allegations in a complaint need not be detailed, but they must go beyond mere speculation of a legally cognizable cause of action. *Lambert, 517 F.3d at 439*. "The complaint should give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *German Free State of Bavaria v. Toyobo Co, Ltd., 480 F. Supp. 2d 958, 963 (W.D. Mich. 2007)*. Accordingly, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under a viable legal theory. *Id.; see also Lillard v. Shelby* ***[*928]*** *County Bd. of Educ., 76 F.3d 716, 726 (6th Cir. 1996)*.

V. Analysis

A. Federal Antitrust Claim (Count 1)

Defendants argue that they are entitled to dismissal of plaintiff's federal antitrust claim, Count **[**9]** 1, on the grounds that (1) they have immunity from suit under either the state action doctrine or the LGAA, and (2) plaintiff has failed to plead an antitrust claim under the Sherman Act, based on the pleading standard in *Twombly.* At this juncture in this case, the Court is not persuaded that dismissal is mandated on the grounds asserted.

1. State Action Doctrine Immunity

HN4[] Under the state action doctrine, antitrust laws generally do not apply to a state operating in its sovereign capacity, or to private conduct approved and supervised by the state as a matter of state policy. WILLIAM C. HOLMES, ***ANTITRUST LAW*** HANDBOOK (Thompson-West, 2007-2008 ed.) § 8.7, pp. 789-90. The test for determining whether the state action doctrine applies depends on the nature of the defendant (state legislature, state agency, local government body, private party) and the challenged conduct (legislative directive, agency ruling,

---

[1] The *Rule 12(b)(6)* "plausibility standard" established in *Twombly* unquestionably applies to plaintiff's antitrust claims, since that was the legal context from which the standard arose. However, the courts are not universal in accepting the *Twombly* standard for cases that do not involve antitrust claims. *See Total Benefits Planning Agency, Inc. v. Anthem BCBS, No. 07-4115, December 22, 2008, 552 F.3d 430, 2008 U.S. App. LEXIS 25810, * 8-9 n.2* (also citing Note, *Much Ado About Twombly, 83 NOTRE DAME L. REV. 1811 (2008)*). **[**8]** Regardless, the Court does not find that any distinction would alter the disposition with respect to any particular claim in this case.

private activity). *Id.* at 790 (citation omitted). At one extreme, if the challenged action is by the state legislature or state supreme court, then the exemption is classified as "complete," with no further inquiry. *Id.* at 790-91. However, at the other end of the spectrum, when the defendant **[**10]** is a private party, a more stringent standard applies. *Id.* at 793. The Supreme Court explained its rationale for this differing standard:

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985); *see also* HOLMES, *supra,* § 8:7, p. 793. ***HN5***[] A private party defendant must demonstrate that the particular conduct challenged as anticompetitive was both authorized by the state as a matter of "clearly articulated and affirmatively expressed state **[**11]** policy," and was subjected to "active state supervision" to protect against possible abuse. HOLMES, *supra,* § 8:7, p. 793.

If the defendant is a municipality or other local government entity, an intermediate standard applies. *Id.* at 793-94. Active supervision by a higher state body is not required since "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Hallie, 471 U.S. at 47*; *see also* HOLMES, *supra,* § 8:7, p. 794. It is sufficient if the municipality is acting pursuant to a "clearly articulated state policy" reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes. HOLMES, *supra,* § 8:7, p. 795 (citing *Hallie, 471 U.S. at 41-43*).

Ultimately, whether CAA and/or SMG is entitled to immunity under the state action doctrine depends on application of the distinct tests for municipalities as opposed to **[*929]** private actors. It also depends on consideration of additional nuances of the doctrine or exceptions, which may apply under the circumstances of this case, given the **[**12]** relationship between CAA and SMG and the role carried out with respect to the PPA.

a. CAA--Municipality Immunity

As established in *Parker, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315*, the general test for whether state action immunity applies to CAA as a municipality is: [2]

> whether the municipality is acting pursuant to "clearly articulated state policy" reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes.

HOLMES, *supra,* § 8:7, p. 795 (citing *Hallie, 471 U.S. at 41-43*). Stated differently, ***HN6***[] the municipality "must demonstrate that [its] anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Hallie, 471 U.S. at 39* (quoting *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (opinion of BRENNAN, J.)). A municipality need not point to a specific, detailed legislative authorization to assert state action immunity. *Hallie, 471 U.S. at 39*.

CAA argues that it meets the requirement for state action immunity because it is authorized **[**13]** by a clearly articulated state policy, the CFAA, to engage in conduct that logically could result in the suppression of competition. The Court does not view the mandates of the CFAA as so clearly encompassing the conduct at issue to warrant a *Rule 12(b)(6)* dismissal of the claim, particularly given the aspect of the PPA that shares revenue from competitor

[2] There appears to be no dispute that CAA is classified as a municipality/local government entity.

arenas under the so-called "Competitor Arena Revenue Siphoning" provisions. It is not clear that the challenged conduct is a "foreseeable consequence of what the state law authorizes."

Moreover, immunity is less justified in this case because the anticompetitive conduct is not regulatory activity, but instead is commercial market activity. In *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 374-75, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, the Court distinguished situations in which the government body acts not in a purely regulatory capacity, but as a market participant. HOLMES, *supra,* § 8:7, p. 808. The Court stated:

> The rationale of *Parker* was that, ***HN7***[] in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as **[**14]** sovereign regulators. The sentences from the opinion quoted above simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.

Omni Outdoor, 499 U.S. at 374-75. Here, the entertainment contracts fall into the category of commercial market activity, and thus, CAA would be less entitled to immunity under the rationale of *Parker.*

b. SMG--Private Party Immunity

> ***HN8***[] The general test for whether state action immunity applies to SMG as a private party is two prong:

> **[*930]** (1) the party must show that it is acting pursuant to clearly articulated state policy reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes, and

> (2) the party must show active state supervision.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980); HOLMES, *supra,* § 8:7, pp. 798-99. This two-prong standard, known as the *Midcal* test, was reiterated in *S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*, in which the Court further explained the applicability of the **[**15]** state action doctrine to private parties. A state policy that expressly permits, but does not compel, anticompetitive conduct may be clearly articulated within the meaning of Midcal. *S. Motor Carriers Rate Conference, 105 S. Ct. at 1729*. Nonetheless, a state may not merely give immunity to those who violate the Sherman Act by authorizing them to violate it. *Id. at 1729 n.23*. The second prong of the *Midcal* test "prevents States from 'casting … a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.'" *Id.* (quoting *Midcal, 445 U.S. at 106*). "This active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Id.* (citing 1 P. Areeda & D. Turner, ***Antitrust Law*** P§ 213a, p. 73 (1978)).

Subsequent decisions have further defined the limits of state action immunity for private parties. The active supervision requirement can only be met by state supervision; municipal oversight is insufficient. HOLMES, *supra,* § 8:7, p. 799 n.16 (citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 442 F.3d 410, 441 (6th Cir. 2006)*, **[**16]** rev'd and remanded *551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007))*; *see also* *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp., 774 F.2d 162, 163 (6th Cir. 1985)*.

HN9[] Antitrust immunity does not apply to a private actor to whom authority is delegated such that the private actor becomes the "effective decision maker." "[P]rivate defendants who are regulated by a municipality are entitled to protection under the state action exemption as long as the municipality is the "effective decision maker." *Mich. Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 536-37 (6th Cir. 2002)*. The Sixth Circuit explained:

> HN10[] The *Riverview* [3] line of cases thus informs us that the basic question in antitrust cases that involve municipal and private actors is whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct. If the municipality or a municipal agent was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision. If the private actor was the effective decision maker, due to corruption of the decision-making process or delegation of decision-making authority, then it is not immune, unless **[**17]** it can show that it was actively supervised by the state.

[*931] Mich. Paytel, 287 F.3d at 537-38. When a private actor (such as a non-profit corporation) acts on behalf of the local government but makes "'independent decisions without the input, advice, involvement, or oversight of … any … governmental body,'" the antitrust immunity accorded to the governmental entity does not apply. Id. at 537-38 (quoting Riverview III, 899 F.2d at 481-82).

HN11[] Under the second prong of the Midcal test, the state must exercise ultimate control over the challenged private anticompetitive conduct; the private entity must demonstrate both that the state has the power to exercise control over the private anticompetitive conduct and that the state in fact exercised its control. HOLMES, *supra,* § 8:7, p. 800 n.16 (citing Snake River Valley Elec. Ass'n v. PacifiCorp, 357 F.3d 1042, 1049 (9th Cir. 2004)). Also, **[**18]** as noted above with regard to municipal immunity, another consideration may be whether the anticompetitive conduct at issue is regulatory-related or part of the commercial market. HOLMES, *supra,* § 8:7, p. 808; Omni Outdoor, 499 U.S. at 374-75.

SMG argues that it is entitled to immunity from suit under the state action doctrine. The Court finds SMG's claim of state action immunity extremely weak under the above principles. Contrary to SMG's argument, the PPA was not formed pursuant to a "clearly articulated state policy" that "authorize[d] anticompetitive conduct," Michigan Paytel, 287 F.3d at 536. HN12[] While it is true that for state action immunity the conduct need not be *expressly* authorized by the state/legislation (in this case the CFAA), the suppression of competition must be the foreseeable or logical result of what the state authorizes. Id. at 535. At this early stage of the proceedings, with no development of the record, the Court finds that any relationship between the CFAA authorization and the "Competitor Arena Revenue Siphoning" provision of the PPA is tenuous at best.

SMG contends that this case presents circumstances analogous to those in *Michigan Paytel,* in which the Court **[**19]** found that state action immunity applied with respect to an exclusive contract for prisoner telephones by the City of Detroit. The Court disagrees. Clearly, to operate a prison, the City of Detroit would have to solicit bids and award contracts for necessary services, which would include exclusive contracts such as that for prisoner telephones. Similarly, the operation of Van Andel Arena would involve exclusive contracts for products and services necessary or convenient to carry out the purposes, objectives, and provisions of the CFAA (SMG Br. 7-8). However, as plaintiff argues, that would not logically or foreseeably include the PPA and its "Competitor Arena Revenue Siphoning" contract provisions.

The Court agrees instead with plaintiff that the circumstances of this case are more analogous to those in First American Title Co. v. Devaugh, 480 F.3d 438 (6th Cir. 2007). In *First American Title,* the Sixth Circuit concluded that the challenged anticompetitive activity by county registers, of restricting the distribution and resale of copies of recorded documents obtained by title companies, was not encompassed within the legislative authority granted to registers. Id. at 440, 447. Rather, **[**20]** the legislative authority extended only to acquiring, recording, and possessing, "the *original official* title documents." Id. The court held that it was not foreseeable that the powers granted to the county registers would logically result in the challenged practices. Id. at 448.

Likewise, in this case, the CFAA undoubtedly authorizes the CAA to undertake certain activities related to the operation **[*932]** of Van Andel Arena, including contracting for essential or even beneficial services incidental to its

---

[3] Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp., 769 F.2d 324 (6th Cir. 1985) ("*Riverview I*"); Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp., 774 F.2d 162 (6th Cir. 1985) ("*Riverview II*"); Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp., 899 F.2d 474 (6th Cir. 1990) ("*Riverview III*").

operations. However, there is nothing before the Court in the pleadings or otherwise that persuades the Court that the CFAA would foreseeably or logically result in "marketplace contracts" to induce, reduce or otherwise regulate the activities of competitor arenas.

Further, the Court concludes that SMG has not met the second prong of the *Midcal* test, under which the private entity must demonstrate both that the state has the power to exercise control over the private anticompetitive conduct and that the state in fact exercised its control. HOLMES, *supra,* § 8:7, p. 800 n.16 (citing *Snake River Valley Elec. Ass'n, 357 F.3d at 1049*). There is no indication of such supervision. Although SMG argues **[**21]** that this prong is essentially met because CAA was plainly the effective decision maker, that is not evident based on plaintiff's allegations, as SMG asserts (SMG Br. 9-10).

Given the above considerations, the Court concludes based on the pleadings and the arguments that defendants are not entitled to state action immunity under the circumstances of this case. The record is devoid of any specifics concerning either defendant's role in developing, executing and overseeing the PPA, making any reasoned consideration of the immunity defenses merely superficial, and thus, unreliable for purposes of legal analysis.

2. LGAA Immunity

HN13[] Under the LGAA, a governmental entity may be entitled to immunity with respect to liability for damages, attorneys' fees and costs, but not injunctive relief when the claim is "based on any official action directed by a local government, or official or employee thereof acting in an official capacity." *15 U.S.C. § 36(a)*. "The Act leaves intact the availability of injunctive relief (including attorney's fees) in suits against municipalities, and does not affect a plaintiff's ability to sue private party defendants for damages as well as equitable relief." HOLMES, *supra,* ***[**22]*** § 8:7, p. 813.

> The Local Government Antitrust Act of 1984 provides that federal antitrust claimants can no longer recover compensatory damages, treble damages, costs or attorney's fees from any local government, or from any local government official or employee acting in an official capacity found guilty of an antitrust violation. The Act effectively restricts municipal antitrust liability to declaratory and injunctive relief. . . . Nevertheless, under the Clayton Act, a plaintiff who substantially prevails in an action of injunctive relief is entitled to an award of costs, including a reasonable attorney's fee.

17 MCQUILLIN MUN. CORP. § 49:97 (3rd ed.) (footnotes omitted).

Defendants contend that they are entitled to the limited immunity available under the LGAA; CAA because it "qualifies as a local government" and the conduct at issue involves "official action," and SMG because its conduct was based on official action directed by a local government, or official or employee acting in an official capacity. Plaintiff argues that the LGAA does not shield defendants at this stage because the Act only provides immunity where the municipality has actually exercised its authority without expressly **[**23]** violating that authority, and where it has actively supervised the private party acting on its behalf. *See GF Gaming Corp. v. City of Black Hawk, Colo., 405 F.3d 876, 886-87 (10th Cir. 2005)*. Plaintiff contends that the LGAA does not shield defendants because the conduct at issue was not lawful, that is, the "Competitor Arena Revenue Siphoning" is not "remotely, much less **[*933]** reasonably," included within the CAA's authority under the CFAA.

The factual record in this case is extremely limited; the genesis of the PPA and the role of CAA versus SMG is not yet known. Accordingly, the resolution of immunity under the LGAA cannot be definitively resolved at this stage of the proceedings. Plaintiff's claim remains generally plausible, and whether the relief sought may be limited on the basis of immunity under the LGAA is an open question. Accordingly, dismissal is unwarranted on this basis.

3. Dismissal under *Twombly*

Defendants argue that plaintiff has failed to plead Sherman Act violations (Count I) under the standard announced in *Twombly.* Defendants correctly state that ***HN14***[] in *Twombly,* the Supreme Court tightened pleading requirements to discourage federal antitrust cases of questionable merit: a **[**24]** plaintiff must allege enough facts to nudge the "claims across the line from conceivable to plausible . . . ." *Twombly, 127 S. Ct. at 1974*. "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id. at 1965*. However, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* (citation omitted). The Court concludes that plaintiff has met the standard in *Twombly.*

In *Twombly,* the court was concerned that there was at least plausible grounds to infer an agreement on which to base the alleged conspiracy. *Id. at 1965-66*. Here, there is no such concern. The existence of an agreement, or at least a draft of the agreement, is undisputed. Further, there is an initial showing that the agreement encompasses activities of competitors. The question is whether the agreement has an anticompetitive effect contrary to federal law. Plaintiff's complaint is well-beyond a mere fishing expedition, and while recovery may be improbable, the complaint passes muster under the plausibility standard. Moreover, this case does not involve a large-scale antitrust **[**25]** claim as in *Twombly:* "a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years." *Id. at 1967*. Accordingly, there is not the same concern regarding extensive and expensive discovery.

HN15[] As *Twombly* makes clear, the pleading standard required for antitrust actions does not rest on the heightened pleading requirements under *FED. R. CIV. P. 9*. Instead, it remains premised on the more liberal *Rule 8(a)(2)*, which "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Id. at 1964, 1973 n.14, 1974* (citation omitted). The complaint allegations must simply render the plaintiff's entitlement to relief plausible. *Twombly, 127 S. Ct. at 1973 n.14*.

a. Plausibility

Nonetheless, at the outset, defendants contend **[**26]** that plaintiff's antitrust theory fails under *Twombly* because it is "fundamentally implausible in multiple respects." The Court disagrees.

Defendants advance various arguments in this regard. First, defendants observe that "standing alone, there is nothing anticompetitive about an exclusive dealing agreement and certainly nothing anticompetive **[*934]** about a non-exclusive one." While defendants' statement may be true, it is not necessarily relevant since such factors do not stand alone in this case, and thus, defendants' observation does not defeat plaintiff's claim.

Another argument defendants advance for dismissal is the implausibility of plaintiff's theory that the operator of a single arena in a single city enlisted Live Nation, an alleged nationwide monopolist, to help establish a local monopoly against its interest, i.e., to enter an agreement that forces it to raise its ticket price. Defendants assert that CAA is not the party with monopoly power over Arena Musical Products--Live Nation is. Although defendants' logic is not entirely clear to the Court, defendants contend that because Live Nation is free to take the acts that it promotes, which allegedly constitute 90 percent of the "Arena **[**27]** Products Musical Market," to other venues, plaintiff cannot plead that defendants have any market power, and defendants therefore cannot dictate prices that Live Nation sets for tickets, and defendants therefore cannot harm competition. This logic, however, does not acknowledge plaintiff's allegation that it is the combined or joint activity of defendants and Live Nation that is at issue (First Am. Compl. P 44). *See, e.g.,* Sherman Act, *§ 2*. Plaintiff's complaint alleges that Live Nation controls as much as 90 percent of the Arena Musical Products in the Market in a given year and that through the PPA, CAA has been able to achieve actual monopoly power since Van Andel Arena hosts 75-80 percent of the total Arena Musical Products in the Market (First Am. Compl. P 32). Whether that concerted action is ultimately procompetitive, as defendants contend, or anticompetitive, as plaintiff contends, is yet to be determined.

In any event, the Court finds no argument or scenario advanced by defendants that is fatal to plaintiff's antitrust claim as a whole. Despite the Court's inquiries, the parties have provided the Court with no precedent on point for adequately evaluating the competitive effects **[**28]** of the revenue sharing provisions of the PPA, which according to the parties is unique in the entertainment market. Defendant SMG asserts that plaintiff has alleged a vertical agreement subject to the "rule of reason." As discussed below, the rule of reason requires the application of the

Court's best sense. Until the record is further developed, and the details of plaintiff's antitrust theory are fleshed out, dismissal would be based on far greater speculation than would permitting this action to proceed to the next stage.

b. Factual Allegations and the Rule of Reason

Defendants also argue that plaintiff has failed to plead sufficient facts to support all the substantive elements of its antitrust claim. Plaintiff has alleged violations of the Sherman Act [4] under *Section 1*, which targets agreements that unreasonably restrain trade, and under *Section 2*, which targets monopoly conduct:

> ***HN16***[] The Sherman Antitrust Act declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. The Act also makes it a felony to "monopolize, or attempt to monopolize, or combine **[**29]** **[*935]** or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *Id.* *§ 2*.

Mich Paytel, 287 F.3d at 534.

HN17[] To establish a § 1 claim, plaintiff must allege that defendants entered into an agreement, and (1) defendants' conduct occurred in a "relevant market," (2) that defendants possessed market power in the relevant market, and (3) that there were anticompetitve effects. *Expert Masonry, Inc., v. Boone County, Ky., 440 F.3d 336, 343, 348 (6th Cir. 2006)*; *Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004)*. To establish a *§ 2* monopolization claim, plaintiff must allege "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, **[**30]** maintenance, or use of that power either by anticompetitive or exclusionary means." *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 612 (6th Cir. 1987)*. [5]

Defendants argue that under either *§ 1* or *§ 2* of the Sherman Act, plaintiff must allege (1) the "market" at issue, (2) that defendants have market power or monopoly power, and (3) whether defendants' conduct has anticompetitive effects (and has caused plaintiff to suffer an antitrust injury). Defendants argue that plaintiff has failed to allege facts to establish these requisite elements. Applying the pleading **[**31]** standard from *Twombly,* the Court disagrees.

With regard to the "market," defendants argue that plaintiff fails to define the relevant product market with reference to the rule of reasonable interchangeability, which is fatal to plaintiff's prima facie case. While the Court agrees that ***HN18***[] definition of the relevant market involves consideration of the product substitutability, the Court does not find plaintiff's pleadings so deficient in this regard that dismissal is warranted, on the circumstances of this case, for plaintiff's failure to properly analyze the parameters of the relevant market.

Defendants assert that "[t]he essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." *White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)*. Defendants argue that plaintiff's incorrectly allege the relevant market as the "Arena Musical Product," market, i.e., "large musical concerts, with over 3,000 fans performed by nationally touring musicians." Defendants contend that the relevant market is in fact all events **[**32]** that could come to area arenas, including *non-Arena Musical Product* events, since defendants and the other West Michigan arenas are in the business of renting arenas. Defendants thus contend

---

[4] Plaintiff also alleges violations of the Clayton Act. "The Clayton Act proscribes certain specific activities in commerce and also provides for private enforcement of the federal antitrust laws." 17 MCQUILLIN MUN. CORP. § 49:97 (3rd ed.) (footnote omitted). Because plaintiff's substantive claims fall under the prohibitions of the Sherman Act, the parties' arguments and the Court's analysis are directed to the Sherman Act.

[5] For purposes of the Motions to Dismiss, the Court accepts defendant SMG's statement of the general elements of claims under *§ 1* and *§ 2* of the Sherman Act. However, the Court recognizes that the precise showing required to prove a claim under these sections may ultimately depend on the specific nature and category of the antitrust claim. *See, e.g., J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 485 F.3d 880, 887 (6th Cir. 2007)* (referring to ***antitrust law*** specific to the Sixth Circuit); *see also* HOLMES, *supra,* § 2:2, pp. 104-05 and § 3:2, pp. 402-03 (identifying and differentiating categories of antitrust claims).

that plaintiff's complaint is deficient because it contains no factual allegations as to why *non-Arena Musical Product* events, such as sporting events, expos, and other entertainment events, are not reasonable substitutes for earning arena revenues.

Defendants also assert that plaintiff confuses the *rental of space to promoters,* which is the business of plaintiff and Van **[*936]** Andel Arena, with the *sale of tickets to consumers,* which is Live Nation's alleged business. Defendants argue that because "it is axiomatic that a firm cannot monopolize a market in which it does not compete," *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996)*, vacated on other grds, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*, defendants are entitled to dismissal. The Court is unpersuaded by defendants' arguments as a basis for dismissal. Given the nature of plaintiff's antitrust claims, the allegations of concerted action between defendants and Live Nation, and the allegation that Live Nation dominates the Arena Musical Product Market, it **[**33]** is not evident that the relevant market must be defined to include non-Arena Musical Product events. Likewise, given the circumstances of this case and the context of the allegations, defendants' characterization of the arena business as distinct from that of Live Nation does not generally defeat plaintiff's claims.

Plaintiff alleges claims under both *§ 1* and *§ 2* of the Sherman Act. These claims are clearly distinct and require independent analysis based on the relevant facts and applicable legal principles.

It is undisputed that plaintiff's ***HN19***[] claim under *§ 1* is subject to the "rule of reason." The rule of reason is a flexible standard that requires a general inquiry into whether, under "all the circumstances," the challenged practice imposes an unreasonable restraint on trade:

> Relevant circumstances can include such diverse factors as the defendants' intent and purpose in adopting the restriction; the structure of and competitive conditions within the affected market; the relative competitive positions and market power of the defendants; the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practice; and apparent justifications for **[**34]** the restriction such as enhanced efficiencies, protection of product or service goodwill, and inducing dealer loyalty. No single such factor is decisive. Rather, the factfinder "weighs all of the circumstances" in deciding whether the challenged practice is, on balance, competitively unreasonable, with courts commonly phrasing the inquiry in terms of shifting burdens of proof.

HOLMES, *supra,* § 2:10, pp. 172-74 (citations omitted).

HN20[] While a necessary first step for the rule of reason inquiry is generally the identification of the relevant market, this threshold requirement is not always essential. *Id.* at 178. "Rather, direct evidence of anticompetitive effects, such as reduced output or supracompetitive prices, can obviate the need for a more rigorous market analysis, provided that the rough contours of the market are sufficiently known and obvious for the trier to assess the plausibility of the claimed anticompetitive effects without going through a full-blown market inquiry." *Id.* (citing *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

Likewise, ***HN21***[] *§ 2* monopolization claims generally require proof of the relevant market as a first element. HOLMES, *supra,* § 3:4, p. 406. The inquiry **[**35]** has two dimensions: (1) identification of the cluster of products or services with which the defendant's product or service effectively competes, the "relevant product market," and (2) identification of the geographic area within which the defendant practicably competes in marketing its product or service, the "relevant geographic market." *Id.* at 407. Further, the relevant product market traditionally emphasizes two factors, the extent of substitutability and the degree of cross-elasticity of demand. *Id.* However, as with *§ 1*, the relevant market inquiry ultimately requires consideration **[*937]** of various factors depending on the nature of the antitrust claim and the case-specific context. *Id.* at 406-33.

In this case, plaintiff has defined the service product as "the hosting of large musical concerts, with over 3,000 fans, performed by nationally touring musicians (the 'Arena Musical Product'), within the West Michigan Market (the "Market"), which consists of the residents of the greater metropolitan areas of the cities of Grand Rapids, Muskegon, Kalamazoo and Battle Creek" (First Am. Compl. P 8). The Court is persuaded that plaintiff has pleaded a sufficient "relevant market" in light of the **[**36]** allegations, particularly given the early stage of these proceedings.

Similar considerations apply to defendants' arguments that plaintiff has failed to allege "market power," and anticompetitive effects and antitrust injury. Until the claims in this case are further elucidated and the record further developed, dismissal is unwarranted on the basis that plaintiff has failed to plead these elements.

Plaintiff's specific allegations include that Live Nation controls as much as 90 percent of the Arena Musical Products in the Market in a given year and that through the PPA, CAA has been able to achieve actual monopoly power since Van Andel Arena hosts 75-80 percent of the total Arena Musical Products in the Market (First Am. Compl. P 32). It is undisputed that defendants' agreement with Live Nation has revenue sharing provisions directly involving not only their own contracts, but also their contracts with competitors. Plaintiff essentially alleges that the PPA incentivizes their (defendants' and Live Nation's) mutual gain in the entertainment marketplace at the expense of competitors and the competitive market. Specifically, plaintiff alleges that the "Competitor Arena Revenue Siphoning" **[**37]** provision in the PPA has resulted in tens of thousands of dollars or more in revenue generated at the DeltaPlex being effectively siphoned from plaintiff to CAA (First Am. Compl. P 22). Plaintiff further alleges:

1. that defendants' intended effect and purpose of entering into the PPA is to increase the cost of events at competitor arenas to their detriment and at the expense of the public by discouraging Live Nation from placing events at competitor arenas (First Am. Compl. P 29);
2. that the PPA has had the effect of some events that would otherwise come to West Michigan do not come at all or come at a higher cost to competitor arenas and/or the general public through increased ticket prices and/or a reduction in rent paid to competitors to cover the "cut" to CAA, which has denied access to Arena Musical Product and/or increased the Product's ticket costs (First Am. Compl. P 30);
3. that the PPA has a substantial, negative impact on the flow of interstate commerce (First Am. Compl. P 31);
4. that with the assignment of revenues from non-Live Nation events in the Van Andel Arena to Live Nation and the assignment of revenues to CAA from Live Nation events held at West Michigan Competitor **[**38]** Arenas, the PPA and the Competitor Arena Revenue Siphoning is a contract that unreasonably restrains trade or commerce in the Market and attempts to monopolize the placement of events in the Market and/or the revenues from events in the Market (First Am. Compl. P 41); and
5. that defendants possess actual monopoly power over the Market, they intend to obtain monopoly power **[*938]** over the Market, or there is a dangerous probability that they will succeed in achieving monopoly power over the Market and a substantial part of interstate concert commerce through the PPA (First Am. Compl. P 42).

Plaintiff's allegations, taken in total, sufficiently plead a plausible antitrust claim.

c. Going Forward

Defendant SMG provides the Court with a litany of citations to cases in which courts have dismissed antitrust claims on *Twombly* grounds. While the list is impressive and may add bulk to defendants' argument, it does not add brawn. Merely because antitrust claims falter statistically does not mandate that the claim in this particular case must fail. But, moreover, because ***HN22***[] the case-specific context is critical to any reasoned analysis of an antitrust claim, such broad-based argument lends little support **[**39]** to defendants' motions for dismissal without a comparative analysis of each case.

Of equal concern to the Court, however, is plaintiff's melding of its antitrust allegations and theories. While this is understandable to a certain extent given the circumstances of this case, the paucity of record facts, and the unique nature of the agreement at issue, the Court is mindful of the difficulties posed in responding logically and succinctly to such allegations, let alone the Court's difficulty in a detailed resolution of the issues in dispute. Fundamentally, it appears to the Court that plaintiff's antitrust claims will succeed or fail on the basis of the parties' efforts to clarify their positions vis-a-vis the fundamental purpose of the ***antitrust law***, as well as the elements of the specific theories advanced.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time **[**40]** providing an environment conducive to the preservation of democratic, political and social institutions. Cases reviewing the legislative history of the Sherman Act have concluded that Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in the United States.

17 MCQUILLIN MUN. CORP. § 49:97 (3rd ed.) (footnotes omitted).

With regard to the substantive antitrust claims, and whether plaintiff has established a prima facie antitrust case, it is far too early to dismiss the claims on this basis because the record is not sufficiently developed to properly decide issues such as the relevant market and monopolization. Federal ***antitrust law*** is a complex area of law, often encumbered by complicated facts and economic market analyses. While this case is relatively narrow in its focus and allegations, it is factually unique, and thus does not fall neatly within established antitrust precedent. Whether plaintiff can establish a violation of federal ***antitrust law*** on the basis of the PPA remains to be seen. However, based on the pleadings and the parties' arguments, it is the Court's view that plaintiff **[**41]** has sufficiently pled the elements of its antitrust claims to survive the motions to dismiss.

Accordingly, the Court concludes that defendants are not entitled to dismissal of the antitrust claims on the basis of the pleading standard in *Twombly*. Plaintiff has pled a plausible antitrust claim.

[*939] B. *42 U.S.C. § 1983* Claim (Count 3)

Defendants argue that plaintiff has failed to adequately plead a *§ 1983* claim. The Court agrees.

HN23[] "A prima facie case under *§ 1983* has two elements: '(1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law.'" *Lambert, 517 F.3d at 439* (citations omitted). Defendants contend that plaintiff has failed to establish the second element.

Although plaintiff asserts its *§ 1983* claim based on procedural due process, substantive due process and equal protection (First Am. Compl. PP 67-69), plaintiff's claim is essentially based on a "taking" theory because of the alleged diminished value/use of its property. Plaintiff argues that it has a property interest in the contractual revenues that CAA has siphoned without due process or equal protection. Plaintiff's claim is novel, if not **[**42]** imaginative. Plaintiff provides no authority that recognizes a "taking" under the circumstances of this case. Contrary to plaintiff's argument, the Court does not find the authority based on a regulatory taking applicable under the facts alleged here. This case, at the core, reasonably sounds in ***antitrust law***, and should proceed, if at all, on that basis. The Court therefore rejects plaintiff's novel *§ 1983* claim.

C. Declaratory Judgment (Count 4)

Plaintiff seeks a declaratory judgment that the PPA's Competitor Arena Revenue Siphoning is illegal and unenforceable as an *ultra vires* act under state law. Plaintiff argues that the CFAA does not confer authority in CAA or any of its authorized agents, such as SMG, to "co-promote" Arena Musical Products in private facilities such as DeltaPlex. Defendants argue that the Court should decline to exercise its discretion to provide the requested declaratory relief, i.e., that the PPA is not enforceable because it is *ultra vires,* since this is a question of state law and policy.

Similar to the *§ 1983* claim, plaintiff's request for a declaratory judgment appears to be tangential to plaintiff's case overall and depends on a somewhat imaginative characterization **[**43]** of the facts--that defendants are illegally co-promoting events at private facilities, placing tax dollars at risk and harvesting income from a private venture that is not subject to federal, state, or local tax. This characterization does not comport with the actual facts or circumstances of this case. For instance, the PPA guarantees CAA a minimum of 1.4 million dollars in revenue from Live Nation; thus, it can hardly be said to be a risk of tax dollars. In any event, the declaratory judgment count seeks relief duplicative in part to that sought in plaintiff's antitrust claim. As defendants observe, the declaratory relief requested implicates matters exclusively involving state law. Given these circumstances, the Court concludes that this claim is properly dismissed.

D. State Law Claims (Counts 2, 5-7)

Finally, with regard to the remaining counts involving state law claims, the parties have not fully argued the merits of these claims. Since certain of plaintiff's federal claims have survived dismissal, the Court need not address the issue of supplemental jurisdiction or whether these claims will ultimately survive on the merits.

VI. Conclusion

Accordingly, the Court denies defendants' **[**44]** motions to dismiss with respect to Count 1 (Violation of Federal Antitrust Act), Count 2 (Violation of State Antitrust Act), Count 5 (Tortious Interference with Prospective Business Advantage), Count 6 (Violation of Open Meetings Act and CFAA), and Count 7 (Violation of the Freedom of Information Act and CFAA) of **[*940]** plaintiff's First Amended Complaint. The Court grants the motions to dismiss with respect to Count 3 (Violation of *42 U.S.C. § 1983*) and Count 4 (Declaratory Judgment--PPA's Competitor Arena Revenue Siphoning is Ultra Vires) of plaintiff's First Amended Complaint.

DATED: January 30, 2009

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge

ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that the Court **DENIES IN PART** and **GRANTS IN PART** defendants' motions to dismiss (Dkts 40, 43) as follows:

The Court DENIES defendants' motions to dismiss with respect to Count 1 (Violation of Federal Antitrust Act), Count 2 (Violation of State Antitrust Act), Count 5 (Tortious Interference with Prospective Business Advantage), Count 6 (Violation of Open Meetings Act and CFAA), and Count 7 (Violation of the Freedom of Information Act and CFAA) of plaintiff's First **[**45]** Amended Complaint.

The Court GRANTS the motions to dismiss with respect to Count 3 (Violation of *42 U.S.C. § 1983*) and Count 4 (Declaratory Judgment--PPA's Competitor Arena Revenue Siphoning is Ultra Vires) of plaintiff's First Amended Complaint.

DATED: January 30, 2009

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge

Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)

United States Court of Appeals for the Second Circuit

December 10, 2007, Argued; January 30, 2009, Decided

Docket No. 06-1871-cv

Reporter
554 F.3d 300 *; 2009 U.S. App. LEXIS 1646 **; 2009-1 Trade Cas. (CCH) P76,478

IN RE: AMERICAN EXPRESS MERCHANTS' LITIGATION, ITALIAN COLORS RESTAURANT, on or behalf of itself and all similarly situated persons, National Supermarkets Association, 492 Supermarket Corp., Bunda Starr Corp., Phoung Corp., Plaintiffs-Appellants, v. American Express Travel Related Services Company, American Express Company, Defendants-Appellees.

Subsequent History: Writ of certiorari granted, Vacated by, Remanded by *Am. Express Co. v. Italian Colors Rest., 559 U.S. 1103, 130 S. Ct. 2401, 176 L. Ed. 2d 920, 2010 U.S. LEXIS 3744 (May 3, 2010)*

On remand at, Remanded by *Nat'l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 634 F.3d 187, 2011 U.S. App. LEXIS 4507 (2d Cir., Mar. 8, 2011)*

Prior History: [1]** The plaintiffs seek review of the March 16, 2006 decision of the United States District Court for the Southern District of New York (Daniels, J.) which, inter alia, held that the enforceability of a class action waiver provision contained in the contract between the parties is a question for the arbitrator. We hold: (1) that the question of the enforceability of the class action waiver provision is properly decided by the Court and (2) that the class action waiver provision is unenforceable under the Federal Arbitration Act.

In re Am. Express Merchants' Litig., 2006 U.S. Dist. LEXIS 11742 (S.D.N.Y., Mar. 15, 2006)

Disposition: REVERSED AND REMANDED.

Core Terms

arbitration, class action, Card, merchant, district court, antitrust, plaintiffs', costs, arbitration agreement, waivers, arbitration clause, mandatory arbitration, damages, individual plaintiff, unenforceable, vindicating, consumers, parties, charge card, named plaintiff, anti trust law, unconscionable, antitrust claim, statutory right, credit card, contracted, clauses, rights, ban, Clayton Act

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN1[] Appellate Jurisdiction, Final Judgment Rule

Section 16(a)(3) of the Federal Arbitration Act, 9 U.S.C.S. § 16(a)(3), provides that an appeal may be taken from a final decision with respect to an arbitration that is subject to the title. An order compelling arbitration and dismissing a party's underlying claims is a final decision with respect to an arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN2[] Arbitration, Arbitrability

Challenges to the validity of arbitration agreements can be divided into two types. One type challenges specifically the validity of an agreement to arbitrate. The other challenges the contract as a whole, either on a ground that directly affects the entire agreement, for example, the agreement was fraudulently induced, or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. If there is a challenge to an arbitration clause itself--an issue which goes to the making of the agreement to arbitrate--a federal court may proceed to adjudicate it. But the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., does not permit a federal court to consider claims which challenge the contract generally.

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN3[] Arbitration, Federal Arbitration Act

The favoring of arbitration is somewhat tempered by the fact that arbitration is strictly a matter of contract. Enhancing the federal policy favoring arbitration is therefore largely a matter of making arbitration agreements as enforceable as other contracts, but not more so.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN4[] Federal Arbitration Act, Arbitration Agreements

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C.S. § 2, which provides that an agreement to arbitrate shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Section 2 is the primary substantive provision of the FAA which creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the FAA.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN5[] Special Proceedings, Class Actions

Insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Fed. R. Civ. P. 23, the right is a procedural right only, ancillary to the litigation of substantive claims. Nevertheless, courts recognize the utility of a class action as a vehicle for vindicating statutory rights. This is especially true with respect to the recognition that a class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN6[] **Arbitration, Arbitrability**

When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN7[] **Antitrust & Trade Law, Clayton Act**

An appellate court reviews mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual. An appellate court reviews de novo a district court's application of the Clayton Act to undisputed facts.

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

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN8[] **Private Actions, Remedies**

With respect to fee-shifting for expert witnesses under *Fed. R. Civ. P. 54(d)* in an antitrust case, when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of *28 U.S.C.S. § 1821(b)*.

Antitrust & Trade Law > General Overview

Contracts Law > Defenses > Public Policy Violations

HN9[] **Antitrust & Trade Law**

An agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Waiver

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN10[] **Arbitration, Waiver**

The U.S. Court of Appeals for the Second Circuit holds that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, is a congressional declaration of a liberal federal policy favoring arbitration agreements. The enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Counsel: For Plaintiffs-Appellants: GARY B. FRIEDMAN, Friedman Law Group LLP (Tracey Kitzman, Aaron Patton, Warren Parrino, on the brief), New York, NY; Read K. McCaffey, Christopher W. Hellmich, Patton Boggs LLP, Washington, DC; Mark Reinhardt, Mark Wendorf. Reinhardt Wendorf & Blanchfield, St. Paul. MN; Blaine H. Bortnick, Christine Palmieri, Liddle & Robinson, L.L.P., New York, NY; Noah Shube, Law Offices of Noah Shube, New York, NY; Bernard Persky, Eric Belfi, Labaton Sucharow & Rudoff LLP, New York, NY; Robert W. Cohen, Law Offices of Robert W. Cohen, Los Angeles, CA; David Markun, Edward Zusman, Kevin Eng, Markun Zusman & Compton LLP, San Francisco, **[**2]** CA; Karl Cambronne, Jefrey D. Bores, Chestnut & Cambronne P.A., Minneapolis, MN; Brian Brooks, Murray, Frank & Sailer LLP, New York, NY; Michael Goldberg, Glancy Binkow & Goldberg LLP, Los Angeles, CA; Curtis V. Trinko, Law Offices of Curtis V. Tinko LLP, New York, NY; Robert C. Schubert, Willem F. Jonckheer, Schubert & Reed LLP, San Francisco, CA; Susan G. Kupfer, Glancy Binkow & Goldberg LLP, San Francisco, CA; Roy A. Katriel, The Katriel Law Firm, PLLC, Washington, DC; Paul C. Whalen, Whalen & Tusa, PC, New York, NY.

For Defendants -Appellees: Bruce H. Schneider, Stroock & Stroock & Lavan, LLP (Heidi Balk, on the brief), New York, NY; JULIA B. STRICKLAND, Stephen J. Newman, Stroock & Stroock & Lavan LLP, Los Angeles, CA; Jonathan M. Jacobson, Wilson Sonsini Goodrich & Rosati, New York, NY; Evan R. Chesler, Cravath, Swaine & Moore LLP, New York, NY; Stuart A. Alderoty, American Express Travel Related Services, Inc., New York, NY.

For Amici: Janet L. McDavid, Catherine E. Stetson, Jake M. Shields, Hogan & Hartson L.L.P. (Maria Ghazal, Business Roundtable, of counsel), Washington, DC, for Business Roundtable; Briscoe R. Smith, Martin S. Kaufman, New York, NY, for Atlantic Legal Foundation; **[**3]** Daniel E. Gustafson, Karla M. Gluek, Gustafson Gluek PLLC, Minnesota, MN, for American Antitrust Institute; Edith M. Kallas, Ilze C. Thielmann, Joy A. Nesbitt, Whatley Drake & Kallas LLC; Steven E. Fineman, Jennifer Gross, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY; F. Paul Bland, Jr., Trial Lawyers for Public Justice, Washington DC, for Trial Lawyers for Public Justice.

Judges: POOLER, SACK, and SOTOMAYOR, Circuit Judges.

Opinion by: POOLER

Opinion

[*302] POOLER, Circuit Judge:

This Court frequently enforces mandatory arbitration clauses contained in commercial contracts. We do so on the principle that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied." *Arciniaga v. General Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006)* (quotation marks omitted). On this appeal, however, we are asked to consider the enforcement of a mandatory arbitration clause in a commercial contract that also contains a "class action waiver," also referred to as a "collective action waiver," that is, a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum. This is a matter of first **[**4]** impression in our Court. [1]

[*303] One commentator has recently contended that "[t]he outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, "Comment: Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard," *45 Hous. L. Rev. 215, 224 (2008)*. [2] We acknowledge at the outset, as have other courts that have considered questions arising from the enforcement of class action waivers, in both consumer and commercial contracts, that the wisdom and utility of these provisions have become the subject of intense debate. See *Skirchak v. Dynamics Research Corp., 508 F.3d 49, 63 (1st Cir. 2007)* ("We recognize that there is a policy debate about whether class action waivers essentially act as exculpatory clauses, allowing for violations of laws where individual cases involve low dollar amounts and so will not adequately address or prevent illegality."). The opposing positions in this frequently impassioned debate have been dispassionately described as follows:

> Companies' use of class action **[**7]** waivers is motivated by the view that plaintiffs exploit the class action procedure in order to wrest large and unfair settlements from defendants. . . . Class action waivers are viewed by these companies as a way to defend themselves from consumers who are ganging up on companies through the leverage inherent in the aggregation of large numbers of claims. In further support of these waivers, corporations argue that the many (perceived) advantages of arbitration to a plaintiff make up for any disadvantages or inconveniences that the plaintiff may incur by sacrificing the ability to be part of a class action.

---

[1] We note that two district courts in our Circuit have found class action waivers in mandatory arbitration clauses to be enforceable. In *Sherr v. Dell, Inc, No. 05cv10097, 2006 U.S. Dist. LEXIS 51864, 2006 WL 2109436 (S.D.N.Y. July 27, 2006)*, a consumer brought a putative class action suit against Dell alleging that certain of the latter's products had a dangerous tendency to overheat. The plaintiff asserted claims under the statutory and common law of New York. *2006 U.S. Dist. LEXIS 51864, [WL] at *1*. Dell moved to compel arbitration and for the enforcement of a class action waiver contained in its sales contract, the terms of which were not even available to the consumer before purchase short of his calling a special telephone number or visiting a Dell internet site. Id. The district court granted the motion to compel, holding that the "plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The [Federal Arbitration Act's] primary purpose is not to create a right to sue as a class. Its main purpose is to ensure that private agreements to arbitrate are enforced according to their terms." *2006 U.S. Dist. LEXIS 51864, [WL] at *7* (quotation marks omitted). The case **[**5]** was decided according to the law of Texas, which, the district court found, had incorporated the Federal Arbitration Act as part of its substantive law. Id.

Dumanis v. Citibank (South Dakota), N.A., No. 07cv6070, 2007 U.S. Dist. LEXIS 81586, 2007 WL 3253975 (W.D.N.Y. Nov. 2, 2007), was an action involving credit card interest rates brought under the federal Truth in Lending Act, *15 U.S.C. § 1601 et seq.*, and the New York General Business Law. The contract at issue had a South Dakota choice of law clause, and the decision was based upon the law of that state, not the federal law of arbitration. *2007 U.S. Dist. LEXIS 81586, [WL] at *2-*3*. The district court enforced the class action waiver contained in the contract's mandatory arbitration clause, both because the plaintiff could have "opt[ed] out" of the arbitration clause by not renewing his credit card and because the plaintiff had not been stripped of any substantive remedies; he merely could not pursue them "in the arguably more-favorable context of a class action." Id.

We note that in neither Sherr nor Dumanis does it appear that the plaintiff made a substantial demonstration -- which we hold that the plaintiffs have made here -- to the effect that an inability to pursue arbitration on a **[**6]** class basis would be tantamount to an inability to assert their claims at all.

[2] Two commentators have suggested that this is particularly so in the credit card industry: "Credit card companies have shown themselves to be even less enthusiastic about classwide arbitration than about class action litigation. The 'devil you know' phenomenon is compounded by the uncertainty of judicial review of class certification in arbitration and the concomitant fear of a 'renegade arbitrator' certifying a class and exposing a company to massive liability." Samuel Issacharoff & Erin F. Delaney, "Credit Card Accountability," *73 U. Chi. L. Rev. 157, 179 (2006)*.

> . . . Opponents of class action waivers contend that the ability to aggregate claims is crucial to protect the rights of those individuals . . . who do not have the resources to litigate individual claims. Further, many individual claims are only viable if brought on a class-wide basis. Indeed, by prohibiting class actions in . . . lawsuits[] where the expected recovery is dwarfed by the cost of litigating or arbitrating the claim, individuals are effectively prevented from pursuing their claims. As a result, businesses are able to engage in unchecked market misbehavior . . . .

J. **[**8]** Maria Glover, "Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements," *59 Vand. L. Rev. 1735, 1746-47 (2006)* (footnotes and internal quotation marks omitted).

[*304] Both of these positions have been proffered to the Court by amici. Compare Brief of Atlantic Legal Foundation at 4 ("For several decades, providers of products and services in the United States have been beset with a litigious environment that has evoked criticism of many observers and applauded only by those professionals who have harvested the substantial financial rewards the civil justice system has produced by way of attorneys' fees. **[**9]** . . . Recognizing the risks of defending against class action litigation, many businesses have elected to have disputes resolved by individual arbitrations and to adopt collective action waivers as part of their arbitration clauses with their business customers to insure that result.") with Brief of Trial Lawyers for Public Justice at 27 ("It is . . . crucial to understand that any ban on class arbitration is essentially a ban on class treatment altogether, as arbitration clauses in standardized corporate contracts are made broader and broader, to encompass all conceivable types of disputes . . . . Under a regime where such prohibitions are enforced, such clauses are tantamount to a clause banning all claims against a corporation, unless they are so large that they justify the outlay of the extraordinary expense involved."). [3]

We note that two standard treatises on the conduct of class action litigation appear to take opposing positions as well. Compare 1 Joseph M. McLaughlin, McLaughlin on Class Actions: Law and Practice, § 2:14 (3d ed. 2006) ("As the potential availability of class-wide arbitration threatens to multiply exponentially the exposure on what is facially a single-consumer issue, companies should strongly consider including in their standard arbitration agreements an express provision barring class action litigation or arbitration.") with 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, § 9:67 n.2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.").

While we are conscious of this debate, we are thankful that we **[**11]** need not resolve it on this appeal. That is, we do not decide whether class action waiver provisions are either void or enforceable per se. Rather, we are concerned solely with the class action waiver contained in the contract between the parties before us on this appeal. We conclude that, on the record before us, the plaintiffs have adequately demonstrated that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.

FACTS

A. Procedural Posture. The plaintiffs appeal from the judgment, dated March 20, 2006, memorializing the memorandum opinion and order, dated March 15, 2006, of the United States District Court of the Southern District of New York, which granted defendants American Express **[*305]** Company and American Express Travel Related Services Company, Inc.'s (collectively "Amex") motion to compel arbitration. See *In re American Express Merchants Litig., No. 03cv9592, 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341 (S.D.N.Y. March 16, 2006)* (Daniels, J.). The

---

[3] Interestingly, when it enacted the Class Action Fairness Act of 2005, Congress itself found both utility and danger in the use of the class action device. Compare ***Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005)*** ("Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims **[**10]** of numerous parties by allowing the claims to be aggregated . . . .") with id. at ***§ 2(a)(2)*** ("Over the past decade, there have been abuses of the class action device that have -- (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system.").

earliest iteration of the plaintiffs' claims was made in August 2003, with the filing of a class action complaint **[**12]** in the United States District Court for the Northern District of California ("the Italian Colors action"). This action, and another subsequently filed class action, were transferred, on Amex's motion, brought pursuant to *28 U.S.C. § 1404(a)*, to the United States District Court for the Southern District of New York. (JA 14, 85) By an order, dated December 10, 2004, that court consolidated these two actions, pursuant to *Rule 42(a) of the Federal Rules of Civil Procedure*, with several class actions that had been filed in the Southern District of New York. Any subsequently filed related actions were also made subject to this consolidation order.

Because we consider here only the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced, a prolix description of the plaintiffs' claims is unnecessary. (And, needless to say, we take no position on the merits of these claims.) In their briefs on this appeal, the parties describe the plaintiffs' claims largely by reference to the amended complaint, filed December 24, 2003, in the Italian Colors action. We will do so as well.

B. The Parties. The plaintiffs allege that Amex "is **[**13]** the leading issuer of general purpose and corporate charge cards to consumers and businesses in the United States and throughout the world. It is also the leading provider of charge card services to merchants." The named plaintiffs are: (1) California and New York corporations which operate businesses which have contracted with Amex and (2) the National Supermarkets Association, Inc. ("NSA"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets." The named plaintiffs seek to represent the following class, pursuant to *Rule 23 of the Federal Rules of Civil Procedure*:

> The class is comprised of all merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . . .

C. The Card Acceptance Agreement. The basic contractual relationship between Amex and the plaintiffs is set forth in an affidavit of an Amex executive:

> American Express issues card products to its card members, which cardmembers **[**14]** then use in making purchases from participating merchants. Participating merchants with annual charge volume expected to be less than $ 10 million agree that, by submitting charges for payment by American Express, their relationship will be governed by the "Terms and Conditions for American Express(c) Card Acceptance" ("the Card Acceptance Agreement"). [4]

The Card Acceptance Agreement is a standard form contract issued by Amex. It may be terminated by either party "at any time by sending written notice to the other party." Further, Amex reserves the right

> **[*306]** to change this Agreement at any time. We will notify you of any change in writing at least ten (10) calendar days in advance. If the changes are unacceptable to you, you may terminate this Agreement as described in the section entitled "TERMINATING THIS AGREEMENT."

According to Amex, the Card Acceptance Agreement has "expressly permitted amendments upon notice" for more than twenty-five years. The Card Acceptance Agreement also contains a choice of law provision designating New York **[**15]** law as governing and, as Amex states, there is no dispute that the agreement "has always" contained this provision.

By contrast, it is only since 1999 that the Card Acceptance Agreement has contained a mandatory arbitration clause. That clause is nothing if not capaciously worded:

---

[4] Amex confirmed at oral argument that this $ 10 million figure relates to purchases made with Amex products, not to purchases made by credit cards generally.

For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.

* * *

Any Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect **[**16]** at the time the Claim is filed. Claims shall be referred to the National Arbitration Forum (NAF), JAMS/Endispute (JAMS), or the American Arbitration Association (AAA), as selected by the party electing to use arbitration. If a selection by us of one of these organizations is unacceptable to you, you shall have the right within thirty (30) days after you receive notice of our election to select one of the other organizations listed to serve as arbitrator administrator.

At the heart of the instant appeal is the fact that the Agreement also contains the following provision:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving **[**17]** Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the **[*307]** arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.

Thus, the Card Acceptance Agreement not only precludes a merchant from bringing a class action lawsuit, it also precludes the signatory from having any claim arbitrated on anything other than an individual basis. The Card Acceptance Agreement further provides as follows:

This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, *9 U.S.C. Sections 1-16*, as it may be amended (the FAA). The arbitrator shall apply applicable substantive law consistent with the FAA . . . . In conducting the arbitration proceeding, the arbitrator shall not apply the Federal or any state rules of civil procedure or rules of evidence. The arbitrator shall apply the applicable provisions **[**18]** of the Code of Procedure of the NAF, JAMS or AAA, as applicable to matters relating to evidence and discovery. [5]

D. The Plaintiffs' Substantive Claims. The plaintiffs' dispute with Amex rests upon the distinction between "charge cards" and "credit cards." The district court explained the distinction as follows:

---

[5] The plaintiffs make no challenge to this preemption of the Federal Rules of Civil Procedure by the rules of the various arbitration firms listed in the Card Acceptance Agreement. We note, however, that some commentators have argued that plaintiffs are placed at a distinct disadvantage by class arbitration rules of these firms. See Daniel R. Higginbotham, "Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers," *58 Duke L.J. 103, 123 (2008)* ("Regarding many important issues . . . the rules [of arbitration firms] are either silent or diverge significantly from the Federal Rules of Civil Procedure, raising serious questions as to the ability of class arbitration to adequately resolve disputes.").

> A charge card requires its holder to pay the full outstanding balance at the end of a standard billing cycle. A credit card, by contrast, allows the **[**19]** cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges. In plain terms, the credit card is a means of financing purchases, the charge card is a method of payment.

*In re American Express Merchants Litig., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *1 n.6*.

According to the plaintiffs, Amex had until recent years centered its business on the issuance of corporate and personal charge cards to corporate clients and affluent consumers. Amex is alleged to be the undisputed leader in this market, to the extent that it "issues Corporate Cards to at least 70% of the companies included in the Fortune 500, and is likewise the leading issuer of Corporate Cards to middle-market companies . . . and small businesses." The plaintiffs further assert that "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." In fact, the plaintiffs allege that Amex itself contends that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card."

Thus, the holder of a charge card **[**20]** is likely to be "a higher class of customer" and, as such, is particularly attractive to merchants such as the plaintiffs. Amex is certainly not unaware of this attraction, and as a result of it, Amex has traditionally been able to charge high "merchant discount fees," which are the fees a card issuer withholds as a percentage of each **[*308]** purchase made with its card at the merchant's establishment. These fees, the plaintiffs aver, "are at least 35% higher than competitive rates" applicable to mass-market credit cards such as Visa, Mastercard, and Discover.

Over the last decade, however, the plaintiffs contend that Amex's "business in the markets for credit card issuance and credit card services has grown dramatically." Specifically, Amex has in recent years created new credit card products "marketed to college students, young adults and others who would certainly not produce the high per-transaction spending that Amex uses to justify [the] high [merchant] discount fees. By leveraging its market power in corporate and personal charge cards, however, American Express was able to compel merchants to accept its new revolving credit card product[s] at the same elevated discount rate, which vastly **[**21]** exceeded the rate for comparable Visa, MasterCard or Discover products."

According to the plaintiffs, the vehicle of this compulsion is the "Honor All Cards" provision contained in the Card Acceptance Agreement. Under the Agreement, a merchant does not contract to accept any one Amex product as a form of payment. Rather, the Agreement applies

> to your acceptance of American Express(c) Cards. . . . American Express Card(s) . . . shall mean any card or other account access device issued by American Express Travel Related Services Company, Inc., or its subsidiaries or affiliates or its or their licensees bearing the American Express name or an American Express trademark, service mark or logo.

The plaintiffs assert that, by means of the "Honor All Cards" provision, merchants are faced with the choice of paying supracompetitive merchant discount fees (i.e., fees above competitive levels) on Amex's new mass-market products or "inevitably los[ing] a significant portion of the sales they receive from businesses, travelers, affluent consumers, and others" who are the traditional users of Amex charge cards. This, the plaintiffs claim, amounts to an illegal "tying arrangement," in violation of Section 1 **[**22]** of the Sherman Act, *15 U.S.C. § 1*. [6]

---

[6] In a definition that has become classic, the Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. A tying arrangement will violate *Section 1* of the Sherman Act if "the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (internal quotation marks omitted).

E. The District Court's Decision. Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. In its March 15, 2006 opinion, the district court granted Amex's motion, first holding that the arbitration clause in the Agreement was "a paradigmatically broad clause" which was certainly applicable to the dispute between the parties. *In re American Express Merchants Litig., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *4*. The district court proceeded to consider **[**23]** the plaintiffs' contention that enforcement of the class action waiver would effectively strip them of the ability to assert their claims because "each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $ 5000." Id. The district court expressed skepticism that this argument amounted to much:

> **[*309]** Plaintiffs' contention . . . that the costs of individual arbitration would eclipse the value of any potential recovery, ignores the statutory protections provided by the Clayton Act. *Section 4* of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. 15(a)* . . . .

*2006 U.S. Dist. LEXIS 11742, [WL] at *5* (footnote omitted).

This observation was quickly reduced to dicta, however. This is because the district court proceeded to hold that "[t]he enforceability of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for **[**24]** the arbitrator, once arbitrability is established." *2006 U.S. Dist. LEXIS 11742, [WL] at *6*. Thus, the district court concluded that all of the plaintiffs' substantive antitrust claims, as well the question of whether or not the class action waivers were enforceable, were subject to arbitration.

The plaintiffs also made two additional arguments before the district court. First, they contended that the class action waiver could not be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement. Amex purportedly informed these plaintiffs of the inclusion of the clause by means of an amendment to the Agreement. The plaintiffs contended, however, that (1) Amex had not produced sufficient evidence of the fact that the "pre-1999 plaintiffs" had ever received this amendment and (2) even if the plaintiffs had received the amendment, their original merchant contract with Amex did not allow the subsequent introduction of an arbitration clause. The district court rejected these arguments, concluding that the plaintiffs had not successfully rebutted the presumption of mailing to which Amex is entitled and that the arbitration **[**25]** amendment constituted a reasonable addition to the original merchant contract. *2006 U.S. Dist. LEXIS 11742, [WL] at *7-*9*.

Second, the plaintiffs contended that the class action waiver was not enforceable against named plaintiffs and class members who were citizens of California because the waivers were unconscionable under that State's law. The district court concluded that this was "a substantive matter[] to be raised before the arbitrator." *2006 U.S. Dist. LEXIS 11742, [WL] at *9*.

The district court concluded as follows: "[Amex's] motion to compel arbitration of all claims against it is granted. Since this Court finds that all of plaintiffs' claims against [Amex] are subject to arbitration, it further orders that plaintiffs' cases against [Amex] be dismissed." *2006 U.S. Dist. LEXIS 11742, [WL] at *10*. The plaintiffs filed a timely appeal.

ANALYSIS

Before we proceed to the weighing of the parties' arguments, we think it would be helpful to set forth some of the issues which are not raised on this appeal. Specifically, these are issues which are commonly raised in the general run of arbitration cases with which this Court is faced.

First, the plaintiffs are not contending that the mandatory arbitration clause contained in the Card Acceptance Agreement is not broad enough to **[**26]** cover their antitrust claims. See *JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 175 (2d Cir. 2004)* (holding that antitrust claims were arbitrable under a broad arbitration clause even though the claims concerned "matters beyond the making of a particular contract between the parties and the **[*310]** performance of its terms"). Further, while they certainly do not deny that this case is one of considerable legal and evidentiary complexity, the plaintiffs do not argue that their claims are too complex to be properly handled in arbitration. See *id. at 181* (rejecting argument that claims involving a "horizontal price-fixing conspiracy" were beyond the capabilities of an arbitral panel). Nor do the plaintiffs take issue with the dicta in JLM to the effect that this Court would view "skeptically" any argument positing that the "assertion of class claims should serve as a bar or deterrent to sending" a case to arbitration. *Id. at 180 n.9*. On the contrary, the plaintiffs expressly aver that they "are not averse to proceeding in a class-wide arbitration." [7] (Blue 29) The plaintiffs are therefore not seeking to revive "the ancient judicial hostility to arbitration" as a form of dispute resolution. **[**27]** *Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 200 (2d Cir. 1998)*. In asking us to hold that the class action waiver in the Card Acceptance Agreement is unenforceable, however, the plaintiffs are implicitly asking us to limit the principle that "many features of arbitration by contract, including . . . procedure and choice of substantive law," *Hall Street Assocs., LLC v. Mattel, Inc., ___ U.S. ___, 128 S. Ct. 1396, 1404, 170 L. Ed. 2d 254 (2008)*, are to be left to the discretion of the contracting parties, unsupervised by judicial review. [8] Although we believe that it is a close question, we believe that the plaintiffs are correct.

A. Jurisdiction. ***HN1***[] Section 16(a)(3) of the FAA, *9 U.S.C. § 16(a)(3)*, provides that an appeal may be taken from "a **[**29]** final decision with respect to an arbitration that is subject to this title." Because "an order compelling arbitration and dismissing a party's underlying claims is a 'final decision with respect to an arbitration,'" *Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 82, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*, there is no dispute that this Court has jurisdiction to hear the instant appeal.

B. Who Should Decide Whether the Class Action Waiver is Enforceable? The plaintiffs argue -- and we do not see that Amex posits any argument to the contrary -- that the district court erred in holding that the question of the class action waiver's enforceability is a matter for **[*311]** the arbitrator, not the court. This is plainly correct.

In Buckeye Check Cashing, Inc. v. Cardegna, the Supreme Court stated that

> ***HN2***[] [c]hallenges to the validity of arbitration agreements . . . can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g. **[**30]** the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

---

[7] It is apparent that "[c]lass arbitration is a swiftly growing phenomenon. In late 2003, the American Arbitration Association ("AAA") introduced procedures for class arbitrations . . . . As of September 27, 2007, the AAA was administering more than 190 class arbitrations, and from July 10, 2006 until September 27, 2007 alone, the number of AAA-administered class arbitrations increased by more than 50%." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 Bus. Law. 55, 56 (2007). Clancy and Stein **[**28]** go on to argue that when Congress passed the Federal Arbitration Act, in 1925, it specifically envisioned arbitration as "something inherently prompt, inexpensive, and streamlined," and "did not expect that arbitrators would adjudicate anything like the modern class action . . . ." Id. at 61, 67. Although the argument that class proceedings in arbitration are incompatible with the Federal Arbitration Act is an intriguing one, we are presented with no such argument on this appeal.

[8] The principle was limited by the Court itself in Hall Street which held that parties are not free to compose arbitration agreements which provide for a greater scope of federal court review of arbitral awards than that set forth in the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1 et seq*, because this would be at odds with the FAA's "substantiat[ion of] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *128 S. Ct. at 1405*.

546 U.S. 440, 444, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) (citation omitted). The Court then held that if there is a challenge to "'the arbitration clause itself -- an issue which goes to the making of the agreement to arbitrate -- the federal court may proceed to adjudicate it. But [the FAA] does not permit the federal court to consider claims [which challenge] the contract generally.'" Id. at 445 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).

The plaintiffs are plainly challenging the Card Acceptance Agreement's arbitration clause insofar as they dispute the enforceability of its class action waiver and, by extension, the validity of the parties' agreement to arbitrate. Their "challenge is to the arbitration clause itself," id., rather than to the entirety of the Card Acceptance Agreement. [9] This appeal therefore involves "a gateway dispute about whether the parties are bound by a given arbitration clause," a dispute which "raises a question of arbitrability for a court to decide." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) **[**31]** (internal quotation marks omitted); *accord* Kristian v. Comcast Corp., 446 F.3d 25, 55 (1 Cir. 2006); Jenkins v. First Am. Cash Advance of Georgia, LLC, 400 F.3d 868, 877 (11 Cir. 2005). [10] We will therefore proceed to consider whether the class action waiver contained in the Card Acceptance Agreement is enforceable.

C. [32] The Enforceability of Class Action Waiver Provisions: General Considerations**. The FAA was "enacted . . . to replace judicial indisposition to arbitration," Hall Street, 128 S. Ct. at 1402, and is, as we acknowledged at the outset of this opinion, an expression of "a strong federal policy favoring arbitration as an alternative means of dispute resolution." Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001). ***HN3***[] The favoring of arbitration is, however, somewhat tempered by the fact that "[a]rbitration is strictly a matter of contract." Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995). Enhancing the federal policy favoring arbitration is therefore largely a matter of "mak[ing] arbitration agreements as **[*312]** enforceable as other contracts, but not more so." Opals on Ice Lingerie v. Body Lines, Inc., 320 F.3d 362, 369 (2d Cir. 2003) (internal quotation marks omitted).

This principle is set forth in ***HN4***[] Section 2 of the FAA, 9 U.S.C. § 2, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is "the **[**33]** primary substantive provision" of the FAA which "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" FAA. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). We join other Circuits that have evaluated arbitration clauses containing class action waivers under the federal substantive law of arbitrability. See Gay v. Credit Inform, 511 F.3d 369, 394-95 (3d Cir. 2007) (holding class action waiver to be enforceable under Section 2 of the FAA notwithstanding claim that waiver was unconscionable under state law); Kristian, 446 F.3d at 63 ("Although Plaintiffs' challenges to the enforceability of the arbitration agreements could be evaluated through the prism of state unconscionability law, we have chosen to apply a vindication of statutory rights analysis, which is also part of the body of federal substantive law of arbitration . . . ."). We conclude that the plaintiffs here have demonstrated that enforcement of the class action waiver in the Card Acceptance Agreement to cover their claims against Amex under federal antitrust statutes would be incompatible with the federal substantive law **[**34]** of arbitration.

We begin by recognizing that ***HN5***[] insofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Rule 23 of the Federal Rules of Civil Procedure, the right "is a procedural right

[9] The plaintiffs' challenge to the enforceability of the class action waiver is distinct from any contention to the effect that Amex's alleged tying arrangement renders the entire Card Acceptance Agreement invalid. See Amex Brief at 49. The latter issue is not before us.

[10] In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), the Supreme Court was faced with an arbitration agreement which was ambiguous as to whether it permitted arbitration proceedings to be conducted on a class basis. The Court concluded that this was a matter of contract interpretation which "should be for the arbitrator, not the courts, to decide." Id. at 453. Here, we do not face an issue of contract interpretation; the Card Acceptance Agreement is unambiguous in forbidding arbitration to proceed on a class basis.

only, ancillary to the litigation of substantive claims." Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). Nevertheless, the Supreme Court has repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights. This is especially true with respect to the Court's recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action. The Court made the point forcefully more than thirty years ago in the context of an antitrust action:

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $ 70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit **[**35]** proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). Thus, as the Court later opined, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); see also Roper, 445 U.S. at 338 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."); Shady **[*313]** Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 144 (2d Cir. 2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' th fees typically incurred."); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7 Cir. 2004) **[**36]** ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $ 30.00.").

The Supreme Court has at least implicitly held that a provision in an arbitration agreement barring class procedures is not per se unenforceable because, as noted above, it held in Bazzle that the question of whether or not an ambiguous arbitration clause contained a class action ban was a matter for the arbitrator, not the court, to decide. 539 U.S. at 453. Beyond this oblique ruling, however, the Supreme Court has yet to squarely face the question of whether or not there are conditions under which a class action ban would be incompatible with the FAA. But, as both parties here acknowledge, the Court has decided cases which involved matters which, if ancillary, are certainly pertinent to this question.

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), involved a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. Specifically, the plaintiff, a manager at a brokerage firm, asserted that he had been terminated by the firm in violation of the ADEA. Id. at 23. After the **[**37]** plaintiff had filed suit in federal district court, the defendant firm moved to compel arbitration pursuant to a mandatory arbitration provision contained in the rules of the New York Stock Exchange ("NYSE"), to which the plaintiff had agreed to be bound when he became a registered securities representative. Id. at 23-24.

The Court held that because "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" Id. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). Even though the Court acknowledged that "the ADEA is designed not only to address individual grievances, but also to further important social policies," id. at 27, the Court could discern no Congressional intent to preclude ADEA claims from being subject to arbitration. The Court also considered the plaintiff's argument to the effect "that **[**38]** arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." Id. at 32. The Court rejected this contention:

> As the court below noted, however, arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." The NYSE rules also provide for collective proceedings. But even if the arbitration could not

> go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. (citations, internal quotation marks, and brackets omitted).

[*314] Amex directs our attention to the final sentence of this passage, and other courts have relied upon it in upholding mandatory arbitration clauses. Amex Brief at 19. In particular, the Third Circuit, in *Johnson v. West Suburban Bank, 225 F.3d 366 (3 Cir. 2000)*, dealt with a claim under the Truth in Lending Act ("TILA"), *15 U.S.C. § 1601 et seq.* The plaintiffs **[**39]** argued that their class action claim in federal court was not subject to mandatory arbitration because TILA

> effectively create[s] an unwaivable right to bring a class action. . . . [In TILA,] Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $ 500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $ 1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims.

Id. at 377.

The Third Circuit held that "[t]his argument is unavailing in light of" Gilmer. Id. The court noted that Gilmer involved a claim under the ADEA, a statute which explicitly provides in its text for the bringing of class actions. Id. (citing *29 U.S.C. § 626(b)*). In spite of this, the court concluded, "the Supreme Court still ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of the class action remedy there." *Id.*; see also *Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5 Cir. 2004)* ("[W]e reject the **[**40]** [plaintiffs'] claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the [Fair Labor Standards Act.] The Supreme Court rejected similar arguments concerning the ADEA in Gilmer . . . .").

We cannot agree with this view of Gilmer because a collective, and perhaps a class action remedy, in fact was available in that case. As set forth above, the Supreme Court explicitly noted that the arbitration rules of the NYSE provided for the conduct of collective arbitration. *500 U.S. at 32*. At the time Gilmer was decided, the NYSE's rules may also have permitted arbitration claims submitted as class actions. Compare NYSE Rule 600(d) (2008) ("A claim submitted as a class action shall not be eligible for arbitration under the Rules of the Exchange.") with NYSE Rule 600 (1991) (containing no prohibition on class actions). The statement in Gilmer that the arbitration clause would be enforceable "even if" class remedies were available evidences that the Court itself was uncertain, but acknowledged the probability, that class action were feasible under the NYSE's rules. Moreover, it is dicta that does not apply here. The plaintiffs do not **[**41]** proffer the argument rejected in Gilmer, namely that the class action waiver is unenforceable merely because the relevant statute allows class actions. Rather, the conundrum presented by the instant appeal is more nuanced: whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity.

After the Third Circuit's decision in Johnson, the Supreme Court came somewhat closer to this issue in Green Tree Financial Corp.-Alabama v. Randolph. That case also involved a claim under TILA and a consideration of the enforcement of a mandatory arbitration clause. **[*315]** The specific issue to be decided was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs." *Green Tree, 531 U.S. at 82*. Specifically, the plaintiff argued "that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required **[**42]** to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have had against [the defendants]." *Id. at 90*. The Court rejected this argument because the plaintiff had proved no more than that the asserted "risk" was hypothetical:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the

> matter. . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 90-91 (footnote omitted); see also In re Cotton Yarn Antitrust Litigation, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate **[**43]** an agreement.").

Although the Court in Randolph declined to consider whether the arbitration agreement was unenforceable because it may have precluded the plaintiff from bringing her claims under TILA as a class action, 531 F.3d at 92 n.7, courts have relied upon its holding to uphold such bans. See In re Cotton Yarn Antitrust Litigation, 505 F.3d at 285 ("This kind of uninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) ("In the present case, the Livingstons have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . ."); Adkins v. Labor Ready, Inc ., 303 F.3d 496, 503 (4th Cir. 2002) ("Adkins makes no showing of the specific financial status of any of the plaintiffs at the time this action was brought. He provides no basis for a serious estimation of how much **[**44]** money is at stake for each individual plaintiff.").

D. Is the Class Action Waiver in the Card Acceptance Agreement Enforceable? Randolph is controlling here to the extent that it holds that ***HN6***[] when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92. We find that the district court erred in ruling that the plaintiffs had failed to bear this burden because they had "ignore[d] the statutory protections provided by the Clayton Act." In re American Express Merchants Litigation, 2006 U.S. Dist. LEXIS 11742, 2006 WL, at *5. On the contrary, the record abundantly supports the plaintiffs' argument that they would incur prohibitive costs if compelled to arbitrate under the **[*316]** class action waiver. [11] The Card Acceptance Agreement therefore entails more than a speculative risk that enforcement of the ban will deprive them of substantive rights under the federal antitrust statutes.

This argument is compellingly set forth in an affidavit filed in the district court by Gary L. French, Ph.D., an economist associated with Nathan Associates Inc., a financial consulting firm retained by the plaintiffs. Dr. French states that the purpose of his affidavit is "to provide an expert opinion concerning the likely costs and complexity of an expert economic study concerning the liability and damages" relating to this action, and to compare this with "the potential recovery of damages by an American Express Card merchant with annual sales volume of $ 10 million or less, such as most if not all of the named plaintiffs in this litigation, and to provide my opinion **[**46]** as to whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." Dr. French continues:

> Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. In my experience, even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $ 1 million. . . . In summary, the cost of [Nathan Associates'] expert assistance in individual plaintiff antitrust cases has ranged from about $ 300 thousand to more than $ 2 million. However, after reviewing the complaint and doing some preliminary research in this case, it is my opinion that . . . the cost for this case will fall in the middle of the range of [Nathan Associates'] experience.

---

[11] ***HN7***[] "We review . . . mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal or factual." United States v. Selioutsky, 409 F.3d 114, 119 (2d Cir. 2005) **[**45]** (internal citations omitted). The plaintiffs' estimated expert witness fees were essentially undisputed. We review de novo the district court's application of the Clayton Act to undisputed facts. See Village of Grand View v. Skinner, 947 F.2d 651, 656 (2d Cir. 1991) ("Because the issues presented on this appeal involve the application of a statutory standard to undisputed facts, the appropriate standard of review is de novo."). We note, however, that our ruling would not be different under a clearly erroneous standard.

> An economic antitrust study . . . is necessarily complex and costly because it involves investigating several antitrust liability and damages issues and, potentially involves numerous tasks and services. The antitrust liability and damages issues that an **[**47]** expert economist will study in this matter will likely include:
> . defining the relevant tying and tied product markets and determining whether they are distinct;
> . determining whether the defendant has market (monopoly) power in the tying product market, . . .;
> . determining whether the defendant has exercised its market (monopoly) power to enforce the tying arrangement;
> . determining whether the tying arrangement has an anticompetitive effect in the tied product market;
> . determining what the merchant fees would have been but for the alleged anticompetitive tying; and
> . quantifying the dollar amount of damages to the plaintiffs as a consequence of the tying arrangement.

Dr. French then proceeds to consider the economic rationality of bringing an **[*317]** individual action against Amex in light of these substantial expert witness costs:

> Based upon publicly available information . . . I have estimated that a small merchant with $ 10 million of annual sales, on average, might calculate and expect $ 754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation. . . . Multiplying the $ 754 damage figure by four, gives a rough estimate of $ 3,015 **[**48]** total damages for the whole four-year damage period, or $ 9,046 when trebled, assuming that the merchant's sales remain constant at $ 10 million for the four-year period.
> . . . The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported $ 230,343 American Express Card volume in 2003, might expect four-year damages of $ 1,751, or $ 5,252 when trebled. . . . The largest volume named plaintiff merchant, with reported American Express Card volume of $ 1,690,749 in 2003, might expect four-year damages of $ 12,850, or $ 38,549 when trebled.
> In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $ 1 million.

In Kristian, the First Circuit found that expert affidavits similar to Dr. French's "demonstrat[ed] that without some form of class mechanism -- be it class action or class arbitration -- a consumer antitrust plaintiff will not sue at all." *446 F.3d at 58*. **[**49]** We hold that the plaintiffs here have also demonstrated that their antitrust claims against Amex can, for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration.

The district court, which held that the enforceability of the class action waiver in the Card Acceptance Agreement was a matter to be determined in arbitration, did not deal head on with Dr. French's affidavit. Dr. French's conclusion that "in a non-class action involving an individual plaintiff . . . even a relatively small economic antitrust study will cost at least several hundred thousand dollars" was essentially uncontested. Instead of addressing this figure, the district court misinterpreted and misapplied the statutory protections available to the plaintiffs. Citing Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, the district court noted that a plaintiff who had established a Sherman Act claim against a defendant "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *In re American Express Merchants Litig ., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *5*; see also *Dambrosio v. Comcast Corp., No. Civ.A.03-6604, 2005 U.S. Dist. LEXIS 35871, 2005 WL 3543794, at *16 (E.D. Pa. Dec. 27, 2005)* **[**50]** (asserting that Section 4 of the Clayton Act "expressly provides for the recovery of attorneys' fees and expenses, [thereby] making the arbitral forum accessible to individual plaintiffs and allowing them to vindicate the full range of substantive rights granted to them" under the federal antitrust laws), vacated on other grounds, *2006 U.S. Dist. LEXIS 48163, 2006 WL 2058643 (E.D. Pa. Apr. 12, 2006)*.

This is true, but, as the plaintiffs correctly point out, the Clayton Act simply does not solve their problem. Besides the fact that the trebling of a small individual damages award is not going to pay for the expert fees Dr. French has estimated will be necessary to make an individual plaintiff's case here, there is an even more **[*318]** important legal consideration that the district court did not consider. In Crawford Fitting Co. v. J.T. Gibbons, Inc., the Supreme Court addressed ***HN8***[] fee-shifting for expert witnesses under *Rule 54(d) of the Federal Rules of Civil Procedure* in an antitrust case, holding that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [*28 U.S.C.] § 1821(b)* . . . ." *482 U.S. 437, 439, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)*. [12] We note that that figure is now **[**51]** set at a $ 40 per diem. Further, as the plaintiffs assert, there are no provisions "in the rules of any of the arbitral bodies designated [in the Card Acceptance Agreement] that would allow such costs to be awarded where they are not authorized by the applicable fee shifting statute." Even with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs. [13] Thus, Amex's reply to the effect that "[a]n arbitrator can award the same reasonable costs that are recoverable by statute," plainly does not solve the problem.

Amex also informs us that a putative antitrust class action challenging the "Honor All Cards" provision in the Card Acceptance Agreement has been brought in the U.S. District Court for the Southern District of New York by a merchant plaintiff who is apparently not subject to the class action waiver provision in the Agreement. See *The Marcus Corp. v. American Express Co., No. 04cv5432, 2005 U.S. Dist. LEXIS 13170, 2005 WL 1560484 (S.D.N.Y. July 5, 2005)*. Further pointing out that the plaintiffs in that action are represented by the same counsel who represent the plaintiffs here, Amex speculates that "[p]resumably" the plaintiffs here, "the Marcus plaintiff, and their common attorneys and experts could reach an agreement as to how the experts' cost of preparation could be shared." This is an intriguing proposition, but we do not believe it can survive the application of the following **[**53]** provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the Marcus action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with anyone. [14]

[*319] Concluding that Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action waiver in the Card Acceptance Agreement "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." The effective negation of a private suit under the antitrust laws is troubling because such "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*. This may be especially true with respect to private antitrust suits brought as class actions. See Dando B. Cellini, "An Overview of Antitrust Class Actions," 49 Antitrust L.J. 1501, 1506 (1980) ("I think it is obvious from the experience over the last fifteen years since the 1966 amendments **[**55]** to *Rule 23* were adopted that linking an antitrust claim with a class action allegation can be devastatingly effective.").

---

[12] Quoting *Paschall v. Kansas City Star Co., 695 F.2d 322, 338-39 (8 Cir. 1982)*, Amex suggests that if an expert's findings prove "to be so 'crucial' and 'indispensable' that an arbitrator determines that the case absolutely could not have been pursued without them, the arbitrator might award such costs." Amex Brief at 28 We are skeptical, however, that an arbitrator might follow Paschall because it appears unlikely that its holding survives Crawford Fitting Co. See *Gilbert v. City of Little Rock, Ark., 709 F. Supp. 856, 862 (E.D. Ark. 1987)* **[**52]** (holding that Paschall is inconsistent with the holding of Crawford Fitting to the effect that expert witness fees are to be determined solely in accordance with *28 U.S.C. § 1821(b)*).

[13] The plaintiffs' counsel has submitted a detailed affidavit which estimates that the cost of depositions and document management would exceed $ 300,000.

[14] One of the amici makes the following suggestion: "Whatever costs the Merchant Plaintiffs might ultimately bear in procuring expert testimony in this case, those costs may be offset by the cost savings of conducting an arbitration proceeding, rather than an all-out federal trial." Brief of Business Roundtable at 16. But this misses the point. While it may be true that an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court, the fact remains that the plaintiffs have demonstrated to our satisfaction that neither an individual arbitration, nor an individual litigation would make any economic sense in **[**54]** light of the likelihood that expert fees far in excess of any likely individual recovery would need to be expended in either action.

In Mitsubishi, the Supreme Court held that there is by no means any necessary reason to prevent sending a Sherman Act claim to arbitration because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *473 U.S. at 637*. The Mitsubishi Court recognized, however, that there might be instances in which an arbitration agreement contained provisions that would be unenforceable because they would prevent a prospective litigant from vindicating its rights under the Sherman Act in an arbitral forum. Specifically, the plaintiff in Mitsubishi speculated that the choice-of-forum and choice-of-law clauses in the arbitration agreement at issue would effectively preclude the arbitrator from determining the plaintiff's substantive claims in accordance with the terms of the Sherman Act. The Court responded that it would not prevent the case from going to arbitration based upon mere conjecture as to what body of law the arbitrator would apply, **[**56]** but also continued as follows:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19.

We readily acknowledge that this statement is dicta, but it is nevertheless dicta grounded upon a firm principle of ***antitrust law*** to the effect that ***HN9***[] an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy. More than a half-century ago, the Supreme Court stated that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" of the antitrust laws is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)*; see also *Minnesota Mining and Mfg. Co. v. Graham-Field, **[*320]** Inc., No. 96cv3839, 1997 U.S. Dist. LEXIS 4457, 1997 WL 166497, at *3 (S.D.N.Y. Apr. 9, 1997)* ("GFI could not have waived [its **[**57]** antitrust] claim in the releases because a prospective waiver of an antitrust claim violates public policy.").

We believe that one of the amici has correctly applied the principle just set forth to the facts of the instant case:

> Plaintiff[s]-appellants' antitrust claims are complex and plaintiffs established for the record below that if they are precluded from participating in a collective action, the cost to each individual consumer to prosecute his or her claim is prohibitive relative to the consumer's potential recovery. If the collective action waiver is enforced, American Express will be shielded from liability, even where it may have violated the antitrust laws. Eradicating the private enforcement component from our ***antitrust law*** scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. Because the class action waiver precluded the plaintiff[s]-appellants from enforcing their statutory rights, the arbitration provision is unenforceable.

Brief of American Antitrust Institute at 15; see also *Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007)* ("Corporations should not be permitted to use class action **[**58]** waivers as a means to exculpate themselves from liability for small value claims.").

We therefore hold that the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery. As already set forth, Section 2 of the FAA, *9 U.S.C. § 2*, provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Given that we believe that a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

E. Two Caveats. We emphasize two important limitations upon our holding. First, our decision in no way rests upon the status of the plaintiffs as "small" merchants. The plaintiffs repeatedly refer to themselves as "small merchants" and as "small businesses." But Amex is correct when it counters that the plaintiffs "undoubtedly hope that, by labeling themselves as 'small,' they can benefit from one line of case law where individual consumers have alleged that arbitration agreements were **[**59]** imposed as a result of unequal bargaining power." See, e.g., *Lowden v. T-*

Mobile USA, Inc., 512 F.3d 1213, 1219 (9th Cir. 2008) (holding class action waiver contained in cellular telephone unconscionable under Washington law); Skirchak, 508 F.3d at 60 (holding class action waiver in employment agreement unconscionable under Massachusetts law); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 984 (9th Cir. 2007) (holding class action waiver in cellular phone contract unconscionable under California law). We do not follow these cases because they all rely on findings of unconscionability under state law, while we have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability. Applying the latter, we have found that plaintiffs have demonstrated the necessity of some class mechanism in order to bring their claims against Amex. This demonstration is in no way dependant on the "size" of any or all of the merchant plaintiffs; it depends upon a showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action.

[*321] Second, we stress that **[**60]** we do not hold here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. [15] Rather, ***HN10***[] we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp., 460 U.S. at 24. We believe that the Eleventh Circuit has posited something like the correct approach:

> [T]he enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will **[**61]** have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Dale, 498 F.3d at 1224.

E. The Plaintiffs' Other Claims. Because we hold that the class action waiver in the Card Acceptance Agreement is unenforceable as to all plaintiffs under the federal substantive law of arbitration, the plaintiffs' **[**62]** contention that the waiver is not enforceable against named plaintiffs and class members who were citizens of California because the waivers are unconscionable under that State's law is moot. Similarly, the plaintiffs' appeal of the district court's holding that the class action waiver could be enforced against those named plaintiffs who had contracted with Amex before the 1999 inclusion of the mandatory arbitration clause in the Card Acceptance Agreement is also moot.

F. Relief. Because the plaintiffs have declared themselves amenable to proceeding to arbitration, we need not consider whether the class action waiver in the Card Acceptance Agreement is severable from the remainder of the arbitration provision contained therein. Further, in light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.

CONCLUSION

---

[15] We note that the Fourth Circuit, in In re Cotton Yarn Antitrust Litigation, has upheld the enforcement in an antitrust action of a collective action ban contained in a contract between commercial parties. The case presented a claim of antitrust conspiracy, and the court pointed out that a bar upon joining the two defendants, who were jointly and severally liable, did not preclude the arbitrability of the claim because "co-conspirators are not necessary parties; a plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy." 505 F.3d at 284. The court also noted "[t]he absence of an evidentiary record on . . . the actual cost of individual proceedings and . . . about the ability of the corporate plaintiffs to bear those speculative costs." Id. at 285. Again, such a record exists in the instant case.

The decision of the district court is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp.

Court of Chancery of Delaware, Kent

September 29, 2008, Submitted; February 3, 2009, Decided; February 3, 2009, EFiled

C.A. No. 3099-VCN

Reporter

2009 Del. Ch. LEXIS 17 *; 2009 wl 294088

BAE SYSTEMS INFORMATION AND ELECTRONIC SYSTEMS INTEGRATION, INC., Plaintiff, v. LOCKHEED MARTIN CORPORATION d/b/a LOCKHEED MARTIN STS-ORLANDO, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Motion granted by, in part, Motion denied by, in part *BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp., 2011 Del. Ch. LEXIS 93 (Del. Ch., June 30, 2011)*

Core Terms

parties, unjust enrichment, motion to dismiss, allocated, allegations, terms, business unit, survive, specific performance, contracts, covenant, pled, obligations, binding, declaratory, indefinite, pricing, work opportunity, Memorandum, antitrust, definite, pleads, rights, bid

LexisNexis® Headnotes

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

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

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A court accepts the truthfulness of facts properly alleged by a plaintiff when considering a defendant's motion to dismiss.

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

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

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

The standard for dismissal pursuant to Del. Ch. Ct. R. 12(b)(6) for failure to state a claim upon which relief can be granted is that the motion may be granted only if it appears with reasonable certainty that a plaintiff could not prevail on any set of facts that can be inferred from the pleading. In considering a motion to dismiss, a court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint. All facts of the pleadings and inferences that can reasonably be drawn therefrom are accepted as true. However, neither inferences nor conclusions of fact unsupported by allegations of specific facts are accepted. That is, the court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.

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

Contracts Law > Contract Formation > General Overview

Evidence > Burdens of Proof > Allocation

HN3[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss with respect to a contract claim, a plaintiff must plead facts demonstrating: (1) the intent of the parties to be bound to (2) sufficiently definite terms supported by (3) consideration.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN4[] **Offers, Definite Terms**

Under Delaware law, an agreement to agree will be enforced if the agreement specifies all of the material and essential terms including those to be incorporated in the future contract.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Contract Interpretation > General Overview

HN5[] **Contract Formation, Meeting of Minds**

Delaware adheres to the "objective" theory of contracts: a contract's construction should be that which would be understood by an objective, reasonable third party. When measuring whether parties to an agreement intend to be bound to it, their overt manifestations of assent, rather than their subjective desires, control.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Standards of Performance > General Overview

Evidence > Burdens of Proof > Allocation

HN6[] **Contract Formation, Meeting of Minds**

For purposes of contract law, an intention to be bound by an agreement may be evidenced by continued performance in accordance with an agreement's terms.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN7[] Offers, Definite Terms

Delaware courts will not enforce an agreement that is indefinite as to any material or essential term.

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

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

HN8[] Motions to Dismiss, Failure to State Claim

A motion to dismiss tests the sufficiency of the allegations made in a plaintiff's complaint. For the purposes of the motion, a court accepts the allegations made in a complaint, and determines whether those allegations are insufficient as a matter of law to sustain a requested cause of action. The standard has been called "plaintiff friendly" because it is. The court need not determine what a given cause of action will ultimately bear. Rather, the court passes judgment on whether the facts alleged in a complaint state a claim.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN9[] Offers, Definite Terms

A contract does not fail simply because the price is not specified. However, there must be some practicable method to determine necessary pricing.

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

HN10[] Motions to Dismiss, Failure to State Claim

Allegations of fact found in a party's briefing, but absent from a party's complaint, cannot properly be considered by a court in determining a motion to dismiss for failure to state a claim.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

HN11[] Offers, Definite Terms

Industry norms occasionally may supply needed precision in a contract.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN12[] Contract Interpretation, Good Faith & Fair Dealing

The covenant of good faith and fair dealing is implied in all contracts governed by Delaware law. The covenant is designed to protect the spirit of an agreement when, without violating an express term of an agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain. The covenant functions by requiring a court to discover additional terms from an agreement; terms in line with the spirit of the agreement but absent from those expressed by the parties.

Contracts Law > Remedies > Specific Performance

Evidence > Burdens of Proof > Clear & Convincing Proof

HN13[] **Remedies, Specific Performance**

Under Delaware law, a party seeking specific performance must establish, by clear and convincing evidence, that: (1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance. The decision as to the availability of specific performance rests within the sound discretion of a court.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Evidence > Burdens of Proof > Allocation

HN14[] **Equitable Relief, Quantum Meruit**

Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity or good conscience. In order to recover on a claim of unjust enrichment, a plaintiff must prove: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. The threshold inquiry a court must first engage in is inquiring as to whether a contract already governs the relevant relationship between the parties. If a contract comprehensively governs the parties' relationship, then it alone must provide the measure of the plaintiff's rights and any claim of unjust enrichment will be denied.

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

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN15[] **Motions to Dismiss, Failure to State Claim**

In some instances, both a breach of contract and an unjust enrichment claim may survive a motion to dismiss when pled as alternative theories for recovery. Such occurrences are factually distinguishable, however, and, more importantly, do not stand for the proposition that an unjust enrichment claim must survive a motion to dismiss when pled alternatively with a contract claim that will move beyond the motion to dismiss stage. A right to plead alternative theories does not obviate the obligation to provide factual support for each theory.

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

HN16[] **Sherman Act, Scope**

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C.S. § 1.

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

HN17[] **Per Se Rule & Rule of Reason, Per Se Violations**

Per se antitrust analysis is generally reserved for agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are "illegal per se."

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

HN18[] **Motions to Dismiss, Failure to State Claim**

At the motion to dismiss stage, the facts before a court are limited in nature and based solely upon the allegations made in a plaintiff's complaint.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN19[] **State Declaratory Judgments, Scope of Declaratory Judgments**

Parties to a contract may seek a declaratory judgment to determine any question of construction or validity and may seek a declaration of rights, status or other legal relations thereunder. Del. Code Ann. tit. 10, § 6502. Declaratory relief is in the discretion of a court and not available as a matter of right. Del. Code Ann. tit. 10, § 6506.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN20[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The essential elements of laches are: (1) a plaintiff with knowledge of the claim, and (2) prejudice to the defendant arising from an unreasonable delay in bringing the claim.

Counsel: [*1] Richard L. Horwitz, Esquire, Kevin R. Shannon, Esquire, and Suzanne M. Hill, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Plaintiff.

Samuel A. Nolen, Esquire, Jeffrey L. Moyer, Esquire, Kelly E. Farnan, Esquire, and Thomas A. Uebler, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Defendant.

Judges: Vice Chancellor NOBLE.

Opinion by: NOBLE

Opinion

MEMORANDUM OPINION

NOBLE, Vice Chancellor

The world's largest defense contractor sold a major business unit to the world's third largest defense contractor. The acquirer expected that business unit to continue to do business with its former owner and believed that it had obtained sufficient and binding contractual commitments for those opportunities to persist. Although this arrangement worked well for a while, the acquirer concluded that it had not been receiving the business opportunities for which it contracted and, thus, brought this action in an effort to secure the benefit of its bargain.

Although there are several ancillary disputes, the critical question is how to contract for unknown work in the future while recognizing that price and scope will necessarily depend upon the specific work. Did the parties **[*2]** devise a process that would bring sufficient "definiteness" to their understanding to make an enforceable contractual obligation regarding future work? Or, did they merely execute a normative "agreement to agree" that leaves the Court with a vague understanding of what the parties may have intended generally but simply cannot be enforced?

Before the Court is the Defendant's motion to dismiss the Amended Complaint.

I. BACKGROUND[1]

A. *The Parties*

Plaintiff BAE Systems Information and Electronic Systems Integration Inc. ("BAE") is a wholly-owned subsidiary of the world's third largest global defense company. BAE, a Delaware corporation, specializes in aircraft self-protection systems and tactical surveillance and intelligence systems, as well as automated test equipment, support systems, and other related services.

Defendant Lockheed Martin Corporation ("Lockheed"), a Maryland corporation, is the largest defense contractor in the world. Lockheed **[*3]** operates through numerous unincorporated business units; the three of primary importance in this action are: Lockheed Martin STS-Orlando ("LMSTS"), [2] Lockheed Martin Aerospace ("LM Aero"), [3] and Sanders.

B. *Sanders, The Sale, and The Memorandum of Agreement*

Lockheed's Sanders business unit was the centerpiece of Lockheed's Aerospace and Electronics Systems ("AES") business segment before 2000. Consistent with the company's practice, Sanders and LMSTS executed a Memorandum of Agreement on June 14, 1996, (the "Internal MOA") [4] which outlined the manner by which the two Lockheed business units would approach opportunities for Automated Test Systems ("ATS") business. These opportunities were primarily generated by a third Lockheed business unit, LM Aero, and are the subject of the parties' **[*4]** current dispute. [5] The Internal MOA outlined which business unit would undertake different types of

---

1 ***HN1***[] The Court accepts the truthfulness of facts properly alleged by a plaintiff when considering a defendant's motion to dismiss. *Gantler v. Stephens, 965 A.2d 695, 2009 Del. LEXIS 33, 2009 WL 188828, at *5 (Del. Jan. 27, 2009)*. These facts are as alleged in the Plaintiff's Amended Complaint.

2 BAE brings this action against Lockheed doing business as LMSTS. LMSTS was formerly known as Lockheed Martin Information Systems Company ("LMISC"). For convenience, "LMSTS" will frequently be used to refer to both LMSTS and LMISC.

3 LM Aero was formerly known as Lockheed Martin Tactical Aircraft Systems Company ("LMTAS"). For convenience, "LM Aero" will frequently be used to refer to both LM Aero and LMTAS.

4 Lockheed refers to these agreements between its unincorporated business units as Intra-Lockheed Martin Work Transfer Agreements.

ATS work, freeing each to focus its energies and resources on its own allocated segments. It also addressed both then-current F-16 support equipment opportunities and future support equipment opportunities. In addition, the two business units executed a letter agreement on February 24, 1997, regarding the relationship between them as to the F-16 support equipment work specifically. [6]

Four years later, on July 13, 2000, Lockheed entered into the Transaction Agreement for the sale of its AES business, including the Sanders business unit, to BAE. [7] That transaction closed on November 27, 2000; BAE paid $ 1.67 billion for Lockheed's AES business.

The Transaction Agreement provided that the then-current arrangements regarding ATS work would continue after BAE acquired ownership of the AES business. In other words, LMSTS **[*5]** [8] and Sanders would continue to operate under the terms of the Internal MOA even though BAE, a defense industry competitor of Lockheed, would become the new owner of the Sanders business unit. In addition, Lockheed and BAE agreed to execute a new memorandum of agreement memorializing this arrangement reflecting their post-closing rights and obligations regarding AES business opportunities and the Sanders business unit.

That new Memorandum of Agreement (the "MOA") [9] was executed between Lockheed and BAE on the same day the AES transaction closed. The MOA is virtually identical to the Internal MOA executed in 1996 between Sanders and LMSTS, then both Lockheed business units. The only difference between the two versions is the substitution of "BAE/Sanders" wherever "Sanders" appeared in the Internal MOA and the incorporation by reference of the 1997 F-16 letter agreement between Sanders and LMSTS. [10] The MOA purports to define "the strategic relationship between LMSTS and Sanders to pursue LM Aero F-16 **[*6]** support equipment outsourcing and [to] establish the general agreement as to how the partners will approach future [LM Aero]-support equipment outsourcing opportunities and future [Lockheed] corporate-wide internal and non-[Lockheed] external opportunities. [11] The parties expected that the MOA would allow LMSTS and BAE/Sanders to "cooperatively align their respective business strategies to maximize the focus and effectiveness of resources, increase corporate business, and jointly broaden the market aperture for ATS." [12] The parties agreed that they would "seek to utilize each other's technology, market, and production strengths to achieve and exploit the advantages of joint cooperation." [13] In order to allocate the work between them effectively, each party agreed to "focus its business pursuits in its allocated areas and meet together as necessary (as least semi-annually) to review and coordinate pursuit efforts." [14] The parties identified three specific opportunities for joint work: "(a) [LM Aero] F-16 outsourcing (In process/future); (b) [LM Aero] future SE outsourcing (other than F-16); and (c) Internal [Lockheed] corporate (beyond [LM Aero]) and external opportunities." [15] Significantly, **[*7]** the parties agreed "to capitalize on the relationship formed by [the

---

[5] Am. Compl. Ex. A.

[6] *Id.,* Letter at 1.

[7] Hill Aff. Ex. A. The Transaction Agreement (§ 13.8) is to be interpreted in accordance with the laws of Delaware.

[8] The original (*i.e.,* "Internal") Memorandum of Agreement and the new Memorandum of Agreement (discussed below) refer to LMISC instead of LMSTS. Again, LMSTS is used here for convenience.

[9] Amended Compl. Ex. B.

[10] MOA § 6.1.

[11] *Id.* § 2.0

[12] *Id.* § 3.0.

[13] *Id*

[14] *Id.* § 4.0.

[15] *Id.* § 5.0.

MOA] . . . [by] establish[ing] an ATS Coordination Team (ACT). The ACT [was to] consist of an equal number of BAE/Sanders and [LMSTS] members. The ACT [was required to] meet as necessary (at least four times a year) to decide matters of joint ATS business strategy, bid position, and investment plans." [16]

BAE and Lockheed functioned under the MOA until at least 2004. During this period BAE performed contracts valued at over $ 2 million in coordination with LMSTS and LM Aero under the MOA. [17]

C. *The Dispute*

As of late-2004, or early-2005, BAE suspected that LMSTS might not intend to behave as expected under the MOA. BAE believed new ATS work was being generated by LM Aero's F-35 fighter-jet project, [18] work that BAE understood as allocated to it under **[*8]** the MOA. While a small engineering services subcontract was allocated to BAE immediately after LM Aero began the F-35 project, [19] the remaining ATS work for the project, $ 1.3 billion of which BAE claims it should be awarded under the MOA, was not progressing as anticipated.

BAE approached Lockheed to address these concerns, and to ensure proper allocation of ATS work arising from the LM-Areo F-35 project. These efforts were unsuccessful. Because BAE is not a part of the Lockheed family, unlike LMSTS and LM Aero, and thus not privy to intra-Lockheed work agreements, BAE claims an inability to identify precisely what work, if any, has improperly not been allocated to it. In addition, BAE has learned that, contrary to its reading of the terms of the MOA, LMSTS has developed F-35 support equipment that should have been allocated to BAE under the MOA. As a result, BAE filed this action.

BAE claims that the MOA constitutes an enforceable agreement that Lockheed has now breached. Lockheed argues that the MOA is wholly unenforceable and merely outlines a general approach the two defense industry competitors should follow **[*9]** only when it makes "good business sense" to do so.

D. *Procedural History*

BAE filed suit seeking specific performance, or, in the alternative, damages for breach of contract and breach of the implied covenant of good faith and fair dealing. Lockheed moved to dismiss the complaint under *Court of Chancery Rule 12(b)(6)* for failure to state a claim upon which relief may be granted, or, in the alternative, for a more definite statement. BAE amended its Complaint and added claims for unjust enrichment and declaratory judgment. Lockheed renewed its motion to dismiss. This is the Court's decision on that motion.

II. ANALYSIS

A. *Standard for Dismissal under Rule 12(b)(6)*

HN2[] The standard for dismissal pursuant to *Court of Chancery Rule 12(b)(6)* for failure to state a claim upon which relief can be granted is well-established. The motion may be granted only if it appears with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading. [20] In considering a motion to dismiss, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint. [21] All facts of the pleadings and inferences that can reasonably be **[*10]** drawn therefrom are

---

[16] *Id.*

[17] Lockheed disputes BAE's contention that contracts in this period were entered pursuant to the MOA. Instead, Lockheed argues they were entered into free from contractual compulsion and based on their independent business value. At this stage, BAE's factual assertions must be accepted.

[18] It is expected that the F-35 will replace the F-16.

[19] Am. Compl. P 37.

[20] *Kohls v. Kenetech Corp., 791 A.2d 763, 767 (Del. Ch. 2000)*.

accepted as true. [22] However, neither inferences nor conclusions of fact unsupported by allegations of specific facts are accepted. [23] That is, the Court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences. [24]

B. *BAE's Direct Contract Claims*

The parties dispute whether the MOA is a binding, enforceable agreement. ***HN3***[] To survive a motion to dismiss, BAE must plead facts demonstrating: (1) the intent of the parties to be bound to (2) sufficiently definite terms supported by (3) consideration. [25] Lockheed does not assert a failure of consideration, and BAE has pled facts sufficiently demonstrating consideration. The Court, therefore, focuses its attention on (1) whether there is any reasonable possibility that BAE could prevail in its attempt to prove intent to be bound on the part of Lockheed and (2) whether it is reasonable to believe, given the facts pled, that the terms of the MOA might be proven sufficiently **[*11]** definite for enforcement.

1. Intent to be Bound

HN5[] Delaware adheres to the "objective" theory of contracts: a contract's construction should be that which would be understood by an objective, reasonable third party. [26] When measuring whether parties to an agreement intend to be bound to it, their overt manifestations of assent, rather than their subjective desires, control. [27] The Court looks for allegations suggesting an objective manifestation of intent to be bound by the MOA.

Such ***HN6***[] an intention to be bound by an agreement may be evidenced by continued performance **[*12]** in accordance with an agreement's terms. [28] BAE pleads facts suggesting Lockheed preformed under the terms of the MOA for at least four years following its execution. During this period BAE alleges at least fifteen contracts were performed pursuant to the MOA. This alone might not constitute a sufficient pleading to survive a motion to dismiss--it might not be reasonable to infer that these contracts, in light of the size and scope of both businesses, were entered under the compulsion of the MOA. However, that allegation combined with the execution of the MOA at the same time the Transaction Agreement was executed, and the references to the MOA found within the Transaction Agreement, presents a sufficient pleading of objective facts demonstrating Lockheed's intent to be bound to the MOA to survive Lockheed's motion to dismiss. [29]

---

[21] *Gantler, 2009 Del. LEXIS 33, 2009 WL 188828, at *5*.

[22] *Id.*

[23] *Id.*

[24] *In re Lukens Inc. S'holder Litig., 757 A.2d 720, 727 (Del. Ch. 1999)*.

[25] *Carlson v. Hallinan, 925 A.2d 506, 524 (Del. Ch. 2006)* (contract); *Vale v. Atl. Coast & Inland Corp., 34 Del. Ch. 50, 99 A.2d 396, 399 (Del. Ch. 1953)* (agreement to agree) (***HN4***[] under Delaware law, an agreement to agree "will be enforced if the agreement specifies all of the material and essential terms including those to be incorporated in the future contract").

[26] *Cantera v. Marriott Senior Living Servs., 1999 Del. Ch. LEXIS 26, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999)*.

[27] *Indus. Am., Inc. v. Fulton Indus., Inc., 285 A.2d 412, 415 (Del. 1971)* (citations omitted); *see also* Diamond Elec., Inc. v. Del. Solid Waste Auth., 1999 Del. Ch. LEXIS 45, 1999 WL 160161, at *3 (Del. Ch. Mar. 15, 1999).

[28] *Carlson v. Hallinan, 925 A.2d 506, 525 (Del. 2006)*; *see also* Honeywell Int'l Inc., v. Air Prods. & Chems. Inc., 872 A.2d. 944, 951 (Del. 2005).

[29] Moreover, Lockheed, at closing, represented that "[e]ach of the Transaction Documents [including the MOA] to which any Seller Company is a party constitutes or will constitute at Closing a legal, valid and binding **[*13]** agreement of the applicable Seller Company, enforceable against it in accordance with its terms . . . ." Trans. Agr., at § 3.01; Trans. Agr. Ex. B, at § B.02. This fairly shows that Lockheed intended to be bound by the MOA. Thus, if the substance of the agreement can be ascertained,

2. Indefiniteness as to Pricing, Work Division, and Party Responsibility

HN7[] Delaware courts will not enforce an agreement that is indefinite as to any material or essential term. [30] Lockheed argues that the absence of pricing terms or a pricing structure, and insufficiently definite terms governing how future ATS work and responsibility would be allocated renders the MOA unenforceable, and, thus, BAE's breach of contract claim should be dismissed. [31]

HN8[] A motion to dismiss tests the sufficiency of the allegations made in the plaintiff's complaint. For the purposes of the motion the Court accepts the allegations made in a complaint, and determines whether those allegations are insufficient as a matter of law to sustain a requested cause of action. The standard has been called "plaintiff friendly" [32] because it is. The Court need not determine what a given cause of action will ultimately bear. Rather, the Court passes judgment on whether the facts alleged in the Amended Complaint state a claim. BAE's Amended Complaint narrowly survives this scrutiny and, therefore, cannot be dismissed. [33]

The Amended Complaint contains two distinct allegations that preclude dismissal. The first is the allegation that the MOA requires Lockheed to offer BAE an opportunity to participate in the pursuit of ATS business opportunities as they arrive. [34] This allegation sufficiently implicates a situation **[*16]** where the indefiniteness Lockheed complains of might be excused, and as a result renders BAE's Amended Complaint sufficient to survive Lockheed's motion to dismiss.

First, the right BAE claims is something in the nature of a "right to bid" on certain ATS opportunities. Throughout its complaint BAE alleges a scenario where, as ATS opportunities arise, LMSTS and BAE would work together in the hopes of winning pending ATS work opportunities from LM Aero. This scenario would necessarily leave negotiations over pricing, work allocations, conditions, and other responsibilities for later determination on a project-by-project basis. [35] Whether or not BAE would ultimately win a particular ATS opportunity would depend on that price and scope negotiation. Indeed, the Amended Complaint suggests that ultimate allocation of ATS work to BAE

---

the Amended Complaint fairly alleges that Lockheed intended to perform those substantive obligations. The obverse--if the substance of the agreement cannot be ascertained, then Lockheed did not intend to be subject to some duty that no one can define--may be a trivial observation, but it does reinforce the fundamental aspect of this case, which is whether the MOA is vague and indefinite and, thus, not susceptible of enforcement.

[30] *Hindes v. Wilmington Poetry Soc'y, 37 Del. Ch. 80, 138 A.2d 501, 503 (Del. Ch. 1958)*; **[*14]** *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Del., 32 Del. Ch. 85, 80 A.2d 294, 295 (Del. Ch. 1951)*.

[31] Lockheed's Opening Br. at 11-14.

[32] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746, 2009 Del. Ch. LEXIS 4, 2009 WL 117563, at *3 (Del. Ch. Jan. 15, 2009)*.

[33] Lockheed represented that the transaction documents, including the MOA, would constitute a "legal, and binding agreement . . . enforceable . . . in accordance with its terms . . . except as [to circumstances not applicable here]." Trans. Agmt., Ex. B, § B.02. BAE understandably has not taken kindly **[*15]** to Lockheed's advancing a position that is directly at odds with a representation that induced BAE to enter into the Transaction. *See* BAE's Answering Br. at 23, 47. BAE, although not bringing a claim based on that representation, has suggested that Lockheed has waived, or is estopped from, arguing that the MOA is too vague to be enforced. *Id.* at 23-24. Waiver and estoppel are truly not responsive to Lockheed's indefiniteness argument. Even if Lockheed may fully and fairly be charged with the consequences of both waiver and estoppel, that would not resolve BAE's dilemma if the MOA is indefinite. If the MOA is indefinite and, thus, no one can figure out the contractual duty that it imposed on Lockheed, then there is nothing for the Court to enforce. Waiver and estoppel, wonderful doctrines that they may be, cannot fill the void resulting from the absence of a definitive contractual undertaking.

[34] Am. Compl. P 22, 36; Tr. at 40, 52.

[35] *See Seidensticker v. Gasparilla, 2007 Del. Ch. LEXIS 89, 2007 WL 1930428, at *5 (Del. Ch. June 19, 2007)* **[*17]** (*HN9*[] "A contract does not fail simply because the price is not specified."). However, there must be some practicable method to determine necessary pricing. *Id.*

would depend entirely upon its agreement to pricing and other work terms set by LM Aero. [36] Nevertheless, BAE would be given a "sporting chance" to participate in the work by virtue of the MOA. Given this allegation, the Court cannot dismiss the Amended Complaint for a lack of definiteness. [37]

In addition, the Court cannot, in this context, find the MOA too indefinite for enforcement as to which projects BAE would enjoy such a "right to bid." The structures determining work allocation **[*18]** found in the MOA at Section 4.0, vague as they may seem, might reasonably prove sufficiently definite when viewed in light of industry norms. [38] Indeed, BAE alleges that at least 15 contracts have been preformed with Lockheed since the execution of the MOA, a fact suggesting a workable protocol exists in the MOA. Further, the Court cannot limit that protocol to F-16 work alone. Although Lockheed concedes a separate, binding, agreement governs F-16 related work, the Amended Complaint contains the allegation of at least one F-35 related contract between the parties. [39] The Court cannot simply read the MOA and conclude that F-35 contracts are not subject to the MOA. These contracts support BAE's position that despite the absence of pricing and work allocation terms in the MOA, some structure exists between the parties for determination of those issues, and the Court cannot conclude on a motion to dismiss that the MOA is unenforceable. [40]

Second, BAE alleges obligations that are sufficiently definite for enforcement. Most directly, BAE alleges that the MOA requires the parties to "meet together as necessary to coordinate their pursuit activities." [41] This obligation is allegedly created in Section 6.1 of the MOA, requiring the "ACT" to meet "at least four times a year" for the purposes of discussing ATS opportunities. [42] Although Lockheed suggests that the absence of disclosure obligations from the MOA would render such a "meet and confer" obligation illusory, or valueless, the Court cannot dismiss BAE's position that value exists in this right to meet regularly with a fellow member of the defense industry, even without contractual disclosure obligations. More importantly for the purposes of this motion, BAE has pled facts sufficient to find that this binding obligation exists, in a form definite enough for enforcement, and has been breached. [43] In sum, a rough skeleton of definite obligations exists in the MOA upon which prior course of dealings and industry custom could, **[*20]** by reasonable inference, add sufficient flesh to justify enforcement of the resulting form. At this stage, such reasonable inferences drawn from the facts pled in the Amended Complaint, and accepted as true, escort this claim past Lockheed's motion.

Finally, BAE seeks an excuse for the lack of definiteness by pointing out that other courts have enforced similar agreements in the government contracting industry, often called "teaming agreements," in the face of similar objections that the agreements were too indefinite to enforce. [44] Simply because other government contracting

---

[36] Am. Compl. P 26, 37. BAE's Answering Brief supplies a clearer discussion of how future pricing issues would be resolved, including a more direct allegation that an existing bid process is already in place from which pricing is objectively determined. ***HN10***[] Allegations of fact found in a party's briefing, but absent from a party's complaint, however, cannot properly be considered by the Court. *Fagnani v. Integrity Finance Corp., 53 Del. 193, 167 A.2d 67, 74, 3 Storey 193 (Del. Super. 1960)*.

[37] BAE may be contending that its rights under the MOA extend indefinitely. Two of the three opportunities for termination of the MOA relate exclusively to F-16 work, leaving only "mutual written consent" as a means of termination. MOA § 5.4. One wonders if Lockheed intended to subject itself to such an open-ended obligation, but that is a question beyond the scope of the Court's current task.

[38] ***HN11***[] Industry norms occasionally may supply needed precision. *See* ***RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. e*** (1981); 12 WILLISTON ON CONTRACTS § 34:12 (4th ed. 2007) (incorporation of usage and custom).

[39] Am. Compl. P 37 ("BAE was awarded purchase order **[*19]** number 99M017234 for JSF [the F-35] Technical Services.").

[40] BAE has not identified any particular work upon any certain terms to which it was entitled.

[41] *Id.* P 51.

[42] MOA §§ 5.0, 6.1; Tr. at 45, 58.

[43] Tr. at 58.

industry agreements have survived similar challenges in other courts does not mean every agreement should survive those same challenges. A brief survey of cases involving teaming agreements proves the point. [45] Maybe more importantly, comparisons to teaming agreements would not necessarily change the standards by which the MOA is evaluated. [46] In light of the Court's earlier conclusion, resolution of this contention is not now necessary. [47]

C. *BAE's Good Faith and Fair Dealing Claim*

BAE, perhaps recognizing that the MOA does not expressly require Lockheed to share news of various work opportunities with it, invokes the covenant of good faith and fair dealing to impose a duty on Lockheed to provide such information, lest the undertaking and agreement be illusory.

HN12[] The covenant of good faith and fair dealing is implied in all contracts governed by Delaware law. [48] The covenant is designed to protect the "spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." [49] The covenant functions by requiring the Court to discover additional terms from an agreement; terms in line with the spirit of the agreement but absent from those expressed by the parties.

This claim must also survive Lockheed's motion to dismiss. BAE claims that Lockheed's failure to disclose ATS work opportunities allocated to BAE under the **[*23]** MOA constitutes a breach of the covenant. BAE alleges that LMSTS, by virtue of its position as a Lockheed subsidiary, is denying BAE the benefit of their agreement by refusing to implement the MOA. This is accomplished by simply refusing to provide BAE with notice of LM Aero opportunities. LMSTS is capable of this because it will have knowledge of ATS opportunities within the Lockheed family. If true, this behavior could violate the implied covenant. [50]

Although Lockheed accurately notes that the MOA imposes no notification requirements, [51] the covenant might imply a notice provision were BAE successful in proving its reading of the agreement to be correct. If the parties agreed to a "right to bid" arrangement it seems elementary that an obligation to notice bid opportunities would be included where only one party has information regarding those opportunities. BAE accuses Lockheed of a failure to notify it of allocated ATS opportunities as they came available. The covenant could be found to require the addition

---

[44] BAE's Answering Br. at 29-30 (citing *EG&G, Inc. v. The Cube Corp., 63 Va. Cir. 634, 2002 WL 31950215 (Va. Cir. Ct. 2002))*.

[45] *Compare* ***[*21]*** *Air Tech. Corp. v. Gen. Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (Mass. 1964)* (enforcing teaming agreement entered to fulfill U.S. Air Force contract despite a finding that precise pricing and scope of work terms were not identified) *with* *W.J. Schafer Assocs., Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512 (1997)* (refusing enforcement of teaming agreement entered to fulfill U.S. Air Force contract on grounds that parties had not reached mutual agreement on, *inter alia,* product pricing).

[46] There is reason to doubt the validity of such comparisons. Teaming agreements generally cover a single, specific acquisition, project or bid, instead of the indefinite relationship alleged by BAE. *See generally* *48 C.F.R. § 9.6 et seq (2004)*.

[47] BAE, nonetheless, must confront some difficult obstacles as it moves beyond the motion to dismiss stage. If LMSTS and BAE had tried, but failed, to come to an understanding about F-35 work, what would be its claim? How would it be valued? How would it be enforced? Or, is this litigation about the allocation of real work or is simply about the "value of a chance"? **[*22]** This case amply demonstrates the perils and shortcomings of any arrangement that sounds like an agreement to agree.

[48] *Chamison v. HealthTrust, Inc.-Hosp. Co., 735 A.2d 912, 920 (Del. Ch. 1999)*.

[49] *Id.*

[50] *See* *Breakaway Solutions, Inc. v. Morgan Stanley & Co., 2004 Del. Ch. LEXIS 125, 2004 WL 1949300, at * 12 (Del. Ch. Aug. 27, 2004)*.

[51] Lockheed's Opening Br. at 17-18.

of a notification term and BAE has pled facts sufficient to sustain **[*24]** a cause of action for its breach. The Court may not dismiss this claim under *Court of Chancery Rule 12(b)(6)*. [52]

D. *Equitable Claims*

1. BAE's Specific Performance Claim

HN13[] Under Delaware law, a party seeking specific performance must establish, by clear and convincing evidence, that (1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance. [53] The decision as to the availability of specific performance rests within the sound discretion of this Court. [54]

As **[*25]** discussed above, it is reasonably conceivable that BAE could demonstrate the existence of an enforceable agreement on the facts alleged. Therefore, the Court cannot conclude, on the facts presented here, that BAE would fail the higher clear and convincing standard required for specific performance. BAE has pled facts supporting an enforceable agreement, of some scope, and claims to be willing and able to perform. The Court, at this stage, is unable to balance the respective equitable justifications for or against the remedy. Thus, BAE's claim for this form of relief survives.

Further, because the scope and obligations of the MOA remains unclear the Court cannot yet find as a matter of law that the enforcement of a specific performance remedy would be unduly burdensome on the Court. Were BAE to prove the MOA to be a binding agreement, but succeeded in establishing only the most rudimentary obligations, specific performance might prove a manageable remedy. Given this possibility the Court cannot dismiss BAE's specific performance claim at this stage.

2. BAE's Unjust Enrichment Claim

HN14[] Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money **[*26]** or property of another against the fundamental principles of justice or equity or good conscience." [55] In order to recover on a claim of unjust enrichment, a plaintiff must prove: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." [56] Of primary importance to BAE's claim for unjust enrichment, however, is not consideration of the elements necessary to prove the claim, but instead the threshold inquiry a court must first engage in: inquiring whether a contract already governs the relevant relationship between the parties. [57] If a contract comprehensively governs the parties' relationship, then it alone must provide the measure of the plaintiff's rights and any claim of unjust enrichment will be denied. [58]

---

[52] The viability, however limited it may be, of the implied covenant is tied to the underlying viability of the MOA. The implied covenant seems not to have any independent application in the absence of a duty imposed by the MOA on Lockheed to allow BAE a "right to bid" on relevant opportunities.

[53] *Szambelak v. Tsipouras, 2007 Del. Ch. LEXIS 161, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007)* (citing *Safe Harbor Fishing Club v. Safe Harbor Realty Co., 34 Del. Ch. 28, 107 A.2d 635, 638 (Del. Ch. 1953))*.

[54] *Gildor v. Optical Solutions, Inc., 2006 Del. Ch. LEXIS 110, 2006 WL 1596678, at * 10 (Del. Ch. June 5, 2006)*.

[55] *Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1062 (Del. 1988)*.

[56] *Jackson Nat. Life Ins. Co. v. Kennedy, 741 A.2d 377, 393-94 (Del. Ch. 1999)* (citing *Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 585 (Del. Ch. 1998))*.

[57] *Bakerman v. Sidney Frank Importing Co, 2006 Del. Ch. LEXIS 180, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006)*.

[58] *See id.*; *ID Biomedical Corp. v. TM Tech., Inc., 1995 Del. Ch. LEXIS 34, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995)*.

BAE **[*27]** claims that it has conferred a benefit upon Lockheed, and is directly impoverished thereby, in two respects. First, BAE paid $ 1.67 billion under the Transaction Agreement "based (in part) upon Lockheed Martin's agreement to enter into the MOA and the Transaction Agreement's representation that the MOA is a valid, legal and binding obligation." [59] Second, BAE claims that Lockheed is unjustly "enriched at the expense of BAE by keeping ATS work opportunities that should have been allocated to BAE and reaping the profit therefrom." [60] BAE claims to have suffered a direct and related impoverishment "because it has not received the revenue it would have earned from the ATS work opportunities that should have been allocated to [BAE]." [61] In both instances a contract governs the relevant rights between the parties and an unjust enrichment claim cannot lie.

First, the Lockheed sale of the Sanders business unit to BAE is governed by the Transaction Agreement and BAE does not argue otherwise. Indeed, it is undisputed that a contract governs that aspect of the parties' relationship. Because that relationship is governed by a complex **[*28]** contract negotiated by sophisticated parties, the Court cannot accept BAE's claim for unjust enrichment recovery. [62] If BAE is unhappy with Lockheed's conduct, it must rely upon the contract governing its rights, not an unjust enrichment claim.

BAE's second basis for its unjust enrichment claim, that Lockheed kept ATS work for itself, instead of allocating it to BAE, must fail for the same reason. The entirety of BAE's position that **[*29]** ATS should be allocated to it depends on the MOA. Because the MOA is the sole basis from which BAE can claim access to ATS opportunities that agreement must govern BAE's rights surrounding ATS opportunities. The claim that BAE has been injured by a Lockheed refusal to allocate new ATS opportunities must succeed or fail entirely on BAE's breach of contract claim. Again, unjust enrichment recovery is unavailable when a contract governs the parties' relationship.

BAE's argument that its unjust enrichment claim must survive because it is pled as an alternative to its contract claim, and such a pleading is allowed, does not change this result. ***HN15***[] In some instances, both a breach of contract and an unjust enrichment claim *may* survive a motion to dismiss when pled as alternative theories for recovery. Such occurrences are factually distinguishable, [63] however, and, more importantly, do not stand for the proposition that an unjust enrichment claim *must* survive a motion to dismiss when pled alternatively with a contract claim that will move beyond the motion to dismiss stage. A right to plead alternative theories does not obviate the obligation to provide factual support for each theory. Here, **[*30]** there is no independent basis for an unjust enrichment claim because the Amended Complaint contains no facts challenging Lockheed conduct on a basis not comprehensively governed by the MOA. Because BAE pleads no right to recovery not controlled by contract there can be no claim for unjust enrichment. [64] BAE cannot, on these facts, use an unjust enrichment theory to rewrite a

---

[59] BAE's Answering Br. at 46; Am. Compl. P 71.

[60] Am. Compl. P 72.

[61] *Id.*

[62] *Chrysler Corp. v. Airtemp Corp., 426 A.2d 845, 854 (Del. Super. 1980)*. BAE may have chosen not to pursue a breach of the Transaction Agreement and its representations concerning the MOA because such claims may be time-barred. BAE has not argued that a claim for unjust enrichment is a proper method of evading such a bar to a cause of action. How BAE selected its claims and whether a breach of the Transaction Agreement claim is barred are questions that do not affect the Court's analysis of this unjust enrichment claim. It is abundantly clear from the allegations in the Amended Complaint that the relationship arising out of the sale of the Sanders business unit and the execution of the MOA is expressly and pervasively governed by the Transaction Agreement.

[63] *See, e.g.*, *Breakaway Solutions, Inc., 2004 Del. Ch. LEXIS 125, 2004 WL 1949300, at *14* (both claims surviving a motion to dismiss where plaintiff sought, in the alternative, the disgorgement on an unjust enrichment theory of benefits defendants received *from third parties* by virtue of their improper behavior *vis-a-vis* the plaintiffs, with whom defendants had entered contracts).

[64] *See, e.g.*, *MetCap Secs. LLC v. Pearl Senior Care, Inc., 2007 Del. Ch. LEXIS 65, 2007 WL 1498989, at *5-6 (Del. Ch. May 16, 2007)* **[*31]** (dismissing unjust enrichment claim for the period when obligations were comprehensively governed by the parties' contract).

comprehensive contract governing the entirety of the parties' relevant relationship after finding disappointment in the resulting agreement. [65] The parties here attempted to memorialize their agreement as to ATS opportunities, and whether or not BAE may enforce its interpretation of the arrangement will depend on the MOA. BAE's unjust enrichment claim will be dismissed.

E. *Lockheed's Antitrust Defense*

Lockheed next argues that the Amended Complaint must be dismissed because BAE's reading of the MOA would render the agreement in violation of Section 1 of the Sherman Act. [66] The Court cannot dismiss the complaint on this ground on the present record.

Lockheed claims that the MOA would violate Section 1 of the Sherman Act, but does so in the most cursory of terms, by labeling the MOA, if binding, a *per se* antitrust violation. ***HN17***[] *Per se* antitrust analysis is generally reserved for "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are 'illegal *per se.*'" [67]

HN18[] At the **[*32]** motion to dismiss stage the facts before the Court are limited in nature, and based solely upon the allegations made in a plaintiff's complaint. As a result, the Court is unable to undertake the proper factual examination required to address fairly the antitrust contention. Thus, Lockheed's motion to dismiss based upon federal ***antitrust law*** is denied. [68]

F. *Declaratory Relief*

HN19[] Parties to a contract may seek a declaratory judgment to determine "any question of construction or validity" and may seek a declaration of "rights, status or other legal relations thereunder." [69] Declaratory relief is in the discretion of the Court and not available as a matter of right. [70]

As previously discussed, whether the MOA is so indefinite that it cannot be enforced is a question that remains for another day. In that context, declaratory relief is simply another forum by which the Court might resolve this matter or, more precisely, implement **[*33]** its ruling. With the contract dispute ongoing, dismissal of the declaratory judgment aspect of the relief sought by BAE is unwarranted.

G. *Lockheed's Laches Defense*

Lockheed asks the Court to dismiss the specific performance claims of the Amended Complaint because of its timing: filed almost seven years after the transaction in question and almost three years after the date BAE suspected that Lockheed held the position it now challenges. [71] ***HN20***[] The essential elements of laches are: (1)

---

[65] In a sense, any breach of contract compensable by damages "unjustly enriches" the party in breach. That truism is not the foundation for an independent cause of action.

[66] ***HN16***[] Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. *15 U.S.C. § 1 (2006)*.

[67] *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

[68] This, of course, does not foreclose Lockheed's ability to raise this affirmative defense in its answer. Indeed, this is yet another example of why it is frequently difficult to resolve affirmative defenses on a motion to dismiss.

[69] *10 Del. C. § 6502*.

[70] *10 Del. C. § 6506*.

[71] Am. Compl. P 30.

a plaintiff with knowledge of the claim and (2) prejudice to the defendant arising from an unreasonable delay in bringing the claim. [72]

This case is one in which application of the doctrine of laches on a motion to dismiss is inappropriate. First, the reasons for delay are often more important than its length. [73] BAE pleads facts that suggest delay was the result of an inability to discover breach because of improper behavior on the part of Lockheed. BAE claims to have "repeatedly" requested information regarding ATS work covered by **[*34]** the MOA; starting upon learning of possible work allocation problems. [74] In response, BAE claims that Lockheed "delayed and/or otherwise failed" to disclose the information necessary to discover breach. [75] Accepting these facts as true, the Court cannot find that dismissal for unreasonable delay is appropriate; BAE pleads that any delay in discovering breach and bringing suit was the fault of Lockheed. Second, Lockheed points to prejudice resulting from the alleged delay; it asserts that, with the passage of time, it is no longer practicable for BAE to participate with it in these time-sensitive and ongoing technical efforts. Lockheed may well be correct in this contention. The facts necessary to support such an argument, however, cannot be gleaned from the Amended Complaint.

III. CONCLUSION

Accordingly, for the foregoing reasons, Defendant Lockheed's motion to dismiss is granted as to Plaintiff BAE's claim for unjust enrichment; otherwise, it is denied.

An implementing order will be entered.

---

[72] *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C., 864 A.2d 930, 951 (Del Ch. 2004)*, *vacated on other grounds,* ***875 A.2d 632 (Del. 2005)*** (TABLE).

[73] *Steele v. Ratledge, 2002 Del. Ch. LEXIS 118, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002)*.

[74] BAE's Answering Br. at 17.

[75] *Id.* at 18.

Alternative Electrodes, LLC v. Empi, Inc.

United States District Court for the Eastern District of New York

February 4, 2009, Decided; February 4, 2009, Filed

No 08-CV-1247 (JFB) (ETB)

Reporter

597 F. Supp. 2d 322 *; 2009 U.S. Dist. LEXIS 7965 **; 2009-1 Trade Cas. (CCH) P76,491

ALTERNATIVE ELECTRODES, LLC, Plaintiff, VERSUS EMPI, INC. AND ENCORE MEDICAL, L.P., Defendants.

Core Terms

electrodes, alleges, Defendants', relevant market, disparagement, amended complaint, Compatible, antitrust, customers, special damage, sham, motion to dismiss, interchangeable, manufacturer, patent, anticompetitive, monopolization, products, competitor, tortious interference, stimulator, courts, false and misleading, anti trust law, Sherman Act, conspiracy, purposes, civil conspiracy, monopoly power, dysphagia

LexisNexis® Headnotes

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

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

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

In reviewing a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court must accept the factual allegations set forth in a complaint as true, and draw all reasonable inferences in favor of the plaintiff. The plaintiff must satisfy a flexible plausibility standard. Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. A court does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

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

In connection with a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court normally may only consider facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference. A court may only consider a document not appended to the complaint if the document is incorporated in the complaint by reference or is a document upon which the complaint solely relies and is integral to the complaint.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN3[] **Adjudicative Facts, Judicial Records**

Courts routinely take judicial notice of documents filed in other courts not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings.

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN5[] **Sherman Act, Claims**

In order to state a claim for monopolization under *§ 2* of the Sherman Act, a plaintiff must establish (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To state a claim for attempted monopolization, a plaintiff must allege that: (1) the defendants engaged in predatory or anticompetitive conduct; (2) with a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. For any antitrust violation, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. A complaint must allege facts which show injury to competition, as distinct from injury to plaintiff as a competitor. The antitrust laws were enacted for the protection of competition not competitors.

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

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] **Private Actions, Remedies**

To survive a motion to dismiss, a complaint must allege antitrust injury, which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. In order to have standing to prosecute private antitrust claims, a plaintiff must show more than that the defendant's conduct caused them an injury. In addition to injury in fact to a plaintiff's business or property caused by the antitrust violation, *15 U.S.C.S. § 15*, antitrust standing for a private plaintiff requires a showing of a special kind of antitrust injury, as well as a showing that the plaintiff is an efficient enforcer to assert a private antitrust claim. It is insufficient that a plaintiff suffers from a defendant's allegedly wrongful behavior; competition itself must be threatened as well. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. Showing such an injury requires identifying the practice complained of and the reasons such a practice is or might be anticompetitive. A plaintiff need not prove that competition has been harmed; it is sufficient to show a likelihood that competition would be diminished.

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

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

***HN7*[]** **Private Actions, Remedies**

The costs of defending against frivolous patent litigations and business disparagement alone do not necessarily rise to the level of an antitrust injury that the antitrust laws were enacted to prevent. However, such allegations can be sufficient where it is alleged that the combined effect of the allegedly sham litigation and the other alleged conduct is such that it threatens to exclude all competitors from a market.

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

***HN8*[]** **Private Actions, Standing**

If a court determines that a plaintiff has alleged an antitrust injury, it must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

***HN9*[]** **Sherman Act, Claims**

The pursuit of litigation may, in some circumstances, constitute a form of anticompetitive activity. Such allegations are limited, however, by a principle known as the Noerr-Pennington doctrine, which was developed to protect *First Amendment* rights to petition government. The doctrine immunizes legislative, executive and judicial activity from antitrust liability even if the activity is designed to eliminate competition. This principle does not apply, however, to "sham" litigation. Immunity may not apply to litigation that is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor. Immunity does not apply to litigation involving unethical conduct in the setting of the adjudicatory process or a pattern of baseless, repetitive claims. Repetitive lawsuits carrying the hallmark of insubstantial claims are unprotected. Repetitive, sham litigation in state courts may constitute an antitrust violation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The definition of "sham" litigation for purposes of the Noerr-Pennington doctrine is as follows: First, a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition of sham, a court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. This two-tiered process requires a plaintiff to disprove a challenged lawsuit's legal viability before a court will entertain evidence of the suit's economic viability.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Presumptions

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN11[] **Sherman Act, Claims**

Although truthful comparisons made in the competition between products do not constitute anticompetitive behavior, courts recognize that false and misleading statements may provide a basis for antitrust claims. Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*. A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. There are several factors to consider in determining whether a plaintiff has overcome this presumption: whether the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Antitrust & Trade Law > Sherman Act > Claims

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

HN12[] **Sherman Act, Claims**

Evaluating market power begins with defining the relevant market. To adequately plead a Sherman Act, *15 U.S.C.S. § 1 et seq.*, violation, a plaintiff must identify the relevant market, including the geographic market and a relevant product market, and the alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes--analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible.

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

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

HN13[ ] **Relevant Market, Product Market Definition**

Market analysis is defined as follows: The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. Reasonable interchangeability sketches the boundaries of a market, but there may also be cognizable sub-markets which themselves constitute the appropriate market for antitrust analysis. Defining a sub-market requires a fact-intensive inquiry that includes consideration of such practical indicia as industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The term sub-market is somewhat of a misnomer, since the sub-market analysis simply clarifies whether two products are in fact reasonable substitutes and are therefore part of the same market. The emphasis always is on the actual dynamics of the market rather than rote application of any formula. Products will be considered to be reasonably interchangeable if consumers treat them as acceptable substitutes.

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

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

HN14[ ] **Relevant Market, Product Market Definition**

Determining the relevant market requires a fact-intensive inquiry that is best served by allowing the parties discovery.

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

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

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

HN15[ ] **Relevant Market, Product Market Definition**

Where a plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

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

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

HN16[ ] **Relevant Market, Product Market Definition**

A relevant market consists of products reasonably interchangeable for the purposes for which they are produced--price, use and qualities considered. The test of interchangeability is whether users regard the products as the same.

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

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

Generally, a single brand does not define a product market.

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

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

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

At the motion to dismiss for failure to state a claim stage, it is sufficient that a plaintiff has alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology courts prescribe to define a market for antitrust purposes.

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

HN19[] **Actual Monopolization, Monopoly Power**

Monopoly power may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market. Market power is defined as the ability to control prices by restricting output. It may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, is modeled on the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and generally is construed in accordance with federal precedent.

Torts > Business Torts > Trade Libel > Elements

HN21[] **Trade Libel, Elements**

In order to make out a claim for business disparagement, a plaintiff must show that the defendant published an oral, defamatory statement directed at the quality of a business's goods and must prove that the statements caused special damages. Under New York law, product disparagement consists of: (1) a false statement; (2) published by a defendant to a third party; (3) with malice; and (4) with special damages. New York courts define special damages as the loss of something having economic or pecuniary value. In addition, special damages must be fully and accurately stated, with sufficient particularity to identify actual losses. Where loss of customers constitutes the alleged special damages, the individuals who ceased to be customers, or who refused to purchase, must be named and the exact damages itemized.

Torts > Business Torts > Trade Libel > Elements

HN22[] **Trade Libel, Elements**

Where loss of customers constitutes the alleged special damages for a claim for business disparagement, the individuals who ceased to be customers, or who refused to purchase, must be named, and the exact damages itemized.

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

HN23[] **Concerted Action, Civil Conspiracy**

Civil conspiracy cannot be alleged as a separate claim because New York law does not recognize civil conspiracy as an independent tort. Under New York law, a claim for civil conspiracy may stand only if it is connected to a separate underlying tort.

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

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

Allegations of civil conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort. While there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN25[] **Civil Conspiracy, Elements**

To properly plead civil conspiracy, a plaintiff must allege both a primary tort and also show the four elements of a conspiracy, namely: (1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury.

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

HN26[] **Intentional Interference, Elements**

Under New York law, the elements of a claim for tortious interference are that (1) the plaintiff had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship. In addition, under New York law, a plaintiff must allege that but for the defendants' wrongful conduct, the plaintiff would have entered into a prospective contract or an existing contract would not have been breached. Intentional procurement of a breach is an essential element of the tort of interference with contractual relations. A plaintiff must allege that there would not have been a breach but for the activities of defendants. Under New York law, interference with pre-contractual relations is actionable where a contract would have been entered into but for the malicious, fraudulent, or deceitful acts of a third party.

Counsel: **[**1]** For Alternative Electrodes, LLC, Plaintiff: Evan M. Janush, Esq., Lanier Law Firm, New York, New York.

For Empi, Inc. and Encore Medical, L.P., Defendants: Kenneth I. Schacter, Esq. and Theo J. Robins, Esq., Bingham McCutchen LLP, New York, New York.

Judges: JOSEPH F. BIANCO, United States District Judge.

Opinion by: JOSEPH F. BIANCO

Opinion

[*325] MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiff Alternative Electrodes, LLC ("plaintiff" or "AEL") brought this action against Empi, Inc. ("Empi") and Encore Medical, L.P. ("Encore") (collectively, "defendants"), alleging violations of the Lanham Act, *15 U.S.C. § 1051, et seq.*, and antitrust violations under the Sherman Act, *15 U.S.C. § 2, et seq.*, as well as averring claims for illegal monopoly, defamation, false advertising, tortious interference with contract, tortious intereference with prospective business relationship, civil conspiracy and breach of contract under New York State law.

Defendants now move for dismissal of all claims in the complaint, except the Lanham Act claim, pursuant to *Fed. R. Civ. P. 12(b)(6)*. For the reasons set forth below, defendants' motion is granted in part and denied in part.

I. BACKGROUND

A. Facts

The following facts are taken from **[**2]** the amended complaint ("Am. Compl.") and are not findings of fact by the Court. The Court assumes these facts to be true for the purpose of deciding this motion and construes them in the light most favorable to plaintiff, the non-moving party.

Defendant Empi is a wholly-owned subsidiary of DJO Inc. Defendant Encore Medical is DJO Inc.'s surgical implant division. (Am. Compl. PP 4-5.) "Defendants market and sell a range of electrical muscle stimulation devices, including the VitalStim device." (*Id*. P 10.) The VitalStim device ("VS") is used to treat a medical condition called dysphagia, or difficulty swallowing, which affects an estimated 15 million Americans. (*Id*. P 11.) The VitalStim requires replacement electrodes throughout the life of the machine.

Defendants allegedly dominate the market for electrodes that can be used with the VitalStim device. (*Id*. P 13.) In fact, plaintiff alleges that "Defendants have an almost 100% market share in this relevant market and enjoy substantial profit margins." (*Id*.) According to the amended **[*326]** complaint, plaintiff "poses a business threat to the Defendants, because Plaintiff distributes far less costly electrodes that can be used with the Defendants' **[**3]** VitalStim device." (*Id*. P 12.) Plaintiff has distributed these electrodes since 2006. (*Id*. P 14.) Prior to that time, "VitalStim customers had no choice but to buy electrodes from Defendants because no other electrodes could connect to a VitalStim device." (*Id*.) Plaintiff alleges that "defendants' electrodes can only be used once and cost approximately $ 18 per four-pack, which upon information and belief, represents a profit margin of $ 15 or 600%." (*Id*. P 17.) "Alternative Electrodes offered electrodes that, unlike those of Defendants, are reusable" and cost $ 8.95 per four-pack. (*Id*. P 18.) Nevertheless, plaintiff has had sales of "far less than 1% of the Defendants' sales in the relevant market." (*Id*.)

According to the amended complaint, "[i]n order to protect its monopoly, Encore and its affiliated entities threatened, and then filed, patent infringement lawsuits against competitors within the electrode market." (*Id*. P 15.) Plaintiff alleges that defendants also issued "repeated false statements about the manufacturers' purported failure to meet Food and Drug Administration ("FDA") regulatory requirements." (*Id*.)

Plaintiff alleges that, less than three weeks after it made its first **[**4]** shipment of sample electrodes to potential customers in October of 2006, "The Chattanooga Group, a division of Encore Medical at the time [and the manufacturer of the VitalStim device], issued a 'Risk Management Alert' nationwide to all VitalStim customers, including an estimated 100 customers in New York, 're: Alternative Electrodes.com: Preventing Possible Adverse Events.'" (*Id*. P 20.) Plaintiff alleges that this advisory contained several false and misleading statements including that Alternative Electrodes: "(1) may compromise patient safety; (2) may reduce efficacy in terms of patient outcomes; (3) have generated performance concerns by VitalStim clinicians in the field; (4) are not cleared to market by the FDA for the treatment of dysphagia; and, (5) carry unsubstantiated manufacturer claims regarding safety, compatibility and clearance for use with the VitalStim system." (*Id*.) The amended complaint further alleges that "Empi and its authorized dealers continue to repeat these statements to this day to Alternative Electrodes' customers and potential customers." (*Id*.) The amended complaint lists many potential customers that have allegedly informed plaintiff that they will not **[**5]** purchase plaintiff's electrodes as a result of statements made to them by defendants. (*Id*. PP 22-23.) The timeframe of these alleged statements are not entirely clear, but appear to range from that initial Risk Management Alert through at least 2008.

Plaintiff also alleges that Encore Medical, VitalStim and ESD LLC filed suit against it on December 20, 2006, alleging patent infringement. This suit was dismissed pursuant to a confidential settlement agreement between the parties entered into on August 23, 2007. (*Id*. P 26, Ex. G.). As part of this agreement, Encore Medical, VitalStim and ESD agreed not to make certain statements about the safety of plaintiff's product. Plaintiff alleges that the recent statements made by defendants about its electrodes violate this agreement. (*Id*. PP 26-27.)

The amended complaint further alleges that Empi threatened another patent litigation as recently as February 2008 against another company which recently began selling electrodes manufactured by plaintiff's manufacturer. (Am. Compl. P 30.) Empi also allegedly sent "mailings **[*327]** with false and misleading statements to current and potential customers of Alternative Electrodes" in February 2008. (Id. P 31, **[**6]** Ex. F.)

B. Procedural History

Plaintiff filed the complaint in this action on March 27, 2008. On July 21, 2008, plaintiff filed an amended complaint. On October 2, 2008, defendants filed a motion for dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiff submitted its response to the motion on November 3, 2008. On November 24, 2008, defendants submitted their reply. Oral argument was heard on January 23, 2009. All of the submissions have been considered by the Court.

II. STANDARD OF REVIEW

HN1[] In reviewing a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See* *Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006)*; *Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005)*. The plaintiff must satisfy "a flexible 'plausibility standard.'" *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007)*. The Court, therefore, **[**7]** does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id. at 1974*.

HN2[] In connection with a motion to dismiss under *Rule 12(b)(6)*, the Court normally may only consider "facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference." *Nechis, 421 F.3d at 100*; *accord* *Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991)*. The Court may only consider a document not appended to the complaint if the document is "incorporated in [the complaint] by reference" or is a document "upon which [the complaint] *solely* relies and . . . is *integral to the complaint*." *Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)* (quoting *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991))* (emphases in original). ***HN3***[] Courts also "'routinely take judicial notice of documents filed in other courts . . . not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings.'" *Crews v. County of Nassau, No. 06-CV-2610 (JFB), 2007 U.S. Dist. LEXIS 6572, at *5 n.2 (E.D.N.Y. Jan. 30, 2007)* (quoting *Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991))*. **[**8]** Thus, in the instant case, this Court can consider the patent litigation plaintiff references in the amended complaint, because it is integral to plaintiff's claims, and consists of documents filed in another court being considered not for its truth, but for the fact of its filing.

III. DISCUSSION

A. Sherman Act Claims

Plaintiff's amended complaint alleges claims for unlawful monopolization and attempted monopolization in violation of the Sherman Act, *15 U.S.C. § 2*. ***HN4***[] The Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*.

HN5[] "[I]n order to state a claim for monopolization under *Section 2* of the Sherman Act, a plaintiff must establish '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition **[*328]** or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. **[**9]** To state a claim for attempted monopolization, a plaintiff must allege that: (1) the defendants engaged in predatory or anticompetitive conduct; (2) with a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 99-100 (2d Cir. 1998)*; *see* *Dolan v. Fairbanks Capital Corp., No. 03 Civ. 3285 (DRH), 2005 U.S. Dist. LEXIS 45308, at *20 (E.D.N.Y. Aug. 16, 2005)*. Furthermore, "[f]or any antitrust violation, 'a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.'" *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*. That is, the amended complaint must allege facts which show injury to competition, as distinct from injury to plaintiff as a competitor. *See* *Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co., Inc., 525 F. Supp. 749, 750 (E.D.N.Y. 1981)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701, (1977)* ("The antitrust laws . . . were enacted for the protection of competition not competitors.") (internal quotation marks and citation omitted)).

Defendants **[**10]** argue that plaintiff's monopolization claims should be dismissed because plaintiff (1) suffered no cognizable injury and, therefore, lacks standing, and (2) has failed to plead the relevant market definition adequately. The Court will address each argument in turn.

1. Standing

HN6[] To survive a motion to dismiss, a complaint must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; see also *Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994)* ("It is now well settled that in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury."). "In addition to injury in fact to the plaintiff's business or property caused by the antitrust violation, *15 U.S.C. § 15*, antitrust standing for a private plaintiff requires a showing of a special kind of 'antitrust injury,' as well as a showing that the plaintiff **[**11]** is an 'efficient enforcer' to assert a private antitrust claim." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117 (2d Cir. 2007)* (citing *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. Thus, it is insufficient that plaintiff suffered from defendants' allegedly wrongful behavior; competition itself must be threatened as well. *Paycom Billing Servs. v. MasterCard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006)* ("'[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior'") (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884,* *109 L. Ed. 2d 333* ***[*329]*** *(1990)* (emphasis in original)). "Showing such an injury requires identifying the practice complained of and the reasons such a practice is or might be anticompetitive." *Port Dock, 507 F.3d at 122*. Plaintiff need not prove that competition has been harmed; it is sufficient to show a likelihood that competition would be diminished. *Brunswick Corp., 429 U.S. at 489*.

In addition to the harm defendants' anticompetitive behavior allegedly caused plaintiff, plaintiff also **[**12]** alleges that defendants have diminished competition in the VitalStim compatible electrodes market in general through frivolous patent litigations and publishing false statements about its competitors. ***HN7***[] The costs of defending against frivolous patent litigations and business disparagement alone do not necessarily rise to the level of an antitrust injury that the antitrust laws were enacted to prevent. However, such allegations can be sufficient where it is alleged that the combined effect of the allegedly sham litigation and the other alleged conduct is such that it threatens to exclude all competitors from a market. *See, e.g., Xerox Corp. v. Media Sciences Int'l Inc., 511 F. Supp. 2d 372, 381 (S.D.N.Y. 2007)*. This is the precise injury alleged here. Plaintiff alleges that these actions have resulted in the following injuries:

> Defendants' unlawful conduct has stifled competition in the VS Compatible Electrodes market and has had a direct, substantial and adverse effect on competition by monopolizing the VS Compatible Electrodes market, artificially creating barriers to entry in the VS Compatible Electrodes market, and foreclosing competition on the basis of price and quality. Defendants' **[**13]** anticompetitive conduct was instituted so that it could illegally maintain the monopoly profits that it reaped from purchases of VS Compatible Electrodes.
>
> But for Defendants' conduct, all purchasers of VS Compatible Electrodes would have been able to purchase comparable if not superior electrodes for use with the VitalStim device at lower prices. In addition, Defendants' anticompetitive conduct has reduced the output of VS Compatible Electrodes. Entry into the VS Compatible Electrodes market has been effectively foreclosed by Defendants' disparagement campaign and sham litigation scare tactics.
>
> By foreclosing competition through unlawful actions, Defendants prevented VS Compatible Electrodes purchasers from purchasing lower-priced VS Compatible Electrodes and prevented these purchasers from improving patient access and care. Indeed, the harm to patient care has been severe. Due to the unlawful monopoly prices of VS Compatible Electrodes, caregivers, such as speech pathologists, have had to forego providing VitalStim treatment to patients who have potentially fatal swallowing disorders and may be on feeding tubes.

(Am. Compl. at PP 51-54.)

Based on the above, it is clear that plaintiff **[**14]** has alleged the kind of injury to competition that antitrust laws were designed to prevent. Further, plaintiff is an efficient enforcer under the standard laid out by the Second Circuit, and defendants do not argue to the contrary. *Balaklaw v. Lovell, 14 F.3d 793, 798 (2d Cir. 1994)* (***HN8***[] if the Court determines that the plaintiff has alleged an antitrust injury, "they must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws."). The Court, therefore, need only assess whether **[*330]** the conduct alleged to have caused these injuries -- sham litigation and deceptive business disparagement -- is conduct that antitrust laws appropriately target.

Plaintiff's Sherman Act claims are brought based on two distinct theories -- namely, that defendants have brought sham litigation as a means of limiting plaintiff's ability to compete against them and that defendants have wrongfully disparaged plaintiff's product in order to unlawfully limit competition. Defendants argue that plaintiff's claims based on sham litigation are barred by the *Noerr-Pennington* doctrine **[**15]** and that plaintiff's claims based on business disparagement do not constitute anticompetitive behavior. As set forth below, the Court disagrees.

a. Sham Litigation

Defendants argue that the *Noerr-Pennington* doctrine bars plaintiff's antitrust claims based on defendants' patent litigation. Plaintiff argues that the litigation at issue here constitutes sham litigation and, therefore, is not protected by the *Noerr-Pennington* doctrine.

"There is no question that HN9[] the pursuit of litigation may, in some circumstances, constitute a form of anti-competitive activity." In re Fresh Del Monte Pineapple Antitrust Litigation, 04 MD 1628 (RMB) (MHD), 2007 U.S. Dist. LEXIS 1372, at *52-*53 (S.D.N.Y. Jan. 9, 2007). Such allegations are limited, however, by a principle known as the *Noerr-Pennington* doctrine, which was developed to protect First Amendment rights to petition government. California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972); *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 134-36, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). The doctrine "immunizes legislative, executive and judicial activity from antitrust **[**16]** liability even if the activity is designed to eliminate competition." Mover's & Warehousemen's Assoc. of Greater New York, Inc. v. Long Island Moving & Storage Ass'n, Inc., 98 CV 5373 (SJ), 1999 U.S. Dist. LEXIS 20667, *18 (E.D.N.Y. Dec. 16, 1999). This principle does not apply, however, to "sham" litigation. Noerr, 365 U.S. at 144 (immunity may not apply to litigation that is "a mere sham to cover . . . an attempt to interfere directly **[*331]** with the business relationships of a competitor"); California Motor Transport, 404 U.S. at 512-13 (immunity does not apply to litigation involving "unethical conduct in the setting of the adjudicatory process" or "a pattern of baseless, repetitive claims"); *accord* Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973) ("repetitive lawsuits carrying the hallmark of insubstantial claims" are unprotected); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 635 n.6, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977) ("repetitive, sham litigation in state courts may constitute an antitrust violation") (plurality opinion).

In Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), the Supreme Court laid out HN10[] the definition of "sham" **[**17]** litigation for these purposes:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor' through the 'use [of] the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon.' This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability."

Professional Real Estate, 508 U.S. at 60-61 (internal citations omitted). A suit is not objectively baseless if there is probable cause to sue. Professional Real Estate, 508 U.S. at 62.

Plaintiff's amended complaint alleges the following: "It was evident from the beginning of the [patent] litigation that the primary, if not sole purpose, of instigating suit was to advise customers of the pending (but meritless) **[**18]** litigation and attempt to drive Alternative Electrodes from the market. The litigation was objectively unreasonable and was initiated in order to interfere directly with Alternative Electrodes' business relationships and activities." (Am. Compl. P 24.) Plaintiff further alleges that "[t]he sham patent suit strategy failed. Recognizing the frivolity of the claim in light of prior art, these Defendants completely dismissed their suit on October 3, 2007 without any penalty or payment of any kind by Alternative Electrodes." (*Id*. P 25.) The parties entered into a settlement agreement dated August 23, 2007. (*Id*. P 26.) According to the amended complaint, "[a]s recently as February, 2008, Empi, its affiliated entities, and authorized dealers have again threatened patent litigation against another company which recently began selling electrodes manufactured by Plaintiff's manufacturer. Notably, this recent competitor to the VitalStim Electrodes market, Columbia Scientific, was previously VitalStim's largest dealer. Thus, despite having unsuccessfully prosecuted sham patent litigation against Plaintiff, Empi continued to threaten yet another sham patent litigation against a new upstart competitor **[**19]** for the purpose of foreclosing competition and retaining their monopoly profits." (*Id*. P 30.)

Plaintiff alleges that the litigation was both subjectively and objectively baseless and plausibly supports this claim with the assertion that there could be no valid patent claim due to the existence of "prior art." (Plaintiff's Memorandum of Law, at 6.) At this stage of litigation, such allegations are sufficient to withstand a motion to dismiss. Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis, No. 07 Civ. 7343(HB), 2008 U.S. Dist. LEXIS 3611, 2008 WL 169362, at *5 (S.D.N.Y. Jan. 18, 2008); ICOS Vision System Corp., N.V. v. Scanner Tech. Corp., 2006 U.S. Dist. LEXIS 13847, 2006 WL 838990 (S.D.N.Y. Mar. 29, 2006) ("If, as alleged, Scanner knew that § 271(g) did not apply and threatened litigation for the sole purpose of harming ICOS, then its threats were neither objectively reasonable nor taken in good faith. This is all that need be alleged at this early stage of the litigation.").

b. Business Disparagement as Antitrust Conduct

Defendants also argue that, "as a matter of law, efforts to disparage a competitor do not harm competition." (Defendants' Memorandum of Law, at 12) (citing Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989)) **[**20]** ("Warfare among suppliers and their different products is competition. ***Antitrust law*** does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of ***antitrust law***.") ***HN11***[] Although defendants are correct that truthful comparisons made in the competition between products do not constitute anticompetitive **[*332]** behavior, courts recognize that false and misleading statements may provide a basis for antitrust claims. *The Nat'l Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988)* (stating that "'[a]dvertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of § 2 [of the Sherman Act]'" but holding that a claim based on a letter alleged to be "false and misleading in certain respects . . . should be allowed to go forward with the discovery process to substantiate its claim.") (quoting Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287-88 (2d Cir. 1979)). "[A] plaintiff asserting a monopolization claim based on misleading advertising must **[**21]** overcome a presumption that the effect on competition of such a practice was *de minimis*.'" Pharm. Mfrs., 850 F.2d at 916 (citation and quotations omitted). The Second Circuit has adopted several factors to consider in determining whether a plaintiff has overcome this presumption: whether the representations "were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals." Pharm. Mfrs., 850 F.2d at 916.

The Second Circuit in *Pharm. Mfrs*. went on to find that, at the motion to dismiss stage, an allegation that the representation was "false and misleading in certain respects" was sufficient "to go forward with the discovery process to substantiate its claim that the [representation] was clearly false, clearly material, and clearly likely to induce reasonable reliance." *Id*. Similarly, here, plaintiff has sufficiently alleged that defendants made statements that were false and misleading to potential clients and, therefore, should be entitled to discovery in order to substantiate its claims. **[**22]** Plaintiff alleges that defendants (including, notably, the manufacturer of VitalStim) repeatedly made representations to potential Alternative Electrodes customers that Alternative Electrodes "(1) may compromise patient safety; (2) may reduce efficacy in terms of patient outcomes; (3) have generated performance concerns by VitalStim clinicians in the field; (4) are not cleared to market by the FDA for the treatment of dysphagia; and, (5) carry unsubstantiated manufacturer claims regarding safety, compatibility and clearance for use with the VitalStim system." (Am. Compl. P 20.) Plaintiff further alleges that these statements are false and misleading and also asserts other allegations which could plausibly support satisfaction of the other above-referenced factors. Defendants argue, among other things, that plaintiff cannot satisfy the requirement for showing that the representations were made to "buyers without knowledge of the subject matter." However, the Court cannot determine, at this early stage of the litigation, as a matter of law, that these factors cannot be satisfied. For example, there is insufficient basis to discern at this juncture whether the statements are unlikely **[**23]** to induce reasonable reliance, whether the buyers are without knowledge of the subject matter, or whether the statements are susceptible to neutralization. [1] Construing **[*333]** the allegations most favorably to plaintiff, including drawing reasonable inferences in its favor, dismissal at this stage is unwarranted. In short, the Court finds "the several

[1] The Court notes that these issues can be particularly complex where the misleading statements are alleged to **[**24]** have been made by, among others, the manufacturer of the principal product, because one may reasonably infer depending on the circumstances that factors such as the ability to neutralize and the willingness of sophisticated buyers to further research such statements can be negatively affected when such statements allegedly come from the manufacturer of the primary product itself, rather than from a mere competitor who does not speak for the primary product.

factors noted above cannot be adequately evaluated until the discovery process has moved forward to a greater extent than it has thus far." *Pharm. Mfrs., 850 F.2d at 916* (finding that, though "pharmacists are likely to have some knowledge of the subject matter discussed in the [representation], and that the representations . . . were made and could only have been made, for [a short period of time]" the claim should proceed to discovery.) If, after discovery, defendants believe that there is insufficient evidence for plaintiff to satisfy these factors, they may move for summary judgment at that time. Accordingly, the motion to dismiss on the ground that plaintiff failed to suffer a cognizable injury and thus lacks standing is denied.

2. Market Definition

HN12[] "Evaluating market power begins with defining the relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004)*. To adequately plead a Sherman Act violation, therefore, a plaintiff must identify the relevant market, including the geographic market and a relevant product market, and the "alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)* (internal quotations marks and citations omitted.). ***HN13***[] The Second Circuit has defined market analysis as **[**25]** follows:

> The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. Reasonable interchangeability sketches the boundaries of a market, but there may also be cognizable submarkets which themselves constitute the appropriate market for antitrust analysis. Defining a submarket requires a fact-intensive inquiry that includes consideration of such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The term submarket is somewhat of a misnomer, since the submarket analysis simply clarifies whether two products are in fact reasonable substitutes and are therefore part of the same market. The emphasis always is on the actual dynamics of the market rather than rote application of any formula.

Geneva Pharms., 386 F.3d at 496 (internal citations and quotation marks omitted). "Products will be considered **[**26]** to be reasonably interchangeable if consumers treat them as acceptable substitutes." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)*.

Courts are reluctant to dismiss antitrust claims for failure to plead the relevant product market because ***HN14***[] determining the relevant market requires a fact-intensive inquiry that is best served by allowing the parties discovery. *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)* (collecting cases and noting that **[*334]** "[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market."). However, there is certainly no bar against dismissal in appropriate cases. *Id*.***HN15***[] "'[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.'" *Chapman v. New York State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)* **[**27]** (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3rd Cir. 1997))*.

Plaintiff alleges that the relevant market is "the market for the sale of electrodes compatible for use with VitalStim powered muscle stimulators" in the United States. (Am. Compl. PP 43, 45.) It argues that this is the appropriate market because "[e]lectrodes utilized with electrical stimulation devices are not interchangeable with electrodes for use in VitalStim electrical stimulation devices as such general electrodes do not have mini-snap connectors that allow the electrodes to connect to a VitalStim device. Thus, VitalStim branded electrodes and the VS Compatible Electrodes manufactured by Plaintiff's manufacturer are the only electrodes that are reasonably interchangeable for each other with regard to use for the treatment of dysphagia with VitalStim electrical stimulation devices. From the view of an owner of a VitalStim device, no other electrodes are acceptable substitutes." (Plaintiff's Memorandum of Law, at 13; Am. Compl. P 44.)

Defendants do not dispute that plaintiff has sufficiently pled the geographic market. (Defendants' Memorandum of Law, at 14.) Instead, they claim that plaintiff **[**28]** has failed to plead a plausible relevant product market because its "alleged relevant market is an aftermarket for replacement electrodes compatible with a single branded product manufactured and marketed by DJO, *i.e*., the VitalStim device," and "[s]uch allegations do not plausibly describe a market susceptible of unlawful monopolization because they do not permit 'an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check.'" (Defendants' Memorandum of Law, at 14-15) (citing *SMS Sys. Maint. Servs. v. Digital Equip. Corp., 188 F.3d 11, 17-18 (1st Cir. 1999)*.) In other words, defendants argue that the relevant market cannot plausibly be limited to the market for electrodes for the VitalStim device, but rather should encompass the market for all products aimed at treating dysphagia. They argue that "'[t]he test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" (Defendants' Memorandum in Reply, at 5 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997)* quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. **[**29]** It is not clear at this stage, however, whether there are adequate substitutes for the VitalStim, especially where it is undisputed, (as confirmed by the parties at oral argument), that the VitalStim device is the only electrical stimulator approved by the FDA for the treatment of dysphagia. ***HN16***[] A relevant market consists of product s reasonably interchangeable "for the purposes for which they are produced -- price, use and qualities considered." *Xerox Corp. v. Media **[*335]** Scis. Int'l, Inc., 511 F. Supp. 2d 372, 383-84 (S.D.N.Y. 2007)*. The test of interchangeability is whether users regard the products as the same. *Xerox, 511 F. Supp. 2d at 384*. In this case, taking into consideration "price, use and qualities," it is unclear, at the motion to dismiss stage, that there are reasonably interchangeable products.

The Court also recognizes that, ***HN17***[] generally, a single brand does not define a product market. *Todd, 275 F.3d at 200* (dismissal is appropriate where a plaintiff "attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes") (collecting cases). However, courts have found that there are circumstances under which replacement **[**30]** items for a single brand do define a relevant market. For example, the Supreme Court has held that "[b]ecause service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines. . . . The relevant market for antitrust purposes is determined by the choices available to Kodak equipment users." *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Similarly, it has been found that replacement parts for Xerox machines constitute a relevant market. *Xerox, 511 F. Supp. 2d at 385*. Likewise, at this early stage, plaintiff has reasonably alleged that the relevant market here is the replacement parts for the VitalStim powered muscle stimulator. *See Todd, 275 F.3d at 203* (***HN18***[] "At this stage, it is sufficient that plaintiff has alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology courts prescribe to define a market for antitrust purposes."). In short, the Court concludes that plaintiff has adequately pled market definition.

Plaintiff also **[**31]** argues that "as an alternative to relevant market analysis, pursuant to which monopoly power is proven *indirectly*, monopoly power can also be proven through *direct evidence* of the Defendants' ability to control prices and/or exclude competition." (Plaintiff's Memorandum of Law, at 12 (citing *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 500 (2d Cir. 2004)*; *Tops Mkts., Inc. v. Quality Mkts, Inc., 142 F.3d 90, 97-98 (2d Cir. 1998)* (noting that ***HN19***[] monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market")).) Defendants argue that plaintiff has not alleged that defendants "control the price of anything other than *its own product*." (Defendants' Reply Memorandum, at 5 (emphasis in original).) This argument is unavailing. By defendants' own admission, until AEL began selling electrodes in October of 2006, "VitalStim device users could only buy replacement electrodes from DJO." (Defendants' Memorandum of Law, at 4.) Plaintiff further alleges that defendants have been able to successfully **[**32]** sell their electrodes, which plaintiff claims are inferior to AEL's, at a 600% profit margin. Such an allegation, along with the other allegations in the amended complaint discussed above, supports a plausible claim that there is monopoly power at work in this market. *See* *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, **[*336]** is, however, sufficient to survive summary judgment under the more stringent monopoly standard of *§ 2*."). Market power is defined as the ability to control prices by restricting output. *Tops Mkts., 142 F.3d at 98* ("It may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market."). In the instant case, plaintiff has sufficiently alleged a plausible claim that direct monopoly power is exerted by defendants, and their pleadings are sufficient at this stage of proceedings to survive a motion to dismiss.

B. Donnelly Act Claims

Plaintiff also brings a claim of illegal monopoly under New York's Donnelly Act, *N.Y. Gen. Bus. L. § 340*. **[**33]** ***HN20***[] The Donnelly Act "is modeled on the Sherman Act and generally is construed in accordance with federal precedent." *Menkes v. St. Lawrence Seaway Pilots' Ass'n, 269 Fed. Appx. 54, 2008 U.S. App. LEXIS 5281, at *3 n.3 (2d Cir. Mar. 12, 2008)*. Defendants make the same arguments against the alleged Donnelly claims as they make against the Sherman Act claims. Because the same analysis applies, for the reasons given *supra* regarding the Sherman Act claims, the Court declines to dismiss plaintiff's Donnelly Act claims.

C. Business Disparagement/Injurious Falsehood Claim

With respect to the state law claim for business disparagement and injurious falsehood, plaintiff alleges that defendants have made false and misleading statements about its electrodes from 2006 through present. Plaintiff further alleges that these statements were made to potential customers and, in several instances, have resulted in loss of prospective business. Defendants argue that the only statement plaintiff specifically alleges constituted business disparagement (a Risk Management Alert published in November 2006) is time barred. Defendants argue that plaintiff's assertion "in conclusory terms that unidentified statements similar **[**34]** to those in the Alert were made at unspecified times 'to this day'. . . provides insufficient notice regarding the identity of the speaker, to whom the false statements were made, and when." (Defendants' Memorandum of Law, at 7 (citing Am. Compl. P 20).) Further, defendants argue that none of the statements that are within the statute of limitations period are "alleged to be ***both*** false ***and*** about AEL." (Defendants' Memorandum of Law, at 7) (emphasis in original.) Next, defendants argue that plaintiff has not sufficiently pled special damages as required. Defendants claim that "[u]nable to identify any loss of business attributable to any specific prospective customer, AEL attempts to satisfy its pleading obligations by merely attaching a list of every single one of Defendants' customers (Am. Compl., Ex. K) -- more than 4800 in total -- and asserting that it lost sales to 'many if not all' of them." (Defendants' Memorandum of Law, at 8.) Defendants argue that "[i]dentifying ***every*** customer is no better than identifying ***none***, and certainly does not plead the requisite 'loss of customers.'" (*Id*.) (emphasis in original.)

HN21[] In order to make out a claim for business disparagement, "the plaintiff **[**35]** must show that the defendant published an oral, defamatory statement directed at the quality of a business's goods and must prove that the statements caused special damages." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 59 (2d Cir. 2002)*; *see also* *Chamilia, LLC v. Pandora Jewelry, LLC, No. 04-CV-6017 (KMK), 2007 U.S. Dist. LEXIS 71246, at *58 (S.D.N.Y. Sept. 24, 2007)* ("Under New York law, product disparagement consists **[*337]** of: (1) a false statement; (2) published by Defendant to a third party; (3) with malice; and (4) with special damages."). "The New York courts define special damages as the loss of something having economic or pecuniary value. In addition, special damages must be fully and accurately stated, with sufficient particularity to identify actual losses." *MapInfo Corp. v. Spatial Re-Engineering Consultants, No. 02-CV-1008 (DRH), 2006 U.S. Dist. LEXIS 70408, *41 (N.D.N.Y Sept. 28, 2006)* (internal quotations omitted). "Where loss of customers constitutes the alleged special damages, the individuals who ceased to be customers, or who refused to purchase, must be named and the exact damages itemized." *Fashion Boutique of Short Hills, 314 F.3d 48, at 59*.

The **[**36]** Court finds that plaintiff has met all of these requirements, with the exception of providing itemized special damages. Plaintiff has identified false and misleading statements made by defendants regarding plaintiff. (Am. Compl. P 20.) Plaintiff alleges that these statements have been made repeatedly over the last few years to potential customers and the general public. Specifically, plaintiff alleges that the assertions made in the November 2006 Risk Management Alert have been repeated until very recently. Plaintiff does not provide exact dates for these statements but does allege with specificity other statements that are certainly not time barred. [2] For example, Exhibits D and E to the amended complaint are alleged to be "[t]rue and correct copies of VitalStim Form documents, dated January 25, 2008 and January 16, 2008." (Am. Compl. P 23(e).) These documents include statements that plaintiff alleges are false, including that "alternative electrodes are not cleared by the FDA for use with the VS stimulator." (Am. Compl., Ex. E.) Similar statements were made in an alleged communication by Empi's sales representatives as recently as February 15, 2008. (Am. Compl. P 23(f), Ex. F.) Plaintiff **[**37]** further alleges that defendants acted with malice. (Am. Compl. P 66) ("Defendants acted with malice in making such false statements about Plaintiff's VS Compatible Electrodes, because Defendants made such statements with the intent to interfere with another person's interest, or with a deliberate desire to do Plaintiff harm, or because Defendants made such statements recklessly, without regard to consequences, and under circumstances which Defendants should have anticipated to cause injury.") The amended complaint also lists in detail many potential customers that allegedly did not purchase plaintiff's electrodes as a result of false statements made to them by defendants. (*See* Am. Compl. P 22.)

Plaintiff does not, however, itemize the damages resulting from these losses. Plaintiff argues that special damages are not required because "words which would tend to injure a party's trade, occupation or business are slanderous *per se*." (Plaintiff's Memorandum of Law, at 21 (citing *Angio-Medical Corp. v. Eli Lilly & Co., 720 F. Supp 269 (S.D.N.Y. 1989))*.) Plaintiff relies on *Angio-Medical's* statement that "[l]anguage **[**38]** which merely disparages a product is not actionable unless special damages are pleaded and it appears that such damage is a natural and immediate consequence of the disparaging statements. If, however, the disparaging statements impeach the business methods or integrity of the plaintiff himself, special damages need not be proved as a direct accusation. The action would then qualify as slander per se instead of trade libel." **[*338]** *Angio-Medical, 720 F. Supp. at 269* (citations omitted). As a threshold matter, this language refers to a claim of slander *per se*, not trade libel. The court in *Angio-Medical* went on to hold that special damages must be pled for the plaintiff's trade libel claim. *Id. at 274*. Plaintiff points to no case law that holds otherwise, nor is the Court aware of any such cases. In any event, plaintiff only has alleged disparaging statements about its product, and the amended complaint does not contain allegations regarding business methods or the integrity of the Company itself. Therefore, special damages must be alleged to sufficiently plead a claim for business disparagement.

Finally, to the extent that plaintiff seeks to satisfy its pleading obligations by attaching a **[**39]** list of all of its customers (more than 4,800 in all) and alleging that it lost sales to "many if not all" of them (Am. Compl. P 67; *Id*., Ex. K), such allegations are insufficient to satisfy the "special damages" pleading requirement. *See Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 59 (2d Cir. 2002)* (***HN22***[] "Where loss of customers constitutes the alleged special damages, the individuals 'who ceased to be customers, or who refused to purchase, must be named,' and the exact damages itemized.") (quoting *Drug Research Corp. v. Curtis Publi'g Co., 7 N.Y.2d 435, 441-42, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960))*.

In sum, plaintiff has not adequately pled special damages and, therefore, this claim is dismissed without prejudice to replead with itemized damages.

D. Conspiracy Tort Claim

Plaintiff also alleges that "[d]efendants combined and conspired among themselves and with their various third party dealers to interfere with Alternative Electrodes' contracts and prospective business relations and to disparage Alternative Electrodes by engaging in the conduct described above, including, but not limited to, making false statements about Alternative Electrodes' products. Each Defendant agreed and intended to **[**40]** participate in the conspiracy, and engaged in one or more overt acts in the United States or New York, or both, in furtherance of the conspiracy." (Am. Compl. P 78.) Defendants argue that this claim should be dismissed because there is no tort of conspiracy under New York law. Plaintiff argues that, although defendants are correct that no such tort exists, "they

[2] The relevant statute of limitations is one year. *N.Y. C.P.L.R. § 215(3)*.

fail to recognize that New York law does allow plaintiffs to use conspiracy allegations to connect Defendants to the torts alleged in the Complaint." (Plaintiff's Memorandum of Law, at 23.) Plaintiff relies on *Transit Management LLC v. Watson Indus. Inc., 23 A.D.3d 1152, 803 N.Y.S.2d 860, 863 (N.Y. App. Div. 2005)* to support this claim.

As a threshold matter, and as plaintiff's counsel conceded at oral argument, it is axiomatic that ***HN23***[] civil conspiracy cannot be alleged as a separate claim because New York law does not recognize civil conspiracy as an independent tort. *See, e.g., Rivera v. Greenberg, 243 A.D.2d 697, 698, 663 N.Y.S.2d 628 (N.Y App. Div. 1997)* ("[T]he Supreme Court should have dismissed the plaintiff's thirtieth cause of action, which alleges conspiracy to defame, since New York does not recognize civil conspiracy as an independent tort . . . .") **[**41]** (citation omitted); *accord* *Transit Management, 803 N.Y.S.2d at 863* ("it is well established that New York does not recognize civil conspiracy as an independent tort"); *see also* *Treppel v. Biovail Corp., 03 cv 3002 (PKL), 2005 U.S. Dist. LEXIS 18511, at *17 (S.D.N.Y. Aug. 30, 2005)* ("Under New York law, a claim for civil conspiracy may stand only if it is connected to a separate underlying tort."). Therefore, to the extent that plaintiff alleges **[*339]** conspiracy as a separate "fourth cause of action," that separate claim must be dismissed.

However, although it is not permitted as a separate cause of action, allegations of conspiracy may survive in a complaint under certain circumstances. As explained in *Transit Management*, ***HN24***[] "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." (*Transit Management, 803 N.Y.S.2d at 863*) (quoting *Alexander & Alexander of N.Y. v. Fritzen, 68 N.Y.2d 968, 969, 503 N.E.2d 102, 510 N.Y.S.2d 546 (N.Y. 1986))*. Thus, "[w]hile there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those **[**42]** acts flow from a common scheme or plan." *American Preferred Prescription, Inc. v. Health Mgmt., Inc., 252 A.D.2d 414, 416, 678 N.Y.S.2d 1 (N.Y. App. Div. 1998)*.

HN25[] To properly plead civil conspiracy for these limited purposes, "a plaintiff must allege both a primary tort and also show the four elements of a conspiracy, namely: (1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Fezzani v. Bear, Stearns & Co., 09 cv 0793 (PAC), 592 F. Supp. 2d 410, 2008 U.S. Dist. LEXIS 71943, at *22-*23 (S.D.N.Y. Sept. 22, 2008)*. Plaintiff has satisfied this pleading requirement. (Am. Compl. PP 78-79.) Therefore, although the Court dismisses the conspiracy claim as a separate cause of action, it will permit the conspiracy allegations to remain for the purposes described above.

E. Tortious Interference with Existing and Prospective Economic Advantage

Defendants argue that plaintiff has not sufficiently pled a tortious interference claim because it has not alleged that "but for Defendants' allegedly wrongful behavior plaintiff would have entered a contract with any party." **[**43]** (Defendants' Memorandum of Law, at 23.) Instead, plaintiff alleges that defendants' conduct "was a substantial factor in preventing Plaintiff from entering into such contracts." (Am. Compl. P 72.) Defendants argue that this is insufficient. For the reasons set forth below, the Court agrees.

HN26[] Under New York law, the elements of a claim for tortious interference are that (1) the plaintiff "had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *Carvel Corp. v. Noonan, 350 F.3d 6, 17 (2d Cir. 2003)*. In addition, under New York law, plaintiff must allege that but for defendants' wrongful conduct, plaintiff would have entered into a prospective contract or an existing contract would not have been breached. *Sharma v. Skaarup Ship Management Corp., 916 F.2d 820, 828 (2d Cir. 1990)* ("Intentional procurement of a breach is an essential element of the tort of interference with contractual relations. A plaintiff must allege that there would not have been a breach **[**44]** but for the activities of defendants.") (internal quotations omitted); *Diario El Pais, S.L. v. Nielsen Co., 07 cv 11295 (HB), 2008 U.S. Dist. LEXIS 92987, *22-*23 (S.D.N.Y. Nov. 6, 2008)* ("To render Plaintiffs' tortious interference claim 'plausible,' *[s]ee* *Iqbal, 490 F.3d at 158 (2d Cir. 2007)*, **[*340]** Plaintiffs must provide some factual allegations that but-for Defendant's alleged acts, Plaintiffs would have entered into contracts with specific prospective advertisers or maintained consistent levels of advertising with their existing advertisers.") (citing *School of Visual Arts v. Kuprewicz, 3 Misc. 3d 278, 771 N.Y.S.2d 804, 813 (N.Y. Sup. Ct. 2003)* ("It is well-settled that an essential element of [the intentional interference with prospective economic advantage] tort is that the plaintiff would have consummated a contract with another person but for the interference of the defendant"); *Zhang v. Wang, 05 cv 3888 (FB) (LB), 2006 U.S. Dist. LEXIS 74203, at *5 (E.D.N.Y. Oct. 12, 2006)* ("The plaintiff must also assert the defendant's actions were the 'but for' cause of the alleged breach of contract, that is, that there would not have been a breach but for the activities of the defendant."); *Corporate Training Unlimited v. NBC, 868 F. Supp. 501, 513 (E.D.N.Y. 1994)* **[**45]** ("Under New York law, interference with pre-contractual relations is actionable where a contract would have been entered into but for the malicious, fraudulent, or deceitful acts of a third party."). In arguing that it need only allege that defendants' actions were a substantial factor preventing the completion of a contract, plaintiff relies on *Utility Metal Research, Inc., No. 03 CV 1463 (SLT)(SMG), 2008 U.S. Dist. LEXIS 25095, 2008 WL 850456, at *8 (E.D.N.Y. Mar. 28, 2008)*. *Utility Metal* stated in *dicta* that "[a] plaintiff claiming tortious interference with contract is obligated to establish that intentional acts on the part of a defendant were a substantial factor in the disruption of the contract," citing to a New York state court case from 1972 which explicitly stated that "in order to recover for tortious interference of contract, there had to exist a valid contract between a plaintiff and another, defendant's knowledge of that contract, his intentional interference with or procuring of a breach thereof without justification, and a showing by plaintiff that, *but for his unlawful actions, plaintiff would have received the contract."* *Bryce v. Wilde, 31 N.Y.2d 882, 292 N.E.2d 320, 340 N.Y.S.2d 185 (N.Y. 1972)* (emphasis added). This Court **[**46]** does not find that case to support plaintiff's argument.

In sum, because plaintiff has failed to allege that defendants' alleged tortious interference was a "but for" cause in preventing the contractual relationship with another party, this claim is dismissed. However, the Court will provide plaintiff, if it wishes, an opportunity to re-plead to correct this pleading defect.

F. Breach of Contract

With respect to the breach of contract claim, plaintiff alleges that it entered into a confidential settlement agreement with defendants on August 23, 2007. (Am. Compl. P 105, Ex. G.) According to the amended complaint, defendants agreed to provide plaintiff any "test and/or clinical data showing that [p]laintiff's products are unsafe for use with the VitalStim device; could cause potential legal liability; are unsafe for the treatment of dysphagia using the VitalStim device; or are unsafe for use with the VitalStim device on the anterior portion of the neck." (*Id*. P 106.) Plaintiff alleges that defendants provided no such information, but "[d]espite this lack of data and their binding agreement to refrain from their product disparagement campaign, [d]efendants continue to make false and malicious **[**47]** statements about Alternative Electrodes' products in an attempt to protect their monopoly." (*Id*. P 107; Ex. G. at 4-5.)

Defendants argue that only one of the defendants, Encore Medical -- not Empi, was a party to the August 2007 settlement agreement. Further, the only statements **[*341]** plaintiff alleges violated this agreement were made by Empi, not Encore Medical. (Defendants' Memorandum of Law, at 24.) Plaintiff asserts that "Encore's possession of [the license to sell the VitalStim technology] would likely make Empi Encore's agent so that Encore would be liable for the Empi statements which breached the settlement agreement." (Plaintiff's Memorandum of Law, at 25.) The Court finds the allegations to be sufficient to survive a motion to dismiss.

Further, defendants argue that, even if the statements were made by Encore Medical, nothing in them would violate the settlement agreement. This argument is unavailing. Plaintiff alleges that amended complaint Exhibit E was posted on Empi's website in January 2008. That document states:

> The alternative electrodes are not cleared by the FDA for use with the VS stimulator; they are only cleared for general use. The FDA must clear both stimulator and **[**48]** electrodes for their intended use (treatment of dysphagia) and they have only done so for the VS device and electrodes. This is important because there are no data to support AE's contention that their electrodes are safe to be used with the VS device.
> I know many PT's think that electrodes are just passive devices and have no influence on the safety of treatment, but this is not true. The impedance of the electrodes (much higher for AE) influences how current flows and how the device operates. VitalStim has been proven safe for use on the anterior portion of the neck with the specially designed hardware AND electrodes. The VitalStim electrodes are currently the only

> electrodes that are designed and tested to safely handle the current load and current density of the VitalStim unit without creating hot spots that could potentially injure a patient.

(Am. Compl., Ex. E.) Whether this and/or other statements constitute a breach of the settlement agreement cannot be decided at the motion to dismiss stage of the proceedings in this case. In short, plaintiff has adequately pled a breach of the settlement agreement, and defendants' motion to dismiss this claim is denied.

IV. CONCLUSION

For the **[**49]** reasons stated, defendants' motion to dismiss, pursuant to *Fed. R. Civ. P. 12 (b)(6)*, is granted with respect to plaintiff's state law claims for business disparagement/injurious falsehood, conspiracy (to the extent it is alleged as a separate cause of action), and tortious interference with existing and prospective economic advantage. However, plaintiff may file an amended complaint within 30 days of this Memorandum and Order to address the pleading defects identified by the Court with respect to the business disparagement/injurious falsehood claim and the tortious interference with existing and prospective economic advantage claim. Defendant's motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* is denied as to all other claims, including the Sherman Act claims.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: February 4, 2009

Central Islip, NY

End of Document

Emerson Elec. Co. v. Le Carbone Lorraine, S.A.

United States District Court for the District of New Jersey

February 4, 2009, Decided; February 4, 2009, Filed

Civil Action No. 05-6042 (JBS)

Reporter

2009 U.S. Dist. LEXIS 8831 *; 2009-2 Trade Cas. (CCH) P76,814

EMERSON ELECTRIC COMPANY, et al., Plaintiffs, v. LE CARBONE LORRAINE, S.A., et al., Defendants.

Subsequent History: Later proceeding at *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 2009 U.S. Dist. LEXIS 13113 (D.N.J., Feb. 18, 2009)*

Prior History: *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 2008 U.S. Dist. LEXIS 80470 (D.N.J., Oct. 7, 2008)*

Core Terms

antitrust claim, antitrust, interlocutory order, products, inherent power, adjudicates, allegations, transferred, electrical, parties, carbon, modify, regain, rights, vacate

Counsel: **[*1]** For **EMERSON ELECTRIC COMPANY, VALEO, S.A., VALEO, INCORPORATED, VIACOM, INCORPORATED, ELECTROLUX HOME CARE PRODUCTS, INCORPORATED, ROCKWELL AUTOMATION, INCORPORATED, DELPHI CORPORATION, ROBERT BOSCH GMBH, ROBERT BOSCH CORPORATION, A.O. SMITH CORPORATION, VISTEON CORPORATION, BALDOR ELECTRIC COMPANY, FASCO INDUSTRIES, INCORPORATED, SIEMENS TRANSPORTATION SYSTEMS, INCORPORATED, Plaintiffs: DANIEL A. SASSE,** *LEAD ATTORNEY,* CROWELL & MORING, IRVINE, CA; **JEROME A. MURPHY, KENT A. GARDINER, MATTHEW J. MCBURNEY,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, CROWELL & MORING, LLP, WASHINGTON, DC; **JOEL H. SERLIN, RONALD L. CORNELL, JR.,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SEYBURN, KAHN, SOUTHFIELD, MI.

For **MORGAN CRUCIBLE COMPANY, PLC, MORGANITE INDUSTRIES, INCORPORATED, MORGANITE, INCORPORATED, MORGAN ADVANCED MATERIALS AND TECHNOLOGIES, INCORPORATED, MORGANITE ELECTRICAL CARBON LTD, Defendants: ROBERT M. OSGOOD,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SULLIVAN & CROMWELL, NEW YORK, NY.

For **LE CARBONE LORRAINE, S.A., Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* **JAMES RICHARD COSTELLO, II,** SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ.

For **CARBONE [*2] LORRAINE NORTH AMERICA CORPORATION, Defendant: HARRIS NEAL FELDMAN, JAMES RICHARD COSTELLO, II,** *LEAD ATTORNEYS,* SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ; **MARY ELLEN HENNESSY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KATTEN, MUCHIN & ROSEMAN, LLP, CHICAGO, IL.

For **CARBONE OF AMERICA INDSTRIES CORPORATION, Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* **JAMES RICHARD COSTELLO, II,** SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ; **MARY ELLEN HENNESSY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KATTEN, MUCHIN & ROSEMAN, LLP, CHICAGO, IL.

For **SCHUNK GMBH, SCHUNK KOHLENSTOFF-TECHNIK GMBH, Defendants: MATTHEW M. NEUMEIER,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, JENNER & BLOCK LLP, CHICAGO, IL.

For **SCHUNK OF NORTH AMERICA, INCORPORATED, SCHUNK GRAPHITE TECHNOLOGY, L.L.C., Defendants: MATTHEW M. NEUMEIER,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, JENNER & BLOCK LLP, CHICAGO, IL; **JOSEPH A. MARTIN, KERRI E. CHEWNING,** ARCHER & GREINER, PC, HADDONFIELD, NJ.

For **HOFFMANN CARBON, INCORPORATED, Defendant: JOSEPH A. MARTIN, KERRI E. CHEWNING,** ARCHER & GREINER, PC, HADDONFIELD, NJ.

For **SGL CARBON AG, SGL CARBON, LLC, Defendants: JEROME S. FORTINSKY, [*3]** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SHEARMAN & STERLING LLP, NEW YORK, NY.

For **EMILIO DIBARNARDO, Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ.

For **SCHUNK OF NORTH AMERICA, INC., Schunk Graphite Technology, LLC, Defendants: KERRI E. CHEWNING,** *LEAD ATTORNEY,* ARCHER & GREINER, PC, HADDONFIELD, NJ.

Judges: HON. JEROME B. SIMANDLE, United States District Judge.

Opinion by: JEROME B. SIMANDLE

Opinion

MEMORANDUM OPINION

SIMANDLE, DISTRICT JUDGE:

This matter comes before the Court on Plaintiff Visteon Corporation's ("Plaintiff Visteon" or "Visteon") motion to cure or for reconsideration of the Court's October 7, 2008 Order [Docket Item 136]. THIS COURT FINDS AS FOLLOWS:

1. Plaintiff Visteon seeks to avoid this Court's October 7, 2008 Order, which found that it lacked antitrust standing to bring the claims at issue here. *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., No. 05-6042, 2008 U.S. Dist. LEXIS 80470, 2008 WL 4560716 (D.N.J. Oct. 7, 2008)*. In brief, Plaintiff Visteon, along with the other Plaintiffs in this action, alleges that it purchased electrical carbon products from Defendants at illegally inflated rates as a consequence of Defendants' conspiracy to fix the price of **[*4]** these products. The Court found, over Visteon's protest, that in October, 2005, shortly after commencing the present action, Visteon assigned this antitrust claim to Ford Motor Company ("Ford"). *Emerson Elec., 2008 U.S. Dist. LEXIS 80470, 2008 WL 4560716, at *5*. Plaintiff Visteon now presents an agreement in which Ford has re-conveyed this antitrust claim to Visteon. [1] (Pl. Visteon Ex. A.)

2. The Court will grant Plaintiff Visteon's request for relief from the Court's October 7, 2008 Order and will vacate that Order to the extent it found that Visteon lacks standing to bring this antitrust claim and granted summary judgment against Visteon. In doing so, the Court relies not on *Local Rule 7.1*, but instead on its inherent power to modify or vacate its own interlocutory orders. *Fed. R. Civ. P. 54(b)* ("any order or other decision, however

[1] The Court rejects Defendants' argument that the agreement does not confer standing because it may not have been signed by representatives with authority to transfer the antitrust claim or because the agreement does not specify what consideration Ford received for conveying the claim. The Court agrees with Plaintiff that any lack of authority to bind would make the contract voidable, not void, and Defendants do not have standing to challenge the contract's validity on that ground. *United States v. Baird, 218 F.3d 221, 230 (3d Cir. 2000)*; *Standard Rolling Bearing Co. V. Hess-Bright Mfg. Co., 275 F. 916, 920 (3d Cir. 1921)*; *Residential Reroofers Local 30-B v. A & B Metal & Roofing, Inc., 976 F. Supp. 341, 346 (E.D. Pa. 1997)*. Likewise, the Court will accept as truthful the assertion in the assignment agreement that Ford received **[*5]** "good and valuable consideration" for the exchange and will not require further proof from Plaintiff Visteon on this matter.

designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all of the parties' rights and liabilities"); *John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 88, 42 S. Ct. 196, 66 L. Ed. 475, 1923 Dec. Comm'r Pat. 669 (1922)* ("the court at any time before final decree may modify or rescind [interlocutory orders]"); *United States v. Jerry, 487 F.2d 600, 605 (3d Cir. 1973)*. "[S]o long as the district court has jurisdiction over the case, it possesses inherent power over **[*6]** interlocutory orders, and can reconsider them when it is consonant with justice to do so." *Jerry, 487 F.2d at 605*.

3. In the present case, the Court finds that the interests of justice, and in particular, the underlying goal of our ***antitrust law*** to deter just the sort of conduct alleged here, call for the reintroduction of Plaintiff Visteon into this litigation. There is no dispute that Visteon purchased the electrical carbon products at issue and, if Plaintiffs' allegations are proven to be true, suffered the injury. Visteon consequently had both constitutional and antitrust standing when this action was brought. See *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993)*. Visteon has consistently maintained that it did not intend to transfer these antitrust claims to Ford, and further, that it did not in fact transfer these claims, and thus did not seek to regain claims it believed were never transferred. Consistent with this Court's October 7, 2008 opinion, however, Visteon has reacquired those claims (still maintaining that they were never transferred) and the Court will permit Visteon to continue in this action now that it has regained antitrust **[*7]** standing. See *Gulfstream, 995 F.2d at 437-40*. An accompanying Order will be entered.

February 4, 2009

Date

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

United States District Judge

In re K-Dur Antitrust Litig.

United States District Court for the District of New Jersey

February 4, 2009, Decided

Civil Action No. 01-1652 (JAG) (Consolidated Cases); MDL Docket No. 1419

Reporter

2009 U.S. Dist. LEXIS 11756 *; 2009-1 Trade Cas. (CCH) P76,480

IN RE K-DUR ANTITRUST LITIGATION; This Document Relates To: All Direct Purchaser Actions

Subsequent History: As Amended February 6, 2009.

Amended by *In re K-Dur Antitrust Litig., 2009 U.S. Dist. LEXIS 126249 (D.N.J., Feb. 6, 2009)*

Prior History: *In re K-Dur Antitrust Litig., 2008 U.S. Dist. LEXIS 71771 (D.N.J., Mar. 27, 2008)*

Core Terms

patent, settlement, generic, infringement, exclusionary, anticompetitive, potassium chloride, parties, baseless, FDA, Plaintiffs', expired, manufacturer, invalid, summary judgment, effects, tablet, certification, antitrust, lawsuit, Defendants', products, viscosity, settlement agreement, license, rule of reason, terms, district court, courts, marketing

Counsel: **[*1]** For STEPHEN M. ORLOFSKY, Special Master: STEPHEN M. ORLOFSKY, LEAD ATTORNEY, BLANK, ROME, LLP, PRINCETON, NJ.

For HIP HEALTH PLAN OF FLORIDA, INC., on behalf of itself and all others similarly situated, Plaintiff: DANIEL BERGER, LEAD ATTORNEY, BERGER & MONTAGUE, PC, PHILADELPHIA, PA; LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For Indirect Purchaser Plaintiffs, Plaintiff: SHELLY L. FRIEDLAND, COHEN, MILSTEIN, HUSFLD & TOLL, P.L.L.C., NEW YORK, NY; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; ALLYN ZISSEL LITE, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For Direct Purchaser Plaintiffs, Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA.

For AMY REICHERT, on behalf of herself and all others similarly situated, GREAT LAKES HEALTH PLAN, INC., on behalf of itself and all others similarly situated, JOSEPH J. MORGAN, on behalf of himself and all others similarly situated, CARL M. WALLACE, NORMA SEABROOK, ISRAEL REXACH, ELIAS HUSAMUDEEN, WILLIAM WASNICKI, GUY ANDERSON, ROBERT SEABROOK, STEVEN ROBINSON, On behalf of Correction officers benevolent association security benefits **[*2]** fund, on behalf of themselves and all other similarly situated, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For JACQUELINE CUNDIFF, Consol Plaintiff: DAVID K. LIETZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COALE, COOLEY, LIETZ & MCINERNY, ESQS., WASHINGTON, DC; FREDERICK P. FURTH, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, THE FURTH FIRM LLP, SAN FRANCISCO, CA.

For ESTELLE TRAVERS, on Behalf of Herself and all Others Similarly Situated, Consol Plaintiff: GUIDO SAVERI, RICHARD ALEXANDER SAVERI, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAVERI & SAVERI, INC., SAN FRANCISCO, CA.

For MECHANICAL CONTRACTORS-UA LOCAL 119 WELFARE PLAN, by and through its Trustees, Danny Price, William Morrison, Phillip Holloway, J. Bradley Donaghey, Glen Reed Jr. and Stanley Small, IBEW-NECA LOCAL 505 HEALTH & WELFARE PLAN, by and through its Trustees, Donnie Adams, Terry N. Adams, Fred J. Moore, Charles S. Belk, Charles Freeman and Larry Smith, A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN, by and through its Trustees, Larry Fincher, Gordon Parmer, Charles Loftin, Gene Stokely, Jack Terry and Andy Joiner, Consol **[*3]** Plaintiffs: JOSEPH J. DEPALMA, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For ESTATE OF STANLEY NEMSER, Consol Plaintiff: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; ANN D. WHITE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA.

For CONSUMERS FOR AFFORDABLE HEALTHCARE COALITION, Consol Plaintiff: STEVEN J. PFEFFERLE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, TERHAAR ARCHIBALD PFEFFERLE & GRIEBEL, MINNEAPOLIS, MN.

For WALGREEN CO., Consol Plaintiff: DEBORAH S. CORBISHLEY, LEAD ATTORNEY, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW & SPECTOR, PA, MIAMI, FL; STACEY K. SUTTON, LEAD ATTORNEY, KENNY NACHWALTER, PA, MIAMI, FL.

For ECKARD CORPORATION, THE KROGER CO., ALBERTSON'S INC., SAFEWAY, INC., HY-VEE, INC., Consol Plaintiffs: STACEY K. SUTTON, LEAD ATTORNEY, KENNY NACHWALTER, PA, MIAMI, FL.

For NATALIE SUTIN, on behalf of herself and all others similarly situated, Consol Plaintiff: LIONEL Z GLANCY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, Los Angeles, CA.

For ROSE LIPSCOMB, NEW YORK STATE-WIDE SENIOR ACTION COUNCIL, INC., MASSACHUSETTS SENIOR ACTION COUNCIL, **[*4]** on behalf of themselves and all others similarly situated, Consol Plaintiffs: ALLYN ZISSEL LITE, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ.

For GEORGE BURNS, Individually and on behalf of all others similarly situated, Consol Plaintiff: ANDREW ROBERT JACOBS, LEAD ATTORNEY, RAMSEY BERMAN, PC, MORRISTOWN, NJ.

For MILDRED GROSSMAN, on her own behalf and on behalf of all others similarly situated, Consol Plaintiff: C. OLIVER BURT, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BURT & PUCILLO, PC, WEST PALM BEACH, FL.

For LOUISIANA WHOLESALE DRUG CO. INC, on behalf of itself and all others similarly situated, Consol Plaintiff: PETER S. PEARLMAN, LEAD ATTORNEY, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For UNITED FOOD AND COMMERCIAL WORKERS LOCAL 56 HEALTH & WELFARE DEPARTMENT, on behalf of itself and all others similarly situated, PATRICK J. LYNCH, Consol Plaintiffs: LISA J. RODRIGUEZ, LEAD ATTORNEY, TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; THEODORE M. LIEVERMAN, SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA.

For FRANCES IRENE STEADMAN, Consol Plaintiff: FREDERICK **[*5]** T. KUYKENDALL, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING, GIBBONS & KITTRELL, PC, BIRMINGHAM, AL; JAMES H MCFERRIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SOUTHEASTERN LEGAL GROUP, BIRMINGHAM, AL; S C MIDDLEBROOKS, III, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING & GIBBONS, PC, MOBILE, AL.

For DAWN MAFFEI, Consol Plaintiff: MICHAEL G. NAST, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, RODA & NAST, PC, LANCASTER, PA.

For LEONARD BROWN, Consol Plaintiff: JENNIFER SHARON ABRAMS, JOSEPH J. TABACCO, JR., LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERMAN, DEVALERIO, PEASE & TABACCO, PC, SAN FRANCISCO, CA.

For ARKANSAS CARPENTERS HEALTH & WELFARE FUND, On its own behalf & on behalf of all others similarly situated, Consol Plaintiff: GREG THOMPSON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PROVOST & UMPHREY, BEAUMONT, TX.

For MARY MARGARET PIETSCH individually and on behalf of a class of persons similarly situated, Consol Plaintiff: LYNN L. SARKO, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER & ROHRBACK, LLP, SEATTLE, WA; RON KILGARD, LEAD ATTORNEY, COUNSEL **[*6]** NOT ADMITTED TO USDC-NJ BAR, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ.

For DONALD W. HANNU, on behalf of himself and all others similarly situated, Consol Plaintiff: NEIL A. MCEWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, INVER GROVE HEIGHTS, MN.

For BETTY SAAD, Consol Plaintiff: DIANE A. NYGAARD, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LEAWOOD, KS.

For EVELYN BARCZAK, ANTHONY DEBELLA, on behalf of himself and others similiarly situated, Consol Plaintiffs: MICHAEL J. FLANNERY, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, CAREY & DANIS, ST. LOUIS, MO.

For AGATHA AGATHA "NIKKI&quo MCCUTCHON, Consol Plaintiff: THOMAS M. SOBOL, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA.

For RITE AID CORPORATION, Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; JERRY L. TANENBAUM, LEAD ATTORNEY, SCHNADER HARRISON SEGAL & LEWIS LLP, CHERRY HILL, NJ; STEVE D. SHADOWEN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For COBALT CORP., Consol Plaintiff: CHARLES J. BARNHILL, JR., WILLIAM P. DIXON, LEAD ATTORNEYS, COUNSEL NOT **[*7]** ADMITTED TO USDC-NJ BAR, MINER, BARNHILL & GALLAND, ESQS., MADISON, WI; MARY C. NASH, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, COBALT CORPORATION, MILWAUKEE, WI; RICHARD W. COHEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOWEY, DANNENBERG, BEMPORAD & SELINGER, ESQS., WHITE PLAINS, NJ.

For CVS MERIDIAN, INC., Consol Plaintiff: BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; STEVE D. SHADOWEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For ROBERT MITCHELL, Consol Plaintiff: DAVID J. SHEA, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MANTESE, MILLER & SHEA, PLLC, TROY, MI; KENNETH J. MCINTYRE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DICKINSON WRIGHT, ESQS., DETROIT, MI; ROBERT L. MICHELS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WINSTON & STRAWN LLP, CHICAGO, IL.

Judges: STEPHEN M. ORLOFSKY, SPECIAL MASTER.

Opinion by: STEPHEN M. ORLOFSKY

Opinion

SPECIAL MASTER'S AMENDED REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS TO THE UPSHER AND ESI SETTLEMENTS AND DIRECT PURCHASER

PLAINTIFFS' PARTIAL MOTIONS FOR SUMMARY JUDGMENT AS TO THE APPLICABLE FRAMEWORK FOR [*8] ANALYSIS OF EXCLUSION PAYMENTS AND THE EXCLUSIONARY SCOPE OF THE '743 PATENT

ORLOFSKY, SPECIAL MASTER

I. INTRODUCTION

This consolidated antitrust action has been transferred to the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to *28 U.S.C. § 1407*. Pursuant to *Rule 53 of the Federal Rules of Civil Procedure* [1] and by consent of all parties in the above-captioned action, I have been appointed by order of this Court, dated April 12, 2006, to preside as a Special Master to review and decide all currently pending and future motions directed to Judge Joseph A. Greenaway, Jr. and Magistrate Judge Madeline Cox Arleo including, but not limited to discovery disputes, class certification and summary judgment (the "Appointment Order") (Doc. No. 316). The Appointment Order provides that the decision of the Special Master on any matter before the Special Master will conclusively resolve that matter unless an appropriate objection is filed pursuant to *Fed. R. Civ. P. 53(g)*.

This Report and Recommendation addresses the following Motions: (1) Motion of Defendants Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher) (collectively, "Defendants") for Summary Judgment as to All Claims Brought By Direct Purchaser Plaintiffs ("DP Plaintiffs" or "DPPs") Related to the Upsher Settlement ("Upsher Motion."); [2] (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DPPs Related to the ESI Settlement ("ESI Motion"); [3] (3) DPPs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments ("Framework Motion"); [4] and (4) DPPs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent ('743 Motion"). [5]

---

[1] **(a) Appointment.**

> **(1)** Unless a statute provides otherwise, a court may appoint a master only to:
>
> > **(A)** perform duties consented to by the parties;
> >
> > * * *
> >
> > **(C)** address pretrial and post-trial matters that **[*9]** cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a).

[2] In support of the Upsher Motion, Defendants' submitted an opening Memorandum of Law (accompanied by 125 exhibits attached to the 7/25/08 O'Shaughnessy Decl.) ("Upsher Mem."), a Statement of Undisputed Facts ("Def. Upsher Facts"), a Reply Memorandum of Law in support of the Uphser and ESI Motions (accompanied by 40 exhibits attached **[*10]** to the 10/3/08 O'Shaughnessy Decl.) ("Upsher/ESI Reply"), a Reply to DPPs' Statement of Disputed Facts in Opposition to the Upsher Settlement ("Def. Upsher Reply Facts"), and a 10/21/2008 letter brief regarding a recent Federal Circuit Court of Appeals decision. In response, DPPs submitted a consolidated Memorandum of Law in opposition to the Upsher Motion and the ESI Motion (accompanied by 158 exhibits attached to the 9/5/2008 Refsin Decl.) ("Upsher/ESI Opp."), a Statement of Disputed Facts in Opposition to the Upsher Motion ("DPP Upsher Facts"), and a 10/31/2008 letter brief.

[3] In support of the ESI Motion, Defendants submitted an opening Memorandum of Law (accompanied by 46 exhibits attached to the 7/3/08 O'Shaughnessy Decl.) ("ESI Mem."), a Statement of Undisputed Facts ("Def. ESI Facts"), the Upsher/ESI Reply, a Reply to DPPs' Statement of Disputed Facts in Opposition to the ESI Motion ("Def. ESI Reply Facts") and the above-referenced 10/21/2008 letter brief. In response, DPPs submitted the Upsher/ESI Opp., a Statement of Disputed Facts in Opposition to the ESI Motion ("DPP ESI Facts"), and the above-referenced 10/31/2008 letter brief.

[4] In support of the Framework Motion, DPPs submitted **[*11]** an opening Memorandum of Law (accompanied by four exhibits) ("Framework Mem."), a Statement of Undisputed Facts ("DPP Framework Facts"), and a Reply Brief (accompanied by two appendices with a total of two exhibits) ("Framework Reply"). In response, Defendants submitted a Brief in opposition to the

After consideration of the parties' voluminous submissions in support of and in opposition to the above-referenced Motions, [6] as well as the oral argument of counsel presented on December 10, 2008, I conclude, based on the following analysis, that: (1) Defendants' Motion for Summary Judgment as to All Claims **[*12]** Brought By DP Plaintiffs Related to the Upsher Settlement is granted; (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the ESI Settlement is granted; (3) DP Plaintiffs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments is denied; and (4) DP Plaintiffs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent is denied.

II. BACKGROUND

This action involves the drug K-Dur 20, a potassium chloride supplement manufactured by Schering. Schering entered into separate agreements with Upsher and ESI Lederle ("ESI") settling patent litigation that Schering had initiated after Upsher and ESI sought approval from the Food and Drug Administration ("FDA") for their generic versions of K-Dur. The gravamen of DP Plaintiffs' Complaint is that Schering's settlements with Upsher and ESI were collusive, anticompetitive agreements that had the effect and purpose of preventing and delaying the entry of generic substitutes for K-Dur and allowing **[*13]** Schering to maintain a monopoly in the extended release potassium chloride supplement market. (DPP Am. Compl., P 1). *See also In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 522, 526 (D.N.J. 2004)*. Plaintiffs allege that but for payments made by Schering to Upsher and ESI under the agreements, Upsher and ESI would have settled on different terms and their generic products would have entered the market earlier than was permitted under the settlements. (DPP Am. Compl. at PP 1, 109). *See also In re K-Dur, 338 F. Supp. 2d at 526*.

As is evident from the discussion to follow, this case involves complex legal and factual issues at the intersection of patent and ***antitrust law***. Accordingly, before analyzing the parties' motions, it is necessary to outline the regulatory, factual and procedural contexts in which the issues presented arise.

A. Statutory and Regulatory Framework

A pharmaceutical company must obtain FDA approval to market a prescription drug. *21 U.S.C. § 355(a)*. In order to obtain approval for a pioneer drug, a company must submit a New Drug Application ("NDA"), which details all safety and efficacy studies, the components in the drug, the methods used in "the manufacture, **[*14]** process and packaging" of the drug, and any patents issued on the composition or methods of using the drug. *Id.* at *§ 355(b)(1)*. The FDA publishes the patent information in the "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." *See* FDA Electronic Orange Book, http://www.fda.gov/cder/ob/.

Prior to 1984, a generic drug company also had to undertake its own costly studies regarding the efficacy and safety of a drug, even if the drug was a bioequivalent of a brand name drug already on the market. *See Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1058-59 n.2 (11th Cir. 2005)*, *cert. denied, 548 U.S. 919, 126 S. Ct. 2929, 165 L. Ed. 2d 977 (2006) ("Schering")* (explaining the NDA process and indicating its potential cost). The generic was then required to file its own NDA for its version of the drug. The generic company could not begin testing the drug until after the patent life on the brand-name drug expired, since before that time the pioneer

---

Framework Motion (accompanied by 14 exhibits attached to the 9/5/08 O'Shaughnessy Decl.) ("Framework Opp.") and a Counterstatement of Material Facts ("Def. Framework Facts").

[5] In support of the '743 Motion, DPPs submitted an opening Memorandum of Law (accompanied by 15 exhibits ("'743 Mem."), a Statement of Undisputed Facts ("DPP '743 Facts"), and a Reply Brief (accompanied by two exhibits) ("'743 Reply"). In response, Defendants' submitted a Brief in Opposition to the '743 Motion accompanied by seven exhibits ("'743 Opp."), and a Counterstatement of Material Facts a ("Def. '743 Facts").

[6] The parties' summary judgment submissions include more than 400 pages of briefs and factual statements and a total of more than 400 exhibits.

company could sue the generic for patent infringement. *See* 35 U.S.C. § 271 (2000) (stating that making or using a patented compound is an act of infringement).

In 1984, Congress enacted the Drug Price Competition & Patent **[*15]** Term Restoration Act, commonly known as the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (codified at various sections of titles 21 and 35 of the United States Code). Among its key provisions, the Hatch-Waxman Act: (1) created the Abbreviated New Drug Application ("ANDA"), which allows a generic drug applicant to piggyback on safety and efficacy studies conducted for the pioneer drug, *see generally* 21 U.S.C. § 355(j); (2) modified the definition of infringement, so that the conduct of safety and efficacy studies for FDA approval is no longer infringing activity, *see generally* 35 U.S.C. § 271(e); and (3) allowed the extension of patent terms to compensate for the period when a patented drug could not be marketed because it was undergoing the FDA approval process. *See generally* 35 U.S.C. § 156.

Under the The Hatch-Waxman Act, the pioneer drug maker still files a NDA with full-scale safety and efficacy studies and lists the patents that generics might infringe in the future. 21 U.S.C. § 355(b)(1) (enumerating NDA provisions). However, a generic company may file an ANDA, which requires the generic to prove that the new drug is the bioequivalent of a brand-name drug on the market, **[*16]** but does not require the time-consuming studies required for a NDA. *Id.* at § 355(j)(2)(A) (listing the ANDA provisions). *See also* Schering, 402 F.3d at 1058-59 n.2 (generics can use a "truncated" process, "so long as the generic manufacturer proves that its drug is a bio-equivalent to the already-approved brand name/pioneer drug"); Herbert Hovenkamp et al., *Anticompetitive Settlement of Intellectual Property Disputes ("Hovenkamp ")*, 87 Minn. L. Rev. 1719, 1753 (2003) (listing ANDA provisions and noting that generic must be bioequivalent of pioneer drug). Further, the generic may begin testing before the pioneer's patent expires. 35 U.S.C. § 271(e)(1).

Under the Hatch-Waxman Act, an ANDA filer must make one of the following certifications: (1) that the "patent information has not been filed" on the generic's brand-name equivalent (a paragraph I certification); (2) that a "patent [on the branded drug] has expired" (a paragraph II certification); (3) that a brand-name patent exists, "the date on which such patent will expire," with a promise not to market until that date (a paragraph III certification); or (4) "that such patent is invalid or will not be infringed by the manufacture, use, **[*17]** or sale of the new drug for which the application is submitted." (a paragraph IV certification). 21 U.S.C. § 355(j)(2)(A)(vii) (emphasis added).

If the ANDA filer makes a paragraph IV certification, it must consult the Orange Book and provide notification to each NDA or patent owner impacted by the ANDA certification "not later than [twenty] days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed." *Id.* at § 355(j)(2)(B)(ii)(I). The filing of an ANDA with a paragraph IV certification allows the patent holders to sue, as it is considered a technical act of infringement, even though the generic has not yet begun marketing its version of the drug. *See* Stephanie Greene, *A Prescription for Change: How the Medicare Act Revises Hatch-Waxman to Speed Market Entry of Generic Drugs,* 30 J. Corp. L. 309, 317 (2005) (noting that paragraph IV certification is a technical act of infringement because the generic intends to market and infringe the patent). The patent owners then have 45 days to bring an infringement suit against the generic. If the affected patent owners do not file suit, the FDA **[*18]** can approve the ANDA without delay. 21 U.S.C. § 355(j)(5)(B)(iii). However, if an affected patent owner brings an infringement suit, approval of the application is automatically stayed for thirty months, or until a district court issues a final decision concluding that the patent has not been infringed or is otherwise invalid. *Id.*

In order to give generic drug makers an incentive to incur the expense and risk of a potential infringement suit by the patent holder, the ANDA procedures give the first ANDA filer a 180-day exclusivity period. *Id.* at 355(j)(5)(B)(iv). During this exclusivity period, the FDA cannot approve any other generic manufacturer's ANDA until 180 days after the earlier of (1) the date of the first ANDA filer's commercial marketing of its generic drug; or (2) the date of a "court [decision ruling] that the patent is invalid or not infringed." [7] *Id* at 355(j)(5)(B)(iii)(I).

---

[7] Prior to 2000, this was calculated from a "final judgment from which no appeal can be or has been taken." 21 C.F.R. § 314.107(e)(1) (1999). Now, a district court decision is sufficient. Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d. 30 (D.D.C. 2000). Also, prior to 1998, FDA regulations had required **[*19]** that ANDA filers would not get the 180-day exclusivity unless they had successfully defended the patent infringement suit. *See* 59 Fed. Reg. 50,338,367 (Oct. 3, 1994). The "successful

B. Factual and Procedural Background [8]

1. The Parties

The DP Plaintiff Class, represented by lead Plaintiff Louisiana Wholesale Drug, is essentially comprised of all persons or entities who purchased K-Dur 20 directly from Schering during the period November 20, 1998, through September 1, 2001. [9] The Class includes wholesalers, hospitals, health maintenance organizations and retail drug store chains.

Schering is a New Jersey corporation engaged in the discovery, development and marketing of, *inter alia,* brand name and generic drugs. Upsher is a Minnesota corporation engaged in the discovery, development and marketing of brand name and generic drugs. Former Defendant Wyeth Laboratories ("Wyeth"), formerly known as American Home Products, Inc. ("AHP"), is a Delaware corporation engaged in the development, manufacturing and marketing of, *inter alia,* brand name and generic drugs. **[*21]** Former Defendant ESI is a business unit of Wyeth that engages in the research, manufacture and sale of generic drugs. [10]

2. K-Dur and the '743 Patent

During the time period relevant to the DP Plaintiffs' claims, Schering marketed a potassium chloride supplement under the brand name K-Dur. (DPP Upsher Facts, P 1). [11] K-Dur is used to treat potassium deficiencies such as those that often arise from the treatment of high blood pressure with diuretic products. (DPP '743 Facts, P 1; Def. '743 Facts, P 1). Although the active ingredient in K-Dur -- potassium chloride -- is not patented, K-Dur is covered by a formulation patent, No. 4,863,743 (the "'743 Patent"), owned by Key Pharmaceuticals, Inc. ("Key"), a division of Schering. (Schering Ans. to DPP Am. Compl., P 23-24). The '743 Patent, which claims a controlled-release

---

defense" requirement was subsequently found to be unreasonable, *Mova Pharm. Corp. v. Shalala, 329 U.S. App. D.C. 341, 140 F.3d 1060, 1069-70 (D.D.C. 1998)*, and the FDA dropped the requirement in 1998. *See* *63 Fed. Reg. 59,710,711 (Nov. 5, 1998)*.

[8] The facts pertinent to the current motions are drawn primarily from the parties' pleadings and their respective statements filed pursuant to *Local Rule 56.1* Unless otherwise indicated, the facts set forth below are not in dispute.

[9] On April 14, 2008, I issued a Report and Recommendation (the "April 14 R&R") recommending that DP Plaintiffs' Motion for Class Certification be granted and the following **[*20]** Class certified:

> All persons or entities who have purchased K-Dur 20 directly from Schering at any time during the period November 20, 1998, through September 1, 2001.
>
> Excluded from the proposed class shall be:
>
> Defendants and their officers, directors, management and employees, subsidiaries and affiliates, as well as federal government entities. Also excluded are persons or entities who have not purchased generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20.

(April 14 R&R, Doc. No. 636). On December 30, 2008, Judge Greenaway overruled the objections of Defendants and DP Plaintiffs to the April 14 R&R and adopted the R&R as the opinion of the Court. (Dec. 30, 2008 Order, Doc. No. 731).

[10] On January 24, 2005, Judge Greenaway granted final approval of a settlement between DP Plaintiffs and Wyeth. (Jan. 24, 2005 Order, Doc. No. 226). As part of the settlement, DP Plaintiffs agreed to the release and dismissal with prejudice of all claims against Wyeth and its related entities, including ESI. (DPP/Wyeth Settlement Agreement, Doc. 170-3).

[11] In the interest of brevity, the record citations herein regarding the factual background refer to the parties' statements filed pursuant to *Local Rule 56.1* and, unless necessary, do not separately identify each exhibit cited by the parties in their statements of fact. In addition, because the DPP Upsher Facts and the DPP ESI Facts restate each paragraph of Defendants' Upsher Facts and EST Facts, it is not necessary to cite separately to Defendants' Upsher Facts and ESI Facts.

dispersible potassium **[*22]** chloride tablet, was issued on September 5, 1989 and expired on September 5, 2006. (Schering Ans. to DPP Am. Compl. at P 24; DPP Uphser Facts, P 9).

The '743 Patent has 12 claims, all of which depend on or incorporate Claim 1. (DPP Upsher Facts, P 49; DPP '743 Facts, P 12; Def. '743 Facts, P 12). Claim 1 of the '743 Patent states:

> A pharmaceutical dosage unit in tablet form for oral administration of potassium chloride, comprising;
> a plurality of coated potassium chloride crystals, the amount of potassium chloride being in the range of about 64% to about 86.5% by weight based on the total weight of the dosage unit;
>
> a coating material for the individual potassium chloride crystals, the coating material comprising **[*23]** ethylcellulose in the amount in the range of about 9% to about 15% by weight based on the total weight of the coated crystals and at least one member selected from hydroxypropylcellulose and polyethylene glycol in an amount in the range of about 0.5% to about 3% by weight based on the total weight of the coated crystals and said ethylcellulose has a viscosity greater than 40 cp.

('743 Mem., Ex. 1 ('743 Patent) at Col. 8, line 18-Col. 10, line 21). With regard to tablets, the '743 Patent specification states, *inter alia,* "[t]he useful ethylcellulose designations are 7 and higher, corresponding to a viscosity of at least 6 cp, preferably more than 40 cp (designations 45 or higher) for crystals to be compressed into tablets." *(Id.* at Col. 4, lines 63-66).

3. <u>Development and Prosecution of the '743 Patent</u>

The sustained release potassium chloride tablet claimed in the '743 Patent was developed at Key by Charles Hsiao and Chi-Tze Chou using a technique called "microencapsulation." (DPP Upsher Facts, P 4). Microencapsulation is a process in which small particles of a drug are coated to give them sustained release properties. (DPP Upsher Facts, P 5). Tableting exposes the coated microcapsules **[*24]** to compression forces as the individual crystals are compressed into a tablet. *(Id.).* Dr. Hsiao and Ms. Chou used a coating consisting of insoluble ethylcellulose ("EC") with a viscosity of greater than 40 centipoise ("cp") and either hydroxypropylcellulose ("HPC") or polyethylene glycol ("PEG"). (DPP Upsher Facts, P 8). Viscosity is a property of fluid that refers to its resistance to flow. (DPP '743 Facts, P 14; Def. '743 Facts, P 14). The addition of HPC or PEG permits the potassium chloride to leach out through the EC coating. *(Id.).*

The '743 Patent issued from patent application No. 830,981 (the "'981 application"), filed February 19, 1986. (Schering Ans. to DPP Am. Complaint, P 29). The '981 application was a continuation-in-part of application No. 702,714 (the '714 application"), filed February 19, 1985. (DPP '743 Facts, P 19; Def. '743 Facts, P 19). As originally filed, Claim I of the '981 application did not contain any limitation on the viscosity grade of the ethylcellulose used in the coating material. (DPP Upsher Facts, P 50). In addition, as originally filed, Claim I described a "dosage unit" for oral administration of potassium chloride, and was not limited to a tablet **[*25]** dosage form. *(Id.).*

On August 31, 1988, the Patent and Trademark Office ("PTO") rejected the then-pending claims of the '981 application based on Patent No. 4,555,399 (the '399 Patent") and other prior art. (DPP '743 Facts, P 28; Def. '743 Facts, P 28). The '399 Patent had previously been granted to Dr. Hsaio for a controlled release tablet aspirin tablet in which aspirin crystals are coated with EC and HPC and compressed into tablet form. (DPP Upsher Facts, P 51; DPP '743 Facts, P 23; Def. '743 Facts, 23). Example 1 of the '399 Patent describes the use of Ethocel N-10 (Dow), an EC with a viscosity of 9-11 cp. (Upsher/ESI Opp., Ex. 167 ('399 Patent) at Col. 3, line 8; '743 Mem., Ex. 2 (Feb. 27, 1989 Amendment) at 5). However, DP Plaintiffs dispute that the '399 Patent limited the claimed invention in any way to 9-11 cp ethylcellulose. (DPP Upsher Facts, P 51).

After the PTO's August 31, 1988 rejection, Key filed a response that included an amendment to Claim 1 and arguments in support of patentability. (DPP Upsher Facts, P 52). Key amended Claim 1 by specifying that the invention was a "tablet" and by adding the phrase "said ethylcellulose has a viscosity greater than 40 cp" at the end **[*26]** of Claim 1. (DPP Upsher Facts, P 52-53; '743 Mem., Ex. 2 (Feb. 27, 1989 Amendment) at 1-2). In its remarks accompanying the amendment, Key stated, *inter alia,* that "the claims have been amended to more precisely define the claimed invention," and argued that a review of the prior art '399 Patent would not lead one skilled in the art to use EC with a viscosity of greater than 40 cp to make a sustained release potassium chloride tablet as claimed in the '981 application. (DPP Upsher Facts, P 54). Key further stated that the prior art '399 Patent disclosed only EC with a viscosity of 9-11 cp. *(Id.).* On March 31, 1989, the Patent Examiner granted Key the '743 Patent. (DPP Upsher Facts, P 55).

4. The Upsher Patent Litigation

On August 8, 1995, Upsher filed an ANDA with the FDA seeking permission to sell a generic version of K-Dur. (DPP Upsher Facts, P 12). Upsher's generic product, Klor-Con(c) M20, was a microencapsulated, controlled release 20mEq potassium chloride tablet. *(Id.* at 13). Upsher certified to the FDA that its product was bioequivalent to K-Dur and stated that its product was "the same as the reference drug, K-DUR." *(Id.* at 15-16). In its November 3, 1995 paragraph IV Certification **[*27]** Notice to Schering, Upsher claimed that its generic drug would not infringe the '743 Patent. (DPP Upsher Facts, P 17). Specifically, Upsher asserted that its product did not infringe Key's product because: (1) "the viscosity of ethyl cellulose employed in KLOR-CON(c) M is outside the range limited by claim 1 of the '743 patent;" and (2) "[t]he KLOR-CON(c) M product does not contain hydroxypropylcellulose." (Upsher Mem., Ex. 17 (Nov. 13, 1995 Patent Certification Notice) at 8-9). [12] Uphser's product used sorbitan monooleate ("SMO"). (DPP Upsher Facts, P 18). Upsher disputes "any implication that it used SMO in place of HPC or PEG," and disputes that the SMO used in Upsher's product was present in an amount corresponding to the claimed amount of HPC or PEG required by the claims of the '743 Patent. *(Id.).* In its Patent Certification Notice, Upsher also asserted that because, in its amendment of Claim 1, Key inserted a limitation of viscosity for EC of greater than 40 cp, prosecution history estoppel precluded Key from "assert[ing] the doctrine of equivalents in alleging that the KLOR-CON(c) M product infringes its claims." (Upsher Mem., Ex. 17 (Nov. 13, 1995 Patent Certification Notice) at 9-13).

On December 15, 1995, Key filed an action in the United States District Court for the District of New Jersey against Upsher alleging "willful and deliberate" infringement of the '743 Patent. (DPP Upsher Facts, P 19). The case was assigned to Judge Walls. *(Id.* at P 23). Key's action was timely commenced within the 45-day period specified in the Hatch-Waxman Act. *(Id.* at P 19). Upsher answered Key's complaint, denying infringement and alleging declaratory judgment counterclaims for patent invalidity, non-infringement and unenforceability. *(Id.* at P 23).

Discovery in the case included the exchange of tens of thousands of pages of documents and depositions of the inventors and patent attorneys from Key and Schering, as well as of the Upsher technical people and consultants who developed the Upsher formulation. *(Id.* at P 24). Schering retained as an expert, Dr. Gilbert S. Banker, dean of the University of Iowa College of Pharmacy. *(Id.* at P 25). Key retained as its technical expert, Dr. Christopher Rhodes, a co-editor with Dr. Banker of the textbook, **[*29]** *Modern Pharmaceutics. (Id.* at P 27). Drs. Banker and Rhodes each submitted expert reports, and both were deposed for multiple days. *(Id.* at P 28, 30). Dr. Banker opined that the '743 Patent was valid and infringed by Upsher's product; Dr. Rhodes opined that the '743 Patent was invalid and that the Upsher formulation was not equivalent to the claims of the '743 Patent. *(Id.* at 29).

On February 6, 1997, Upsher moved for summary judgment on the issue of non-infringement. *(Id.* at P 31). Upsher argued that Key was barred by prosecution history estoppel from claiming that the Upsher product was equivalent to the '743 Patent, and that no factual equivalency existed between its generic product and the claims of the '743 Patent. *(Id.* at P 31). In opposition to the Motion, Key argued that it was not barred by prosecution history estoppel from asserting equivalency, and that factual disputes existed regarding whether Upsher's formulation was equivalent to the '743 Patent. *(Id.* at P 32). Key separately moved for summary judgment on Upsher's affirmative defenses that the '743 Patent was unenforceable based on inequitable conduct before the PTO. *(Id.* at 34). Upsher opposed Key's motion on the ground **[*30]** that fact disputes concerning the alleged inequitable conduct precluded summary judgment. *(Id.* at P 35).

---

[12] Upsher's **[*28]** Patent Certification Notice also stated that "the KLOR-CON(c) M product does not contain magnesium stearate of polyvinylpyrolidone." *(Id.* at 9).

On June 17, 1997, Judge Walls held a hearing on certain motions, including Upsher's motion for summary judgment. ("743 Mem., Ex. 9). Trial in the **Key v. Upsher** matter was scheduled to being on June 18, 1997.

5. The Upsher Settlement

Upsher initiated contact with Schering to discuss settlement of the patent litigation. (DPP Upsher Facts, P 68). The first settlement meeting took place on May 21, 1997, with subsequent discussions between the parties occurring on May 28, June 3, and June 12, and June 16, 1997. (DPP Upsher Facts, PP 197, 199, 205; Def. Upsher Reply Facts, PP 197, 199, 205). In the early morning hours of June 18, 1997, the parties signed and finalized an agreement, dated June 17, 1997 (the "June 17 Agreement"), "as to the terms under which [Upsher and Schering, on behalf of itself and Key] will settle the *[Key v. Upsher]* action and will enter into a transaction licensing rights to certain Upsher-Smith products to an affiliate of Schering." (DPP Upsher Facts, P 208; Def. Upsher Reply Facts, P 208; Upsher Mem., Ex. 61 (June 17, 1997 letter from Raman Kapur to Ian Troup) at p. 1).

The **[*31]** terms of the June 17 Agreement pertinent to the instant Motions provided that: (1) Upsher would not market its Klor-Con(c) M20 product, or any other sustained release microencapsulated potassium chloride tablet, prior to September 1, 2001; (2) effective September 1, 2001, Schering would grant Upsher a non-royalty bearing non-exclusive license to market its Klor-Con(c) M20 and Klor-Con(c) M10 product in the United States; (3) Upsher would grant Schering licenses to Upsher's Niacor-SR(c) and five other Upsher products; [13] and (4) "[i]n consideration for the licenses, rights and obligations described in paragraphs 1 through 10" of the agreement, Schering would pay to Upsher a total of $ 60 million, comprised of $ 28 million payable upon approval of the agreement by Schering's Board of Directors, $ 20 million on the first anniversary of the approval date, and $ 12 million on the second anniversary of the approval date. [14] (Upsher Mem., Ex. 61 (June 17 Agreement) at PP 3, 7-11).

The parties dispute the facts regarding the *bona fides* of the Niacor-SR(c) license deal and the reasons it was included in the June 17 Agreement. DP Plaintiffs contend that the deal was effectively a sham and that all or part of the $ 60 million paid to Upsher by Schering under the Agreement was really for Upsher's agreement to delay the entry of its generic K-Dur. (Uphser Opp., pp. 37-66; DPP Upsher Facts, PP 72-106, 192-277). Schering contends that the Niacor-SR(c) license was a separately valued deal, that the $ 60 million was a good faith payment for rights Schering believed -- in its business judgment at the time -- were worth $ 60 million, and that the deal was included in the June 17 Agreement only after Schering was satisfied that the deal stood on its own merit. (Upsher Mem., pp. 41-66; Upsher/ESI Reply, pp. 18-27; DPP Upsher Fact, PP 72-106; **[*33]** 192-277).

6. The ESI Patent Litigation and Settlement

On December 29, 1995, ESI sought FDA approval to market a generic version of K-Dur. (DPP ESI Facts, p 3; Schering Ans. to DPP Am. Complaint, P 78). ESI's product was a sustained release tablet for oral administration of potassium chloride. It used the ingredients potassium chloride, EC and HPC in amounts within the ranges specified by Claim 1 of the '743 Patent. (DPP ESI Facts, P 4). ESI submitted a Paragraph IV Certification and notified Schering of its Paragraph IV Certification and ANDA filing. (Schering Ans. to DPP Am. Complaint, P 78).

On February 16, 1996, Schering (through Key) sued ESI in the United States District Court for the Eastern District of Pennsylvania, alleging that ESI's generic product infringed the '743 Patent. (DPP ESI Facts, P 5; Schering Ans.

---

[13] The five other Upsher products were KLOR CON(c) 8, KLOR CON(c) 10, KLOR CON(c) M20, PREVALITE(c), and Pentoxifylline. (Upsher Mem., Ex. 61 (June 17 Agreement) at PP 7-10).

[14] The Agreement also provided for milestone **[*32]** and royalty payments contingent upon Schering's sales of Niacor-SR(c). Subsequent to the June 17 Agreement, Schering decided not to pursue the Niacor-SR(c) opportunity, and Schering never marketed the drug. However, the facts regarding the reasons for Schering's decision are disputed. (DPP Am. Compl., P 74; Schering Ans. to Am. Compl., P 74).

to DPP Am. Compl., P 80). ESI argued that its product did not literally infringe the "743 Patent because ESI's product did not have a "coating material with different ingredients" as required by the '743 Patent. (ESI Opp., Ex. 145 (ESI Reply Mem. in Support of Defendant's Mot. for a Markman Ruling on Patent Claim Construction and/Or for Partial Summary Judgment of No Literal **[*34]** Infringement and Response to Plaintiff's Cross Motion) at p. 2). ESI stated that its "tablets are made by a completely different technology which produces a multi-layered coating with each layer comprised of a separate material having only a single ingredient." *(Id.* at p. 13).

In the Fall of 1996, Schering and ESI agreed to engage in court-supervised mediation. (DPP ESI Facts, P 7). The mediation session was suggested by the presiding District Judge, the Hon. Jan DuBois, to whom the case was assigned. *(Id.).* U.S. Magistrate Judge Thomas Rueter was appointed mediator. *(Id.).* During the mediation sessions, Magistrate Judge Rueter met with the parties both jointly and separately and urged them to settle. *(Id.* at P 8).

In December 1997, Schering obtained information from ESI concerning problems ESI had encountered in demonstrating the bioequivalence of its generic product to K-Dur, as required for approval of ESI's ANDA. (DPP Upsher Facts, P 9; Def. ESI Reply Facts, P 9; ESI Mem., Ex. 13 (Dec. 15, 1997 letter, AHP 05 00175)). The information showed that the FDA had twice rejected ESI's bioequivalence studies and that ESI's most recent effort to conduct a trial showing bioequivalence had **[*35]** begun on December 8, 1997. *(Id.).* Also in mid-December 1997, the parties discussed a proposed settlement whereby Schering would grant ESI a royalty free license to market its generic Micro-K(R) 20 product on December 31, 2003, and ESI would grant Schering licenses for certain ESI products in exchange for a $ 5 million up-front royalty fee plus additional royalty fees based on sales of the products. (DPP ESI Facts, PP 10-11; Def. ESI Reply Facts, PP 10-11).

Judge DuBois held a Markman hearing on January 21 and 22, 1998. (DPP ESI Facts, P 13). At the close of the January 22, 1998 session of the hearing, Judge DuBois told the parties:

> I want you to take this business decision, and it is a business decision and decide it without any more help than you're getting from Judge Rueter. I don't want you to use the adjudicatory powers of the Court.
> We're talking about the conciliatory services that the Court offers, and that's what I want you to use to resolve the case. I don't want to have to adjudicate either this case or the two-week long or longer trial of this case. I want you to try to do it.
>
> I think that's the best way to resolve a dispute of this kind, particularly since I think you can craft **[*36]** a settlement among yourselves.

(ESI Mem., Ex. 17 (Jan. 22, 1998 Tr.) at 139). At the end of the hearing, after summoning the parties to his chambers, Judge DuBois directed the parties to Magistrate Judge Rueter to try to settle the case. (DPP ESI Facts, P 13; ESI Mem., Ex. 18 (Herman 10/30/01 Dep.) at 129-130). [15]

The parties had another mediation session with Magistrate Judge Rueter on Friday, January 23, 1998, which began around 5:30 p.m. and continued until 11:30 p.m. (DPP ESI Facts, P 14). Participating in all or part of the session were three of Schering's counsel and one Schering executive, Martin Driscoll, who participated by phone in parts of the session while attending a New Jersey Nets basketball game with his children. *(Id.).* By the time of the January 23, 1998 mediation session, the parties had agreed to a $ 15 million license from ESI to Schering for ESI's two generic products, and ESI had indicated that it required money to settle the case. (DPP ESI Facts, P 15).

---

[15] In their Statement of Disputed Facts, DP Plaintiffs have asserted that certain of the statements cited in Defendants' Statement of Facts regarding the ESI Settlement are inadmissible hearsay. In this regard, I note that hearsay statements may be considered on summary judgment if the statements are capable of being admissible at trial. *Shelton v. Univ. of Med. & Dentistry, 223 F.3d 220, 223 n.2 (3d Cir. 2000)*. Moreover, to the extent that the statements are offered not to show the truth of the matter asserted, but to demonstrate their effect on the listener, they may be admissible. *See Marks v. Marina, 213 Fed. Appx. 147, 2007 U.S. App. LEXIS 479, at *10-11 (3d Cir. Jan. 10, 2007)* (court properly admitted evidence offered not for its truth, but to show the effect on the listener); *Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1434 (10th Cir. 1993)* ("statements offered for the effect on the listener **[*37]** . . . are generally not hearsay.").

Magistrate Judge Rueter encouraged Schering to pay ESI $ 5 million, which he characterized as "nothing more than legal fees." (DPP ESI Facts, P 16-17). During the January 23, 1998 mediation session, Magistrate Judge Rueter called Mr. Driscoll three times at the basketball game. In those calls, Magistrate Judge Rueter told Mr. Driscoll that he had been instructed by the court to reach a settlement that night and that if the parties did not reach a settlement that night, the judge wanted the parties **[*38]** in court at 8 a.m. the next day. (DPP ESI Fact, P 16-18; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2707-11; ESI Mem., Ex. 19 (Driscoll Dep.) at 295; ESI Mem., Ex. 20 (Driscoll I.H. Tr.) at 105-7). Magistrate Judge Rueter also called John Hoffman, Schering's then in-house antitrust counsel, at home and asked Schering to pay ESI $ 5 million. (DPP ESI Facts, P 17; ESI Mem., Ex. 10 (Hoffman Dep.) at 328, 330; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2618-20). Prior to and during the mediation, ESI requested more than $ 5 million to settle the case. (DPP ESI Facts, P 18).

During the January 23 session, Magistrate Judge Rueter urged Mr. Driscoll to settle and emphasized that he thought the parties could reach a middle ground. (DPP ESI Facts, P 18; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2707-11). Mr. Driscoll expressed his belief that ESI might have difficulty getting its product approved and discussed with Magistrate Judge Rueter a proposal under which Schering would pay ESI a certain amount if ESI's ANDA was approved by a certain date, and a lesser amount if ESI received approval at a later date. (DPP ESI Facts, P 19; ESI Mem., Ex. 19 (Driscoll Dep.) at 295-96; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2711-12). **[*39]** Magistrate Judge Rueter discussed the proposal with Mr. Hoffman, and characterized it as a "bet." (DPP ESI Facts, P 21; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2620). Regarding Schering's doubt that ESI would receive FDA approval, Magistrate Judge Rueter told Mr. Hoffman that he should "put [his] money where [his] mouth is," and stated that if Schering's concern was correct, the proposal wouldn't cost Schering anything. (DPP ESI Facts, P 22; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2621).

The January 23, 1998 mediation session concluded with the parties' agreement that Schering would pay ESI $ 10 million if its ANDA was approved by July 1999, with Schering's payment incrementally decreasing to $ 625,000 if ESI's ANDA was approved in 2002. (ESI Mem., Ex. 16 (C+B-2 002196-97) at P II). The parties further agreed that Key would grant ESI a "royalty free, non-exclusive license under US Patent '743 beginning 1/1/04." *(Id.* at P VI). Once the terms had been agreed to by Schering and ESI, Magistrate Judge Rueter called the participants into chambers and asked them to put the terms in writing and initial or sign them. (DPP ESI Facts, 24; ESI Mem., Ex. II (FTC Trial Tr.) at 2621). Counsel for ESI prepared **[*40]** a handwritten document summarizing the settlement principles. (ESI Mem., Ex. 16 (C+B-2 002196-97); ESI Mem., Ex. 8 (FTC Trial Tr.) at 2488-89; 2537). The document was prepared, and was signed by representatives of Key and ESI, in the presence of Magistrate Judge Rueter. *(Id.).*

Schering and ESI signed a formal settlement agreement in June of 1998. (DPP ESI Facts, P 26). Among its terms, the Agreement provided that: (1) Key would grant to ESI a non-exclusive, royalty-free license, effective January 1, 2004, to market a "Referencing Product" [16] (ESI Mem., Ex. 24 (Settlement Agreement) at P 3.1(a)(i)); (2) except with respect to a Referencing Product for which ESI was permitted to seek FDA approval pursuant to the Agreement, ESI would not, prior to the expiration of the '743 Patent: (i) apply for, sponsor or support an application for AB rating for any potassium chloride product with respect to K-Dur, or (ii) conduct, sponsor, file or support a substitutability or equivalence study of a potassium chloride product with respect to K-Dur *(id.* at P 2.9); and (3) Key would pay to ESI $ 5 million plus an additional sum ranging from $ 10 million, if ESI's ANDA received FDA approval by June 30, **[*41]** 1999, to $ 625,000, if ESI received approval in 2002 *(id.* at P 4.1). In the Agreement, ESI represented that it was not "developing, or currently intends or plans to develop, a potassium chloride product, other than an ESI KCI Product or other potassium chloride products" that it already made. *(Id.* at P 2.8).

ESI received FDA approval for its generic K-Dur product in May 1999, and Schering paid ESI the $ 10 million required under Paragraph 4.1(b) of the Settlement Agreement. (DPP ESI Facts, P 21). In July 2001, ESI announced

[16] The Agreement defined a "Referencing Product" as an ESI KCI Product, a potassium chloride product that is the subject of an ANDA or NDA that references a Key NDA, or a potassium chloride product marketed by ESI as equivalent to, or otherwise substitutable on a generic basis for, K-Dur. (ESI Mem., Ex. 24 (Settlement Agreement) at P 1.2). An ESI KCI Product was defined as the 20 Meq extended release potassium chloride tablet described in Key's ANDA. *(Id.).*

that it was exiting the oral generic business altogether, and in 2002, ESI left the oral generics market. (DPP ESI Facts, P 28).

7. The FTC Action

On March 30, 2001, the Federal Trade Commission ("FTC") filed a complaint **[*42]** against Schering, Upsher and AHP (the "FTC Action"). (DPP ESI Facts, P 29). The complaint alleged, *inter alia,* that Schering's settlements with Upsher and ESI unreasonably restrained commerce and constituted unfair methods of competition in violation of *Section 5 of the Federal Trade Commission Act* (the "FTC Act"). (ESI Mem., Ex. 29 (FTC Complaint) at PP 68-69). The complaint further alleged that Schering monopolized and conspired with Upsher and ESI to monopolize the potassium supplement market. *(Id.* at P 70-71).

Between January and March 2002, the FTC Action was tried before an Administrative Law Judge ("ALJ"). *In re Schering-Plough, 2002 FTC LEXIS 40, *6 (June 27, 2002)* *("Schering-ALJ").* The trial before the ALJ included the testimony of 41 witnesses, thousands of exhibits, and resulted in 8,629 pages of transcript. *Id.* On June 27, 2002, the ALJ issued a lengthy decision -- including 431 findings of fact -- ruling that the Upsher and ESI Agreements were lawful settlements of legitimate patent disputes and dismissing the FTC complaint. *Id. at *8-9*. *See also* *Schering, 402 F.3d at 1061*. The ALJ ruled that the theories advanced by the FTC required a presumption that the '743 Patent was not **[*43]** valid or that Upsher's and ESI's products did not infringe the patent. *Id. at *8-9*. *See also* *Schering, 402 F.3d at 1061*. The ALJ concluded that there was "no basis in law or fact to make that presumption." *Schering-ALJ, 2002 FTC LEXIS 40, at *9*. The ALJ further concluded that a *per se* antitrust analysis of the agreements was not appropriate. *Id. at *219-33*. Rather, applying a rule of reason analysis, the ALJ emphasized the need to consider the exclusionary power of the patent at issue. *Id. at *235-43* ("Application of ***antitrust law*** to markets affected by exclusionary statutes such as the Patent Act cannot ignore the rights of the patent holder.") Considering the exclusionary power of the '743 Patent and the inability to predict the outcome of the patent litigation, the ALJ rejected the FTC's argument that, absent Schering's payments to Upsher and ESI, the generics could have entered the market earlier. *Id. at *242-43*.

The FTC's complaint counsel appealed to the full Commission, which reversed the ALJ. *In re Schering-Plough Corp., 2003 FTC LEXIS 187 (Dec. 8, 2003)* *("Schering-FTC").* Although the Commission refrained from holding that Schering's payments to Upsher and ESI made the settlements **[*44]** *per se* illegal, it also declined to apply the full rule of reason analysis employed by the ALJ. *Id. at *13, 22-27*. Instead, under the analysis adopted by the Commission, once the FTC demonstrates the agreements' anticompetitive effects, the "respondents must demonstrate that the challenged provisions are justified by procompetitive benefits that are both cognizable and plausible." *Id. at *14*. The Commission ruled that the FTC had demonstrated the anticompetitive effect of the agreements, and reasoned that "[a]bsent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise." [17] *Id. at *16, 52*. Although the FTC ostensibly used a truncated rule of reason analysis, it essentially indicated that any settlement involving reverse payments over $ 2 million (an estimated cost of legal fees) would be *quid pro quo* for market delay and, thus, illegal. *Id. at *175-76*. The FTC further rejected the ALJ's conclusion that the licenses granted to Schering under the agreements were adequate consideration for the payments made by Schering, **[*45]** ruling instead that the payments were for delay. *Id. at *15-16*.

The Defendants chose to appeal the FTC's decision to the Eleventh Circuit, which reversed the Commission. *Schering, 402 F.3d at 1068*. The Eleventh Circuit's decision in *Schering,* and its previous decision in *Valley Drug*

---

[17] Although the FTC found both the Upsher and ESI Agreements unlawful, it noted the limited evidence presented regarding the ESI settlement and stated that "[a]s a matter of prosecutorial discretion, we might not have brought a stand-alone case based on such relatively limited evidence." *Schering-FTC, 2003 FTC LEXIS 187, at *166*.

Co. v. Geneva Pharms., 344 F.3d 1294 (11th Cir. 2003), *cert. denied, 543 U.S. 939, 125 S. Ct. 308, 160 L. Ed. 2d 248 (2004)*, are discussed, *infra.*

III. DISCUSSION

A. The Parties' Motions

1. Defendants' Upsher and ESI Motions

In their Motions, Defendants contend that unless DP Plaintiffs can show either: (1) that Schering's underlying patent litigation was "objectively baseless"; (2) that the '743 Patent was procured by fraud; or (3) that terms of the settlements extended the patent's coverage beyond the patent's potential exclusionary scope, the Upsher and ESI Settlements were lawful, even if they did include "reverse **[*46]** payments" to Upsher and ESI Defendants argue that under the foregoing standard, DP Plaintiffs cannot establish that Schering's patent infringement suits were baseless. According to Defendants, the patent litigation with Upsher and ESI involved disputed issues of fact and law such that Schering's claim of infringement could not possibly be deemed objectively baseless. Therefore, Defendants argue, summary judgment must be granted in their favor.

With respect to the Upsher Settlement, Defendants further argue that DP Plaintiffs cannot show that there was a "reverse payment" to Upsher and, thus, their antitrust claim must fail. In short, Defendants contend that because the $ 60 million Schering paid Upsher was fair value for the Niacor license -- and not a net payment for delay of Uphser's generic K-Dur -- there can be no antitrust violation.

In their opposition to Defendants' Upsher and ESI Motions, and in their separate Framework Motion, DP Plaintiffs contend that the legal standard proposed by Defendants is incorrect. DP Plaintiffs argue that the correct framework is either a *per se* analysis, or what they term the "FTC/Hovenkamp approach." Under the framework proposed by DP Plaintiffs, **[*47]** settlement agreements involving reverse payments would be subject to a rebuttable presumption of illegality, which could be overcome by proof of a pro-competitive justification for the payment. With respect to whether the payments to Niacor were, in fact, "reverse payments," DPPs argue that the question of whether Schering paid more than fair value for the Niacor license is a "quintessential factual issue" which cannot properly be decided on summary judgment.

In addition to Defendants' two primary summary judgment arguments summarized above, Defendants contend that DP Plaintiffs have failed to present sufficient evidence of an actual anticompetitive effect on the relevant product market resulting from the settlement. According to Defendants, all generic potassium chloride supplements are interchangeable with K-Dur and, thus, must be included in the relevant market. Defendants argue that because DP Plaintiffs have failed to prove the relevant market, they cannot prove that the Upsher Settlement caused any anticompetitive effects in that market.

In response to Defendants' arguments regarding the relevant market, DP Plaintiffs contend that the anticompetitive effects of delayed generic **[*48]** are indisputable, have been admitted by Schering, and can be proved by direct evidence that eliminates a need for the "relevant market" analysis urged by Defendants. DP Plaintiffs further argue that if a market definition is required, the relevant market cannot simply include all potassium chloride supplements that may be therapeutic substitutes for K-Dur. Rather, they argue, the market consists of K-Dur and its AB-rated equivalents.

Finally, Defendants contend that they are entitled to summary judgment on DP Plaintiffs' damages claims on two grounds. First, Defendants argue that this is not a price-fixing case and DP Plaintiffs cannot claim "overcharge" damages because, as distributors, they were not overcharged for K-Dur but, rather, were allegedly prevented from buying additional products, *i.e.,* generic versions of K-Dur. Defendants argue that the proper measure of damages under these circumstances is lost profits, and that DP Plaintiffs have failed to offer any evidence of such damages.

Second, Defendants contend that DPPs have no claim for damages for K-Dur purchases that were subject to generic bypass.

In response, DP Plaintiffs assert that overcharge damages have long been the **[*49]** standard remedy for direct purchasers suing for antitrust violations. With respect to generic bypass, DPPs contend that Defendants' position is inconsistent with the only published decision on the issue, as well as with the principles underlying the antitrust laws. (Upsher Opp., p. 78 (citing *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 368-70 (D. Mass. 2004)*. DP Plaintiffs further argue that even if an adjustment for bypass were required, it would not affect the amount of overcharges suffered by the Plaintiff Class.

2. DPPs' '743 Motion

DP Plaintiffs also seek partial summary judgment as to the exclusionary scope of Schering's '743 patent. This motion has two principal components. First, DPPs argue that under the doctrine of prosecution history estoppel and the "All Elements Rule," the scope of the '743 patent cannot extend to exclude Upsher's generic product. DPP's second contention is that, by its express terms, the Schering/Upsher Settlement Agreement exceeds the exclusionary scope of the '743 patent. Specifically, DPPs contend that the terms of the agreement prevent Upsher not only from selling the allegedly infringing Klor Con M, but also "any other sustained release microencapsulated **[*50]** potassium chloride tablet," irrespective of whether such products infringed Schering's patent.

B. Summary Judgment Standard

Motions for summary judgment are governed by *Federal Rule of Civil Procedure 56*. "Summary judgment is appropriate under *Fed. R. Civ. P. 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law." *Med Alert Ambulance, Inc. v. Atlantic Health Sys., Inc., No. 04-1615 (JAG), 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335, *2 (D.N.J. Aug. 6, 2007)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*.

Under *Rule 56(c)*, the moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex, 477 U.S. at 323 (1986)* (quoting *Fed. R. Civ. P. 56*). "Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists." **[*51]** *Med Alert, 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335 at *3* (citing *Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109 (3d Cir. 1985))*. The party opposing the motion may not rest upon mere allegations or denials of the pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. *See* also *Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999)* ("Speculation and conclusory allegations do not satisfy [the nonmoving party's] duty.").

"'A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial.'" *MedAlert, 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335 at *3* (quoting *Gleason v. Norwest Mortg., Inc., 243 F.3d 130, 138 (3d Cir. 2001))*. *See also* *Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431, 443 (D.N.J. 2006)* ("A dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'") (quoting *Anderson, 477 U.S. at 248*). In addition, "[a] fact is 'material' only if it might affect the outcome of the suit under the applicable rule of law." *Id.*

C. Traditional Antitrust Analysis

Section 1 of the Sherman Act **[*52]** declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is ... illegal." 15 U.S.C. § 1. It is well-settled, however, that this provision outlaws only unreasonable restraints of trade. *See* State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). In order to determine whether an "unreasonable restraint" of trade has taken place, courts have traditionally used one of two different analyses: the *per se* rule and the rule of reason. *See* State Oil Co., 522 U.S. at 10.

The *per se* analysis applies only under circumstances where courts have previously considered the type of conduct and found that its expected effects are overwhelmingly anticompetitive and have little prospect of yielding any pro-competitive benefit. *Id.* For a *per se* analysis to apply, the courts must have adequate judicial experience with the type of conduct at issue and must have found that it yields anticompetitive effects in the vast majority of cases (almost one-hundred percent of the time). *See* Herbert Hovenkamp, *Sensible Antitrust Rules for Pharmaceutical Competition,* 39 U.S.F. L. Rev. 11, 19-20. **[*53]** Under the *per se* approach, a court can condemn the action as a *per se* illegal restraint on trade "without elaborate inquiry into the defendant's market power, the actual anticompetitive effects of the restraint in a particular case, or the rationales offered for it." Id. at 20. The *per se* analysis applies to only a few types of conduct, including "naked" exit payments (those payments made solely to keep a competitor out of the market), market-division agreements, and price fixing. Id. at 20-21.

In most cases, where the conduct is not so clearly anticompetitive, courts use the rule of reason analysis. Further, courts have begun to realize that categorization of conduct often is not clear cut, id. at 20-21, and that "[t]here is always something of a sliding scale in appraising reasonableness." Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 780, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). In the rule of reason analysis, "'the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, **[*54]** nature, and effect.'" In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 201 n.13 (2d Cir. 2006), *cert. denied sub. nom.*, *Joblove v. Barr Labs, Inc., 551 U.S. 1144, 127 S.Ct. 3001, 168 L. Ed. 2d 726 (2007) ("Tamoxifen II")* (quoting State Oil Co., 522 U.S. at 10). [18]

Courts have divided the rule of reason analysis into three parts, which involve burden-shifting between the two parties. First, the plaintiff must show that the conduct has produced adverse, anti-competitive effects within the relevant market. U.S. v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993). *See also* Tamoxifen II, 466 F.3d at 201 n. 13. If the plaintiff is able to prove this effect, then the burden shifts to the defendant, who must attempt to prove that the conduct "promotes a sufficiently pro-competitive objective." Id. If the defendant meets this standard, the burden then shifts back to the plaintiff to prove that the restraint is not reasonably necessary **[*55]** to achieve the pro-competitive objective. *Id.*

In addition to the *per se* and rule of reason standards, a third type of analysis has evolved: the "quick look" or "truncated rule of reason." *See* Fed. Trade Comm 'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). The truncated rule of reason analysis permits the plaintiff to shift the burden to the defendant more quickly, once the plaintiff has shown that the defendant has engaged in conduct similar to those practices falling into the per se category, e.g., restraints on price, output or customers. *Id.* The plaintiff need not establish the relevant market or the defendant's market power, but the defendant has the opportunity to demonstrate pro-competitive justifications and efficiencies. *Id.*

D. Analyses Applied By Other Courts to "Reverse Payment" Settlements

To date, only a few courts have considered the issue of what analytical framework should be applied to antitrust claims involving reverse payment settlements of patent litigation by pioneer and generic drug companies. Although

[18] The opinion in *Tamoxifen II* amended and superseded In re Tamoxifen Citrate Antitrust Litig., 429 F.3d 370 (2d Cir. 2005) *("Tamoxifen I"). Tamoxifen II* predominantly made changes and corrections to the citations in the *Tamoxifen I* opinion, but did not modify the court's analysis or holding.

one Circuit Court has applied a *per se* analysis, the other courts that have considered this issue have adopted approaches that focus on the exclusionary scope **[*56]** of the patent at issue. The reasoning of these cases is summarized below.

1. The Sixth Circuit's *Per Se* Analysis

The Sixth Circuit was the first federal appellate court to consider the legality of a settlement involving a reverse payment. *In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)*, *cert. denied, 543 U.S. 939, 125 S. Ct. 307, 160 L. Ed. 2d 248 (2004)*. In that case, the brand name drug maker, Hochst Marion Roussel ("HMR"), manufactured and sold the drug Cardizem CD. *Id. at 901*. HMR's original patent for the active ingredient of Cardizem CD expired in late 1992. *Id.* In September 1995, a generic manufacturer, Andrx, Inc., filed an ANDA and submitted a Paragraph IV certification, stating that its drug did not infringe the patents covering Cardizem. *Id. at 902*. As the first ANDA filer, Andrx was eligible for the 180-day exclusivity period. *Id.* In November 1995, HMR received a new patent for Cardizem CD's "dissolution profile." *Id.* In January 1996, HMR sued Andrx for patent infringement, thus triggering the 30-month stay of FDA approval of Andrx's ANDA. *Id.* In September 1997, the FDA tentatively approved Andrx's ANDA, indicating that it would be finally approved upon the expiration of the stay or a court **[*57]** ruling of non-infringement. *Id.*

Shortly after the FDA granted tentative approval, HMR and Andrx entered into the agreement that was at issue in the case. *Id.* Among its terms, the agreement provided that Andrx would not market a generic version of Cardizem CD until the earliest of: (1) a final, unappealable determination in favor of Andrx in the infringement case; (2) HMR and Andrx entering into a license agreement; or (3) HMR entering into a license agreement with a third party. *Id.* Andrx further agreed not to "relinquish or otherwise compromise" its right to the 180-day exclusivity period. *Id.* In exchange, HMR agreed to make quarterly payments of $ 10 million to Andrx beginning on the date its ANDA received final FDA approval. *Id.*

On July 9, 1998, the FDA approved Andrx's ANDA, and HMR began making quarterly payments to Andrx. *Id. at 903*. Only in June 1999, after the FDA approved a reformulated generic version submitted by Andrx, did the two companies terminate their agreement and enter into a final settlement of the patent infringement suit. *Id.* At the time of the settlement, HMR made a further payment of $ 50.7 million to Andrx, bringing the total payments to more than $ 89 million. **[*58]** *Id.* On June 23, 1999, Andrx began marketing its generic product, triggering its 180-day exclusivity period. *Id.*

The court found that the parties' agreement was "at its core, a horizontal agreement to eliminate competition" and, thus, "a classic example of a *per se* illegal restraint of trade." *Id. at 908*. In finding the agreement *per se* illegal, the Sixth Circuit appeared particularly troubled by the fact that HMR's agreement with Andrx effectively used the 180-day exclusivity period to delay the entry of other generic competitors. In this regard, the court noted:

> By delaying Andrx's entry into the market, the Agreement also delayed the entry of other generic competitors, who could not enter the market until the expiration of Andrx's 180 period of exclusivity, *which Andrx had agreed not to relinquish or transfer.*

Id. at 907 (emphasis added).

2. The Eleventh Circuit Approach in *Valley Drug* and *Schering v. FTC*

Three months after the *Cardizem* decision, the Eleventh Circuit reached a different result in the case of *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003)*. *Valley Drug* involved separate settlement agreements between Abbott Laboratories and two generic **[*59]** competitors, Geneva Pharmaceuticals and Zenith Goldine Pharmaceuticals, which had filed ANDAs challenging Abbot's patents relating to Hytrin, a brand name hypertension drug marketed by Abbott since 1987. [19] *Valley Drug, 344 F.3d at 1298*. Abbott filed suit against Geneva alleging infringement of its '207 Patent. *Id. at 1299*. In the suit, Geneva admitted infringement but asserted that Abbott's patent was invalid. *Id.* Zenith filed its own lawsuit against Abbott seeking delisting of the '207 Patent and another Abbott patent (from the Orange Book), and requesting a declaratory judgment that its generic product did not infringe the two patents. *Id.* Abbott asserted counterclaims for infringement against Zenith. *Id.*

Abbott entered into an agreement with Zenith on March 31, 1998 and with Geneva one day later. The Zenith Agreement included the following terms: (1) both parties dropped their lawsuit claims; (2) Zenith acknowledged the validity of Abbott's patents and admitted that any generic **[*60]** terazosin product it might market would infringe those patents; (3) Abbott agreed to make quarterly payments of $ 6 million dollars to Zenith until March 1, 2000 or the termination of the agreement; (4) Zenith agreed not to market any product containing terasozin hydrochloride until Abbott's '207 patent expired on February 17, 2000; and (5) Zenith agreed not to transfer any of its ANDA rights, including the 180-day exclusivity period it earned as the first ANDA filer. *Id. at 1300*.

Similarly, under the terms of the Geneva Agreement: (1) Abbott agreed to pay Geneva $ 4.5 million per month until another manufacturer brought a terazosin product to market, or Abbott won the '207 patent infringement suit; (2) Geneva agreed not to market any terazosin product until a second patent expired in February 2000 or until it obtained a court judgment of non-infringement or invalidity in the '207 patent infringement suit; (3) Geneva agreed not to transfer its rights under the ANDA, including its 180-day exclusivity period; and (4) Geneva agreed to challenge any subsequent ANDA filer's attempt to enforce the "successful defense" requirement. *Id.* On September 1, 1998, the district court hearing Abbott's **[*61]** infringement suit against Geneva declared the '207 Patent invalid. *Id. at 1301* (citing *Abbott Labs. v. Geneva Pharms., Inc., 1998 U.S. Dist. LEXIS 13864, 1998 WL 566884 (N.D. Ill. Sept. 1, 1998))*. That decision was affirmed by the Federal Circuit, and Abbott's petition for certiorari was denied. *Id.* (citing *182 F.3d 1315 (Fed. Cir. 1999)* and *528 U.S. 1078, 120 S. Ct. 796, 145 L. Ed. 2d 671 (2000)*).

In the subsequent private antitrust action, the Eleventh Circuit reversed the district court's decision granting summary judgment against the defendants. [20] *Valley Drug, 344 F.3d at 1295*. The Eleventh Circuit concluded that the district court misapplied the law when it found the agreements to be *per se* antitrust violations. *Id. at 1295*. The court reasoned that the "exclusionary potential of the ['207] patent" shielded the agreements' effects from *per se* antitrust evaluation. *Id. at 1311*. Thus, because the '207 patent would not expire until 2014, the effect of the agreements on competition was "no broader than the potential exclusionary effect of the '207 patent, and was actually narrower to the extent [they] permitted Zenith [and Geneva] to market [their] drug[s] before the '207 patent expired." *Id. at 1305*.

While the court noted that the agreements resembled a horizontal market allocation, it recognized that the patent rights held by Abbott changed the evaluation. *Id. at 1304*. The court emphasized that the patent grant involves the right to exclude, which can lead to lawful agreements allocating the market geographically or by customer type. *Id. at 1304*. The court concluded that the district court erred when it focused on market allocation without considering the lawful exclusionary rights granted to Abbott under the '207 Patent. *Id. at 1305*.

The court further concluded that it was inappropriate **[*63]** to analyze the agreements under a traditional rule of reason framework because "the anticompetitive effects of exclusion cannot be seriously debated." *at 1311*. Rather, the court reasoned, a threshold analysis of the exclusionary scope of the patent must precede any specific antitrust

---

[19] Abbott had multiple patents relating to terazosin hydrochloride, the active ingredient in Hytrin. *Id.* The patents covered various forms of the terazosin hydrochloride compound and methods for using it. *Id.*

[20] On remand, the district court still applied a *per* ***[*62]*** *se* analysis and found the agreements at issue in *Valley Drug* to be *per se* illegal. *See* *In re Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005)*. However, in its subsequent decision in *Schering,* the Eleventh Circuit found the agreements in *Valley Drug* to be "wholly different" from the Upsher and ESI Agreements. *Schering, 402 F.3d at 1066, n.14*. The court noted that the "critical difference" is that the agreements in *Valley Drug* did not involve final settlements of the patent litigation, and did not permit the generic company to market its product before patent expiration. *Id.*

inquiry. *Id. at 1312*. If the terms of the agreements are found to have effects "beyond the exclusionary effects of Abbott's patent," they "may then be subject to traditional antitrust analysis to assess their probable anticompetitive effects in order to determine whether those provisions violate *§ 1 of the Sherman Act*." *Id.*

The court identified a number of factors influencing its reasoning. First, it emphasized the competing regimes of patent and ***antitrust law***. *Id. at 1305-06*. Second, the fact that the '207 patent subsequently was found to be invalid was not dispositive. *Id. at 1308*. Rather, the court concluded, the "reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into." *Id. at 1306* (citing *Polk Bros. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985)*; *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1209 (2d Cir. 1981)*. Third, noting the "important **[*64]** role played by settlement in the enforcement of patent rights," the court rejected the notion that the mere existence or substantial size of a reverse payment was sufficient to trigger *per se* illegality, especially where the lack of any damages reduces the risk for the generic manufacturers in the infringement suit. *Id. at 1309-10* (citing *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 251-52 (E.D.N.Y. 2003)* *("Cipro I")* (discussing the asymmetries of litigation risk create by Hatch-Waxman and rejecting argument that payments from the patentee to the infringer are subject to *per se* antitrust analysis)).

(b) **Schering v. FTC**

In Schering's appeal of the *Schering-FTC* decision, the Eleventh Circuit reversed the FTC and reaffirmed the reasoning first set forth in *Valley Drug. Schering, 402 F.3d 1056*. The court restated its view that "neither the rule of reason nor the *per se* analysis is appropriate in this context." *Id. at 1065*. Recognizing the tension between the antitrust and patent laws, the court observed:

> By their nature, patents create an environment of exclusion, and consequently, cripple competition. the anticompetitive effect is already present. "What is required **[*65]** here is an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects."

Schering, 402 F.3d at 1065-66 (quoting *Valley Drug, 344 F.3d at 1311, n.27*). Clarifying the standard it adopted in *Valley Drug,* the court explained that "the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects." *Id. at 1066*. Applying the foregoing analysis to the Upsher and ESI agreements, the Eleventh Circuit found them well within the scope of the patent and thus legal patent settlements.[21] *Id. at 1076*. In reaching this conclusion, the court emphasized the fact that the agreements permitted Upsher to enter the market more than five years before the '743 Patent expired, and ESI to enter the market more than two years before the expiration of the patent. *Id. at 1067-68*. The court further noted that "there has been no allegation that the '743 patent itself is invalid or that the resulting infringement suits against **[*66]** Upsher and ESI were 'shams.'" *Id. at 1068*. The court rejected the FTC's contention that, absent the payments to Upsher and ESI, the parties could have "simply compromised" on earlier entry dates. Finding no evidence in the record to support this conclusion -- which the court viewed as "somewhat myopic" -- the court reasoned:

> It is uncontested that parties settle cases based on their perceived risk of prevailing in and losing the litigation. Pre-Hatch-Waxman, Upsher and ESI normally would have had to enter the market with their products, incurring the costs of clinical trials, manufacturing and marketing. This market entry would have driven down Schering's profits, as it took sales away. As a result, Schering would have sued ESI and Upsher, seeking damages for lost profits and willful infringement....
>
> By contrast, the Hatch-Waxman Amendments grant generic manufacturers standing to mount a challenge without incurring the cost of entry or risking enormous damages flowing from any possible infringement. *See In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 251 (E.D.N.Y. 2003)*. Hatch-Waxman

[21] The Eleventh Circuit also rejected the FTC's conclusion that the Niacor license was not worth $ 60 million, but was a payment to keep Upsher off the market, and stated that the FTC's conclusion was "not supported by law or logic." *Id. at 1070*.

> essentially redistributes the relative risk assessments and explains the flow **[*67]** of settlement funds and their magnitude. *Id.* Because of the Hatch-Waxman scheme, ESI and Upsher gained considerable leverage in patent litigation: the exposure to liability amounted to litigation costs, but paled in comparison to the immense volume of generic sales and profits. This statutory scheme could then cost Schering its patent.
>
> By entering into the settlement agreements, Schering realized the full potential of its infringement suit -- a determination that the '743 patent was valid and that ESI and Upsher would not infringe in the future. Furthermore, although ESI and Uphser obtained less than they what they would have received from successfully defending the lawsuits (the ability to immediately market their generics), they gained more than if they had lost. A conceivable compromise, then, directs the consideration from the patent owner to the: challengers. *Id.*

Schering, 402 F.3d at 1074.

Noting the "private and social benefits" of settlements **[*68]** in avoiding the "the inveterate and costly effects of litigation," the court reiterated its view that neither the presence of a reverse payment, nor its size, should "dictate the availability of a settlement remedy." *Id. at 1075* (citing D. Crane, *Exit Payments in Settlement of Patent Infringement Lawsuits; Antitrust Rules and Economic Implications,* 54 Fla. L. Rev. 747, 760 (2002). The court further reasoned that "[a]n exception cannot lie, as the [FTC] might think, when the issue turns on validity *(Valley Drug)* as opposed to infringement (the Schering agreements)." *Id. at 1075-76*.

3. The Second Circuit's *Tamoxifen* Decision

In *Tamoxifen II,* the Second Circuit considered a "reverse payment" settlement between the pioneer drug company, Zenica, [22] and generic manufacturer Barr Laboratories. [23] *Tamoxifen II, 466 F.3d at 190*. Zeneca held the patent rights to and manufactured tamoxifen citrate, a leading breast cancer drug. *Id. at 193*. Barr filed an ANDA for a generic version of tamoxifen, which it amended in 1987 to include a Paragraph IV certification. *Id.* After Zeneca timely sued Barr and Barr's raw material supplier for patent infringement, the district court declared Zeneca's patent invalid **[*69]** based on its conclusion that Zeneca deliberately withheld information from the PTO. *Id.* Zeneca appealed the invalidity decision, and in 1993, while the appeal was pending, the parties entered into a settlement agreement. *Id.*

Under the agreement's principal terms: (1) Barr agreed not to market its generic version of tamoxifen until Zeneca's patent expired in 2002 and thus amended its ANDA to a Paragraph III certification; (2) Barr received a non-exclusive license to sell tamoxifen tablets manufactured by Zeneca under Barr's own label; (3) Zeneca agreed to pay Barr $ 21 million plus an additional $ 45 million over ten years to Barr's raw material supplier; and (4) the parties agreed that if Zeneca's patent were subsequently declared invalid or unenforceable in a final, **[*70]** unappealable judgment, Barr would be allowed to revert to a Paragraph IV certification. *Id. 193-94*. In addition, pursuant to the settlement, the parties jointly moved for *vacatur* of the district court's patent invalidity judgment, which motion was granted by the Federal Circuit. *Id. at 194*.

The validity of Zeneca's patent was subsequently challenged by three other ANDA filers, all of whom were unsuccessful in their attempts to rely on the vacated invalidity judgment. *Id. at 195*. In each case, the court upheld the validity of Barr's patent. *Id.* In the meantime, the "successful defense" rule was invalidated, and Barr became

---

[22] Zeneca refers collectively to Imperial Chemical Industries, PLC ("ICI") and its former subsidiaries, Zeneca, Inc., AstraZeneca Pharmaceuticals LP, and Astra Zeneca PLC, which succeeded to ICI's rights to the patent at issue. *Tamoxifen II, 466 F.3d at 190, 193*.

[23] The case was before the Second Circuit on plaintiffs' appeal of the district court's dismissal of their antitrust claims pursuant to *Fed. R. Civ. P. 12(b)(6)*. *Id.*

eligible for the 180-day exclusivity period, which would only be triggered by Barr marketing its own generic version of tamoxifen. *Id. at 195-96*. In March 1999, the FDA confirmed Barr's entitlement to the exclusivity period. *Id. at 196*.

The private antitrust plaintiffs alleged that the settlement agreement unlawfully: (1) enabled Zeneca and Barr to "resuscitate" a patent that had been held invalid and unenforceable; (2) perpetuated Zeneca's monopolization of the tamoxifen market and allowed Zeneca and Barr to share the monopoly profits; and (3) maintained artificially **[*71]** high prices for tamoxifen and prevented competition from other generic manufacturers. *Id. at 196-97*.

The Second Circuit affirmed the district court's dismissal of the antitrust complaint and upheld the legality of the settlement. *Id. at 197-99*. In reaching its decision, the court noted the tension between the antitrust laws and an innovator's right under patent law to exclude competition. *Id. at 201*. The court further emphasized "our longstanding adherence to the principle that 'courts are bound to encourage' the settlement of litigation." *Id. at 202* (citing *Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004)*. The court observed:

> It is well settled that '[w]here there are legitimately conflicting [patent] claims ..., a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act," although such a settlement may ultimately have an adverse effect on competition....
>
> Rules severely restricting patent settlements might also be contrary to the goals of the patent law because the increased number of continuing lawsuits that would result would heighten the uncertainty surrounding patents and might delay innovation.

Id. (quoting *Standard Oil Co. v. United States, 283 U.S. 163, 171, 51 S. Ct. 421, 75 L. Ed. 926 (1931)* **[*72]** (other citations omitted).

The court also declined to find the settlements unlawful based on plaintiffs' contention that the Federal Circuit would have affirmed the invalidity of Zeneca's patent. *Id. at 203-05*. "We cannot judge this post-trial, pre-appeal settlement on the basis of the likelihood *vel non* of Zeneca's success had: it not settled but rather pursued its appeal." *Id. at 203* (citing, *inter alia, Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 993 (N.D. Ill. 2003)* (Posner, J., sitting by designation) ("No one can be *certain* that he will prevail in a patent suit."); *In re Ciprofloxacin Hydrochloride Anitirust Litig., 261 F. Supp. 2d 188, 200-01 (E.D.N.Y. 2003)* (noting that courts should not speculate about the outcome of litigation); *Valley Drug, 344 F.3d at 1306* ("[T]he reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into.")).

Citing with approval the reasoning of the courts in *Cipro I, Valley Drug, Schering,* and *Asahi Glass,* the court further held that the mere existence of a reverse payment, especially in the context of the Hatch-Waxman Act, is not enough to trigger *per se* unlawfulness. *Id. at 205-6* **[*73]** (citing *Valley Drug, 344 F.3d at 1309*; *Asahi Glass, 289 F. Supp. 2d at 994*; *Cipro I, 261 F. Supp. 2d at 252*; *Schering, 402 F.3d at 1074*). While the court acknowledged that reverse payments may seem "suspicious," it reasoned that this "suspicion abates upon reflection." *Id. at 208*. Rather, the court held, *"so long as the patent litigation is neither a sham nor otherwise baseless,* the patent holder is seeking to arrive at a settlement in order to protect that to which it presumably entitled: a lawful monopoly." *Id. at 208-09* (emphasis added). In this sense, the settlement did not exceed the scope of the patent. *Id. at 209 n.22*.

The court also noted its general agreement with the Eleventh Circuit regarding the importance of analyzing the scope of the patent, and concluded: "Whatever damage is done to competition by settlement is done pursuant to the monopoly extended to the patent holder by patent law unless the terms of the settlement enlarge the scope of that monopoly." *Id. at 212*. The court agreed that "'[u]nless and until the patent is shown to have been procured by fraud, or a suit for its enforcement shown to be objectively baseless, there is no injury to the market cognizable under **[*74]** existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.'" *Id. at 213* (quoting *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 535 (E.D.N.Y. 2005)* *("Cipro II").*

4. *In re Cipro*

On October 15, 2008, the Federal Circuit Court of Appeals affirmed the district court's decision in *Cipro II* granting summary judgment in favor of the defendants. *In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed.*

Cir. 2008) *("Cipro III").* The facts of the *Cipro* case are generally similar to those of the cases discussed above. Bayer held a patent for the active ingredient in the branded drug Cipro, which patent had an expiration date of December 9, 2003. *Id. at 1327-28*. In 1991, Barr Labs, Inc. filed an ANDA with a paragraph IV certification for a generic version of Cipro. *Id. at 1328*. Thereafter, Bayer sued Barr for patent infringement. *Id.*

Shortly before trial, Bayer entered into settlements with Barr and other generic manufacturers. Pursuant to Bayer's settlement with Barr, Barr agreed to convert its paragraph IV ANDA to a paragraph III ANDA, thus certifying that it would not market its generic version of Cipro until after **[*75]** Bayer's patent expired. *Id. at 1328-29*. In exchange, Bayer agreed to make a settlement payment of $ 49.1 million to Barr. *Id. at 1329*. Under a separate "Cipro Supply Agreement," Bayer agreed to either supply Barr with Cipro for resale or make quarterly payments to Barr until December 31, 2003. *Id.* Barr, in turn, agreed not to manufacture, or have manufactured, a generic version of Cipro in the United States. *Id.* Beginning at least six months before the expiration of Bayer's patent, Bayer agreed to allow Barr to sell a competing ciprofloxacin product. *Id.* Bayer and Barr then entered into a consent judgment under which Barr affirmed the validity and enforceability of Bayer's patent and admitted infringement. *Id.*

In the subsequent antitrust action brought by indirect and direct purchasers, the district court granted summary judgment in favor of defendants. *Id. at 1329* (citing *Cipro II, 363 F. Supp. 2d at 548*). Using a rule of reason analysis, the district court first determined that the relevant market was ciprofloxacin and that Bayer had market power within that market. *Id. at 1330*. The court then concluded that "any adverse effects on competition stemming from the Agreements were within **[*76]** the exclusionary zone of [Bayer's patent], and hence could not be redressed by ***antitrust law***." *Id.* Having determined that there was no evidence that the Agreements "created a bottleneck on challenges to [Bayer's patent] or otherwise restrained competition beyond the scope of the patent," the district court concluded that the plaintiffs had failed to show that the Agreements had an anticompetitive effect beyond that authorized by the patent. *Id.*

Affirming the district court, the Federal Circuit distinguished the Sixth Circuit's decision in *Cardizem* and stated:

> We find . . . the district court's analysis to be sound .... [T]he district court applied a rule of reason analysis in assessing the lawfulness of the Agreements. In that analysis, it considered whether there was evidence of sham litigation or fraud before the PTO, and whether any anticompetitive effects of the Agreements were outside the exclusionary zone of the patent. The application of a rule of reason analysis to a settlement agreement involving an exclusion payment in the Hatch-Waxman context has been embraced by the Second Circuit, and advocated by the FTC and the Solicitor General. And, although the Sixth Circuit found **[*77]** a per se violation of the antitrust laws in *In re Cardizem,* the facts of that case are distinguishable from this case and from the other circuit court decisions. In particular, the settlement in that case included, in addition to a reverse payment, an agreement by the generic manufacturer to not relinquish its 180-day exclusivity period, thereby delaying the entry of other generic manufacturers. *In re Cardizem, 332 F.3d at 907*. Furthermore, the agreement provided that the generic manufacturer would not market non-infringing versions of the generic drug. *Id. at 908 n. 13*. Thus, the agreement clearly had anticompetitive effects outside the exclusion zone of the patent. [citation omitted] To the extent that the Sixth Circuit may have found a per se antitrust violation based solely on the reverse payments, we respectfully disagree.

Id. at 1335.

Citing with approval the approaches adopted by the Eleventh and Second Circuits, the Federal Circuit concluded:

> [I]n cases such as this, wherein all anticompetitive effects of the settlement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under ***antitrust law*** by applying a rule of reason **[*78]** approach to evaluate the anti-competitive effects, or under patent law by analyzing the right to exclude afforded by the patent. The essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent. This analysis has been adopted by the Second and Eleventh Circuits and by the district court below and we find it to be completely consistent with Supreme Court precedent.

Id. at 1336 (citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-77, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965) (holding that there may be a violation of the Sherman Act when a patent is procured by fraud, but recognizing that a patent is an exception to the general rule against monopolies). The court further noted its agreement with the Second and Eleventh Circuits that "in the absence of evidence of fraud before the PTO or sham litigation, the court need not consider the validity of the patent in the antitrust analysis of a settlement agreement involving a reverse payment." *Id.*

E. Framework Applicable to the Upsher and ESI Settlements

Having considered the analyses of the cases summarized above, I first conclude that the Upsher and ESI settlements were not *per se* unlawful. DP Plaintiffs' **[*79]** arguments that a *per se* approach is consistent with "traditional antitrust principles" and the legislative purpose of the Hatch-Waxman Act ignore the important purpose underlying the exclusionary rights granted by patent law. *See* Tamoxifen, 429 F.3d at 385; Cipro III, 544 F.3d at 1333. Moreover, with the sole exception of the *Cardizem* case, all of the courts that have considered so-called "reverse payment" settlements, as well as the FTC, have declined to apply a *per se* analysis. *See* Valley Drug, 344 F.3d at 1304; Schering, 402 F.3d at 1065; Tamoxifen II, 466 F.3d at 206; Schering-FTC, 2003 FTC LEXIS 187, at *13, 22-27. *But see* In re Cardizem, 332 F.3d at 908. To the extent that the *Cardizem* court reached a contrary conclusion, the facts of that case are distinguishable.

Unlike the interim settlement in Cardizem, Schering's settlements in this case finally resolved its litigation with Upsher and ESI. Moreover, the settlement agreements in this case permitted the Upsher and ESI generic products to enter the market five years and almost three years, respectively, before the expiration of Schering's '743 Patent. Finally, the agreements in this case did not manipulate the 180-day exclusivity **[*80]** period to create a "bottleneck" precluding the entry of other generic drugs. Upsher's settlement with Schering did not preclude Upsher from transferring or relinquishing the 180-day exclusivity and, because the "successful defense" requirement was in place at the time of the settlement, Upsher arguably was not entitled to the exclusivity period.

I further decline to adopt the "FTC/Hovenkamp" framework proposed by DP Plaintiffs, and note that Plaintiffs have not cited -- nor am I aware of -- any case that has applied this legal framework. The standard articulated by the FTC treats settlements involving reverse payments as presumptively anticompetitive, but purports to allow rebuttal of that presumption with a showing of the pro-competitive effect of the settlement. Schering-FTC, 2003 FTC LEXIS 187, at *57-58. However, the order entered by the FTC prohibited settlements in which the generic company "receives anything of value," with an exception for payments, limited to $ 2 million, linked to litigation costs. Id. at *176. Similarly, the framework suggested by Professor Hovenkamp applies a rebuttable presumption of illegality, which the infringement plaintiff can rebut by showing both "(1) that **[*81]** the *ex ante* likelihood of prevailing in the infringement lawsuit is significant, and (2) that the size of the payment is no more than the expected value of the litigation and collateral costs attending the lawsuit." *See* Herbert Hovenkamp et al., Anticompetitive Settlement of Intellectual Property Disputes, 87 Minn. L. Rev. 1719, 1759 (2003) (emphasis added).

Similar to a *per se* analysis, the FTC/Hovenkamp framework effectively discounts the fact that Schering's '743 Patent gave it the right to exclude infringing competitors. Moreover, it essentially requires a presumption that if the patent holder pays money to the generic company, the patent at issue must be either invalid or not infringed. In my view, the weight of authority counsels against adopting such a presumption. *See, e.g.,* Schering, 402 F.3d at 1066 (noting presumption of patent validity); Tamoxifen, 466 F.3d at 208-09; Cipro II, 363 F. Supp. 2d at 534-35 (declining to infer invalidity based on reverse payment).

I recognize that in this case, the key disputed issues in the patent case involved infringement, rather than validity. In this regard, DP Plaintiffs note that although patents are presumptively valid by statute; *see* **[*82]** 35 U.S.C. § 282, there is no corresponding presumption of infringement. *See* Framework Mem., p. 11. Thus, according the DP Plaintiffs, the probabilistic nature of patents is particularly relevant. *Id.* DP Plaintiffs further contend that Schering's payments to Upsher and ESI are *prima facie* evidence that the parties expected the litigation to result in more competition than was provided for under the settlement agreements. Plaintiffs' arguments are unpersuasive.

Although there is no presumption of infringement, neither is there a statutory presumption that Schering's patent was not infringed. *See* *Schering-FTC, 2003 FTC LEXIS 187, at *61* ("We cannot assume that Schering had a right to exclude Upsher's generic competition for the life of the patent any more than we can assume that Upsher had the right to enter earlier.") (emphasis added).

Accordingly, I decline to discount the exclusionary power of Schering's patent based on the *possibility* that it was not infringed by the Upsher and ESI products. *See* *Cipro II, 363 F. Supp. 2d at 514 and n. 19* (rejecting argument that exclusionary power of the patent should be discounted by the probability of an invalidity finding, and noting the applicability **[*83]** of its analysis to cases in which infringement is the dominant issue); *Tamoxifen, 466 F.3d at 211-12* (citing *Cipro II, supra*); *Asahi Glass, 289 F. Supp. 2d at 992-93* ("It is not 'bad faith' to assert patent rights that one is not certain will be upheld in a suit for infringement pressed to judgment and to settle the suit to avoid risking the loss of the rights. No one can be *certain* that he will prevail in a patent suit."). In addition, I conclude that it is inappropriate to conduct an *ex post* inquiry into infringement issues that were resolved by the parties' settlement. As the *Cipro II* court observed regarding issues of patent validity, "[s]uch an inquiry would undermine any certainty for patent litigants seeking to settle their disputes." *Cipro II, 363 F. Supp. 2d at 530*. *See also* Schering, 402 F.3d at 1072-73 (noting public policy favoring settlement of patent disputes); *Schering-FTC, 2003 FTC LEXIS 187, at *60* (expressing concern that "a mandated inquiry into [the merits of the patent case], as part of an antitrust review, would ultimately have a chilling effect on the efficient settlement of patent litigation").

Finally, I reject DP Plaintiffs' suggestion that Judge Greenaway **[*84]** previously weighed and rejected the analytical framework that has now been adopted by the Second, Eleventh and Federal Circuits. In his Sept. 29, 2004 opinion, Judge Greenaway denied Defendants' 12(b)(6) motion to dismiss, finding, *inter alia,* that Plaintiffs' had adequately *alleged* anti-competitive conduct. As summarized by Judge Greenaway, Defendants had argued that:

> Plaintiffs fail to allege that Defendants engaged in anti-competitive behavior by entering into the settlement agreements. [Defendants] argue that Plaintiffs have not established anti-competitive behavior because the settlement agreements in question do not have an anti-competitive effect. Rather, the settlement agreements are pro- competitive because they allowed Upsher and ESI to enter the market years before Schering's K-Dur patent expired, and such agreements, as a matter of law, are not antitrust violations. By not alleging that the settlements do not reasonably reflect the objective merits of the patent suits, or that Upsher or ESI would have won the patent suit, Plaintiffs have not stated anti-competitive behavior, and thus have no claim.

In re K-Dur, 338 F. Supp. 2d 517, 530-31. Defendants further argued that the **[*85]** settlements (and the payments by Schering allegedly for delay) could not be anti-competitive because Schering had a valid patent and, thus, was entitled to exclude generic competitors until the patent expired. Thus, according to Defendants, absent an allegation of patent invalidity or non-infringement, the entry dates in the agreement are beyond attack. *Id. at 531*.

Contrary to DP Plaintiffs' suggestion, Judge Greenaway did not decide that the framework DP Plaintiffs' now propose (or any other framework) would apply beyond the pleading stage, *i.e.,* at dispositive motions or trial. On the contrary, in denying Defendants' Motion to Dismiss, he stated that "[i]n this Court's view Plaintiffs can sustain a claim of anti-competitive conduct simply by *alleging* facts which show that the outcome of the settlement agreements would have been more pro-competitive absent the cash payments from Schering to Upsher and ESI." [24] *Id. at 532* (emphasis added). Moreover, Judge Greenaway noted the different standards that had been applied by the Sixth Circuit in *Cardizem* (reverse payments *per se* illegal) and the 11th Circuit in *Valley Drug* (rejecting *per se* approach), and expressly stated that he did not **[*86]** need to address whether Defendants' alleged conduct was

---

[24] As Judge Greenaway noted, his opinion addressed a Rule 12(b)(6) motion to dismiss and was decided under the framework of that rule, which treats all of Plaintiffs' allegations as true and draws all inferences in Plaintiffs' favor. *Id. at 527* (noting that Plaintiffs' alleged that but for the reverse payments, Upsher and ESI would have settled on different terms and entered the market sooner); 528 (noting the standard for 12(b)(6) and 12(c) motions); 529 (noting that there is no heightened pleading standard in antitrust cases); 533 (stating that Plaintiffs had sufficiently pled anti-competitive conduct and noting that, at pleading stage, court must consider defendants' pro-competitive justifications as unproven).

per se illegal. *Id. at 533*. Further, although he noted that the FTC had found the Defendants' conduct unlawful and stated that the FTC's findings were "of some interest," he also stated that the FTC's findings were not binding, and he did not adopt the standard used by the FTC in its analysis.

Finally, Judge Greenaway's decision was issued in 2004, before the 11th Circuit's decision in *Schering* and before the decisions **[*87]** of the Second and Federal Circuits following the 11th Circuit approach. Thus, the Circuit Court case law regarding the appropriate analytical framework has developed significantly since Judge Greenaway decided Defendants' motion to dismiss in 2004.

In summary, I will not adopt the FTC/Hovenkamp framework, but, rather, will apply an analysis consistent with the approach that has been adopted by the Second, Eleventh and Federal Circuits. Under that framework, as long as the Upsher and ESI settlements restrained competition only within the scope of Schering's patent, and the underlying patent lawsuits were not objectively baseless, Defendants are entitled to summary judgment on DP Plaintiffs' antitrust claims.

1. The Settlements Do Not Exceed the Exclusionary Scope of the '743 Patent

It is undisputed that the Schering's '743 Patent gave it the right to exclude infringing products until September 5, 2006. It is likewise undisputed that the Upsher Settlement permitted Upsher to market its generic product more than five years before the '743 Patent expired; and the ESI Settlement permitted ESI to market its generic product more than two years before the patent's expiration. Thus, with respect to **[*88]** the entry dates the parties agreed upon, the Upsher and ESI Agreements clearly were well within the exclusionary scope of the '743 Patent.

Having reviewed the Agreements and the record in this case, I further conclude that there is no evidence that any other aspects of the settlement exceeded the exclusionary scope of the '743 Patent. [25] In the Upsher Settlement, Upsher agreed not to market Klor-Con M20(c) or "any other sustained release microencapsulated potassium chloride tablet," prior to Sept. 1, 2001. DP Plaintiffs' contend that by virtue of the above-quoted language, the agreement precluded Upsher from marketing non-infringing products and exceeded the scope of the patent. I disagree. First, there is no evidence in the record that Upsher had developed or planned to develop and market "any other sustained release microencapsulated potassium chloride tablet." Absent evidence that any other such generic product existed or was contemplated by Upsher, there is simply no basis upon which to conclude that the terms of the Upsher Agreement exceeded the scope of the '743 Patent. Moreover, I note that in *Schering,* the Eleventh Circuit determined, on the record before it, [26] that the Upsher, **[*89]** Agreement's restraint covering "sustained release microencapsulated potassium chloride tablet[s]" covered the "identical reach of the '743 patent" and was a lawful ancillary restraint. *Schering, 402 F.3d at 1072* ("Ancillary restraints are generally permitted if they are 'reasonably necessary' toward the contract's objective of utility and efficiency.").

With respect to the ESI Agreement, DP Plaintiffs have not even argued that its terms exceed the exclusionary scope of the patent. Although the terms of the ESI Settlement included ESI's agreement not to conduct, sponsor or support an application for AB rating or equivalence study for a potassium chloride product with respect to K-Dur, ESI also expressly stated in the agreement that neither it nor any of its affiliates were developing, or planned or

[25] Contrary to DP Plaintiffs' argument, Judge Greenaway did not decide that the terms of the Upsher and ESI Settlements exceeded the exclusionary scope of Schering's patent. Rather, he merely concluded that Plaintiffs had *alleged* that the settlement agreements exceeded the scope of the patent. *In re K-Dur, 338 F. Supp. 2d at 532*.

[26] The record in *Schering* included the ALJ's factual finding that the quoted language was included in the settlement so that "Upsher-Smith could continue to market its Klor Con 8 and Klor Con 10 wax matrix tablets without any restrictions," and because "Schering wanted to prevent Uphser-Smith from simply renaming its Klor Con M 20 product to get around the language and intent of the settlement agreement." *Schering-ALJ, 2002 FTC LEXIS 40, at *62-63* (P 158). The ALJ found that "no other restrictions on any of Uphser-Smith's **[*90]** other products were intended by the settlement agreements." *Id.*

intended to develop any such product. Accordingly, as with the Upsher Settlement, there is no evidence that the ESI Agreement excluded any non-infringing products.

Finally, I reject DP Plaintiffs' argument in their '743 Motion that under the doctrine of prosecution history estoppel and the "All Elements Rule," the scope of the '743 patent cannot extend to exclude Upsher's generic product. The DPP's '743 Motion would require me not only to conduct a detailed inquiry into the merits of the patent case, but to decide the infringement issues that were resolved when Schering and Upsher settled. For the reasons discussed above regarding the analytical framework applicable to the Upsher **[*91]** and ESI Settlements, I decline to conduct such an inquiry. *See* *Cipro II, 363 F. Supp. 2d at 524-30* (reviewing refusals of courts and the FTC to undertake an after-the-fact inquiry into the merits of the patent issues in a settled case). To the extent that I consider the infringement issues raised by DP Plaintiffs, I do so only to determine whether Schering's patent lawsuits were objectively baseless.

2. Schering's Patent Infringement Lawsuits Against Upsher and ESI Were Not Objectively Baseless

Because I have concluded that the Upsher and ESI settlements did not exceed the exclusionary scope of the '743 Patent, DP Plaintiffs' antitrust claims fail unless they can show that Schering's patent litigation against Upsher and ESI was objectively baseless. [27] As set forth below, I conclude that DP Plaintiffs cannot satisfy the objectively baseless standard with respect to either of the patent lawsuits. In order to establish that Schering's patent lawsuits were objectively baseless, DP Plaintiffs must show that the lawsuits were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors, Inc. v. Columbia Pictures, Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ***[*92]*** *("PRE").* If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is [not objectively baseless], and an antitrust claim premised on the sham exception must fail." *Id. See also* *Cheminor Drugs, Ltd. v. Ethyl Corp., 993 F. Supp. 271, 281 (D.N.J. 1998)* (Greenaway, J.) (case must be shown to have "absolutely no objective merit"), *aff'd,* *168 F.3d 119 (3d Cir. 1999)*. Where there is no dispute over the "predicate facts" of the underlying lawsuit, the question of whether the suit was objectively baseless is a matter of law. *PRE, 508 U.S. at 63-64*. Predicate facts are the facts and circumstances that were available to the party that brought the underlying lawsuit. *PRE, 508 U.S. at 63* (citing *Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 444 (Kan. 1980)*. *See also* *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 362 n. 7 (D. Mass. 2004)* (recognizing that probable cause is a question of law when the relevant predicate facts involve an unsettled condition of law).

The party seeking to establish that a lawsuit was objectively baseless must do so with clear **[*93]** and convincing evidence. *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1369 (Fed. Cir. 1998)*; *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 (9th Cir. 1979)*. "The U.S. Supreme Court has defined 'clear and convincing evidence' as evidence that places in the Court, as factfinder, an 'abiding conviction that the truth of its factual contentions are highly probable.'" *Bayer Schering Pharma AG v. Barr Laboratories, Inc., No. 05-cv-2308, 2008 U.S. Dist. LEXIS 15917, *50* (quoting *Colorado v. New Mexico, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1984)* (internal quotation marks omitted)). *See also A.K. Stamping Co., Inc. v. Instrument Specialties Co., Inc., 106 F. Supp. 2d 627, 639 n. 13 (D.N.J. 2000)* (Greenaway, J.) ("'Clear and convincing' falls between the 'reasonable doubt' standard governing criminal cases and the "preponderance of the evidence" standard typical of civil actions.").

(a) *The Upsher Case*

(i) *Prosecution History Estoppel*

DP Plaintiffs have argued that even if the objectively baseless standard applies, they have developed a record which establishes that it was virtually certain that Upsher would have won the patent case. DP Plaintiffs' principal

---

[27] DP Plaintiffs do not contend that Schering's '743 Patent was procured by fraud on the PTO.

argument is that Schering's primary infringement **[*94]** argument was legally baseless because, during prosecution of the '743 Patent, Schering amended its claims to require EC with a viscosity of "greater than 40 cp." Specifically, DP Plaintiffs note that during prosecution of the '743 patent -- in response to the examiner's rejection of its claims as obvious in light of the prior art -- Schering amended its claims to require an EC with a viscosity of "greater than 40 cp." Upsher's generic product, however, uses Ethocel 20, with a viscosity of 18-22 cp and, thus, did not literally infringe the '743 patent. Therefore, Schering could only claim infringement under the "doctrine of equivalents." According to DP Plaintiffs, however, having surrendered its claim to a product using EC with a viscosity of less than 40 cp, Schering was barred by the doctrine of prosecution estoppel from claiming that Upsher's product using Ethocel 20 was equivalent to Schering's product claimed in the '743 patent.

Defendants dispute DPPs' contention that Schering's reliance on the doctrine of equivalents was objectively baseless. In the patent lawsuit, Key conceded that it was estopped from claiming equivalency as to EC described in the prior art '399 Patent, which **[*95]** had a viscosity of 9-11 cp. Key contended, however, that under the applicable law, it was not estopped from claiming equivalency as to EC with a range between the 11 cp disclosed in the prior art and the 40 cp literally claimed in the '743 Patent. Upsher moved for summary judgment contending that Key's amendment of the patent to recite a viscosity of "greater than 40 cp," estopped Key from claiming equivalence as to any product with a viscosity lower than 40 cp.

Defendants note that at the time Schering filed its lawsuit against Upsher, Federal Circuit law imposed a "flexible bar" under which a claim amendment did not necessarily surrender all range of equivalency regarding the subject matter literally given up by the amendment. *See* *Hughes Aircraft Co. v. United States, 717 F.2d 1351 (Fed. Cir. 1983)*. However, shortly before the settlement, the Supreme Court issued a decision in the case of *Warner Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997)*, which called into question the applicability and scope of the "flexible bar" rule. Thus, by the time of the settlement, the law regarding Schering's ability to rely on the doctrine of equivalents was unsettled. *See* *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki, 234 F.3d 558, 574 (Fed. Cir. 2000)* **[*96]** (noting inconsistency in rules as to the scope' of prosecution history estoppel), *vacated on other grounds,* *535 U.S. 722, 122 S. Ct. 1831, 152 L. Ed. 2d 944 (2002)*. *See also* *In re Wellbutrin SR Antitrust Litig., 2006 U.S. Dist. LEXIS 9687, at *24 (E.D. Pa. Mar. 9, 2006)* (noting that during the 1980s and 1990s, there were two conflicting approaches to prosecution history estoppel, "the more prevalent of which was known as the flexible bar rule, according to which the doctrine of prosecution history estoppel extends only to the subject matter ... relinquished during the prosecution"). In view of the unsettled state of the law regarding prosecution estoppel at the time of the Upsher litigation and settlement, I conclude that Schering's equivalence argument can not be deemed objectively baseless. To be sure, Schering might have lost the argument had the case proceeded to a decision on summary judgment or at trial. In this regard, I note that at the summary judgment argument, Judge Walls expressed doubt about Schering's infringement claim in light of the claim amendment. However, the test is not whether Schering might have lost the patent suit; it is whether the suit was so objectively baseless "that no reasonable litigant **[*97]** could realistically expect success on the merits." *PRE, 508 U.S. at 60*. I conclude as a matter of law that DP Plaintiffs cannot satisfy that test.

(ii) *Other Equivalence and Inequitable Conduct Issues*

Finally, DP Plaintiffs argue that as a factual matter, Schering's argument in the patent case that the SMO in Upsher's product was equivalent to the HPC and PEG required by the '743 patent was objectively baseless. According to DP Plaintiffs, the facts show that: (1) Schering misrepresented the function of HPC and PEG as plasticizers; (2) Schering misrepresented the function of SMO as a plasticizer; and (3) Schering improperly ignored the principal function of HPC and PEG. DP Plaintiffs further argue that summary judgment should be denied so that a jury can consider the invalidity and unenforceability claims that Schering would have had to overcome to prevail on its infringement claim.

DP Plaintiffs' opposition to the Upsher Motion, and the parties' extensive recitations of the conflicting evidence in the patent case regarding these issues, foreclose any finding that Schering's lawsuit was objectively baseless. In particular, the issue of whether SMO was equivalent to HPC was hotly disputed **[*98]** in the patent case, with both sides offering expert opinion in support of their positions. In addition, as Defendants note, Upsher argued in the patent case that multiple fact disputes precluded summary judgment in favor of Key on Upsher's inequitable conduct claim. Because it is clear that there were genuine factual and legal disputes regarding Schering's claims in the patent lawsuit, DP Plaintiffs cannot establish that those claims were objectively baseless.

(b) *The ESI Case*

DP Plaintiffs have not argued, nor identified any evidence, that Schering's patent litigation against ESI was objectively baseless. Moreover, it is undisputed that ESI had problems demonstrating the bioequivalence of its product to K-Dur and that the FDA had twice rejected ESI's bioequivalence studies. Additional undisputed evidence reflects that Schering believed ESI did not have a viable product and that Schering settled under some pressure from the presiding court. *See* *Schering-FTC, 2003 FTC LEXIS 187, at *165* (acknowledging that "Schering was subject to intense, and perhaps unseemly, judicial pressure to settle the patent litigation, and [that] Schering may well have been concerned about its future litigation **[*99]** prospects if it resisted."). In sum, there is no evidence that Schering's lawsuit against ESI was objectively baseless, and, thus, Defendants are entitled to summary judgment on DP Plaintiffs' claims relating to the ESI Settlement.

IV. CONCLUSION

For the reasons set forth above, I conclude that Defendants' Motions for Summary Judgment as to DP Plaintiffs' claims relating to the Uphser and ESI Settlements should be granted. I further conclude that DP Plaintiffs' Motions for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments and as to the Exclusionary Scope of the '743 Patent should be denied.

As provided in the Order entered by Magistrate Judge Arleo in this matter, the Special Master's decision on any motion can be appealed to Judge Greenaway in the manner, and subject to the standards of review set forth in *Rule 53 of the Federal Rules of Civil Procedure* and applicable Local Rules.

ENTERED this

6th day of February, 2009

s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

ORDER

The Special Master having considered: (1) the Motion of Defendants Schering-Plough Corporation and Upsher-Smith Laboratories, Inc. (collectively, "Defendants") for Summary **[*100]** Judgment as to All Claims Brought By Direct Purchaser Plaintiffs ("DPPs") Related to the Upsher Settlement; (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DPPs Related to the ESI Settlement; (3) DPPs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments; and (4) DPPs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent, the briefs submitted by all parties in support of and in opposition to the Motions, and the oral argument of counsel, for the reasons set forth in the foregoing Amended Report and Recommendation;

IT IS HEREBY ORDERED, this 6th day of February, 2009, that:

(1) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the Upsher Settlement is **GRANTED;**

(2) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the ESI Settlement is **GRANTED;**

(3) DP Plaintiffs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments is **DENIED;** and

(4) DP Plaintiffs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent is **DENIED.**

ENTERED this

6th day of February, **[*101]** 2009

s/ Stephen M Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

Lannett Co. v. Kv Pharm.

United States District Court for the District of Delaware

February 4, 2009, Decided; February 4, 2009, Filed

C.A. No. 08-338-BF

Reporter
2009 U.S. Dist. LEXIS 149745 *

LANNETT COMPANY INC., Plaintiff, v. KV PHARMACEUTICAL, DRUGTECH CORPORATION, AND THER-RX CORPORATION, Defendants.KV PHARMACEUTICAL COMPANY, THER-RX CORPORATION, AND DRUGTECH CORP., Counterclaim-Plaintiffs, v. LANNETT COMPANY, INC. Counterclaim-Defendant.

Core Terms

patent, alleges, infringement, Counts, iron, monopoly power, discovery, subject matter jurisdiction, motion for leave, customers, patentee, products, tortious interference, declaratory judgment, inequitable conduct, relevant market, patent misuse, antitrust, invalidity, asserting, motion to dismiss, deceptive trade practices, counterclaim, depositions, summary judgment motion, case or controversy, anti trust law, patent law, multivitamin, recommend

Counsel: **[*1]** Sophia Siddiqui, Esquire, of FOX ROTHSCHILD LLP, Attorneys for Plaintiff, Counterclaim-Defendant Lannett Company, Inc.

Frederick L. Cottrell, III, Esquire; Chad M. Shandler, Esquire; and Anne Shea Gaza, Esquire; of RICHARDS LAYTON & FINGER, P.A., Attorneys for Defendants, Counterclaim-Plaintiffs KV Pharmaceutical Company, Ther-RX Corporation and Drugtech Corporation.

Judges: Collins J. Seitz, Jr., Special Master.

Opinion by: Collins J. Seitz, Jr.

Opinion

Collins J. Seitz, Jr., Special Master

The District Court referred to me for decision the following motions:

(1) Defendants/Counterclaim-Plaintiffs KV Pharmaceutical, Ther-RX Corp., and Drugtech Corporation's (collectively "KV") motion to dismiss Plaintiff/Counterclaim Defendant Lannett Company Inc.'s ("Lannett") Amended Complaint (D.I. 59);

(2) Lannett's motion for leave to file a Second Amended Complaint (D.I. 77);

(3) KV's motions for summary judgment with respect to Counts Four through Ten of Lannett's Amended and [Proposed] Second Amended Complaint (D.I. 127, 128, 129, 130);

(4) KV's motion to bifurcate the antitrust, deceptive trade practices and tort claims from the Patent and Lanham Act claims (DI 141); and

(5) Lannett's motion for leave to file a Third Amended Complaint **[*2]** (DI 271).

For the reasons stated herein, I recommend that

(1) KV's motion to dismiss be granted;

(2) Lannett's motion for leave to file a Second Amended Complaint be granted in part and denied in part;

(3) KV's motions for summary judgment on Counts Six Through Ten be denied;

(4) KV's motion to bifurcate the antitrust, deceptive trade practices and tort claims be denied as moot; and

(5) Lannett's motion for leave to file a Third Amended Complaint be denied.

I. BACKGROUND

Lannett has begun selling a multivitamin and mineral product containing omega-3 fatty acids (the "product"). The product is prescribed to women "throughout pregnancy, during the postnatal period for both lactating and non-lactating mothers, and throughout the childbearing years." (DI 4 at ¶ 10). The central issue in this case is whether Lannett's product infringes KV's patents *(Id*. at ¶ 13). Deciding that it would rather play offense than defense in determining that question, Lannett sent a letter to KV demanding that KV refrain from asserting its patents against Lannett's product *(Id*. at ¶ 14).

Assuming that KV would refuse to agree to its request, and within hours of sending the letter, Lannett filed a Complaint (D.I. 1) **[*3]** against KV and two of its subsidiaries. Four days later, on June 10, 2008, Lannett filed an Amended Complaint (D.1. 4). Count One of the Amended Complaint seeks a declaratory judgment of non-infringement directed to United States Patent Nos. 6,258,846 ("the '846 Patent"), 6,576,666 ("the '666 Patent"), 7,112,609 ("the '609 Patent"), 6,197,329 ("the '329 Patent"), and 6,569,857 ("the '857 Patent" collectively, the "KV Patents") and United States Patent Nos. 5,516,925 ("the '925 Patent") and 6,716,814 ("the '814 Patent") (D.I. 4 ¶¶ 5-6, 17-27). Count Two seeks a declaratory judgment of invalidity directed to the KV Patents, and Count Three asserts inequitable conduct directed to the '609 Patent *(id*. at ¶¶ 28-56). Counts Four and Five claim antitrust violations and violations of the Delaware Deceptive Trade Practices Act *(Id*. at ¶¶ 57-72).

As Lannett predicted, KV counter-attacked almost immediately. On June 16, 2008, KV filed an answer and counterclaim (D.I. 5) against Lannett for patent infringement, trademark infringement, false advertising, and unfair competition, and moved for a temporary restraining order ("TRO") and preliminary injunction (D.1. 6). On June 25, 2008, the District Court heard oral argument on the TRO and entered an Order compelling Lannett to take remedial action with respect to product that it provided to distributors (D.1. 57). Since the Court's June 25 Order, discovery ensued and this action has proceeded toward **[*4]** trial, which is now set for March 23, 2009.

II. DISPOSITION OF KV'S MOTION TO DISMISS

In its brief in support of its motion to dismiss, KV argues that (1) Counts One, Two, and Three of the Amended Complaint should be dismissed for lack of subject matter jurisdiction because there was no case or controversy at the time Lannett's initial Complaint was filed; (2) Counts One and Two of the Amended Complaint concerning the '925 and '814 patents, which are owned by non-party Albion International, Inc. ("Albion"), should be dismissed for failure to join an indispensable party;[1] and (3) Counts Four and Five should be dismissed for failure to state a claim upon which relief can be granted (D.I. 60).

---

[1] The parties have stipulated to the dismissal of claims relating to the two patents owned by Albion. (D.I. 69 at 41). Indeed, Lannett struck all references to the '925 and '814 patents in its proposed Second Amended Complaint (D.I. 77, Ex. A ¶¶ 23). Therefore, KV's motion to dismiss claims relating to these patents is moot.

A. Standard of Review

Because the motion to dismiss implicates the Court's subject matter jurisdiction, the Declaratory Judgment Act, and whether the Amended Complaint states a claim upon which relief can be granted, I briefly set forth the various standards of review.

1. Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes dismissal of a complaint for lack of subject matter jurisdiction. "Motions brought under *Rule 12(b)(1)* may present either a facial or factual challenge to the court's subject matter jurisdiction." *Priority Healthcare Corp.* ***[*5]*** *v. Aetna Specialty Pharmacy, LLC, 590 F. Supp. 2d 663, 2008 WL 5273495, at *3 (D. Del. Dec. 18, 2008)*. In reviewing a factual challenge to the court's subject matter jurisdiction, the court is not confined to the allegations of the complaint, and the presumption of truthfulness does not attach to those allegations. *Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)*. Instead, the court may consider evidence outside the pleadings, including affidavits, depositions, and testimony, to resolve any factual issues bearing on jurisdiction. *Gotha v. United States, 115 F.3d 176, 179, 36 V.I. 392 (3d Cir. 1997)*. Once the court's subject matter jurisdiction over a complaint is challenged, the plaintiff bears the burden of proving that subject matter jurisdiction exists. *Mortensen, 549 F.2d at 891*.

2. The Declaratory Judgment Act

The Declaratory Judgment Act does not create federal jurisdiction. Rather, jurisdiction must be established in accordance with *Article III, Section 2 of the United States Constitution*, and therefore, jurisdiction under the Declaratory Judgment Act requires a justiciable case or controversy between the parties. *28 U.S.C. § 2201(a)*; *Cat Tech LLC v. TubeMaster, Inc., 528 F.3d 871, 879 (Fed. Cir. 2008)*. For there to be a case or controversy under Article III, "the dispute must be definite and concrete, touching the legal relations of parties having adverse legal interests," "real and substantial," and "admit of specific relief through a decree of conclusive character, as distinguished from an opinion advising **[*6]** what the law would be upon a hypothetical state of facts." *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)* (citation omitted). Because there is no bright-line rule for determining whether an action satisfies the case or controversy requirement, "the analysis must be calibrated to the particular facts of each case," *Cat Tech LLC, 528 F.3d at 879*, with the basic standard being whether "the facts alleged, under all the circumstances, show that *there is a substantial controversy*, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *MedImmune, 549 U.S. 118 at 127, 127 S. Ct. 764, 166 L. Ed. 2d 604* (emphasis added).

Recent decisions by the Federal Circuit have elaborated on the *MedImmune* standard. In *Prasco, LLC v. Medicis Pharmaceutical Corporation*, the Federal Circuit explained that the "immediacy and reality" requirement can be viewed through the lens of standing. To satisfy standing, the plaintiff must allege "(1) an injury-in-fact, *i.e.* a harm that is concrete and actual or imminent, not conjectural or hypothetical, (2) that is fairly traceable to the defendant's conduct, and (3) redressable by a favorable decision." *Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1338 (Fed. Cir. Aug. 15, 2008)* (quoting *Caraco Pharin. Labs., Ltd. v. Forest Labs., Inc., 527 F.3d 1278, 1291 (Fed. Cir. 2008)* (quotations omitted). An injury-in-fact is crucial because "jurisdiction generally will not arise merely on the basis **[*7]** that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement." *Id. at 1339*. At least "some affirmative act by the patentee" is necessary for an injury-in-fact sufficient to establish an actual controversy. *Id.* (quoting *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1380 (Fed. Cir. 2007))*; *see also* *Innovative Therapies, C.A. No. 07-589-SLR-LPS, 2008 U.S. Dist. LEXIS 53290, 2008 WL 2746960, at *8 (D. Del. July 14, 2008)* (finding lack of subject matter jurisdiction over claim for declaratory judgment where plaintiff failed to take "affirmative acts" to enforce patents).

3. *Federal Rule of Civil Procedure 12(b)(6)*

When reviewing a motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, "the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff." *Watson v. Hartford Life and Acc. Ins. Co., C.A. No. 08-013-JJF, 589 F. Supp. 2d 452, 2008 WL 5171854, *1 (D. Del. Dec. 9, 2008)* (citing *Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007))*. The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly, 127 S.Ct. at 1965, 1965 (2007)* (citations omitted). Therefore, "'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." *Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)* (quoting *Twombly, 127 S.Ct. at 1965 n. 3*). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts **[*8]** to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Id. at 234*. Blanket and conclusory assertions will not suffice. *Id. at 232*.

B. The Non-Infringement, Invalidity and Inequitable Conduct Claims

KV makes a factual challenge to the Court's subject matter jurisdiction over Lannett's request for declaratory relief on Counts One, Two, and Three of the Amended Complaint (the "non-infringement", "invalidity" and "inequitable conduct" claims, respectively). It argues that there is no case or controversy because KV has never taken any affirmative action regarding the patents-in-suit (D.I. 60 at 7; D.I. 75 at 1-3; D.I. 81) (citing *Prasco, 537 F.3d at 1339*; *San Disk, 480 F.3d at 1380*; and *Innovative Therapies, 2008 U.S. Dist. LEXIS 53290, 2008 WL 2746960, at *8)*. Specifically, KV states that it had never asserted the patents against Lannett, threatened Lannett, or communicated with Lannett concerning its patents. (D.I. 60 at 5, 7). In fact, KV asserts that prior to receiving Lannett's letter demanding that KV agree to refrain from asserting any claim of patent infringement against Lannett's multivitamin and mineral product, it had "no knowledge" that Lannett was planning to launch a generic version of PrimaCare ONE® into the marketplace *(Id.)*. According to KV, this lawsuit came "completely **[*9]** out of the blue." *(Id*. at 4).

Lannett does not dispute that it blindsided KV with its Complaint, which followed immediately on the heels of its letter demand for assurances. Rather, Lannett identifies the following "affirmative acts" by KV that, it contends, create an injury-in-fact sufficient to give the Court subject matter jurisdiction over its request for declaratory relief: (1) KV's failure or refusal to provide assurances that it would not asserts its patents against Lannett and block Lannett's entry into the market (D.I. 69 at 8); (2) KV's pattern of litigious conduct in intellectual property matters *(Id*. at 9); (3) KV's counterclaim for infringement *(Id*. at 8-12); (4) KV's press release that it "intended to defend this and any other challenges to our patents rights vigorously" (DI 82); and (5) KV's statement to customers that it was taking steps to "vigorously enforce" the patents at issue in this suit. *(Id.)* These arguments do not survive scrutiny.

First, KV's refusal to give assurances that it would not enforce its patents, although relevant to a determination of jurisdiction, is not dispositive. *Prasco, 537 F.3d at 1341*. As the Federal Circuit explained in *Prasco*, "the patentee's silence does not alone make an infringement **[*10]** action or other interference with the plaintiff's business imminent." *Id.* "Thus, though a defendant's failure to sign a covenant not to sue is one circumstance to consider in evaluating the totality of the circumstances, it is not sufficient to create an actual controversy — some affirmative actions by the defendant will also generally be necessary." *Id.*

At the time the complaint under consideration was filed — the Amended Complaint[2] — it is undisputed that KV had not accused Lannett of infringement, asserted any rights to Lannett's generic version of PrimaCare ONE®, or

---

[2] I disagree with Lannett's argument that the *Second* Amended Complaint is currently under the Court's consideration, and as a consequence, that there is a live controversy between the parties because KV had asserted counterclaims by the time that it filed the Second Amended Complaint (D.I. 98 at 3-4) (citing *Prasco)*. In *Prasco*, the Federal Circuit explained that the district court *accepted* the declaratory judgment plaintiff's Amended Complaint. *537 F.3d at 1337*. Here, the Court has not accepted the Second Amended Complaint. The Second Amended Complaint is merely an exhibit to a motion for leave to file. Moreover, while

communicated with Lannett about its product. Nor had it taken any actions that restrained Lannett with regard to its product. Indeed, Lannett repeatedly alleges that it "has already manufactured, imported, sold and distributed the product for which it now seeks a declaration of non-infringement or invalidity." (D.1. 69 at 8; *see also id.* at 2, 9). Coupled with its inaction, KV's silence or refusal to provide assurances does not evidence an actual controversy.

Second, Lannett's claim that KV has previously litigated other "intellectual property matters" (D.1. 69 at 10) is only "one circumstance **[*11]** to be considered in assessing whether the totality of circumstances creates an actual controversy." *Prasco, 537 F.3d at 1341*. And that circumstance here is not persuasive because the cases cited by Lannett are all Lanham Act cases against companies *other than Lannett* seeking redress for *trademark infringement* (D.I. 75, Ex.'s A and B). In *Prasco*, the Federal Circuit explained that prior suits asserting different claims against different parties covering different products "is not the type of pattern of prior conduct that makes reasonable an assumption that [the patentee] will also take action against [the declaratory judgment plaintiff]." *Id.* Thus, KV's prior suits cannot "alone create a real and immediate controversy," and given KV's lack of affirmative action prior to the filing of the Complaint, I apply only "minimal weight" to those facts in analyzing whether there was a case or controversy between the parties at the time the Amended Complaint was filed. *Id.*

Third, KV's counterclaim against Lannett for infringement of its patents does not retroactively give rise to subject matter jurisdiction. The counterclaim was filed six days after the Amended Complaint, and it is well established that "[1]ater events **[*12]** may not create jurisdiction where none existed at the time of filing of the complaint." *GAF Bldg. Materials Corp. v. Elk Corp., 90 F.3d 479, 483 (Fed. Cir. 1996)*; *Prase()* (quoting *GAF, 90 F.3d at 483*); *Innovative Therapies, 2008 U.S. Dist. LEXIS 53290, 2008 WL 2746960 at *9* (quoting *GAF, 90 F.3d at 483*). The proper focus in determining jurisdiction for purposes of a declaratory judgment are the facts "at the time the complaint under consideration was filed." *GAF, 90 F.3d at 483*. *See also Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570-71, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* ("It has long been the case that the jurisdiction of the court depends upon the state of things at the time of the action brought.") (citation omitted); *Keene Corp. v. United States, 508 U.S. 200, 113 S.Ct. 2035, 2040, 124 L. Ed. 2d 118 (1993)* (noting "longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought"). Therefore, even though Lannett correctly predicted KV's course of action, there was no case or controversy at the time the Amended Complaint was filed.[3]

Similarly, KV's statements that it would "vigorously" defend its patents — after Lannett filed suit[4] — does not cure the previous lack of an actual controversy. Nor are such statements sufficient to create a controversy. *See Baker*

Rule 15(d) of the Federal Rules of Civil Procedure allows supplemental pleadings to cure defects in the original pleadings, the Second Amended Complaint does not supplement the pleadings with regard to jurisdiction — Latnnett fails to plead the filing of the counterclaim. The Second Amended Complaint still claims that "Where is a reasonable likelihood that the KV Defendants *will assert* a claim for patent infringement against Lannett once its product, Multivitamin With Mineral Capsules, enters the marketplace." (DI 77, Ex. A ¶11) (emphasis added). Thus, Lannett did not "mislabel" its *amended* complaint. *Prasco, 537 F.3d at 1337* (explaining that "[p]arties and courts occasionally confuse supplemental pleadings with amended pleadings and mislabeling is common."). The amended complaint is not actually a supplemental complaint, at least with regard to the infringement, invalidity, inequitable conduct, antitrust and unfair trade practices claims. But even if Lannett had actually supplemented the Amended Complaint, it is within the Court's discretion to decide whether to allow the supplemental pleading. *Prasco, 537 F.3d at 1337* at n.5. I decline to recommend the exercise of such discretion. Lannett has a remedy to obtain adjudication on the patents asserted in this suit—KV's counterclaim. Accordingly, the Amended Complaint is the proper complaint under consideration on Lannett's invalidity, non-infringement and inequitable conduct claims.

[3] Lannett cites *Micron Tech., Inc. v. Mosaid Techs., Inc., 518 F.3d 897, 901-02 (Fed. Cir. 2008)* for the proposition that "evidence that the declaratory judgment defendant would sue the declaratory judgment plaintiff soon" creates a case or controversy (D.1. 69 at 9). There is no quarrel with that statement, which is wholly consistent with the cases requiring an affirmative act by the patentee in order to establish the necessary controversy for declaratory judgment jurisdiction. However, the affirmative acts by the patentee in *Micron* (a warning letter strongly suggesting that the plaintiff should license patentee's technology, and three follow-up letters) occurred *prior* to the filing of the complaint, unlike the counterclaim filed by KV here.

[4] According to Lannett, KV's public statement that it would vigorously enforce its patents was issued on the same day that Lannett filed the Amended Complaint, and KV's similar statement to its customers was made "at or about th[e] same time." (D.I.

*Hughes Oilfield Operations, Inc. v. Reedhycalog UK, Ltd., 2008 U.S. Dist. LEXIS 9323, 2008 WL 345849 at *2-3 (D. Utah Feb. 6, 2008)* (dismissing action seeking declaratory judgment of noninfringement, invalidity, and unenforceability of patents due to lack of "affirmative act" by patentee, even though patentee had sent plaintiff numerous letters evidencing that **[*13]** patentee was evaluating possible infringement litigation against plaintiff).

Considering "all the circumstances," *MedImmune, 549 U.S. 118 at 127, 127 S. Ct. 764, 166 L. Ed. 2d 604*, I find that Lannett has failed to establish a case or controversy under Article III for its non-infringement, invalidity and inequitable conduct claims. *See* *Benitec Australia, Ltd. v. Nucleonics, Inc., 495 F.3d 1340, 1344 (Fed. Cir. 2007)* (explaining that the burden is on the declaratory judgment plaintiff to establish that such jurisdiction existed at the time the claim for declaratory relief was filed). Accordingly, I recommend that Counts One, Two, and Three be dismissed for failure to establish a case or controversy under Article III of the Constitution.[5]

C. The Antitrust Claims

In analyzing KV's motion to dismiss both the antitrust and deceptive trade practices act claims, I will consider the Second Amended Complaint because KV opposes Lannett's motion for leave to amend on grounds that those claims would not survive a motion to dismiss (D.I. 91 at 9-11).

In the Second Amended Complaint, Lannett claims that KV "ha[s] obtained and maintained monopoly power in both the relevant product market," which is "multivitamin/mineral products containing omega-3 fatty acids for prenatal and postnatal support, including all products that are reasonably interchangeable," and **[*14]** the relevant geographic market, which is the United States (D.1. 77, Ex. A at ¶¶ 58-60). Lannett alleges that KV violated *Section 2* of the Sherman Act, *15 U.S.C. § 2*, by unlawfully obtaining and maintaining market power in the relevant market by "use of threats to enforce patents that the KV Defendants knew were invalid and/or procured fraudulently" and by "interfering with Lannett's relationships with its suppliers." *(Id*. at ¶ 132).

1. Lannett's Walker Process Claim

As a general rule, "behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws." *Unitherm Food Sys. v. Swift-Ickrich, Inc., 375 F.3d 1341, 1356 (Fed. Cir. 2004)*, *rev 'd on other grounds* *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. Because a patentee has a lawful monopoly over an invention, antitrust liability cannot flow from conduct that is permissible under the patent laws. *See* *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981)* ("we hold that where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws"). An exception to this rule arises when a patentee attempts to enforce a patent obtained by fraud. *Id.* (citing *Walker Process Equip., Inv .v Food Mach. & Chem. Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*; *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1072 (Fed. Cir. 1998))*. Patent antitrust claims alleging fraud are called *Walker Process* claims. In a typical *Walker Process* case, a defendant with monopoly power in **[*15]** a well-defined product market uses a fraudulently obtained patent to deter would-be competitors from entering the market. In those circumstances, the threat of litigation (enforcement) may deter market entry and preserve monopoly power. *Walker Process, 382 U.S. at 174*; *Nobelpharma, 141 F.3d at 1072*.

To establish a *Walker Process* claim, Lannett must demonstrate that (1) KV attempted to enforce its patents, (2) KV's patents issued because it defrauded the United States Patent & Trademark Office ("PTO"), (3) attempted

---

82). These assertions are vague about the actual timing of KV's alleged statements, and thus do not satisfy Lannett's burden of proving that they were made *prior* to the filing of the Amended Complaint.

[5] In granting KV's motion to strike Lannett's affirmative defenses of inequitable conduct regarding the '846 and '666 patents, I also dismissed without prejudice Lannett's request to file a second amended complaint, "insofar as it seeks to add new claims of inequitable conduct with respect to the '846 and the '666 patents." Had the jurisdictional issue been presented at that time, I may have recommended that the motion for leave to amend be denied *with prejudice*.

enforcement of the patents harmed competition in the relevant market, (4) Lannett suffered antitrust damages, and (5) the necessary additional elements of an underlying violation of the antitrust laws. Unitherm, 375 F.3d at 1355. Turning to the first element, a plaintiff must plead that the fraudulently-procured patent was enforced. Merely procuring a patent by fraud is not sufficient. Unitherm, 375 F.3d at 1355. If a plaintiff cannot plead the minimum level of enforcement necessary to sustain a declaratory judgment action, the plaintiffs likewise cannot plead a *Walker Process* claim. Unitherm, 375 F.3d at 1358 (holding "that, as a matter of Federal Circuit ***antitrust law***, the standards that we have developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity also define the minimum **[*16]** level of 'enforcement' necessary to expose the patentee to a Walker Process claim" for monopolization).

Lannett did not plead the minimum level of enforcement necessary to sustain a declaratory judgment action. Absent from the pleadings is any "affirmative" action taken by KV to enforce its patents *prior* to Lannett's bringing this lawsuit. Thus, Lannett's claim essentially boils down to an assertion that KV has fraudulently obtained its patents. But, "the courts lack jurisdiction to entertain" a *Walker Process* claim "if the patentee has done nothing but obtain a patent in a manner that the plaintiff believes is fraudulent." *Id.;* In re Netflix Antitrust Litig., 506 F.Supp. 2d 308, 317-19 (N.D. Cal. 2007) (dismissing *Walker Process* claim for failure to meet the enforcement requirement because "[e]nforcement requires some affirmative act which is lacking in the pleadings"). Accordingly, I recommend that Lannett's *Walker Process* claim be dismissed.[6]

2. An Antitrust Claim Under *Section 2* of the Sherman Act

In addition to its failure to state a *Walker Process* claim, Lannett does not state a claim for monopolization under the antitrust laws. To state a monopolization claim, Lannett must allege "(1) the possession of monopoly power in the relevant market and (2) **[*17]** the willful acquisition or maintenance of that power." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) (internal quotation marks omitted); *see also* Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.")*. Lannett fails to allege either element.[7]

Possession of Monopoly Power

Lannett's allegations of monopoly power fall short both because Lannett fails to define a relevant market and because it does not allege facts that KV has monopoly power in "the market" for prenatal and postnatal vitamins containing omega-3 fatty acids, or any market.

"Plaintiffs have the burden of defining the relevant market," and

> [w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiffs favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

---

[6] Because Lannett cannot plead the minimum level of enforcement necessary to sustain a *Walker Process* claim, I need not address the other elements of the claim: whether KV's patents issued because it defrauded the PTO; enforcement of KV's patents harmed competition in the relevant market; and Lannett suffered antitrust damages. I address the monopolization issues for purposes of evaluating Lannett's other antitrust claim in Count Eleven.

[7] Even if Lannett is bringing an *attempted* monopolization claim, as opposed to a monopolization claim, it must define a relevant market, which it has not done. Nor has Lannett pled any facts that KV has a "dangerous probability" of achieving monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997).[8] The Second Amended Complaint fails to clear this initial hurdle; the **[*18]** market is defined solely as "prenatal and postnatal vitamins containing *omega-3 fatty acids"* and "all products that are reasonably interchangeable." This definition is deficient for at least two reasons.

First, Lannett's referral to the rule of reasonable interchangeability is nothing more than "a formulaic recitation of the elements of a cause of action." Twombly, 127 S. Ct. at 1964-65. Nowhere does the complaint "allege *facts* regarding substitute products, ... distinguish among apparently comparable products, or allege other pertinent facts relating to cross-elasticity of demand." ReAlco Indus. v. Nat'l Ctr. For Health Educ., 812 F. Supp. 387, 391-92 (S.D.N.Y 1993) (granting motion to dismiss because "[p]laintiff has made no showing why [the product] should be considered a market unto [itself]" and failed to discuss "any relevant differences in demand"); B. V. Optische Industrie de Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995) (granting motion to dismiss because plaintiff's failed to "allege facts regarding substitute products, and distinguish among comparable products"). And second, defining the market to that covered by the patents-in-suit does not confer monopoly power in the antitrust sense. Every patent owner has a "monopoly" over the patent that it owns (by definition). *See* Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 45-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006); 3 Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 704a, at 159 (2d ed. **[*19]** 2002) ("Neither ownership of the [patent] nor the power to exclude conveys monopoly power unless the property right in question dominates a properly defined relevant market.").

Furthermore, even if Lannett's definition of the relevant market is sufficient, Lannett has failed to allege anything more than the conclusion that KV has monopoly power in the market for prenatal and postnatal vitamins containing omega-3 fatty acids. Both the Amended and Second Amended Complaints are barren of facts that Lannett has any present market share at all. Without any specific facts, Lannett's Sherman Act claim cannot proceed. *See* Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000) (conclusory allegations disregarded in assessing adequacy of complaint).

Exclusionary Conduct

Lannett also fails to allege that KV has engaged in exclusionary conduct that could create or sustain any alleged monopoly power. Monsanto Co. v. Scruggs, 459 F.3d 1328, 1338-39 (Fed. Cir. 2006) ("To establish a section 2 violation, one must prove that the party charged had monopoly power in a relevant market and acquired or maintained that power by anticompetitive practices instead of by competition on the merits."). In the Second Amended Complaint, Lannett claims that KV has maintained and is continuing to maintain its market power by "obstructing interfering **[*20]** with Lannett's relationships with its suppliers." (D.I. 77, Ex. A at ¶ 130). Specifically, Lannett contends that KV interfered with its contract with Albion for the purchase of Ferrochel® chelated iron for use as a source of iron in Lannett's multivitamin with minerals product (*Id.* at 129). This alleged *individual* harm does not suffice. The alleged anticompetitive conduct must have an adverse effect on competition *as a whole* in the relevant market. Brooke Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1995) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.") (citation and quotations omitted); Spanish Broadcasting Sys. of Florida, Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1075-76 (11th Cir. 2004) ("conduct that injures individual firms rather than competition in the market as a whole does not violate Section Two"); Conwood v. U.S. Tobacco Co., 290 F.3d 768, 783-84 (6th Cir. 2002) ("Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or

---

[8] "[I]n most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265, (1992)). However, there is no *per se* rule against dismissal for failure to define a relevant market under Rule 12(b)(6). *Id.*

customer."). Because Lannett's antitrust claims do not allege monopoly power or conduct that injures the market as a whole, those claims should be dismissed for failure to state a claim.

D. The Deceptive Trade Practices Act Claim

Count Five of the Second Amended Complaint alleges **[*21]** that KV has violated the Delaware Deceptive Trade Practices Act ("DTPA"), 6 *Del. C*. *§ 2532*, by representing in the course of its business and in its advertising that PrimaCare ONE® is protected by five patents — the '609 Patent, '846 Patent, '666 Patent and Patent Nos. 4,822,816 ("the '816 Patent") and 5,070,085 ("the '085 Patent") — all of which are alleged to be invalid or unenforceable (the '609, '846 and '666 patents) or expired (the '816 and '085 patents). (D.I. 77, Ex. A at ¶¶ 70-80).

KV argues that Lannett's state law claims are preempted by federal patent law (D.I. 60 at 16, D.I. 91 at 11). A state law claim is preempted by federal patent law only when the state law "stands as an obstacle to the accomplishment and execution of the fall purposes and objectives of Congress." *Cryovac Inc. v. Pechiney Plastic Packaging, Inc., 430 F. Supp.2d 346, 358 (D. Del. 2006)* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61, 61 S. Ct. 399, 85 L. Ed. 581 (1941))*. However, a state law claim is not an obstacle to Congress's regulation of the patent law if the elements of the federal and state law causes of action are not the same. *See* *In re Semiconductor Energy Lab. Co. v. Samsung Elecs. Co., 204 F.3d 1368, 1382 (Fed. Cir. 2000)* (recognizing that state cause of action would not be preempted where it also included elements not found in the patent infringement defense of inequitable conduct) (citing *Dow Chem. Co. v. Exxon Corp., 139 F.3d 1470 (Fed.Cir.1998))*; *Netflix Antitrust Litig., 506 F.Supp. 2d at 319* ("Tort claims under state law are not preempted by federal patent law where they include additional elements not found in federal patent law claims.").

The elements of inequitable misconduct **[*22]** and a DTPA claim are different. An inequitable misconduct claim requires a showing that KV engaged in misconduct before the PTO. *Inline Connection Corp. v. AOL Time Warner Inc., 237 F.R.D. 361, 367 (D. Del. 2006)* (a "claim of patent unenforceability is premised upon inequitable conduct before the" PTO). On the other hand, KV could be liable to Lannett under DTPA if it has engaged in misconduct that "creates a likelihood of confusion or of misunderstanding" in the mind of the consumer. *6 Del. C. § 2532(a)*. Thus, Lannett's DTPA claim contains an "element other than misconduct or fraud before the PTO." *Netflix Antitrust Litig., 506 F.Supp. 2d at 319*. Thus, I find that Lannett's DTPA claim is not preempted.

However, Lannett's DTPA claim still fails because Lannett does not assert a basis for injunctive relief. Absent such a claim, Lannett lacks standing to sustain a cause of action under the DTPA. *Grand Ventures, Inc. v. Whaley, 632 A.2d 63, 70 (Del. 1993)*; *6 Del C. § 2533*. As explained in *Dionisi v. DeCampli, 1995 Del. Ch. LEXIS 88, 1995 WL 398536, at *13 (Del. Ch. June 28, 1995)*:

> A party seeking to recover this Act must have a basis for injunctive relief. The Act is designed to encourage immediate or at least timely enforcement of its provisions to halt unfair or deceptive trade practices between business with 'horizontal relationships.'... Injunctive relief coupled with the possibility of treble damages and counsel fees looms as a powerful deterrent against wrongdoers and an incentive to litigate **[*23]** for the wronged. It is not a vehicle for damages long after the immediacy of the grievance dissipates. When the press for instant action eases, so does the basis for possible concomitant damages. The DTPA is not a platform for an independent common law damage suit.

Accordingly, Count Five of the Second Amended Complaint should be dismissed. *See* *State ex rel Brady v. Pettinaro Enters, 870 A.2d 513, 537 (Del. Ch. 2005)* (dismissing DTPA claim for failing to state a claim for injunctive relief); *Irgau v. Christiana Care Health Servs., C.A. No. 07C-11-180-JOH, 2008 Del. Super. LEXIS 129, 2008 WL 1724250, at *5 (Del. Super. Ct. Apr. 9, 2008)* (dismissing DTPA claim for failing to bring claim for injunctive relief).

III. DISPOSITION OF LANNETT'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Rule 15 of the Federal Rules of Civil Procedure provides that after amending the complaint once or after an answer has been filed, the plaintiff may amend "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Fed. R. Civ.P. 15(a)*. The Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co., 921 F.2d 484, 486-87 (3d Cir. 1990)* (citations omitted). Amendment, however, is not automatic. *See* *Bacon v. Carroll C.A. No. 05-714-JJF, 2008 U.S. Dist. LEXIS 84195, 2008 WL 4681177, at *2 (D. Del. Oct 21, 2008)*.

Leave to amend will not be granted upon a showing of **[*24]** "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Oran v. Stafford, 226 F.3d 275, 291 (3d Cir. 2000)*. Futility of amendment occurs when the complaint, as amended, does not state a claim upon which relief can be granted. *See* *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*.

As discussed, the Court lacks subject matter jurisdiction over Counts One, Two, and Three of the Amended Complaint, and the Second Amended Complaint pleads no new facts that create jurisdiction. Counts Four and Eleven of the Second Amended Complaint do not state a claim upon which relief may be granted. And Lannett lacks standing to assert Count Five - the DTPA claim. Therefore, I recommend that Lannett's motion for leave to file a Second Amended Complaint with respect to those claims be denied for futility. Lannett's motion for leave to file a Second Amended Complaint is granted with respect to Counts Six, Seven, Eight, Nine, and Ten.[9]

IV. DISPOSITION OF KV'S SUMMARY JUDGMENT MOTIONS

A. Summary Judgment Standard

In pertinent part, *Rule 56(c) of the Federal Rules of Civil Procedure* provides that a party is entitled to summary judgment if a court determines from **[*25]** its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*. In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 200 (3d Cir. 1995)*. However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. To consider properly all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id. at 151* (internal citations omitted).

To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts.... In the language of the Rule, the non-moving party must come forward with specific facts showing that there is a genuine issue **[*26]** for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal citations omitted). However, the mere existence of some evidence in support of the non-movant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-movant on that issue. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Thus, if the evidence for the non-movant is "merely colorable, or is not significantly probative," summary judgment may be granted. *Id.*

---

[9] I note that Counts Six through Ten of the Second Amended Complaint allege supplemental facts that occurred after the Amended Complaint was filed.

B. Tortious Interference with Contract or Prospective Contract or Prospective Contract with Customers

In Counts Six, Seven, and Eight of the Second Amended Complaint, Lannett alleges that KV is liable for commercial disparagement,[10] tortious interference with contract and tortious interference with prospective contractual relationship for mailing false and/or misleading letters to customers and/or potential customers. According to Lannett, the gist of KV's claims in those letters is that the sources of iron in Lannett's product and PrimaCare ONE® are "different," Lannett's product does not use "high quality, pharmaceutical grade fish oils," Lannett's product "contains ferric iron rather than ferrous iron," and "the iron contained in Lannett's product is ten times **[*27]** less soluble than the iron contained in" PrimaCare ONE®. (D.L 77, Ex, A at ¶¶ 81-108).

In Delaware,[11] to state a claim for tortious interference or prospective interference with contract requires proof, among other things, of: (1) a contract, (2) of the interferer's knowledge of the contract, (3) intentional interference that induces or causes breach of the contract, and (4) damages. *See* *Elite Cleaning Co. v. Capel, C.A. No., C.A. No. 2006 Del. Ch. LEXIS 105, 2006 WL 1565161, at *10 (Del. Ch. June 2, 2006)*. The elements of tortious interference with prospective contract are: (1) a "valid business relation or expectancy, (2) the interferer's knowledge of the relationship or expectancy, (3) intentional interference that (4) induces or causes a breach or termination of the relationship or expectancy and that (5) causes resulting damages to the party whose relationship or expectancy is disrupted." *In re Ferederick's of Hollywood S'holders Litig., C.A. No. 15444, 1998 Del. Ch. LEXIS 111, 1998 WL 398244, at *3 (Del. Ch. July 9, 1998)*.

KV asserts that summary judgment on Lannett's claims regarding its customers is warranted because Lannett has not produced evidence that it had a contract or a prospective business relationship with any of the recipients of the letters, or that it suffered economic injury as a result of the mailed letters. (D.I. 129, 198). While that may have been true when KV briefed its motion for summary judgment, at oral argument **[*28]** on the various motions, I granted Lannett leave to submit a counterstatement of genuine issues of material fact. (Transcript of Hearing on Jan. 21, 2009 at 95). In its counterstatement, Lannett claims that it "entered into numerous contracts with its customers for the sale of its Multivitamin with Minerals product." (D.I. 306 at ¶ 24). In support of that claim, Lannett submitted roughly 600 pages of "Return Authorization Forms" from customers who allegedly returned more than 330,000 units of the approximately 400,000 units (approximately 82.6%) that Lannett distributed (*Id.*, at ¶ 25, Ex. 19). The evidence shows that Lannett had either a contract or an expectancy of a business relationship with the customers that KV contacted. (*Id.*).

Turning to the next argument, KV contends that Lannett has not showed that KV *caused* a breach of the contract with Lannett's customers or interfered with Lannett's prospective business relationships. Lannett's causation argument proceeds as follows: KV contacted the national databanks (which provide information to pharmacies regarding generic substitutes of branded drugs) "for the purpose of preventing Lannett's product from being linked to PrimaCare ONE **[*29]** as a generic or reasonably equivalent product" (*Id.* at ¶ 16); as a result of KV's misrepresentations to the databanks that the iron sources of the two drugs are different, the databanks refused to link them (*Id.* at ¶ 21); KV then sent numerous letters stating that Lannett's product was not linked to PrimaCare ONE® on the basis of the difference in the iron sources (*Id.* at ¶¶ 22); consequently, Lannett could not dispense its

[10] There is no common law tort of commercial disparagement in Delaware. Rather, it is subsumed by DTP A, and as discussed previously, Lannett does not state a DTPA claim.

[11] Delaware law applies because Delaware has the most significant relationship to the instant action. "The relevant factors a court must consider when determining the state with the most significant relationship to the action include 1) the place where the injury occurred, 2) the place where the conduct causing the injury occurred, 3) the place of incorporation and principal place of business of the parties, and 4) the place where the relationship between the parties is centered." *Corning Inc. v. SRU Biosystems, LLC, 292 F. Supp.2d 583, 585 (D. Del. 2003)* (citing *Restatement (Second) of Conflicts § 145* (1971)). Because Lannett filed this action in Delaware and both parties are incorporated in Delaware, I conclude for purposes of the pending motions that Delaware has the most significant relationship to the action.

product generically, Lannett's customers returned Lannett's vitamin product, and Lannett suffered millions of dollars in damages (*Id.* at ¶¶ 23, 24, 32).

To prevail on its tortious interference claims, Lannett must show "there would not have been a breach *but for* the activities of [KV]." *Vornado PS, L.L.C. v. Primestone Inv. Partners, L.P., 821 A.2d 296, 318 (Del. Ch. 2002)* (emphasis added). At this stage of the litigation, there is sufficient evidence in the record to conclude that a jury could reasonably find that but for KV's alleged misrepresentations to the databanks *and* to its customers, Lannett's contracts and/or relationships would still be viable. Indeed, in its letters to Lannett's customers, KV stated:

> If you have taken any action to override the decision of the pricing data services to consider PrimaCare ONE® as a sole source product and **[*30]** have linked these products, directly or indirectly, in your own system, we urge you to reconsider your decision, and, in view of the points noted in this and our prior correspondence, discontinue any substitution for PrimaCare ONE®.

(D.I. 306 at Ex. 16). Accordingly, KV's motion for summary judgment on Counts Six, Seven, and Eight should be denied because a jury could reasonably find for Lannett on those tortious interference claims.

C. Tortious Interference With Contract or Prospective Contractual Relationship with Third Party Albion

In Count Nine of the Second Amended Complaint, Lannett contends that KV, after learning about Lannett's multivitamin and minerals product, contacted Lannett's suppliers "for the sole purpose of interrupting and cutting off Lannett's relationships" with those suppliers "so that Lannett could not obtain the ingredients necessary to manufacture its competing product." (D.I. 77, Ex. A at ¶ 111). Specifically, Lannett alleges that KV contacted Albion, which supplies Lannett with Ferrochel®, a chelated iron (*Id.* at ¶ 110). Lannett claims that "[a]s a direct and proximate result of the KV Defendants' actions, Albion has demanded that Lannett return to Albion all **[*31]** quantities of its chelated iron product Ferrochel® which Lannett previously purchased from Albion." (*Id.* at ¶ 112).

In Count Ten of the Second Amended Complaint, Lannett alleges that KV tortiously interfered with a prospective contractual relationship with Albion. "Had it not been for the improper actions of the KV Defendants Lannett would have continued to have a contractual and business relationship with Albion for the purchase of Ferrochel® chelated iron for use as a source of iron" in its product (*Id.* at ¶ 118).

KV argues that summary judgment on counts Nine and Ten should be granted because Lannett has failed to submit any evidence that Lannett had a contract or prospective relationship with KV, that KV interfered with a contract or prospective relationship, or that KV's alleged interference caused Lannett damage (D.I. 130, 195). However, in its supplemental briefing, Lannett submitted a letter from Albion - which demands that Lannett stop using Ferrochel® in its multivitamin product - that raises doubt as to those claims (D.I. 306 at Ex. 23). The letter suggests that there was, at the very least, a business relationship between Lannett and Albion that Lannett expected to continue **[*32]** into the future. Lannett also submitted an email from Albion's general counsel to KV which suggests that KV was involved with Albion's letter to Lannett. This email raises significant doubt as to KV's lack of interference claim (*Id.* at Ex. 22).

Moreover, contrary to KV's assertions, there is some evidence that its alleged improper interference with Albion caused Lannett injury. But for KV's actions, Albion may not have sued Lannett for "patent infringement, trademark misappropriation, and related claims against Lannett for incorporating the purchased Ferrochel® into the Multivitamin with Minerals product and identifying Ferrochel® as a product component." (D.I. 173 at 3). On the other hand, there is also evidence that Lannett voluntarily decided to change the iron source of its product from Ferrochel® to ferrous asparto glycinate (the same source of iron in PrimaCare ONE®) so that it could become a certified generic substitute for PrimaCare ONE® (D.L 195, Ex. C).

Because there are genuine issues of material fact on the tortious interference claims regarding Albion, I recommend that KV's motion for summary judgment on Counts Nine and Ten be denied.

V. DISPOSITON OF KV S MOTION TO BIFURCATE [*33]

As a result of the disposition of Lannett's antitrust, DTP A, and tortious interference claims, KV's motion to bifurcate the antitrust, deceptive trade practices and tortious interference claims should be denied as moot. However, KV's request to realign this action, with KV as the Plaintiff and Lannett as the Defendant should be granted (D.I. 141). At oral argument on the various outstanding motions, the following dialogue occurred:

> SPECIAL MASTER SEITZ: All right So just looking at it practically, the effect of dismissing these counts will be what?
>
> MR. WEISS: To realign, to put the case in what I would say is its normal procedural posture, which is KV is the plaintiff asserting infringement and Lannett is the defendant making its affirmative defenses like virtually every patent case.
>
> SPECIAL MASTER SEITZ: And so—
>
> MR. WEISS: And, of course, able to get an adjudication of its defenses to the extent that they're properly pled and the case is supported in defense of KV's case.
>
> So again, Lannett is not deprived of an opportunity to obtain adjudication of this patent. It's gotten what it wanted. It just can't get it by a declaratory judgment action.

(Transcript of Hearing on Jan. 21, 2009 at 9-10). **[*34]** Because the effect of dismissing Lannett's claims is realignment, I recommend that the case be realigned with KV as Plaintiff and Lannett as Defendant.[12]

VI. DISPOSITION OF LANNETT'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT AND ANSWER TO COUNTERCLAIM

A. AMENDED COMPLAINT

As discussed, Larmett's inequitable conduct claims and antitrust claims in the Second Amended Complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim. But even if those claims were dismissed without prejudice, Larmett's Third Amended Complaint fails to allege new facts that would confer jurisdiction or state a claim upon which relief can be granted.

Larmett's proposed Third Amended Complaint alleges several new inequitable conduct claims, including claims that KV (1) withheld an abstract from the PTO, which was material prior art to the '846, '666, and '609 patents (D.I. 271 at ¶¶ 11-15); and (2) procured the '666, '846, and '609 patents by misrepresenting to the PTO that: the patents (a) presented "unique, unexpected, and superior therapeutic benefits," including the "optimization of neurological development" to the breastfeeding infant (*Id.* at ¶¶ 33-50); (b) contained omega-2 fatty acid compositions (*Id.* at **[*35]** ¶¶ 51-53); and (c) improved the "bioavailability" of the fatty acid to the mother (*Id.* at ¶¶ 56-60). The proposed Third Amended Complaint also alleges new *Walker Process* claims. Specifically, Lannett contends that KV publicly defamed its product and orchestrated a scheme that caused the major data banks to "de-link" its product from PrimaCare ONE® (*Id.* at ¶¶ 61-70). Lannett also alleges that KV conspired with Albion to develop Sumulate (ferrous asparto glycinate), which has "no medically or nutritionally significant difference from Ferrochel," for purposes of precluding competitors such as Lannett from becoming linked by the data banks as cost effective generic drugs.

These new claims are futile. The inequitable conduct claims regarding the '846 and '666 patents fail to cure the pleading deficiencies of the Second Amended Complaint. As the parties are aware, the Court previously denied Lannett's motion for leave to file a Second Amended Complaint with respect to the '846 and '666 patents as futile because "Lannett as of yet has no basis to allege that KV's representatives had knowledge of the '539 European Application during prosecution of the '846 and the '666 patents." *Lannett Co. Inc. v. KV Pharmaceuticals*, C.A. No.

---

[12] Counts Six through Ten of the Second Amended Complaint should be deemed counterclaims.

08-338 **[*36]** JJF, 2008 WL 4974579, at *5 (D. Del Nov. 21, 2008). However, the Court also found that "Lannett should be afforded an opportunity to amend its pleadings to assert inequitable conduct relating to the '846 and the '666 patents" if "discovery reveals that KV had actual knowledge of the '539 European Application before the '846 and the '666 patents were issued." *Id.* at n.6. Unfortunately for Lannett, discovery does not appear to have revealed any "actual knowledge" of the '539 European Application because the Third Amended Complaint makes the same bare and conclusory allegation as the Second Amended Complaint: that the "KV Defendants knew or should have known of the existence of the '539 Application, but did not disclose to the USPTO the reference of same as a prior art reference." (D.I. 271 at ¶ 32).

Similarly, the Third Amended Complaint's new inequitable conduct claims regarding the '846 and '666 patents (that KV knew about an abstract of an article by Dr. W.E. Connor that is prior art to those patents) fail to allege any "actual knowledge" of the allegedly prior art (*Id.* at ¶¶ 11-15). And even if the allegations in the Third Amended Complaint were sufficient to state a claim for inequitable conduct regarding the '609 patent, the Court **[*37]** lacks subject matter jurisdiction to hear it in a declaratory judgment action.[13] As previously discussed, Lannett has failed to meet its burden of proving that KV took some "affirmative" action to enforce its patents prior to filing the Amended Complaint. *See* Section IIB, supra.

The new *Walker Process* allegations are deficient for the same reason. And Lannett's new *Walker Process* claims do nothing to cure its deficient monopolization claim. *See* Section IIC, supra. The proposed Third Amended Complaint is devoid of any facts that KV has monopoly power or that KV has engaged in exclusionary conduct that could create or sustain any alleged monopoly power. For the foregoing reasons, Lannett's motion for leave to file a Third Amended Complaint should be denied as futile.

B. AMENDED ANSWER

In addition to the new allegations proposed in Lannett's Third Amended Complaint, Lannett also seeks leave to amend its Answer to Lannett's Counterclaim to add patent misuse as an affirmative defense. Lannett argues in its motion that KV misused the asserted patents by (1) enforcing them against Lannett; (2) conspiring to obtain and enforce invalid patents "over new ingredients for its products for the sole purpose of excluding competition"; (3) **[*38]** convincing data banks to not link Lannett's vitamin product to PrimaCare ONE® based on different iron ingredients in the two products; and (4) by identifying expired patents on the package insert of PrimaCare ONE® (D.I. 271, Ex. 3 at ¶ 60).

KV argues that Lannett's affirmative defense of patent misuse does not meet the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure because Lannett does not allege either the facts or elements of a patent misuse defense (D.I. 294 at 10). KV further argues the patent misuse defense fails to comply with the Rule 9(b) requirement of particularity, to the extent that it is based on the alleged fraudulent procurement of patents (*Id.*). However, I need not reach those issues. Even assuming that Lannett's patent misuse defense meets the pleading requirements of both rules, its motion should be denied because none of the new patent misuse allegations, even when assumed to be true, constitute patent misuse.

The purpose of the patent misuse doctrine "is to prevent a patentee from using the patent to obtain market benefit beyond that which inures in the statutory patent right." *Monsanto Co. v. McFarling, 363 F.3d 1336, 1341 (Fed. Cir. 2004)*. To establish a defense, a defendant must show that "by imposing conditions that derive their force from the patent, **[*39]** the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect." *Id. at 1341*.

Lannett's first contention, that the very act by KV of claiming that Lannett has infringed the asserted patents, is incorrect. "The bringing of a lawsuit to enforce legal rights does not of itself constitute violation of the antitrust laws

[13] Because the Court lacks subject matter jurisdiction over the inequitable conduct claim related to the '609 patent, I need not reach the merits of that claim. Accordingly, Lannett's affirmative defense of inequitable conduct on that issue remains intact.

or patent misuse; there must be bad faith and improper purpose in bringing the suit, in implementation of an illegal restraint of trade." *Glaverbel Societe Anonyme v. Northlake Marketing & Supply, Inc., 45 F.3d 1550, 1558 (Fed. Cir. 1995)* (stating that "[a] purpose is improper if its goal is not to win a favorable judgment, but to harass a competitor and deter others from competition, by engaging the litigation process itself, regardless of the outcome"); *35 U.S.C. § 271(d)* (providing that a patentee does not commit misuse by having "sought to enforce its patent rights against infringement"). Lannett does not allege that KV has acted in bad faith or for an improper purpose in asserting its infringement claims. Indeed, KV's counterclaims for infringement were compulsory (*Fed. R. Civ. P. 13(a)*), and Lannett has admitted that its vitamin product is "arguably within the scope of the KV patent" (D.L 271, Ex. 3 at ¶ 64).

The next three grounds for the patent misuse **[*40]** defense concern conduct by KV that is unrelated to the asserted patents. For example, Lannett's contention that KV engaged in patent misuse by "conspiring to obtain and enforce invalid patents over new ingredients for its products for the sole purpose of excluding competition" (*Id.* at ¶ 64) relates to KV's alleged scheme with Albion to create Sumulate (*Id.* at ¶ 67). However, nowhere does Lannett allege that the Sumulate patent(s) belongs to KV, as opposed to Albion, and nowhere does Lannett allege that KV has asserted that patent.

Lannett's contention that KV caused the databanks to de-link Lannett's vitamin product from PrimaCare ONE® based on "different iron ingredients" is also based on Sumulate patents that KV does not own, and has not asserted. Nor does Lannett contend that KV has asserted the expired patents displayed on the package insert of PrimaCare ONE®. Accordingly, Lannett's motion for leave to file the patent misuse defense should be denied. *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp., C.A. No. 98 Civ. 7766(PAC), 2006 U.S. Dist. LEXIS 83823, 2006 WL 3342655, at *2 (S.D.N.Y. 2006)* (stating that "conduct unrelated to the [asserted] patent is not adequate to support Romag's affirmative defense and counterclaim of patent misuse"); *Carter-Wallace, Inc. v. U.S., 449 F.2d 1374, 1384, 196 Ct. Cl. 35 (Ct. Cl. 1971)* ("Misuse defenses must be directed to the patent or patents alleged to be infringed."). **[*41]**

VII. DISPOSITION OF THE DISCOVERY MOTION

Seeking to exceed the ten deposition limit in the Scheduling Order once again,[14] Lannett moves for leave to take the deposition of Dr. Jonathan Bortz, Vice President of Therapeutic Growth Strategies at KV (D.L 292). KV alleges that Dr. Bortz had a "key role in approaching listing agencies, such as First Data Bank, regarding the 'Unking' of Lannett's accused product to KV's product PrimaCare ONE®." (*Id.* at ¶ 12). According to Lannett, "[t]his conduct is highly important to Lannett's antitrust, unfair competition, and tortious interference claims against KV in that Lannett alleges that this and related activities by KV led to a loss of sales and business opportunities." (*Id.*).

The Federal Rules of Civil Procedure prohibit a party from exceeding the number of depositions provided for in the Court's Scheduling Order unless that party demonstrates that additional depositions are necessary under *Rule 26(b)(2)(C)*. The Rule states:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from **[*42]** some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

[14] Lannett has already taken eleven depositions, and has already been granted leave to take two more: that of Albion and Accucaps Industries, Ltd.

Fed. R. Civ. P. 26(b)(2)(C); *see also* *Fed. R. Civ. P. 30(a)(2)*.

Lannett argues that leave should be granted to depose Dr. Bortz because he is "the likely source - and in some instances, the only source of— information" regarding the "linking" of Lannett's product to KV's PrimaCare ONE® (D.I. 292 at ¶¶ 12, 14). KV claims that Larmett could have used one of its depositions to take Dr. Bortz' testimony early in the litigation, but chose not to, and should not be rewarded now for a poor discovery plan (D J. 298 at 3-5). KV also claims that the testimony that it seeks from Dr. Bortz is cumulative of the testimony it has already obtained from Scott Goedeke, KV's Senior Vice President of Marketing (*Id.* at 5). And KV further claims that the additional deposition is unduly burdensome **[*43]** because fact discovery has ended and the parties are well under way with expert discovery and the production of expert reports (*Id.* at 5-6).

All of KV's arguments are persuasive. I find that Dr. Bortz' testimony would be cumulative of Mr. Goedeke's testimony. I also find that Larmett had ample opportunity to take Mr. Bortz' deposition. And I also find that, given my recommendation that Larmett's antitrust and unfair competition claims should be dismissed for failure to state a claim, the burden of discovery far outweighs the "importance of the discovery in resolving the issues" that remain in the case. *Fed. R. Civ. P. 26(b)(2)(C)(iii)*. Lannett's motion is denied.[15]

VIII. CONCLUSION

For the reasons set forth, I recommend that KV's motion to dismiss be granted, Lannett's motion for leave to file a Second Amended Complaint be granted in part and denied in part, KV's motions for summary judgment on Counts Six, Seven, Eight, Nine, and Ten of the Amended Complaint be denied, KV's motion to bifurcate the antitrust, deceptive trade practices and tort claims for the Lanham Act and patent claims be denied as moot, and Lannett's motion for leave to file a Third Amended Complaint be denied.

/s/ Collins J. Seitz, Jr.

Special Master

Dated: February **[*44]** 4, 2009

End of Document

---

[15] Larmett also filed a motion to take an additional *30(b)(6)* deposition, but at oral argument, Lannett stated that Dr. Bortz' deposition and the additional *30(b)(6)* deposition "could be combined." (Transcript of Hearing on Jan. 21, 2009 at 96). Accordingly, Lannett's *30(b)(6)* motion is denied as well.

Walter Kozak D v. Hillsborough Pub. Transp. Comm'n

United States District Court for the Middle District of Florida, Tampa Division

February 4, 2009, Decided; February 4, 2009, Filed

Case No. 8:04-CV-1162-T-27MSS

Reporter
2009 U.S. Dist. LEXIS 151011 *

WALTER KOZAK d/bla Gunny's Intrastate Travel and Tours, Plaintiff, vs. HILLSBOROUGH PUBLIC TRANSPORTATION COMMISSION, Defendant.

Core Terms

transportation, alleges, immunity, interstate, commerce, motion to dismiss, state action, license, travel, anticompetitive, burdened, argues

Counsel: **[*1]** For Hillsborough County Public Transportation Commission an Independent Special District of the State of Florida, DEFENDANT: Brandon Robert, Scheele Banker Lopez Gassler PA, Tampa FL.

For Hillsborough County Public Transportation Commission an Independent Special District of the State of Florida, DEFENDANT: Jay Daigneault, Frazer Hubbard Brandt Trask & Yacavone LLP, Dunedin FL.

For Walter Kozak Doing Business as Gunny's Intrastate Travel and Tours, PLAINTIFF: Walter Kozak, Spring Hill FL.

For Walter Kozak Doing Business as Gunny's Intrastate Travel and Tours, PLAINTIFF: Grayden Michael, Dough Kruk & Dough PL, Port Richey FL.

For Walter Kozak Doing Business as Gunny's Intrastate Travel and Tours, PLAINTIFF: Luke Charles Lirot, Luke Charles Lirot PA, Clearwater FL.

For Walter Kozak Doing Business as Gunny's Intrastate Travel and Tours, PLAINTIFF: Joseph R Kruk III, Law Office of Joseph R Kruk III, Lakeland FL.

For Hillsborough County Public Transportation Commission an Independent Special District of the State of Florida, DEFENDANT: James L Yacavone III, Frazer Hubbard Brandt Trask & Yacavone LLP, Dunedin FL.

Judges: JAMES D. WHITTEMORE, United States District Judge.

Opinion by: JAMES D. WHITTEMORE

Opinion

ORDER

BEFORE THE [*2] COURT is Defendant's Motion to Dismiss Counts II through V of the Amended Complaint (Dkt. 73), to which Plaintiff has responded in opposition (Dkt. 76). Upon consideration, Defendant's motion is GRANTED.

Background

Plaintiff Walter Kozak, d/b/a Gunny's Intrastate Travel and Tours ("Plaintiff') commenced this action against Defendants Hillsborough County Public Transportation Commission, Hillsborough County, Kathy's Airport & Limo Service, Inc., J&M Limousines, Inc., Carol Martin, and Barney Fletcher, in state court on May 6, 2004. On May 20, 2004, the action was removed to this Court. (Dkt. 1).

The Hillsborough County Public Transportation Commission ("the Commission") is an independent special district created by the Legislature of the State of Florida to "regulate the operation of public vehicles upon the public highways of Hillsborough County and its municipalities." (Dkt. 69, Am. Comp. ¶ 7); 2001 Fla. Laws 299. Plaintiff, a sole proprietorship operating a travel and tour business from Hernando County, Florida, is licensed by the State as a "seller of travel" pursuant to *Fla. Stat. § 559.927(10)*. (Am. Comp. ¶¶ 6, 8). Plaintiff provides chartered passenger transportation "with a concentration on sightseeing **[*3]** charters and transfers to and from the interstate transportation hubs located in St. Petersburg, Tampa, Orlando and Port Canaveral." (Am. Comp. ¶ 8).

The original Complaint alleged that Plaintiff was wrongfully arrested at Tampa International Airport in 2003 by a Commission inspector, in conspiracy with the private Defendants, for operating a public vehicle without obtaining a license and permit from the Commission. (Dkt. 2, Comp. ¶¶ 43-45). Plaintiff alleged that the arrest was wrongful because *Fla. Stat. § 559.939*, *Fla. Stat. § 341.102*, and *Article III, section 11(20) of the Florida Constitution* prohibited the Commission from regulating state-licensed "sellers of travel" such as himself. (Comp. ¶¶ 19, 26, 64).

On September 24, 2004, this Court granted Plaintiff's application for a *Pullman* abstention and stayed the case in order for Plaintiff to commence a declaratory judgment in state court as to whether the Commission could, in accordance with state law, regulate state-licensed "sellers of travel." (Dkt. 44). On March 29, 2007, the Thirteenth Circuit Court in and for Hillsborough County granted the Commission's motion for summary judgment, holding that Commission had the authority to regulate "public vehicles" notwithstanding the provisions of Fla. Stat. § 559.53, *Fla. Stat. § 341.102*, and Article III, section 11(20). (Dkt. 48-4). **[*4]** On March 26,2008, the Second District Court of Appeals affirmed. (Dkt. 57, Exh. A).

This Court held a status conference on June 4, 2008 and granted Plaintiff's oral motion to amend his complaint. (Dkts. 59-61). Plaintiff filed the Amended Complaint on July 25, 2008 against the Commission only, alleging five claims: (1) "Federal authority over intrastate transportation" (Count I); (2) "Economic regulation and manipulation of the passenger ground transportation industry is a violation of the Sherman Act" (Count II); (3) "Commission regulatory scheme places discriminatory undue economic burdens on interstate commerce"(Count III); (4) "Application of 2001-299 is unequal and arbitrary" (Count IV); and (5) "Arrest of Kozak and seizure of property and threatened continued enforcement in unconstitutional" (Count V). (Dkt. 69). In the instant motion, the Commission moves to dismiss Counts II through V for failure to state a claim upon which relief and can be granted.

Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the. . . claim is and the grounds upon which **[*5]** it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*; *Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 n.43 (11th Cir. 2008)*. Although a complaint need not include detailed factual allegations, it must contain sufficient factual allegations, which, when taken as true, "raise a right to relief above the speculative level." *Id. at 1964-65*. A conclusory statement of the elements of a cause of action will not suffice to state a claim under *Rule 8*. *Id.* A well-pleaded complaint, however, may survive a motion to dismiss even if it appears "that recovery is very remote and unlikely." *Id. at 1965* (quoting *Scheur v. Rhodes, 416 U.S. 232, 236 (1974))*.

Discussion

1. Sherman Act violation (Count II)

In Count II, Plaintiff alleges that the Commission, acting at the urging of its taxicab industry constituents, "continually explores means to economically block market entry and raise operating costs that will force travelers to seek alternative modes of ground transportation," in an effort "to curb out-of-county motor carriers from the interstate hubs." (Am Comp. ¶ 31). The Commission construes Count II as a monopolization claim under the Sherman Act, *15 U.S.C. § 2*. In order to state a *Section 2* claim, Plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293-94 (11th Cir. 2004)*. In the instant motion, the Commission argues that **[*6]** Plaintiff has not pled a relevant market, the Commission does not possess market power because it is not a market participant, the Commission is protected by state immunity, Plaintiff lacks antitrust standing, and the claim is barred by the statute of limitations. Because the Court finds that the Commission is subject to state action immunity as a matter of law, the remaining arguments are not addressed.

Pursuant to the state action immunity doctrine, "states are immune from federal ***antitrust law*** for their actions as sovereign." *Crosby v. Hosp. Auth. of Valdosta and Lowndes County, 93 F.3d 1515, 1521 (11th Cir. 1996)* (citing *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*. A municipality may also be afforded state action immunity under certain circumstances. *See id. at 1522*; *Town of Hallie v. City of Eau Claire, 471 U.S. 34,46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. To be entitled to immunity, the Commission must demonstrate that: (1) it is a political subdivision of Florida; (2) through statutes, Florida generally authorizes the Commission to perform the challenged action; and (3) through statutes, Florida has clearly articulated a state policy authorizing anticompetitive conduct. *See F.T C. v. Hosp. Bd. of Directors of Lee County, 38 F.3d 1184, 1187-88 (11th Cir. 1994)*.

Plaintiff does not dispute that the Commission constitutes a political subdivision of the state of Florida, and this Court finds that it is, pursuant to its enabling legislation, 2001 Fla. Laws 299 ("S.L. 2001-299" or "the Act"). *See* ***[*7]*** *Hosp. Bd. of Directors of Lee County, 38 F.3d at 1188* (holding that hospital board was political subdivision where it was created by special act of the legislature). Assuming that the Commission's monopoly power is, as Plaintiff alleges, based on its ability to require certificates of public convenience, to set rates, and to set minimum insurance for public vehicles (Am. Comp. ¶¶ 32-33), it is undisputed that S.L. 2001-299 authorizes the Commission to engage in these actions, as required by the second element. The Act specifically provides that the Commission possesses power to fix rates and charges for public vehicles and to require additional insurance coverage for public vehicles. *See* 2001 Fla. Laws. 299, sec. 5(gg), (jj).[1] The Act also mandates that the Commission carry out the Act's provisions for requiring certificates of public convenience from public vehicle operators. *See* 2001 Fla. Laws. 299, sec. 5(g), sec. 7(2).[2]

Finally, the Court finds that S.L. 2001-299 manifests the requisite "clearly articulated state policy" authorizing anticompetitive conduct. It is well-established that the state policy need not be expressly articulated if the relevant

---

[1] Section 5(2) provides that the Commission "has the power to:"

"(gg) Require additional insurance coverage and limitations by rule for certificate holders which coverages may not be less than those required by general law or by this act."

"(jj) Fix or approve zones, rates, fares, and charges for public vehicles other than taxicabs."

[2] Section 5(a) provides that the Commission "shall:"

"(g) Perform the duties required by this action and any rules adopted in accordance with this act relating to the application for and approval, modification, or rejection of certificates, permits, and public vehicle drivers' licenses."

Section 7(2) sets for the requirements for an application for a certificate.

law provides for "a regulatory scheme that inherently displaces unfettered business freedom." *Executive Town & Country Servs., Inc. v. City of Atlanta, 789 F.2d 1523, 1529 (11th Cir. 1986)*. In other words, the **[*8]** policy may be clearly articulated if anticompetitive conduct is "the foreseeable result of the legislation." *Hosp. Bd. of Directors of Lee County, 38 F.3d at 1188*. An anticompetitive effect is foreseeable if it could "reasonably be anticipated to result from the powers granted to a political subdivision by the state. "*Id. at 1191*.

In a factually similar case, the Eleventh Circuit held that there was "no doubt" that the pertinent Georgia statute specifically authorized the City of Atlanta to set rates for motor carriers and that the city was therefore entitled to immunity. *Executive Town & Country Servs., Inc., 789 F.2d at 1529-30*. Consistent with *Executive Town & Country Services, Inc.*, this Court finds that it could be reasonably anticipated that S.L. 2001-299, based on its comprehensive regulatory scheme, would result in an anticompetitive effect on the public vehicle transportation industry. The Commission is therefore entitled to state action immunity as a matter of law. *Id.; see also TEC Cogeneration Inc. v. Fla. Power & Light Co., 76 F.3d 1560, 1568 (11th Cir. 1996)* (finding that utility was subject to state action immunity based on comprehensive regulatory scheme).

Because the application of the state action immunity doctrine appears on the face of the Amended Complaint, the Commission's motion to dismiss Count II is GRANTED. *See Brown v. Crawford County, 960 F.2d 1002, 1009-10 (11th Cir. 1992)* (stating that district court should resolve absolute **[*9]** immunity issues on a motion to dismiss or motion for judgment on the pleadings).

2. Commerce Clause (Count III)

In Count III, Plaintiff alleges that the regulatory provisions in S.L. 2001-299 impose "discriminatory undue burdens on interstate commerce," which the Commission construes as a claim pursuant to the *Commerce Clause of the United States Constitution*. The Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." *U.S. Const. Art. I, § 8, cl. 3*. Although the *Commerce Clause* provides an affirmative grant of regulatory power to Congress, it is also "understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys/, Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)*. This so-called "dormant *commerce clause*" "prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844, 846 (11th Cir. 2008)* (internal quotations omitted). It is undisputed that a business such as Plaintiff's, which mainly consists of providing prearranged trips to and from international airports, is part of interstate commerce. *See Executive Town & Country Servs., Inc., 789 F.2d at 1526*.

In the instant motion, the Commission argues that Plaintiff has not adequately alleged that S.L. 2001-299 does, in fact, "burden" interstate commerce. The Court agrees. **[*10]** The Amended Complaint alleges that the requirement that any public vehicle operator acquire a certificate to operate in Hillsborough County "effectively blocks any motor carrier providing passenger transportation in a conveyance that would fit the definition of a public vehicle from traversing Hillsborough County regardless of what type of transport is being provided" and "blocks access to regional interstate transportation hubs." (Am. Comp. ¶¶ 39, 40). In alleging that transportation is "effectively blocked," Plaintiff is essentially claiming that commerce is "burdened." This conclusory allegation is insufficient under *Rule 8* notice pleading standards because it requires the Court to speculate as to how commerce is burdened. *Bell Atlantic Corp., 127 S.Ct. at 1964-65* (complaint must contain sufficient allegations to "raise a right to relief above the speculative level"). The Commission's motion to dismiss the *Commerce Clause* Claim (Count III) is therefore GRANTED.

3. Equal Protection Clause (Count IV)

In Count IV, Plaintiff alleges that S.L. 2001-299 is "unequal and arbitrary" as applied to his business. The Commission has construed this as a "class of one" selective enforcement challenge under the *Equal Protection*

Clause of the United States Constitution. U.S. CONST. amend. XIV, § 1. In order to plead this type of equal protection claim, Plaintiff **[*11]** must allege that: (1) he was treated differently from other similarly situated individuals; and (2) the Commission unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiff. *Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1045 (11th Cir. 2008)*. The Commission argues that Plaintiff has failed to allege both that a similarly situated individual exists and that the Commission intentionally discriminated against Plaintiff. This Court agrees.

As to the first element, it is well-established that Plaintiff must identify other similarly individuals or entities with "some specificity." *Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006)*. Further, this Court is "obliged to apply the 'similarly situated' requirement with rigor." *Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1207 (11th Cir. 2007)*. In the Amended Complaint, Plaintiff alleges that while "dozens of unlicensed limousine companies" were permitted to operate in Hillsborough County without a license during the 2001 Super Bowl, he was arrested in 2003 for operating without a license. (Am. Comp. ¶ 45). This allegation fails to identify a similarly situated entity with the requisite specificity, and is therefore insufficient. *See id.*

Although Plaintiff now argues in the response in opposition that a company called Carey International was one of the companies that received preferential **[*12]** treatment in 2001, the Amended Complaint clearly does not include such an allegation with respect to the 2001 Super Bowl. The Amended Complaint instead alleges that the Commission and the NFL "were cutting a deal" to grant licensing exemptions to Carey International for transportation during the *2009* Super Bowl in Tampa when Plaintiff challenged their authority to waive licensing requirements. (Am. Comp. ¶ 46). Plaintiff has not, however, alleged that any unequal treatment actually occurred in connection with the 2009 Super Bowl.

Moreover, Plaintiff has not alleged facts indicating that the Commission engaged in the requisite "intentional or purposeful discrimination." *E & T Realty v. Strickland, 830 F.2d 1107, 1112-13 (11th Cir. 1987)*. "Even arbitrary administration of a statute, without purposeful discrimination, does not violate the *equal protection clause*." *Id. at 1114*. Plaintiff has alleged only arbitrary enforcement at best, and Count W therefore fails on this additional basis.

Based on the foregoing, the Commission's motion to dismiss the *Equal Protection Clause* claim (Count IV) is GRANTED.

4. Count V

As the Commission correctly argues, Plaintiff fails to identify any constitutional or statutory basis for his claim in Count V, which appears to encompass multiple theories of relief. This claim is accordingly **[*13]** DISMISSED WITHOUT PREJUDICE, with leave to provide a more definite statement pursuant to Rule 12(f). *Davis, 516 F.3d at 983-84*.

Conclusion

Upon consideration, it is **ORDERED AND ADJUDGED**:

1) Defendant's Motion to Dismiss Counts II through V of the Amended Complaint (Dkt. 73) is **GRANTED**. Plaintiff is granted leave to file an Amended Complaint within **twenty (20) days** of the date of this Order.

2) The Clerk is directed to **REOPEN** this case and change the Magistrate Judge as s ignment.[3]

DONE AND ORDERED in chambers this 4th day of February, 2009.

/s/ James D. Whittemore

---

[3] The Honorable Mary S. Scriven was confirmed as a District Judge for the Middle District of Florida on September 26, 2008.

JAMES D. WHITTEMORE

United States District Judge

Apple Inc. v. Psystar Corp.

United States District Court for the Northern District of California

February 6, 2009, Decided; February 6, 2009, Filed

No. C 08-03251 WHA

Reporter

2009 U.S. Dist. LEXIS 14370 *; 90 U.S.P.Q.2D (BNA) 1123 **

APPLE INC., a California corporation, Plaintiff, v. PSYSTAR CORPORATION, a Florida corporation, Defendant.

Subsequent History: Motion denied by, Motion granted by Apple Inc. v. Psystar Corp., 673 F. Supp. 2d 926, 2009 U.S. Dist. LEXIS 94019 (N.D. Cal., Sept. 22, 2009)

Prior History: Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 2008 U.S. Dist. LEXIS 93780 (N.D. Cal., 2008)

Core Terms

misuse, counterclaims, software, antitrust, amend, alleges, futile, unfair competition, operating system, manufacturers, infringement, declaratory, predicated, licensed, computer hardware, motion for leave, violations

LexisNexis® Headnotes

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

HN1[] **Amendment of Pleadings, Leave of Court**

Under Fed. R. Civ. P. 15(a), leave to amend a complaint shall be freely given when justice so requires, but leave to amend need not be granted when an amendment would be futile.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN2[] **Defenses, Copyright Misuse**

The United States Court of Appeals for the Ninth Circuit has explicitly adopted the doctrine of copyright misuse. The Ninth Circuit has implied in prior decisions that misuse is a defense to copyright infringement. The United States District Court for the Northern District of California adopts that rule.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN3[] **Defenses, Copyright Misuse**

The doctrine of copyright misuse forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which is contrary to public policy to grant.

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN4[] **Defenses, Copyright Misuse**

Copyright misuse does not invalidate a copyright, but precludes its enforcement during the period of misuse. Moreover, a defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense.

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

HN5[] **State Regulation, Claims**

"Unfair" conduct under *Cal. Bus. & Prof. Code § 17200* is conduct that threatens or harms competition. Any finding of unfairness to competitors under *§ 17200* must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.

Counsel: [*1] For Apple Inc., a California corporation, Plaintiff, Counter-defendant: James G. Gilliland, LEAD ATTORNEY, Jeb Bacon Oblak, Megan M Chung, Mehrnaz Boroumand Smith, Townsend and Townsend and Crew LLP, San Francisco, CA.

For Psystar Corporation, Defendant: Christine S. Watson, Robert Joseph Yorio, LEAD ATTORNEYS, Christopher Paul Grewe, Colby B. Springer, Carr & Ferrell LLP, Palo Alto, CA.

For Psystar Corporation, Counter-claimant: Christine S. Watson, Robert Joseph Yorio, LEAD ATTORNEYS, Colby B. Springer, Carr & Ferrell LLP, Palo Alto, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

[1124] ORDER RE PSYSTAR'S MOTION FOR LEAVE TO AMEND COUNTERCLAIMS**

INTRODUCTION

Plaintiff Apple Incorporated filed this lawsuit against defendant Psystar Corporation asserting copyright, trademark and other claims related to PsyStar's use of Apple's computer operating system. PsyStar filed counterclaims against Apple alleging violations of federal and state antitrust laws. A previous order granted Apple's motion to dismiss the counterclaims without prejudice. Psystar now moves for leave to amend in order to assert counterclaims under the copyright misuse doctrine and state unfair competition laws. For the **[*2]** reasons stated below, the motion for leave to amend is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

In its proposed pleading, PsyStar no longer presses its antitrust counterclaims but instead seeks leave to amend in order to assert counterclaims for copyright misuse, and for unfair competition violations predicated on the alleged copyright misuse. The facts of this case were set forth in detail in the order granting Apple's motion to dismiss and do not differ significantly in PsyStar's proposed amendment (Dkt. No. 33).

Apple manufacturers and markets the Macintosh Computer and the OS X Operating System ("Mac OS"). Operating systems like Mac OS control and direct the interaction between software applications such as word processors and internet browsers, and the central processing unit and the various hardware in a computer. Apple is the exclusive manufacturer and master licensor of Mac OS (Countercl. PP 9, 14, 17). [1]

PsyStar manufacturers and distributes a tailored line of computers called Open Computers. PsyStar's Open Computers support a wide range of operating **[*3]** systems including Mac OS, Microsoft Windows XP and XP 64-bit, Windows Vista and Vista 64-bit and Linux 32 and 64-bit kernels. PsyStar allows its customers to choose the operating system on the computers they purchase (Countercl. PP 11-12).

Numerous companies manufacturer entire computer hardware systems, including (but not limited to) Dell, Acer, Lenovo, Sony and Hewlett-Packard. In addition, numerous companies manufacture and sell components -- such as hard drives, processors and graphics processing cards -- used by those computer manufacturers. Few competitors, if any, other than PsyStar, however, currently sell computers compatible with Mac OS (Countercl. PP 18-19, 22, 57).

PsyStar alleges that Apple has improperly leveraged its Mac OS copyrights in order to gain exclusive rights with respect to Mac OS-compatible computer hardware systems not granted in the Mac OS copyrights, in two general respects.

First, PsyStar alleges that Apple has wrongfully extended the scope of its Mac OS copyright via its End User License Agreement ("EULA"), which specifically required that consumers install Mac OS *only* on Apple-labeled computers, as well as by embedding certain technical barriers to interoperability **[*4]** in Mac OS -- kernel panic and infinite loops (Countercl. PP 36-51). [2]

Second, PsyStar alleges that Apple is leveraging its Mac OS copyrights by improperly asserting claims under the Digital Millennium Copyright Act, *17 U.S.C. 1201 et seq.* ("DMCA"). PsyStar alleges, in effect, that Apple is improperly extending its Mac OS copyright into the computer hardware market by intimidating potential competitors into avoiding the market with dubious DMCA claims (Countercl. PP 52-56). **[**1125]**

The proposed counterclaim asserts four claims for relief, all of which seek a declaratory judgment that Apple's Mac OS copyrights are unenforceable. The first claim alleges copyright misuse based on Apple's exclusive licensing of Mac OS in its EULA. The second claim alleges copyright misuse based on Apple's use or threat of DMCA claims against potential competitors for Apple's Mac OS -based computers. The third claim alleges a violation of **[*5]** California's unfair competition laws predicated on the alleged copyright misuse related to the EULA. The fourth claim alleges a violation of California's unfair competition laws predicated on the alleged copyright misuse related Apple's DMCA claims.

ANALYSIS

HN1[] Under *FRCP 15(a)*, leave to amend a complaint shall be freely given when justice so requires, but "[l]eave to amend need not be granted when an amendment would be futile." *In re Vantive Corp. Sec. Litig., 283 F.3d 1079,*

---

[1] All references to the counterclaim and citations to "Countercl." hereafter refer to the proposed first amended counterclaim.

[2] The EULA states, "This license allows you to install, use and run (1) copy of the Apple Software on a single Apple-labeled computer at a time. You agree not to install, use or run the Apple Software on any non-Apple-Labeled computer or enable another to do so" (Countercl. P 47).

1097 (9th Cir. 2002). As stated, in its proposed amendment PsyStar abandons its antitrust claims and instead asserts counterclaims for copyright misuse and for violations of California's unfair competition laws predicated on the alleged copyright misuse. In its answer to Apple's complaint, PsyStar asserted copyright misuse as an affirmative defense. PsyStar now seeks to assert it as a counterclaim as well.

Apple contends that the proposed amendment would be futile, for the following reasons: (1) copyright misuse may be alleged only as a defense, not as a counterclaim; (2) the counterclaims fail adequately to plead copyright misuse; (3) that state unfair competition claims may not be predicated on the defense of copyright **[*6]** misuse.

HN2[] The Ninth Circuit explicitly adopted the doctrine of copyright misuse for the first time in *Practice Management*:

> We have implied in prior decisions that misuse is a defense to copyright infringement. *See* *Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir.1995)*; *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986)*. We now adopt that rule.

Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516, 520 (9th Cir. 1997). ***HN3***[] The doctrine "forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which is contrary to public policy to grant." *Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir. 2005)* (citation omitted).

HN4[] "Copyright misuse does not invalidate a copyright, but precludes its enforcement during the period of misuse." *Practice Management, 121 F.3d at 520 n.9*. Moreover, "a defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense." *Id. at 521*.

Apple contends that copyright misuse may *only* be asserted as a defense, not as a counterclaim. This order **[*7]** is unconvinced, however, that misuse may never be asserted as a counterclaim for declaratory relief. PsyStar may well have a legitimate interest in establishing misuse independent of Apple's claim against it, for example, to clarify the risks it confronts by marketing the products at issue in this case or others it may wish to develop. Moreover, if established, misuse would bar enforcement (for the period of misuse) not only as to defendants who are actually a party to the challenged license but also as to potential defendants not themselves injured by the misuse who may have similar interests. *See* *Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990)*.

The best analogy is to patent misuse. *See* *Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990)*. Apple identifies no rule analogous to the one it here urges barring counterclaims for patent misuse, and in fact patent misuse counterclaims have been permitted. *See, e.g.,* *Allan Block Corp. v. County Materials Corp., 512 F.3d 912 (7th Cir. 2008)*; *Glitsch, Inc. v. Koch Engineering Co., Inc., 216 F.3d 1382 (Fed. Cir. 2000)* (both discussing patent misuse counterclaims). This order finds no reason to reject plaintiff's **[*8]** misuse counterclaims as necessarily futile.

It is true that the Ninth Circuit has described the doctrine of copyright misuse as a defense. *Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir. 2005)*. The doctrine has, however, been permitted in actions for declaratory relief in this **[**1126]** circuit as well. *Practice Management, 121 F.3d at 518* (describing the doctrine as a defense, but the issue actually arose in an action for declaratory judgment); *Open Source Yoga Unity v. Choudhury, 2005 U.S. Dist. LEXIS 10440, 2005 WL 756558, *8 (N.D. Cal. 2005)* (Hamilton, J.) (declaratory relief action). Insofar as other district courts have concluded that the doctrine may not be asserted as a counterclaim, this order respectfully disagrees. [3]

---

[3] *See, e.g.,* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 269 F. Supp. 2d 1213, 1225-26 (C.D. Cal. 2003)*, *aff'd*, *380 F.3d 1154*, *vacated on other grounds by* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)*; *Ticketmaster L.L.C. v. RMG Technologies, Inc., 536 F. Supp. 2d 1191, 1199 (C.D. Cal. 2008)*.

It is also true that, in *Altera*, the Ninth Circuit rejected an effort affirmatively to assert a misuse claim and emphasized that the doctrine is ordinarily a defense. **[*9]** *Altera, 424 F.3d at 1090*. That decision, however, is distinguishable. It simply agreed with the district court that the doctrine of copyright misuse should not be extended beyond its "logical place" as a defense to an infringement claim in order to allow it to be used as a defense to *state law* claims or as a "pretext" to avoid enforcement of certain licensing agreements, when no claim or threat of copyright infringement had been asserted. *Altera Corp., 424 F.3d at 1090*. Here, Apple *has* asserted copyright claims against PsyStar, and as stated, Psystar's interest in the issue may not be limited solely to its defense of those claims. As in *Open Source Yoga*, subject-matter jurisdiction exists over the declaratory judgment action. *Open Source Yoga Unity, 2005 U.S. Dist. LEXIS 10440, 2005 WL 756558, at *8*. This order, therefore, rejects the argument that misuse may never be asserted as a counterclaim and declines to find PsyStar's misuse counterclaims futile on that basis.

Apple further argues that amendment would be futile because the proposed amended counterclaims fail to plead sufficient facts to support the claim. In its proposed amended counterclaims, PsyStar alleges that Apple leveraged Mac OS copyrights to secure **[*10]** exclusive rights not within the scope of the monopolies granted by those copyrights, *i.e.*, to Mac OS-compatible computer hardware systems. The complaint avers that Apple accomplished this through its EULA, through allegedly spurious litigation and by other means.

Apple responds that it is within its rights to determine whether, how or by whom its software is reproduced and how it is to be licensed, distributed or used. This may ultimately prove to be true. Apple, however, identifies no reason to bar the claims as a matter of law at the pleading stage. This order declines to find the claims futile.

Apple cites *Triad Systems v. Southeastern Express Company, 64 F.3d 1330 (9th Cir.1995)*. Triad was a seller of computer systems that performed sales, inventory and accounting tasks for auto parts stores. It held copyrights in the computers' operating systems, application software, and in service software. The service software included utilities, diagnostic, and auxiliary software which was used by technicians to repair Triad computers. Triad sued Southeastern, an independent service organization that serviced Triad computers. Triad and Southeastern competed in the business of servicing Triad **[*11]** computers. Triad brought an infringement action against Southeastern claiming that in servicing the computers, Southeastern used the computers' OS and service software, and in so doing it infringed the copyrights because copies of the software were made in the computer's random access memory when the computer was in use. The service potentially also involved making copies onto the computer's hard drive or backup copies. *Triad, 64 F.3d at 1333-34*.

Triad had instituted a regime whereby it licensed rather than sold its software and, under the agreements, customers could not duplicate the software or allow it to be used by third parties. Southeastern asserted that these limitations constituted misuse. The decision agreed with the district court's rejection of the misuse defense, because "Triad did not attempt to prohibit Southeastern or any other ISO from developing its own service software to compete with Triad." *Id. at 1337*. Apple contends that *Triad* governs PsyStar's motion, because "[a]s is the case with the Apple [EULA], Triad did not attempt to control the use of its hardware, but only the use of its copyrighted software" (Opp. at 7).

In *Triad*, the district court had rejected the misuse **[*12]** defense in the course of issuing a preliminary injunction, and the Ninth Circuit simply agreed with that ruling, finding that Southeastern could "[]not show that it is likely to prevail on its asserted copyright misuse defense." The issue did not arise in an effort **[**1127]** to bar a claim or counterclaim. Moreover, *Triad* did not clarify the scope of its holding; its entire analysis consisted of four sentences. Apple interprets the decision to have hinged on whether or not Triad had sought to "control the use of its hardware," but that is not the only interpretation. The decision may eventually be found to provide some degree of guidance, but this order declines to find the proposed pleading futile based on *Triad*. Apple also cites language from the November 2008 order in this case granting Apple's motion to dismiss PsyStar's counterclaims. The order addressed the *antitrust* issues then before the court; it did not opine one way or the other on the merits of Apple's instant *copyright* claims or PsyStar's misuse allegations. For all of these reasons, PsyStar's motion for leave to amend is granted with respect to the proposed misuse counterclaims.

As stated, PsyStar also seeks leave to amend in order **[*13]** to assert Section 17200 claims predicated on the misuse claims. Apple's opposition thereto relies in part on its contentions that the misuse counterclaims themselves fail, and to that extent, its contentions are foreclosed by the conclusions reached above.

Apple also contends that those claims fail because PsyStar has failed adequately to plead any actual or incipient violation of the antitrust laws. Both sides agree that ***HN5***[] "unfair" conduct under *Section 17200* is conduct that threatens or harms competition. *Cel-Tech Communications v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186-87, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (requiring "that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition"). Thus, although the misuse doctrine does not hinge on antitrust violations, plaintiff's Section 17200 claims survive only if the complaint pleads conduct that "threatens an incipient violation of [] ***antitrust law***[s], or violates the policy or spirit of one of those laws." *Id. at 187*.

PsyStar's single-product-market theory was previously rejected (Dkt. No. 33). Plaintiff fails otherwise to identify an actual **[*14]** or incipient violation of antitrust laws or the spirit thereof -- harm to competition. PsyStar argues that the alleged misuse is, "at the least, unfair in that Apple has attempted (and continues to attempt) to extend the reach of its copyrights by tying them to computer hardware not otherwise protected by the Copyright Act" (Reply at 12). It fails to explain, however, how this conduct constitutes harm to competition or a violation of the spirit of the antitrust laws. In the context of single-firm conduct, tying requires monopolization. PsyStar has identified none -- other than the limited monopolies inherent in the copyrights themselves. The Section 17200 claims, therefore, are futile. PsyStar's motion for leave to amend the Section 17200 claims is denied.

CONCLUSION

For all of the above-stated reasons, PsyStar's motion for leave to amend is **GRANTED IN PART AND DENIED IN PART**. PsyStar should file its amended counterclaims, to the extent here permitted, within seven days of the date of entry of this order and Apple must answer within 20 calendar days. No more motion practice shall be allowed on the pleadings without leave of the Court. Both sides should be taking discovery and preparing **[*15]** themselves for trial and/or summary judgment.

IT IS SO ORDERED.

Dated: February 6, 2009.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

In re K-Dur Antitrust Litig.

United States District Court for the District of New Jersey

February 6, 2009, Decided; February 6, 2009, Filed

Civil Action No. 01-1652 (JAG); MDL Docket No. 1419

Reporter

2009 U.S. Dist. LEXIS 126249 *; 2010-1 Trade Cas. (CCH) P76,949

IN RE K-DUR ANTITRUST LITIGATION; This Document Relates To: All Direct Purchaser Actions

Subsequent History: Adopted by *In re K-Dur Antitrust Litig., 2010 U.S. Dist. LEXIS 28918 (D.N.J., Mar. 24, 2010)*

Prior History: *In re K-Dur Antitrust Litig., 2009 U.S. Dist. LEXIS 11756 (D.N.J., Feb. 4, 2009)*
In re K-Dur Antitrust Litig., 2008 U.S. Dist. LEXIS 118396 (D.N.J., Apr. 14, 2008)

Core Terms

patent, settlement, generic, infringement, exclusionary, anticompetitive, potassium chloride, parties, baseless, FDA, Plaintiffs', expired, manufacturer, invalid, summary judgment, effects, tablet, certification, antitrust, lawsuit, Defendants', products, viscosity, settlement agreement, license, rule of reason, terms, district court, courts, marketing

LexisNexis® Headnotes

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate under *Fed. R. Civ. P. 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law.

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

HN2[] **Burdens of Proof, Movant Persuasion & Proof**

Under *Fed. R. Civ. P. 56(c)*, a moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Fed. R. Civ. P. 56*.

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

HN3[] **Burdens of Proof, Nonmovant Persuasion & Proof**

Once a moving party has satisfied its initial summary judgment burden, the party opposing the motion must establish that a genuine issue as to a material fact exists.

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

HN4[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A party opposing a summary judgment motion may not rest upon mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Speculation and conclusory allegations do not satisfy the nonmoving party's duty.

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

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

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

On summary judgment, a nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial. A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

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

HN6[] **Entitlement as Matter of Law, Materiality of Facts**

On summary judgment, a fact is material only if it might affect the outcome of the suit under the applicable rule of law.

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

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

HN7[] **Sherman Act, Scope**

Section 1 of the Sherman Act declares that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal. *15 U.S.C.S. § 1*. It is well-settled, however, that this provision outlaws only unreasonable restraints of trade. In order to determine whether an unreasonable restraint of trade has taken place, courts have traditionally used one of two different analyses: the per se rule and the rule of reason.

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

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

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

The per se analysis under § 1 of the Sherman Act, 15 U.S.C.S. § 1, applies only under circumstances where courts have previously considered the type of conduct and found that its expected effects are overwhelmingly anticompetitive and have little prospect of yielding any pro-competitive benefit. For a per se analysis to apply, the courts must have adequate judicial experience with the type of conduct at issue and must have found that it yields anticompetitive effects in the vast majority of cases--almost 100 % of the time. Under the per se approach, a court can condemn an action as a per se illegal restraint on trade without elaborate inquiry into the defendant's market power, the actual anticompetitive effects of the restraint in a particular case, or the rationales offered for it. The per se analysis applies to only a few types of conduct, including naked exit payments (those payments made solely to keep a competitor out of the market), market-division agreements, and price fixing.

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

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

HN9[] Sherman Act, Scope

In most cases, where the conduct is not so clearly anticompetitive, courts use the rule of reason analysis under § 1 of the Sherman Act, 15 U.S.C.S. § 1. Further, categorization of conduct often is not clear cut, and there is always something of a sliding scale in appraising reasonableness. In the rule of reason analysis, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

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

Evidence > Burdens of Proof > Allocation

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

Evidence > Burdens of Proof > Burden Shifting

HN10[] Sherman Act, Scope

Courts divide the rule of reason analysis under § 1 of the Sherman Act, 15 U.S.C.S. § 1, into three parts, which involve burden-shifting between the two parties. First, a plaintiff must show that the conduct has produced adverse, anticompetitive effects within the relevant market. If the plaintiff is able to prove this effect, then the burden shifts to the defendant, who must attempt to prove that the conduct promotes a sufficiently pro-competitive objective. If the defendant meets this standard, the burden then shifts back to the plaintiff to prove that the restraint is not reasonably necessary to achieve the pro-competitive objective.

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

Evidence > Burdens of Proof > Allocation

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

Evidence > Burdens of Proof > Burden Shifting

HN11[] Sherman Act, Scope

In addition to the per se and rule of reason standards under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a third type of analysis has evolved: the "quick look" or "truncated rule of reason." The truncated rule of reason analysis permits a plaintiff to shift the burden to the defendant more quickly, once the plaintiff has shown that the defendant has engaged in conduct similar to those practices falling into the per se category, for example, restraints on price, output or customers. The plaintiff need not establish the relevant market or the defendant's market power, but the defendant has the opportunity to demonstrate pro-competitive justifications and efficiencies.

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN12[] Defenses, Inequitable Conduct

It is not bad faith to assert patent rights that one is not certain will be upheld in a suit for patent infringement pressed to judgment and to settle a suit to avoid risking the loss of the rights. No one can be certain that he will prevail in a patent suit.

Civil Procedure > Settlements > General Overview

Patent Law > Infringement Actions > General Overview

HN13[] Civil Procedure, Settlements

There is a public policy favoring settlement of patent disputes.

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

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

HN14[] Price Fixing & Restraints of Trade, Vertical Restraints

Ancillary restraints are generally permitted if they are reasonably necessary toward a contract's objective of utility and efficiency.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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

HN15[] Noerr-Pennington Doctrine, Sham Exception

In order to establish that a defendant's patent lawsuits were objectively baseless, a plaintiff must show that the lawsuits were objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is not objectively baseless, and an antitrust claim premised on the sham exception must fail. Where there is no dispute over the predicate facts of an underlying lawsuit, the question of whether the suit was objectively baseless is a matter of law. Predicate facts are the facts and circumstances that were available to the party that brought the underlying lawsuit.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Clear & Convincing Proof

HN16[] **Noerr-Pennington Doctrine, Sham Exception**

A party seeking to establish that a lawsuit was objectively baseless must do so with clear and convincing evidence. Clear and convincing evidence is defined as evidence that places in a court, as factfinder, an abiding conviction that the truth of its factual contentions are highly probable. Clear and convincing falls between the reasonable doubt standard governing criminal cases and the preponderance of the evidence standard typical of civil actions.

Counsel: [*1] For **STEPHEN M. ORLOFSKY,** **Special Master:** **STEPHEN M. ORLOFSKY,** *LEAD ATTORNEY,* BLANK, ROME, LLP, PRINCETON, NJ.

For **HIP HEALTH PLAN OF FLORIDA, INC.,** *on behalf of itself and all others similarly situated,* **Plaintiff:** **DANIEL BERGER,** *LEAD ATTORNEY,* BERGER & MONTAGUE, PC, PHILADEPHIA, PA; **LISA J. RODRIGUEZ,** *LEAD ATTORNEY,* TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For **Indirect Purchaser Plaintiffs,** **Plaintiff:** **SHELLY L. FRIEDLAND,** COHEN, MILSTEIN, HUSFLD & TOLL, P.L.L.C., NEW YORK, NY; **THEODORE M. LIEVERMAN,** SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA; **ALLYN ZISSEL LITE,** LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For **Direct Purchaser Plaintiffs,** **Plaintiff:** **BARRY L. REFSIN,** *LEAD ATTORNEY,* HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA.

For **AMY REICHERT,** *on behalf of herself and all others similarly situated,* **GREAT LAKES HEALTH PLAN, INC.,** *on behalf of itself and all others similarly situated,* **JOSEPH J. MORGAN,** *on behalf of himself and all others similarly situated,* **Consol Plaintiffs:** **LISA J. RODRIGUEZ,** *LEAD ATTORNEY,* TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For **JACQUELINE CUNDIF,** **Consol Plaintiff:** **DAVID K. LIETZ,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, **[*2]** COALE, COOLEY, LIETZ & MCINERNY, ESQS., WASHINGTON, DC; **FREDERICK P. FURTH,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, THE FURTH FIRM LLP, SAN FRANCISCO, CA.

For **TEAMSTERS HEALTH AND WELFARE FUND OF PHILADELPHIA AND VICINITY,** *on behalf of itself and all others similarly situated,* **UNITED FOOD AND COMMERCIAL WORKERS LOCAL 56 HEALTH & WELFARE DEPARTMENT,** *on behalf of itself and all others similarly situated,* **PATRICK J. LYNCH,** **Consol Plaintiffs:** **LISA J. RODRIGUEZ,** *LEAD ATTORNEY,* TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; **THEODORE M. LIEVERMAN,** SPECTOR, ROSEMAN & KODROFF, PC, PHILADELPHIA, PA.

For **CARL M. WALLACE, BURT LAVIN,** *on behalf of themselves and all others similarly situated,* **NORMA SEABROOK, ISRAEL REXACH, ELIAS HUSAMUDEEN, WILLIAM WASNICKI, GUY ANDERSON, ROBERT SEABROOK, STEVEN ROBINSON,** *On behalf of Correction officers benevolent association security benefits fund, on behalf of themselves and all other similarly situated,* **Consol Plaintiffs:** **LISA J. RODRIGUEZ,** *LEAD ATTORNEY,* TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For **ESTELLE TRAVERS,** *on Behalf of Herself and all Others Similarly Situated,* **Consol Plaintiff: GUIDO SAVERI, RICHARD ALEXANDER SAVERI,** *LEAD* ***[*3]*** *ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAVERI & SAVERI, INC., SAN FRANCISCO, CA.

For **MECHANICAL CONTRACTORS-UA LOCAL 119 WELFARE PLAN,** *by and through its Trustees, Danny Price, William Morrison, Phillip Holloway, J. Bradley Donaghey, Glen Reed Jr. and Stanley Small,* **IBEW-NECA LOCAL 505 HEALTH & WELFARE PLAN,** *by and through its Trustees, Donnie Adams, Terry N. Adams, Fred J. Moore, Charles S. Belk, Charles Freeman and Larry Smith,* **A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN,** *by and through its Trustees, Larry Fincher, Gordon Parmer, Charles Loftin, Gene Stokely, Jack Terry and Andy Joiner,* **Consol Plaintiffs: JOSEPH J. DEPALMA,** *LEAD ATTORNEY,* LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For **ESTATE OF STANLEY NEMSER, Consol Plaintiff: ALLYN ZISSEL LITE,** *LEAD ATTORNEY,* LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; **ANN D. WHITE,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, ANN D. WHITE LAW OFFICES, P.C., JENKINTOWN, PA.

For **CONSUMERS FOR AFFORDABLE HEALTHCARE COALITION, Consol Plaintiff: STEVEN J. PFEFFERLE,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, TERHAAR ARCHIBALD PFEFFERLE & GRIEBEL, MINNEAPOLIS, MN.

For **WALGREEN CO., Consol Plaintiff: DEBORAH S. CORBISHLEY,** *LEAD* ***[*4]*** *ATTORNEY,* KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW & SPECTOR, PA, MIAMI, FL; **STACEY K. SUTTON,** *LEAD ATTORNEY,* CARLTON FIELDS PA, WEST PALM BEACH, FL.

ECKARD CORPORATION, Consol Plaintiff, Pro se.

For **ECKARD CORPORATION, THE KROGER CO., ALBERTSON'S INC., SAFEWAY, INC., HY-VEE, INC., Consol Plaintiffs: STACEY K. SUTTON,** *LEAD ATTORNEY,* CARLTON FIELDS PA, WEST PALM BEACH, FL.

THE KROGER CO., Consol Plaintiff, Pro se.

ALBERTSON'S INC., Consol Plaintiff, Pro se.

SAFEWAY, INC., Consol Plaintiff, Pro se.

HY-VEE, INC., Consol Plaintiff, Pro se.

For **NATALIE SUTIN,** *on behalf of herself and all others similarly situated,* **Consol Plaintiff: LIONEL Z GLANCY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, Los Angeles, CA.

For **ROSE LIPSCOMB, NEW YORK STATE-WIDE SENIOR ACTION COUNCIL, INC., MASSACHUSETTS SENIOR ACTION COUNCIL,** *on behalf of themselves and all others similarly situated,* **Consol Plaintiffs: ALLYN ZISSEL LITE,** *LEAD ATTORNEY,* LITE DEPALMA GREENBERG, LLC, NEWARK, NJ.

For **GEORGE BURNS,** *Individually and on behalf of all others similarly situated,* **Consol Plaintiff: ANDREW ROBERT JACOBS,** *LEAD ATTORNEY,* BERMAN,SAUTER, RECORD & JARDIM, P.C., MORRISTOWN, NJ.

For **MILDRED GROSSMAN,** *on her own behalf* ***[*5]*** *and on behalf of all others similarly situated,* **Consol Plaintiff: C. OLIVER BURT , III,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, BURT & PUCILLO, PC, WEST PALM BEACH, FL.

For **LOUISIANA WHOLESALE DRUG CO. INC,** *on behalf of itself and all others similarly situated,* **Consol Plaintiff: PETER S. PEARLMAN,** COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, *LEAD ATTORNEY,* SADDLE BROOK, NJ; **REBEKAH R. CONROY,** WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For **FRANCES IRENE STEADMAN, Consol Plaintiff: FREDERICK T. KUYKENDALL , III,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING, GIBBONS & KITTRELL, PC, BIRMINGHAM, AL; **JAMES H MCFERRIN,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, BIRMINGHAM, AL; **S C MIDDLEBROOKS , III,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, GARDNER, MIDDLEBROOKS, FLEMING & GIBBONS, PC, MOBILE, AL.

For **SHELIA HARRIS,** *individually and on behalf of all those individuals similarly situated,* **Consol Plaintiff: FRANK A. SILVESTRI,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SILVESTRI & MASSICOT, NEW ORLEANS, LA; **S. MICHOLLE WALKER,** *LEAD ATTORNEY,* SILVESTRI & MASSICOT, NEW ORLEANS, LA.

For **DAWN MAFFEI, Consol Plaintiff: MICHAEL [*6] G. NAST,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, LANCASTER, PA.

For **LEONARD BROWN, Consol Plaintiff: JENNIFER SHARON ABRAMS, JOSEPH J. TABACCO , JR.,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERMAN, DEVALERIO, PEASE & TABACCO, PC, SAN FRANCISCO, CA.

For **ARKANSAS CARPENTERS HEALTH & WELFARE FUND,** *On its own behalf & on behalf of all others similarly situated,* **Consol Plaintiff: GREG THOMPSON,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, PROVOST & UMPHREY, BEAUMONT, TX.

For **MARY MARGARET PIETSCH,** *individually and on behalf of a class of persons similarly situated,* **Consol Plaintiff: LYNN L. SARKO,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KELLER & ROHRBACK, LLP, SEATTLE, WA; **RON KILGARD,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, DALTON, GOTTO, SAMSON & KILGARD, PLC, PHOENIX, AZ.

For **DONALD W. HANNU,** *on behalf of himself and all others similarly situated,* **Consol Plaintiff: NEIL A. MCEWEN,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, INVER GROVE HEIGHTS, MN.

For **ELAINE PALMER, BETTY SAAD, Consol Plaintiffs: DIANE A. NYGAARD,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, LEAWOOD, KS.

For **EVELYN BARCZAK, ANTHONY DEBELLA,** *on behalf of* ***[*7]*** *himiself and others similiarly situated,* **Consol Plaintiffs: MICHAEL J. FLANNERY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, CAREY & DANIS, ST. LOUIS, MO.

For **AGATHA AGATHA "NIKKI&quo MCCUTCHON, Consol Plaintiff: THOMAS M. SOBOL,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA.

For **RITE AID CORPORATION, Consol Plaintiff: BARRY L. REFSIN,** *LEAD ATTORNEY,* HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; **JERRY L. TANENBAUM,** *LEAD ATTORNEY,* SCHNADER HARRISON SEGAL & LEWIS LLP, CHERRY HILL, NJ; **STEVE D. SHADOWEN,** COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For **COMMONWEALTH OF PENNSYLVANIA,** *BY D. MICHAEL FISHER, ATTORNEY GENERAL,* **Consol Plaintiff: SHANIN SPECTER,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KLINE & SPECTER, PHILADELPHIA, PA; **THOMAS W. HENDERSON,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, PITTSBURGH, PA; **JONATHAN M. COHEN,** KLINE & SPECTER, CHERRY HILL, NJ.

For **COBALT CORP., Consol Plaintiff: CHARLES J. BARNHILL , JR.,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, MINER, BARNHILL & GALLAND, ESQS., MADISON, WI; **MARY C. NASH,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED **[*8]** TO USDC-NJ BAR, COBALT CORPORATION, MILWAUKEE, WI; **RICHARD W. COHEN,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, LOWEY, DANNENBERG, BEMPORAD & SELINGER, ESQS., WHITE PLAINS, NJ; **WILLIAM P. DIXON,** *LEAD*

ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MINER, BARNHILL & GALLAND, ESQS., MADISON, WI.

For **CVS MERIDIAN, INC., Consol Plaintiff: BARRY L. REFSIN,** *LEAD ATTORNEY,* HANGLEY, ARONCHICK, SEGAL & PUDLIN, PHILADELPHIA, PA; **STEVE D. SHADOWEN,** COUNSEL NOT ADMITTED TO USDC-NJ BAR, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For **ROBERT MITCHELL, Consol Plaintiff: DAVID J. SHEA,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, MANTESE, MILLER & SHEA, PLLC, TROY, MI; **KENNETH J. MCINTYRE,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, DICKINSON WRIGHT, ESQS., DETROIT, MI; **ROBERT L. MICHELS,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, WINSTON & STRAWN LLP, CHICAGO, IL.

For **SCHERING-PLOUGH CORPORATION, Defendant: DAVID GEORGE RADLAUER, MARK AARON CUNNINGHAM,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, ESQS., NEW ORLEANS, LA; **GEORGE W WALKER , III, RICHARD H. GILL,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ **[*9]** BAR, COPELAND, FRANCO, SCREWS & GILL, ESQS., MONTGOMERY, AL; **WILLIAM J. O'SHAUGHNESSY, RICHARD HERNANDEZ,** MCCARTER & ENGLISH, LLP, NEWARK, NJ.

For **UPSHER-SMITH LABORATORIES,, Defendant: A. GREGORY GRIMSAL,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, GORDON, ARATA, MCCOLLAM, DUPLANTIS & EGAN LLP, NEW ORLEANS, LA; **GAGE ANDRETTA,** *LEAD ATTORNEY,* WOLFF & SAMSON, PC, THE OFFICES OF CRYSTAL LAKE, WEST ORANGE, NJ; **JENNIFER KEIFE CONRAD,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, GORDON, ARATA, MCCOLLAM, DUPLANTIS & EGAN LLP, NEW ORLEANS, LA; **STEVEN W. COPLEY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, GORDON, ARATA, MCCOLLAM, DUPLANTIS & EGAN, LLP, NEW ORLEANS, LA; **WILLIAM E. GOYDAN,** *LEAD ATTORNEY,* WOLFF & SAMSON, PC, WEST ORANGE, NJ.

For **AMERICAN HOMES PRODUCTS CORPORATION, Defendant: BRIAN J. MCMAHON,** *LEAD ATTORNEY,* GIBBONS, PC, NEWARK, NJ; **LISA J. RODRIGUEZ,** *LEAD ATTORNEY,* TRUJILLO, RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; **MARTIN ALAN STERN,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, ADAMS & REESE, NEW ORLEANS, LA; **RALPH H. WALL,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, ADAMS & REESE, NEW ORLEANS, LA; **GUY V. AMORESANO, JENNIFER A. HRADIL,** GIBBONS, **[*10]** PC, NEWARK, NJ; **BRIAN J. MCMAHON,** GIBBONS, PC, NEWARK, NJ.

For **ESI LEDERLE INC.,** *a Delaware corporation,* **Consol Defendant: GUY V. AMORESANO, JENNIFER A. HRADIL,** GIBBONS, PC, NEWARK, NJ; **BRIAN J. MCMAHON,** GIBBONS, PC, NEWARK, NJ.

Judges: STEPHEN M. ORLOFSKY, SPECIAL MASTER.

Opinion by: STEPHEN M. ORLOFSKY

Opinion

SPECIAL MASTER'S AMENDED REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS TO THE UPSHER AND ESI SETTLEMENTS AND DIRECT PURCHASER PLAINTIFFS' PARTIAL MOTIONS FOR SUMMARY JUDGMENT AS TO THE APPLICABLE FRAMEWORK FOR ANALYSIS OF EXCLUSION PAYMENTS AND THE EXCLUSIONARY SCOPE OF THE '743 PATENT

ORLOFSKY, SPECIAL MASTER

I. INTRODUCTION

This consolidated antitrust action has been transferred to the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to *28 U.S.C. § 1407*. Pursuant to *Rule 53 of the Federal Rules of Civil Procedure* [1] and by consent of all parties in the above-captioned action, I have been appointed by order of this Court, dated April 12, 2006, to preside as a Special Master to review and decide all currently pending and future motions directed to Judge Joseph A. Greenaway, Jr. and Magistrate Judge Madeline Cox Arleo including, but not limited to discovery **[*11]** disputes, class certification and summary judgment (the "Appointment Order") (Doc. No. 316). The Appointment Order provides that the decision of the Special Master on any matter before the Special Master will conclusively resolve that matter unless an appropriate objection is filed pursuant to *Fed. R. Civ. P. 53(g)*.

This Report and Recommendation addresses the following Motions: (1) Motion of Defendants Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher) (collectively, "Defendants") for Summary Judgment as to All Claims Brought By Direct Purchaser Plaintiffs ("DP Plaintiffs" or "DPPs") Related to the Upsher Settlement ("Upsher Motion."); [2] (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DPPs Related to the ESI Settlement ("ESI Motion"); [3] (3) DPPs' Motion for Partial Summary Judgment as to the Applicable **[*12]** Framework for Analysis of Exclusion Payments ("Framework Motion"); [4] and (4) DPPs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent ('743 Motion"). [5]

---

[1] **(a) Appointment.**

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

* * *

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a).

[2] In support of the Upsher Motion, Defendants' submitted an opening Memorandum of Law (accompanied by 125 exhibits attached to the 7/25/08 O'Shaughnessy Decl.) ("Upsher Mem."), a Statement of Undisputed Facts ("Def. Upsher Facts"), a Reply Memorandum of Law in support of the Uphser and ESI Motions (accompanied by 40 exhibits attached to the 10/3/08 O'Shaughnessy Decl.) ("Upsher/ESI Reply"), a Reply to DPPs' Statement of Disputed Facts in Opposition to the Upsher Settlement ("Def. Upsher Reply Facts"), and a 10/21/2008 letter brief regarding a recent Federal Circuit Court of Appeals decision. In response, DPPs submitted a consolidated Memorandum of Law in opposition to the Upsher Motion and the ESI Motion (accompanied by 158 exhibits attached to the 9/5/2008 Refsin Decl.) ("Upsher/ESI Opp."), a Statement of Disputed Facts in Opposition to the Upsher Motion ("DPP Upsher Facts"), and a 10/31/2008 letter brief.

[3] In support of the ESI Motion, Defendants submitted an opening Memorandum of Law (accompanied by **[*13]** 46 exhibits attached to the 7/3/08 O'Shaughnessy Decl.) ("ESI Mem."), a Statement of Undisputed Facts ("Def. ESI Facts"), the Upsher/ESI Reply, a Reply to DPPs' Statement of Disputed Facts in Opposition to the ESI Motion ("Def. ESI Reply Facts") and the above-referenced 10/21/2008 letter brief. In response, DPPs submitted the Upsher/ESI Opp., a Statement of Disputed Facts in Opposition to the ESI Motion ("DPP ESI Facts"), and the above-referenced 10/31/2008 letter brief.

[4] In support of the Framework Motion, DPPs submitted an opening Memorandum of Law (accompanied by four exhibits) ("Framework Mem."), a Statement of Undisputed Facts ("DPP Framework Facts"), and a Reply Brief (accompanied by two appendices with a total of two exhibits) ("Framework Reply"). In response, Defendants submitted a Brief in Opposition to the Framework Motion (accompanied by 14 exhibits attached to the 9/5/08 O'Shaughnessy Decl.) ("Framework Opp.") and a Counterstatement of Material Facts ("Def. Framework Facts").

[5] In support of the '743 Motion, DPPs submitted an opening Memorandum of Law (accompanied by 15 exhibits ("'743 Mem."), a Statement of Undisputed Facts ("DPP '743 Facts"), and a Reply Brief (accompanied **[*14]** by two exhibits) ("'743 Reply"). In response, Defendants' submitted a Brief in Opposition to the '743 Motion accompanied by seven exhibits ("'743 Opp."), and a Counterstatement of Material Facts a ("Def. '743 Facts").

After consideration of the parties' voluminous submissions in support of and in opposition to the above-referenced Motions, [6] as well as the oral argument of counsel presented on December 10, 2008, I conclude, based on the following analysis, that: (1) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the Upsher Settlement is granted; (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the ESI Settlement is granted; (3) DP Plaintiffs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments is denied; and (4) DP Plaintiffs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent is denied.

II. BACKGROUND

This action involves the drug K-Dur 20, a potassium chloride supplement **[*15]** manufactured by Schering. Schering entered into separate agreements with Upsher and ESI Lederle ("ESI") settling patent litigation that Schering had initiated after Upsher and ESI sought approval from the Food and Drug Administration ("FDA") for their generic versions of K-Dur. The gravamen of DP Plaintiffs' Complaint is that Schering's settlements with Upsher and ESI were collusive, anticompetitive agreements that had the effect and purpose of preventing and delaying the entry of generic substitutes for K-Dur and allowing Schering to maintain a monopoly in the extended release potassium chloride supplement market. (DPP Am. Compl., P 1). *See also* *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 522, 526 (D.N.J. 2004)*. Plaintiffs allege that but for payments made by Schering to Upsher and ESI under the agreements, Upsher and ESI would have settled on different terms and their generic products would have entered the market earlier than was permitted under the settlements. (DPP Am. Compl. at PP 1, 109). *See also* *In re K-Dur, 338 F. Supp. 2d at 526*.

As is evident from the discussion to follow, this case involves complex legal and factual issues at the intersection of patent and ***antitrust*** **[*16]** ***law***. Accordingly, before analyzing the parties' motions, it is necessary to outline the regulatory, factual and procedural contexts in which the issues presented arise.

A. Statutory and Regulatory Framework

A pharmaceutical company must obtain FDA approval to market a prescription drug. *21 U.S.C. § 355(a)*. In order to obtain approval for a pioneer drug, a company must submit a New Drug Application ("NDA"), which details all safety and efficacy studies, the components in the drug, the methods used in "the manufacture, process and packaging" of the drug, and any patents issued on the composition or methods of using the drug. *Id.* at *§ 355(b)(1)*. The FDA publishes the patent information in the "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." *See* FDA Electronic Orange Book, *http://www.fda.gov/cder/ob/*.

Prior to 1984, a generic drug company also had to undertake its own costly studies regarding the efficacy and safety of a drug, even if the drug was a bioequivalent of a brand name drug already on the market. *See* *Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1058-59 n.2 (11th Cir. 2005)*, *cert. denied, 548 U.S. 919, 126 S. Ct. 2929, 165 L. Ed. 2d 977 (2006)* **[*17]** ("*Schering*") (explaining the NDA process and indicating its potential cost). The generic was then required to file its own NDA for its version of the drug. The generic company could not begin testing the drug until after the patent life on the brand-name drug expired, since before that time the pioneer company could sue the generic for patent infringement. *See* *35 U.S.C. § 271 (2000)* (stating that making or using a patented compound is an act of infringement).

In 1984, Congress enacted the Drug Price Competition & Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (codified at various sections of titles 21 and 35 of the United States Code). Among its key provisions, the Hatch-Waxman Act: (1) created the Abbreviated New Drug Application ("ANDA"), which allows a generic drug applicant to piggyback on safety and efficacy studies conducted for the pioneer drug, *see generally* *21 U.S.C. § 355(j)*; (2) modified the definition of infringement, so that the conduct of

[6] The parties' summary judgment submissions include more than 400 pages of briefs and factual statements and a total of more than 400 exhibits.

safety and efficacy studies for FDA approval is no longer infringing activity, *see generally* 35 U.S.C. § 271(e); and (3) allowed the extension of patent terms to compensate for the **[*18]** period when a patented drug could not be marketed because it was undergoing the FDA approval process. *See generally* 35 U.S.C. § 156.

Under the The Hatch-Waxman Act, the pioneer drug maker still files a NDA with full-scale safety and efficacy studies and lists the patents that generics might infringe in the future. 21 U.S.C. § 355(b)(1) (enumerating NDA provisions). However, a generic company may file an ANDA, which requires the generic to prove that the new drug is the bioequivalent of a brand-name drug on the market, but does not require the time-consuming studies required for a NDA. *Id.* at § 355(j)(2)(A) (listing the ANDA provisions). *See also* Schering, 402 F.3d at 1058-59 n.2 (generics can use a "truncated" process, "so long as the generic manufacturer proves that its drug is a bio-equivalent to the already-approved brand name/pioneer drug"); Herbert Hovenkamp et al., *Anticompetitive Settlement of Intellectual Property Disputes ("Hovenkamp"),* 87 Minn. L. Rev. 1719, 1753 (2003) (listing ANDA provisions and noting that generic must be bioequivalent of pioneer drug). Further, the generic may begin testing before the pioneer's patent expires. 35 U.S.C. § 271(e)(1).

Under the Hatch-Waxman **[*19]** Act, an ANDA filer must make one of the following certifications: (1) that the "patent information has not been filed" on the generic's brand-name equivalent (a paragraph I certification); (2) that a "patent [on the branded drug] has expired" (a paragraph II certification); (3) that a brand-name patent exists, "the date on which such patent will expire," with a promise not to market until that date (a paragraph III certification); or (4) "that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted." (a paragraph IV certification). 21 U.S.C. § 355(j)(2)(A)(vii) (emphasis added).

If the ANDA filer makes a paragraph IV certification, it must consult the Orange Book and provide notification to each NDA or patent owner impacted by the ANDA certification "not later than [twenty] days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed." *Id.* at § 355(j)(2)(B)(ii)(I). The filing of an ANDA with a paragraph IV certification allows the patent holders to sue, as it is considered a technical act of infringement, even though the generic has **[*20]** not yet begun marketing its version of the drug. *See* Stephanie Greene, *A Prescription for Change: How the Medicare Act Revises Hatch-Waxman to Speed Market Entry of Generic Drugs,* 30 J. Corp. L. 309, 317 (2005) (noting that paragraph IV certification is a technical act of infringement because the generic intends to market and infringe the patent). The patent owners then have 45 days to bring an infringement suit against the generic. If the affected patent owners do not file suit, the FDA can approve the ANDA without delay. 21 U.S.C. § 355(j)(5)(B)(iii). However, if an affected patent owner brings an infringement suit, approval of the application is automatically stayed for thirty months, or until a district court issues a final decision concluding that the patent has not been infringed or is otherwise invalid. *Id.*

In order to give generic drug makers an incentive to incur the expense and risk of a potential infringement suit by the patent holder, the ANDA procedures give the first ANDA filer a 180-day exclusivity period. Id. at 355(j)(5)(B)(iv). During this exclusivity period, the FDA cannot approve any other generic manufacturer's ANDA until 180 days after the earlier of (1) the date **[*21]** of the first ANDA filer's commercial marketing of its generic drug; or (2) the date of a "court [decision ruling] that the patent is invalid or not infringed." [7] Id at 355(j)(5)(B)(iii)(I).

B. Factual and Procedural Background [8]

[7] Prior to 2000, this was calculated from a "final judgment from which no appeal can be or has been taken." 21 C.F.R. § 314.107(e)(1) (1999). Now, a district court decision is sufficient. Mylan Pharms., Inc. v. Shalala, 81 F. Supp. 2d. 30 (D.D.C. 2000). Also, prior to 1998, FDA regulations had required that ANDA filers would not get the 180-day exclusivity unless they had successfully defended the patent infringement suit. *See* 59 Fed. Reg. 50,338,367 (Oct. 3, 1994). The "successful defense" requirement was subsequently found to be unreasonable, Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1069-70, 329 U.S. App. D.C. 341 (D.D.C. 1998), and the FDA dropped the requirement in 1998. *See* 63 Fed. Reg. 59,710,711 (Nov. 5, 1998).

[8] The facts pertinent to the current motions are drawn primarily from the parties' pleadings and their respective statements filed pursuant to Local Rule 56.1 Unless otherwise indicated, the facts set forth below are not in dispute.

1. The Parties

The DP Plaintiff Class, **[*22]** represented by lead Plaintiff Louisiana Wholesale Drug, is essentially comprised of all persons or entities who purchased K-Dur 20 directly from Schering during the period November 20, 1998, through September 1, 2001. [9] The Class includes wholesalers, hospitals, health maintenance organizations and retail drug store chains.

Schering is a New Jersey corporation engaged in the discovery, development and marketing of, *inter alia,* brand name and generic drugs. Upsher is a Minnesota corporation engaged in the discovery, development and marketing of brand name and generic drugs. Former Defendant Wyeth Laboratories ("Wyeth"), formerly known as American Home Products, Inc. ("AHP"), is a Delaware corporation engaged in the development, manufacturing and marketing of, *inter alia,* brand name and generic drugs. Former Defendant ESI is a business unit of Wyeth that engages in the research, manufacture and sale of generic drugs. [10]

2. K-Dur and the '743 Patent

During the time period relevant to the DP Plaintiffs' claims, Schering marketed a potassium chloride supplement under the brand name K-Dur. (DPP Upsher Facts, P 1). [11] K-Dur is used to treat potassium **[*24]** deficiencies such as those that often arise from the treatment of high blood pressure with diuretic products. (DPP '743 Facts, P 1; Def. '743 Facts, P 1). Although the active ingredient in K-Dur -- potassium chloride -- is not patented, K-Dur is covered by a formulation patent, No. 4,863,743 (the "'743 Patent"), owned by Key Pharmaceuticals, Inc. ("Key"), a division of Schering. (Schering Ans. to DPP Am. Compl., P 23-24). The '743 Patent, which claims a controlled-release dispersible potassium chloride tablet, was issued on September 5, 1989 and expired on September 5, 2006. (Schering Ans. to DPP Am. Compl. at P 24; DPP Uphser Facts, P 9).

The '743 Patent has 12 claims, all of which depend on or incorporate Claim **[*25]** 1. (DPP Upsher Facts, P 49; DPP '743 Facts, P 12; Def. '743 Facts, P 12). Claim 1 of the '743 Patent states:

> A pharmaceutical dosage unit in tablet form for oral administration of potassium chloride, comprising;
> a plurality of coated potassium chloride crystals, the amount of potassium chloride being in the range of about 64% to about 86.5% by weight based on the total weight of the dosage unit;
> a coating material for the individual potassium chloride crystals, the coating material comprising ethylcellulose in the amount in the range of about 9% to about 15% by weight based on the total weight of the coated crystals and at least one member selected from hydroxypropylcellulose and polyethylene glycol in an amount in the

---

[9] On April 14, 2008, I issued a Report and Recommendation (the "April 14 R&R") recommending that DP Plaintiffs' Motion for Class Certification be granted and the following Class certified:

> All persons or entities who have purchased K-Dur 20 directly from Schering at any time during the period November 20, 1998, through September 1, 2001.
>
> Excluded from the proposed class shall be:
>
> Defendants and their officers, directors, management and employees, subsidiaries and affiliates, as well as federal government entities. Also excluded are persons or entities who have not purchased generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20.

(April 14 R&R, Doc. No. 636). On December 30, 2008, Judge Greenaway overruled the objections of Defendants and DP Plaintiffs to the April 14 R&R and adopted the R&R as the opinion of the Court. (Dec. 30, 2008 Order, **[*23]** Doc. No. 731).

[10] On January 24, 2005, Judge Greenaway granted final approval of a settlement between DP Plaintiffs and Wyeth. (Jan. 24, 2005 Order, Doc. No. 226). As part of the settlement, DP Plaintiffs agreed to the release and dismissal with prejudice of all claims against Wyeth and its related entities, including ESI. (DPP/Wyeth Settlement Agreement, Doc. 170-3).

[11] In the interest of brevity, the record citations herein regarding the factual background refer to the parties' statements filed pursuant to *Local Rule 56.1* and, unless necessary, do not separately identify each exhibit cited by the parties in their statements of fact. In addition, because the DPP Upsher Facts and the DPP ESI Facts restate each paragraph of Defendants' Upsher Facts and ESI Facts, it is not necessary to cite separately to Defendants' Upsher Facts and ESI Facts.

range of about 0.5% to about 3% by weight based on the total weight of the coated crystals and said ethylcellulose has a viscosity greater than 40 cp.

('743 Mem., Ex. 1 ('743 Patent) at Col. 8, line 18-Col. 10, line 21). With regard to tablets, the '743 Patent specification states, *inter alia,* "[t]he useful ethylcellulose designations are 7 and higher, corresponding to a viscosity of at least 6 cp, preferably more than 40 cp (designations 45 or higher) for crystals to be **[*26]** compressed into tablets." (*Id.* at Col. 4, lines 63-66).

3. <u>Development and Prosecution of the '743 Patent</u>

The sustained release potassium chloride tablet claimed in the '743 Patent was developed at Key by Charles Hsiao and Chi-Tze Chou using a technique called "microencapsulation." (DPP Upsher Facts, P 4). Microencapsulation is a process in which small particles of a drug are coated to give them sustained release properties. (DPP Upsher Facts, P 5). Tableting exposes the coated microcapsules to compression forces as the individual crystals are compressed into a tablet. (*Id.*). Dr. Hsiao and Ms. Chou used a coating consisting of insoluble ethylcellulose ("EC") with a viscosity of greater than 40 centipoise ("cp") and either hydroxypropylcellulose ("HPC") or polyethylene glycol ("PEG"). (DPP Upsher Facts , P 8). Viscosity is a property of fluid that refers to its resistance to flow. (DPP '743 Facts, P 14; Def. '743 Facts, P 14). The addition of HPC or PEG permits the potassium chloride to leach out through the EC coating. (*Id.*).

The '743 Patent issued from patent application No. 830,981 (the "'981 application"), filed February 19, 1986. (Schering Ans. to DPP Am. Complaint, P 29). The '981 **[*27]** application was a continuation-in-part of application No. 702,714 (the "'714 application"), filed February 19, 1985. (DPP '743 Facts, P 19; Def. '743 Facts, P 19). As originally filed, Claim 1 of the '981 application did not contain any limitation on the viscosity grade of the ethylcellulose used in the coating material. (DPP Upsher Facts, P 50). In addition, as originally filed, Claim 1 described a "dosage unit" for oral administration of potassium chloride, and was not limited to a tablet dosage form. (*Id.*).

On August 31, 1988, the Patent and Trademark Office ("PTO") rejected the then-pending claims of the '981 application based on Patent No. 4,555,399 (the "'399 Patent") and other prior art. (DPP '743 Facts, P 28; Def. '743 Facts, P 28). The '399 Patent had previously been granted to Dr. Hsaio for a controlled release tablet aspirin tablet in which aspirin crystals are coated with EC and HPC and compressed into tablet form. (DPP Upsher Facts, P 51; DPP '743 Facts, P 23; Def. '743 Facts, 23). Example 1 of the '399 Patent describes the use of Ethocel N-10 (Dow), an EC with a viscosity of 9-11 cp. (Upsher/ESI Opp., Ex. 167 ('399 Patent) at Col. 3, line 8; '743 Mem., Ex. 2 (Feb. 27, 1989 Amendment) at 5). **[*28]** However, DP Plaintiffs dispute that the '399 Patent limited the claimed invention in any way to 9-11 cp ethylcellulose. (DPP Upsher Facts, P 51).

After the PTO's August 31, 1988 rejection, Key filed a response that included an amendment to Claim 1 and arguments in support of patentability. (DPP Upsher Facts, P 52). Key amended Claim 1 by specifying that the invention was a "tablet" and by adding the phrase "said ethylcellulose has a viscosity greater than 40 cp" at the end of Claim 1. (DPP Upsher Facts, P 52-53; '743 Mem., Ex. 2 (Feb. 27, 1989 Amendment) at 1-2). In its remarks accompanying the amendment, Key stated, *inter alia,* that "the claims have been amended to more precisely define the claimed invention," and argued that a review of the prior art '399 Patent would not lead one skilled in the art to use EC with a viscosity of greater than 40 cp to make a sustained release potassium chloride tablet as claimed in the '981 application. (DPP Upsher Facts, P 54). Key further stated that the prior art '399 Patent disclosed only EC with a viscosity of 9-11 cp. (*Id.*). On March 31, 1989, the Patent Examiner granted Key the '743 Patent. (DPP Upsher Facts, P 55).

4. <u>The [*29] Upsher Patent Litigation</u>

On August 8, 1995, Upsher filed an ANDA with the FDA seeking permission to sell a generic version of K-Dur. (DPP Upsher Facts, P 12). Upsher's generic product, Klor-Con(c) M20, was a microencapsulated, controlled release 20mEq potassium chloride tablet. (*Id.* at 13). Upsher certified to the FDA that its product was bioequivalent to K-Dur and stated that its product was "the same as the reference drug, K-DUR." (*Id.* at 15-16). In its November 3, 1995 paragraph IV Certification Notice to Schering, Upsher claimed that its generic drug would not infringe the '743 Patent. (DPP Upsher Facts, P 17). Specifically, Upsher asserted that its product did not infringe Key's product because: (1) "the viscosity of ethyl cellulose employed in KLOR-CON(c) M is outside the range limited by claim 1 of the '743 patent;" and (2) "[t]he KLOR-CON(c) M product does not contain hydroxypropylcellulose." (Upsher Mem., Ex. 17 (Nov. 13, 1995 Patent Certification Notice) at 8-9). [12] Uphser's product used sorbitan monooleate ("SMO"). (DPP Upsher Facts, P 18). Upsher disputes "any implication that it used SMO in place of HPC or PEG," and disputes that the SMO used in Upsher's product was present **[*30]** in an amount corresponding to the claimed amount of HPC or PEG required by the claims of the '743 Patent. (*Id.*). In its Patent Certification Notice, Upsher also asserted that because, in its amendment of Claim 1, Key inserted a limitation of viscosity for EC of greater than 40 cp, prosecution history estoppel precluded Key from "assert[ing] the doctrine of equivalents in alleging that the KLOR-CON(c) M product infringes its claims." (Upsher Mem., Ex. 17 (Nov. 13, 1995 Patent Certification Notice) at 9-13).

On December 15, 1995, Key filed an action in the United States District Court for the District of New Jersey against Upsher alleging "willful and deliberate" infringement of the '743 Patent. (DPP Upsher Facts, P 19). The case was assigned to Judge Walls. (*Id.* at P 23). Key's action was timely commenced within the 45-day period specified in the Hatch-Waxman Act. (*Id.* at P 19). Upsher answered Key's complaint, denying infringement and alleging declaratory judgment counterclaims for patent invalidity, non-infringement and unenforceability. **[*31]** (*Id.* at P 23).

Discovery in the case included the exchange of tens of thousands of pages of documents and depositions of the inventors and patent attorneys from Key and Schering, as well as of the Upsher technical people and consultants who developed the Upsher formulation. (*Id.* at P 24). Schering retained as an expert, Dr. Gilbert S. Banker, dean of the University of Iowa College of Pharmacy. (*Id.* at P 25). Key retained as its technical expert, Dr. Christopher Rhodes, a co-editor with Dr. Banker of the textbook, *Modern Pharmaceutics.* (*Id.* at P 27). Drs. Banker and Rhodes each submitted expert reports, and both were deposed for multiple days. (*Id.* at P 28, 30). Dr. Banker opined that the '743 Patent was valid and infringed by Upsher's product; Dr. Rhodes opined that the '743 Patent was invalid and that the Upsher formulation was not equivalent to the claims of the '743 Patent. (*Id.* at 29).

On February 6, 1997, Upsher moved for summary judgment on the issue of non-infringement. (*Id.* at P 31). Upsher argued that Key was barred by prosecution history estoppel from claiming that the Upsher product was equivalent to the '743 Patent, and that no factual equivalency existed between its generic **[*32]** product and the claims of the '743 Patent. (*Id.* at P 31). In opposition to the Motion, Key argued that it was not barred by prosecution history estoppel from asserting equivalency, and that factual disputes existed regarding whether Upsher's formulation was equivalent to the '743 Patent. (*Id.* at P 32). Key separately moved for summary judgment on Upsher's affirmative defenses that the '743 Patent was unenforceable based on inequitable conduct before the PTO. (*Id.* at 34). Upsher opposed Key's motion on the ground that fact disputes concerning the alleged inequitable conduct precluded summary judgment. (*Id.* at P 35).

On June 17, 1997, Judge Walls held a hearing on certain motions, including Upsher's motion for summary judgment. ("743 Mem., Ex. 9). Trial in the *Key v. Upsher* matter was scheduled to being on June 18, 1997.

5. <u>The Upsher Settlement</u>

Upsher initiated contact with Schering to discuss settlement of the patent litigation. (DPP Upsher Facts, P 68). The first settlement meeting took place on May 21, 1997, with subsequent discussions between the parties occurring on May 28, June 3, and June 12, and June 16, 1997. (DPP Upsher Facts, PP 197, 199, 205; Def. Upsher Reply Facts, PP 197, **[*33]** 199, 205). In the early morning hours of June 18, 1997, the parties signed and finalized an agreement, dated June 17, 1997 (the "June 17 Agreement"), "as to the terms under which [Upsher and Schering, on behalf of itself and Key] will settle the [*Key v. Upsher*] action and will enter into a transaction licensing rights to

---

[12] Upsher's Patent Certification Notice also stated that "the KLOR-CON(c) M product does not contain magnesium stearate of polyvinylpyrolidone." (*Id.* at 9).

certain Upsher-Smith products to an affiliate of Schering." (DPP Upsher Facts, P 208; Def. Upsher Reply Facts, P 208; Upsher Mem., Ex. 61 (June 17, 1997 letter from Raman Kapur to Ian Troup) at p. 1).

The terms of the June 17 Agreement pertinent to the instant Motions provided that: (1) Upsher would not market its Klor-Con(c) M20 product, or any other sustained release microencapsulated potassium chloride tablet, prior to September 1, 2001; (2) effective September 1, 2001, Schering would grant Upsher a non-royalty bearing non-exclusive license to market its Klor-Con(c) M20 and Klor-Con(c) M10 product in the United States; (3) Upsher would grant Schering licenses to Upsher's Niacor-SR(c) and five other Upsher products; [13] and (4) "[i]n consideration for the licenses, rights and obligations described in paragraphs 1 through 10" of the agreement, Schering would pay to **[*34]** Upsher a total of $ 60 million, comprised of $ 28 million payable upon approval of the agreement by Schering's Board of Directors, $ 20 million on the first anniversary of the approval date, and $ 12 million on the second anniversary of the approval date. [14] (Upsher Mem., Ex. 61 (June 17 Agreement) at PP 3, 7-11).

The parties dispute the facts regarding the *bona fides* of the Niacor-SR(c) license deal and the reasons it was included in the June 17 Agreement. DP Plaintiffs contend that the deal was effectively a sham and that all or part of the $ 60 million paid to Upsher by Schering under the Agreement was really for Upsher's agreement **[*35]** to delay the entry of its generic K-Dur. (Uphser Opp., pp. 37-66; DPP Upsher Facts, PP 72-106, 192-277). Schering contends that the Niacor-SR(c) license was a separately valued deal, that the $ 60 million was a good faith payment for rights Schering believed -- in its business judgment at the time -- were worth $ 60 million, and that the deal was included in the June 17 Agreement only after Schering was satisfied that the deal stood on its own merit. (Upsher Mem., pp. 41-66; Upsher/ESI Reply, pp. 18-27; DPP Upsher Fact, PP 72-106; 192-277).

6. The ESI Patent Litigation and Settlement

On December 29, 1995, ESI sought FDA approval to market a generic version of K-Dur. (DPP ESI Facts, p 3; Schering Ans. to DPP Am. Complaint, P 78). ESI's product was a sustained release tablet for oral administration of potassium chloride. It used the ingredients potassium chloride, EC and HPC in amounts within the ranges specified by Claim 1 of the '743 Patent. (DPP ESI Facts, P 4). ESI submitted a Paragraph IV Certification and notified Schering of its Paragraph IV Certification and ANDA filing. (Schering Ans. to DPP Am. Complaint, P 78).

On February 16, 1996, Schering (through Key) sued ESI in the United **[*36]** States District Court for the Eastern District of Pennsylvania, alleging that ESI's generic product infringed the '743 Patent. (DPP ESI Facts, P 5; Schering Ans. to DPP Am. Compl., P 80). ESI argued that its product did not literally infringe the "743 Patent because ESI's product did not have a "coating material with different ingredients" as required by the '743 Patent. (ESI Opp., Ex. 145 (ESI Reply Mem. in Support of Defendant's Mot. for a Markman Ruling on Patent Claim Construction and/Or for Partial Summary Judgment of No Literal Infringement and Response to Plaintiff's Cross Motion) at p. 2). ESI stated that its "tablets are made by a completely different technology which produces a multi-layered coating with each layer comprised of a separate material having only a single ingredient." (*Id.* at p. 13).

In the Fall of 1996, Schering and ESI agreed to engage in court-supervised mediation. (DPP ESI Facts, P 7). The mediation session was suggested by the presiding District Judge, the Hon. Jan DuBois, to whom the case was assigned. (*Id.*). U.S. Magistrate Judge Thomas Rueter was appointed mediator. (*Id.*). During the mediation sessions, Magistrate Judge Rueter met with the parties both **[*37]** jointly and separately and urged them to settle. (*Id.* at P 8).

In December 1997, Schering obtained information from ESI concerning problems ESI had encountered in demonstrating the bioequivalence of its generic product to K-Dur, as required for approval of ESI's ANDA. (DPP

---

[13] The five other Upsher products were KLOR CON(c) 8, KLOR CON(c) 10, KLOR CON(c) M20, PREVALITE(c), and Pentoxifylline. (Upsher Mem., Ex. 61 (June 17 Agreement) at PP 7-10).

[14] The Agreement also provided for milestone and royalty payments contingent upon Schering's sales of Niacor-SR(c). Subsequent to the June 17 Agreement, Schering decided not to pursue the Niacor-SR(c) opportunity, and Schering never marketed the drug. However, the facts regarding the reasons for Schering's decision are disputed. (DPP Am. Compl., P 74; Schering Ans. to Am. Compl., P 74).

Upsher Facts, P 9; Def. ESI Reply Facts, P 9; ESI Mem., Ex. 13 (Dec. 15, 1997 letter, AHP 05 00175)). The information showed that the FDA had twice rejected ESI's bioequivalence studies and that ESI's most recent effort to conduct a trial showing bioequivalence had begun on December 8, 1997. (*Id.*). Also in mid-December 1997, the parties discussed a proposed settlement whereby Schering would grant ESI a royalty free license to market its generic Micro-K(R) 20 product on December 31, 2003, and ESI would grant Schering licenses for certain ESI products in exchange for a $ 5 million up-front royalty fee plus additional royalty fees based on sales of the products. (DPP ESI Facts, PP 10-11; Def. ESI Reply Facts, PP 10-11).

Judge DuBois held a Markman hearing on January 21 and 22, 1998. (DPP ESI Facts, P 13). At the close of the January 22, 1998 session of the hearing, Judge DuBois told the parties:

> I want you to take this **[*38]** business decision, and it is a business decision and decide it without any more help than you're getting from Judge Rueter. I don't want you to use the adjudicatory powers of the Court.
> We're talking about the conciliatory services that the Court offers, and that's what I want you to use to resolve the case. I don't want to have to adjudicate either this case or the two-week long or longer trial of this case. I want you to try to do it.
> I think that's the best way to resolve a dispute of this kind, particularly since I think you can craft a settlement among yourselves.

(ESI Mem., Ex. 17 (Jan. 22, 1998 Tr.) at 139). At the end of the hearing, after summoning the parties to his chambers, Judge DuBois directed the parties to Magistrate Judge Rueter to try to settle the case. (DPP ESI Facts, P 13; ESI Mem., Ex. 18 (Herman 10/30/01 Dep.) at 129-130). [15]

The parties had another mediation session with Magistrate Judge Rueter on Friday, January 23, 1998, which began around 5:30 p.m. and continued until 11:30 p.m. (DPP ESI Facts, P 14). Participating in all or part of the session were three of Schering's counsel and one Schering executive, Martin Driscoll, who participated by phone in parts of the session while attending a New Jersey Nets basketball game with his children. (*Id.*). By the time of the January 23, 1998 mediation session, the parties had agreed to a $ 15 million license from ESI to Schering for ESI's two generic products, and ESI had indicated that it required money to settle **[*40]** the case. (DPP ESI Facts, P 15).

Magistrate Judge Rueter encouraged Schering to pay ESI $ 5 million, which he characterized as "nothing more than legal fees." (DPP ESI Facts, P 16-17). During the January 23, 1998 mediation session, Magistrate Judge Rueter called Mr. Driscoll three times at the basketball game. In those calls, Magistrate Judge Rueter told Mr. Driscoll that he had been instructed by the court to reach a settlement that night and that if the parties did not reach a settlement that night, the judge wanted the parties in court at 8 a.m. the next day. (DPP ESI Fact, P 16-18; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2707-11; ESI Mem., Ex. 19 (Driscoll Dep.) at 295; ESI Mem., Ex. 20 (Driscoll I.H. Tr.) at 105-7). Magistrate Judge Rueter also called John Hoffman, Schering's then in-house antitrust counsel, at home and asked Schering to pay ESI $ 5 million. (DPP ESI Facts, P 17; ESI Mem., Ex. 10 (Hoffman Dep.) at 328, 330; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2618-20). Prior to and during the mediation, ESI requested more than $ 5 million to settle the case. (DPP ESI Facts, P 18).

During the January 23 session, Magistrate Judge Rueter urged Mr. Driscoll to settle and emphasized that **[*41]** he thought the parties could reach a middle ground. (DPP ESI Facts, P 18; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2707-11). Mr. Driscoll expressed his belief that ESI might have difficulty getting its product approved and discussed with Magistrate Judge Rueter a proposal under which Schering would pay ESI a certain amount if ESI's ANDA was

---

[15] In their Statement of Disputed Facts, DP Plaintiffs have asserted that certain of the statements cited in Defendants' Statement of Facts regarding the ESI Settlement are inadmissible hearsay. In this regard, I note that hearsay statements may be considered on summary judgment if the statements are capable of being admissible at trial. *Shelton v. Univ. of Med. & Dentistry, 223 F.3d 220, 223 n.2 (3d Cir. 2000)*. **[*39]** Moreover, to the extent that the statements are offered not to show the truth of the matter asserted, but to demonstrate their effect on the listener, they may be admissible. *See Marks v. Marina, 213 Fed. Appx. 147, 213 Fed. Appx. 147, 2007 U.S. App. LEXIS 479, at *10-11 (3d Cir. Jan. 10, 2007)* (court properly admitted evidence offered not for its truth, but to show the effect on the listener); *Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1434 (10th Cir. 1993)* ("statements offered for the effect on the listener . . . are generally not hearsay.").

approved by a certain date, and a lesser amount if ESI received approval at a later date. (DPP ESI Facts, P 19; ESI Mem., Ex. 19 (Driscoll Dep.) at 295-96; ESI Mem., Ex. 12 (FTC Trial Tr.) at 2711-12). Magistrate Judge Rueter discussed the proposal with Mr. Hoffman, and characterized it as a "bet." (DPP ESI Facts, P 21; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2620). Regarding Schering's doubt that ESI would receive FDA approval, Magistrate Judge Rueter told Mr. Hoffman that he should "put [his] money where [his] mouth is," and stated that if Schering's concern was correct, the proposal wouldn't cost Schering anything. (DPP ESI Facts, P 22; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2621).

The January 23, 1998 mediation session concluded with the parties' agreement that Schering would pay ESI $ 10 million if its ANDA was approved by July 1999, with Schering's payment **[*42]** incrementally decreasing to $ 625,000 if ESI's ANDA was approved in 2002. (ESI Mem., Ex. 16 (C2 002196-97) at P II). The parties further agreed that Key would grant ESI a "royalty free, non-exclusive license under US Patent '743 beginning 1/1/04." (*Id.* at P VI). Once the terms had been agreed to by Schering and ESI, Magistrate Judge Rueter called the participants into chambers and asked them to put the terms in writing and initial or sign them. (DPP ESI Facts, 24; ESI Mem., Ex. 11 (FTC Trial Tr.) at 2621). Counsel for ESI prepared a handwritten document summarizing the settlement principles. (ESI Mem., Ex. 16 (C2 002196-97); ESI Mem., Ex. 8 (FTC Trial Tr.) at 2488-89; 2537). The document was prepared, and was signed by representatives of Key and ESI, in the presence of Magistrate Judge Rueter. (*Id.*).

Schering and ESI signed a formal settlement agreement in June of 1998. (DPP ESI Facts, P 26). Among its terms, the Agreement provided that: (1) Key would grant to ESI a non-exclusive, royalty-free license, effective January 1, 2004, to market a "Referencing Product" [16] (ESI Mem., Ex. 24 (Settlement Agreement) at P 3.1(a)(i)); (2) except with respect to a Referencing Product for which ESI **[*43]** was permitted to seek FDA approval pursuant to the Agreement, ESI would not, prior to the expiration of the '743 Patent: (i) apply for, sponsor or support an application for AB rating for any potassium chloride product with respect to K-Dur, or (ii) conduct, sponsor, file or support a substitutability or equivalence study of a potassium chloride product with respect to K-Dur (*id.* at P 2.9); and (3) Key would pay to ESI $ 5 million plus an additional sum ranging from $ 10 million, if ESI's ANDA received FDA approval by June 30, 1999, to $ 625,000, if ESI received approval in 2002 (*id.* at P 4.1). In the Agreement, ESI represented that it was not "developing, or currently intends or plans to develop, a potassium chloride product, other than an ESI KCI Product or other potassium chloride products" that it already made. (*Id.* at P 2.8).

ESI received FDA approval for its generic K-Dur product in May 1999, and Schering paid ESI the $ 10 million required under Paragraph 4.1(b) of the Settlement Agreement. (DPP ESI Facts, P 21). In July 2001, ESI announced that it was exiting the oral generic business altogether, and in 2002, ESI left the oral generics market. (DPP ESI Facts, P 28).

7. <u>The FTC Action</u>

On March 30, 2001, the Federal Trade Commission ("FTC") filed a complaint against Schering, Upsher and AHP (the "FTC Action"). (DPP ESI Facts, P 29). The complaint alleged, *inter alia,* that Schering's settlements with Upsher and ESI unreasonably restrained commerce and constituted unfair methods of competition in violation of *Section 5* of the Federal Trade Commission Act (the "FTC Act"). (ESI Mem., Ex. 29 (FTC Complaint) at PP 68-69). The complaint further alleged that Schering monopolized and conspired with Upsher and ESI to monopolize the potassium supplement market. (*Id.* at P 70-71).

Between January and March 2002, the FTC Action was tried before an Administrative Law Judge ("ALJ"). *In re Schering-Plough, 136 F.T.C. 956, 2002 FTC LEXIS 40, *6 (June 27, 2002)* ("*Schering-ALJ*"). **[*45]** The trial before the ALJ included the testimony of 41 witnesses, thousands of exhibits, and resulted in 8,629 pages of transcript. *Id.*

---

[16] The Agreement defined a "Referencing Product" as an ESI KCI Product, a potassium chloride product that is the subject of an ANDA or NDA that references a Key NDA, or a potassium chloride product marketed by ESI as equivalent to, or otherwise substitutable on a generic basis for, K-Dur. (ESI Mem., Ex. 24 (Settlement Agreement) at P 1.2). An ESI KCI Product **[*44]** was defined as the 20 Meq extended release potassium chloride tablet described in Key's ANDA. (*Id.*).

On June 27, 2002, the ALJ issued a lengthy decision -- including 431 findings of fact -- ruling that the Upsher and ESI Agreements were lawful settlements of legitimate patent disputes and dismissing the FTC complaint. *136 F.T.C. 956, 2002 FTC LEXIS 40 at *8-9*. *See also* *Schering, 402 F.3d at 1061*. The ALJ ruled that the theories advanced by the FTC required a presumption that the '743 Patent was not valid or that Upsher's and ESI's products did not infringe the patent. *136 F.T.C. 956, 2002 FTC LEXIS 40 at * 8-9*. *See also* *Schering, 402 F.3d at 1061*. The ALJ concluded that there was "no basis in law or fact to make that presumption." *Schering-ALJ, 136 F.T.C. 956, 2002 FTC LEXIS 40, at *9*. The ALJ further concluded that a *per se* antitrust analysis of the agreements was not appropriate. *136 F.T.C. 956, 2002 FTC LEXIS 40 at *219-33*. Rather, applying a rule of reason analysis, the ALJ emphasized the need to consider the exclusionary power of the patent at issue. *136 F.T.C. 956, 2002 FTC LEXIS 40 at *235-43* ("Application of ***antitrust law*** to markets affected by exclusionary statutes such as the Patent Act cannot ignore the rights of the patent holder.") Considering **[*46]** the exclusionary power of the '743 Patent and the inability to predict the outcome of the patent litigation, the ALJ rejected the FTC's argument that, absent Schering's payments to Upsher and ESI, the generics could have entered the market earlier. *136 F.T.C. 956, 2002 FTC LEXIS 40 at *242-43*.

The FTC's complaint counsel appealed to the full Commission, which reversed the ALJ. *In re Schering-Plough Corp., 2003 FTC LEXIS 187 (Dec. 8, 2003)* ("*Schering-FTC*"). Although the Commission refrained from holding that Schering's payments to Upsher and ESI made the settlements *per se* illegal, it also declined to apply the full rule of reason analysis employed by the ALJ. *Id. at *13, 22-27*. Instead, under the analysis adopted by the Commission, once the FTC demonstrates the agreements' anticompetitive effects, the "respondents must demonstrate that the challenged provisions are justified by procompetitive benefits that are both cognizable and plausible." *Id. at * 14*. The Commission ruled that the FTC had demonstrated the anticompetitive effect of the agreements, and reasoned that "[a]bsent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic **[*47]** to defer entry beyond the date that represents an otherwise reasonable litigation compromise." [17] *Id. at *16, 52*. Although the FTC ostensibly used a truncated rule of reason analysis, it essentially indicated that any settlement involving reverse payments over $ 2 million (an estimated cost of legal fees) would be *quid pro quo* for market delay and, thus, illegal. *Id. at * 175-76*. The FTC further rejected the ALJ's conclusion that the licenses granted to Schering under the agreements were adequate consideration for the payments made by Schering, ruling instead that the payments were for delay. *Id. at * 15-16*.

The Defendants chose to appeal the FTC's decision to the Eleventh Circuit, which reversed the Commission. *Schering, 402 F.3d at 1068*. The Eleventh Circuit's decision in *Schering,* and its previous decision in *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003)*, **[*48]** *cert. denied, 543 U.S. 939, 125 S. Ct. 308, 160 L. Ed. 2d 248 (2004)*, are discussed, *infra.*

III. DISCUSSION

A. The Parties' Motions

1. Defendants' Upsher and ESI Motions

In their Motions, Defendants contend that unless DP Plaintiffs can show either: (1) that Schering's underlying patent litigation was "objectively baseless"; (2) that the '743 Patent was procured by fraud; or (3) that terms of the settlements extended the patent's coverage beyond the patent's potential exclusionary scope, the Upsher and ESI Settlements were lawful, even if they did include "reverse payments" to Upsher and ESI Defendants argue that under the foregoing standard, DP Plaintiffs cannot establish that Schering's patent infringement suits were baseless. According to Defendants, the patent litigation with Upsher and ESI involved disputed issues of fact and

---

[17] Although the FTC found both the Upsher and ESI Agreements unlawful, it noted the limited evidence presented regarding the ESI settlement and stated that "[a]s a matter of prosecutorial discretion, we might not have brought a stand-alone case based on such relatively limited evidence." *Schering-FTC, 2003 FTC LEXIS 187, at * 166*.

law such that Schering's claim of infringement could not possibly be deemed objectively baseless. Therefore, Defendants argue, summary judgment must be granted in their favor.

With respect to the Upsher Settlement, Defendants further argue that DP Plaintiffs cannot show that there was a "reverse payment" to Upsher and, thus, their antitrust claim must fail. In short, Defendants contend that because **[*49]** the $ 60 million Schering paid Upsher was fair value for the Niacor license -- and not a net payment for delay of Uphser's generic K-Dur -- there can be no antitrust violation.

In their opposition to Defendants' Upsher and ESI Motions, and in their separate Framework Motion, DP Plaintiffs contend that the legal standard proposed by Defendants is incorrect. DP Plaintiffs argue that the correct framework is either a *per se* analysis, or what they term the "FTC/Hovenkamp approach." Under the framework proposed by DP Plaintiffs, settlement agreements involving reverse payments would be subject to a rebuttable presumption of illegality, which could be overcome by proof of a pro-competitive justification for the payment. With respect to whether the payments to Niacor were, in fact, "reverse payments," DPPs argue that the question of whether Schering paid more than fair value for the Niacor license is a "quintessential factual issue" which cannot properly be decided on summary judgment.

In addition to Defendants' two primary summary judgment arguments summarized above, Defendants contend that DP Plaintiffs have failed to present sufficient evidence of an actual anticompetitive effect on the **[*50]** relevant product market resulting from the settlement. According to Defendants, all generic potassium chloride supplements are interchangeable with K-Dur and, thus, must be included in the relevant market. Defendants argue that because DP Plaintiffs have failed to prove the relevant market, they cannot prove that the Upsher Settlement caused any anticompetitive effects in that market.

In response to Defendants' arguments regarding the relevant market, DP Plaintiffs contend that the anticompetitive effects of delayed generic are indisputable, have been admitted by Schering, and can be proved by direct evidence that eliminates a need for the "relevant market" analysis urged by Defendants. DP Plaintiffs further argue that if a market definition is required, the relevant market cannot simply include all potassium chloride supplements that may be therapeutic substitutes for K-Dur. Rather, they argue, the market consists of K-Dur and its AB-rated equivalents.

Finally, Defendants contend that they are entitled to summary judgment on DP Plaintiffs' damages claims on two grounds. First, Defendants argue that this is not a price-fixing case and DP Plaintiffs cannot claim "overcharge" damages because, **[*51]** as distributors, they were not overcharged for K-Dur but, rather, were allegedly prevented from buying additional products, *i.e.,* generic versions of K-Dur. Defendants argue that the proper measure of damages under these circumstances is lost profits, and that DP Plaintiffs have failed to offer any evidence of such damages. Second, Defendants contend that DPPs have no claim for damages for K-Dur purchases that were subject to generic bypass.

In response, DP Plaintiffs assert that overcharge damages have long been the standard remedy for direct purchasers suing for antitrust violations. With respect to generic bypass, DPPs contend that Defendants' position is inconsistent with the only published decision on the issue, as well as with the principles underlying the antitrust laws. (Upsher Opp., p. 78 (citing *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 368-70 (D. Mass. 2004))*. DP Plaintiffs further argue that even if an adjustment for bypass were required, it would not affect the amount of overcharges suffered by the Plaintiff Class.

2. DPPs' '743 Motion

DP Plaintiffs also seek partial summary judgment as to the exclusionary scope of Schering's '743 patent. This motion has two principal **[*52]** components. First, DPPs argue that under the doctrine of prosecution history estoppel and the "All Elements Rule," the scope of the '743 patent cannot extend to exclude Upsher's generic product. DPP's second contention is that, by its express terms, the Schering/Upsher Settlement Agreement exceeds the exclusionary scope of the '743 patent. Specifically, DPPs contend that the terms of the agreement prevent Upsher not only from selling the allegedly infringing Klor Con M, but also "any other sustained release microencapsulated potassium chloride tablet," irrespective of whether such products infringed Schering's patent.

B. Summary Judgment Standard

Motions for summary judgment are governed by *Federal Rule of Civil Procedure 56*. ***HN1***[] "Summary judgment is appropriate under *Fed. R. Civ. P. 56(c)* when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law." *Med Alert Ambulance, Inc. v. Atlantic Health Sys., Inc., No. 04-1615 (JAG), 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335, *2 (D.N.J. Aug. 6, 2007)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*.

HN2[] Under *Rule 56(c)*, the moving party "always bears **[*53]** the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex, 477 U.S. at 323 (1986)* (quoting *Fed. R. Civ. P. 56*). ***HN3***[] "Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists." *Med Alert, 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335 at *3* (citing *Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109 (3d Cir. 1985))*. ***HN4***[] The party opposing the motion may not rest upon mere allegations or denials of the pleadings, "but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. *See also* *Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999)* ("Speculation and conclusory allegations do not satisfy [the nonmoving party's] duty.").

HN5[] "'A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its **[*54]** favor at trial.'" *Med Alert, 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335 at *3* (quoting *Gleason v. Norwest Mortg., Inc., 243 F.3d 130, 138 (3d Cir. 2001))*. *See also* *Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431, 443 (D.N.J. 2006)* ("A dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'") (quoting *Anderson, 477 U.S. at 248*). In addition, ***HN6***[] "[a] fact is 'material' only if it might affect the outcome of the suit under the applicable rule of law." *Id.*

C. Traditional Antitrust Analysis

HN7[] *Section 1* of the Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal." *15 U.S.C. § 1*. It is well-settled, however, that this provision outlaws only unreasonable restraints of trade. *See* *State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. In order to determine whether an "unreasonable restraint" of trade has taken place, courts have traditionally used one of two different analyses: the *per se* rule and the rule of reason. *See* *State Oil Co., 522 U.S. at 10*.

HN8[] The *per se* analysis applies only under circumstances where courts **[*55]** have previously considered the type of conduct and found that its expected effects are overwhelmingly anticompetitive and have little prospect of yielding any pro-competitive benefit. *Id.* For a *per se* analysis to apply, the courts must have adequate judicial experience with the type of conduct at issue and must have found that it yields anticompetitive effects in the vast majority of cases (almost one-hundred percent of the time). *See* Herbert Hovenkamp, *Sensible Antitrust Rules for Pharmaceutical Competition, 39 U.S.F. L. Rev. 11, 19-20*. Under the *per se* approach, a court can condemn the action as a *per se* illegal restraint on trade "without elaborate inquiry into the defendant's market power, the actual anticompetitive effects of the restraint in a particular case, or the rationales offered for it." *Id. at 20*. The *per se* analysis applies to only a few types of conduct, including "naked" exit payments (those payments made solely to keep a competitor out of the market), market-division agreements, and price fixing. *Id. at 20-21*.

HN9[] In most cases, where the conduct is not so clearly anticompetitive, courts use the rule of reason analysis. Further, courts have begun to realize that categorization **[*56]** of conduct often is not clear cut, *id. at 20-21*, and that "[t]here is always something of a sliding scale in appraising reasonableness." *Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 780, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. In the rule of reason analysis, "'the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.'" *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 201 n.13 (2d Cir. 2006)*, *cert. denied sub. nom., Joblove v. Barr Labs, Inc., 551 U.S. 1144, 127 S.Ct. 3001, 168 L. Ed. 2d 726 (2007) ("Tamoxifen II")* (quoting *State Oil Co., 522 U.S. at 10*). [18]

HN10[] Courts have divided the rule of reason analysis into three parts, which involve burden-shifting between the two parties. First, the **[*57]** plaintiff must show that the conduct has produced adverse, anti-competitive effects within the relevant market. *U.S. v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*. *See also Tamoxifen II, 466 F.3d at 201 n. 13*. If the plaintiff is able to prove this effect, then the burden shifts to the defendant, who must attempt to prove that the conduct "promotes a sufficiently pro-competitive objective." *Id. at 669*. If the defendant meets this standard, the burden then shifts back to the plaintiff to prove that the restraint is not reasonably necessary to achieve the pro-competitive objective. *Id.*

HN11[] In addition to the *per se* and rule of reason standards, a third type of analysis has evolved: the "quick look" or "truncated rule of reason." *See Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. The truncated rule of reason analysis permits the plaintiff to shift the burden to the defendant more quickly, once the plaintiff has shown that the defendant has engaged in conduct similar to those practices falling into the per se category, e.g., restraints on price, output or customers. *Id.* The plaintiff need not establish the relevant market or the defendant's market power, but the defendant **[*58]** has the opportunity to demonstrate pro-competitive justifications and efficiencies. *Id.*

D. Analyses Applied By Other Courts to "Reverse Payment" Settlements

To date, only a few courts have considered the issue of what analytical framework should be applied to antitrust claims involving reverse payment settlements of patent litigation by pioneer and generic drug companies. Although one Circuit Court has applied a *per se* analysis, the other courts that have considered this issue have adopted approaches that focus on the exclusionary scope of the patent at issue. The reasoning of these cases is summarized below.

1. The Sixth Circuit's *Per Se* Analysis

The Sixth Circuit was the first federal appellate court to consider the legality of a settlement involving a reverse payment. *In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)*, *cert. denied, 543 U.S. 939, 125 S. Ct. 307, 160 L. Ed. 2d 248 (2004)*. In that case, the brand name drug maker, Hochst Marion Roussel ("HMR"), manufactured and sold the drug Cardizem CD. *Id. at 901*. HMR's original patent for the active ingredient of Cardizem CD expired in late 1992. *Id.* In September 1995, a generic manufacturer, Andrx, Inc., filed an ANDA and submitted a Paragraph IV certification, **[*59]** stating that its drug did not infringe the patents covering Cardizem. *Id. at 902*. As the first ANDA filer, Andrx was eligible for the 180-day exclusivity period. *Id.* In November 1995, HMR received a new patent for Cardizem CD's "dissolution profile." *Id.* In January 1996, HMR sued Andrx for patent infringement, thus triggering the 30-month stay of FDA approval of Andrx's ANDA. *Id.* In September 1997, the FDA tentatively approved Andrx's ANDA, indicating that it would be finally approved upon the expiration of the stay or a court ruling of non-infringement. *Id.*

Shortly after the FDA granted tentative approval, HMR and Andrx entered into the agreement that was at issue in the case. *Id.* Among its terms, the agreement provided that Andrx would not market a generic version of Cardizem CD until the earliest of: (1) a final, unappealable determination in favor of Andrx in the infringement case; (2) HMR and Andrx entering into a license agreement; or (3) HMR entering into a license agreement with a third party. *Id.* Andrx further agreed not to "relinquish or otherwise compromise" its right to the 180-day exclusivity period. *Id.* In

[18] The opinion in *Tamoxifen II* amended and superseded *In re Tamoxifen Citrate Antitrust Litig., 429 F.3d 370 (2d Cir. 2005)* ("*Tamoxifen I*"). *Tamoxifen II* predominantly made changes and corrections to the citations in the *Tamoxifen I* opinion, but did not modify the court's analysis or holding.

exchange, HMR agreed to make quarterly payments of $ 10 million **[*60]** to Andrx beginning on the date its ANDA received final FDA approval. *Id.*

On July 9, 1998, the FDA approved Andrx's ANDA, and HMR began making quarterly payments to Andrx. *Id. at 903*. Only in June 1999, after the FDA approved a reformulated generic version submitted by Andrx, did the two companies terminate their agreement and enter into a final settlement of the patent infringement suit. *Id.* At the time of the settlement, HMR made a further payment of $ 50.7 million to Andrx, bringing the total payments to more than $ 89 million. *Id.* On June 23, 1999, Andrx began marketing its generic product, triggering its 180-day exclusivity period. *Id.*

The court found that the parties' agreement was "at its core, a horizontal agreement to eliminate competition" and, thus, "a classic example of a *per se* illegal restraint of trade." *Id. at 908*. In finding the agreement *per se* illegal, the Sixth Circuit appeared particularly troubled by the fact that HMR's agreement with Andrx effectively used the 180-day exclusivity period to delay the entry of other generic competitors. In this regard, the court noted:

> By delaying Andrx's entry into the market, the Agreement also delayed the entry of other generic **[*61]** competitors, who could not enter the market until the expiration of Andrx's 180 period of exclusivity, *which Andrx had agreed not to relinquish or transfer.*

Id. at 907 (emphasis added).

2. The Eleventh Circuit Approach in *Valley Drug* and *Schering v. FTC*

(a) *Valley Drug*

Three months after the *Cardizem* decision, the Eleventh Circuit reached a different result in the case of *Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003)*. *Valley Drug* involved separate settlement agreements between Abbott Laboratories and two generic competitors, Geneva Pharmaceuticals and Zenith Goldine Pharmaceuticals, which had filed ANDAs challenging Abbot's patents relating to Hytrin, a brand name hypertension drug marketed by Abbott since 1987. [19] *Valley Drug, 344 F.3d at 1298*. Abbott filed suit against Geneva alleging infringement of its '207 Patent. *Id. at 1299*. In the suit, Geneva admitted infringement but asserted that Abbott's patent was invalid. *Id.* Zenith filed its own lawsuit against Abbott seeking delisting of the '207 Patent and another Abbott patent (from the Orange Book), and requesting a declaratory judgment that its generic product did not infringe the two patents. *Id.* Abbott asserted **[*62]** counterclaims for infringement against Zenith. *Id.*

Abbott entered into an agreement with Zenith on March 31, 1998 and with Geneva one day later. The Zenith Agreement included the following terms: (1) both parties dropped their lawsuit claims; (2) Zenith acknowledged the validity of Abbott's patents and admitted that any generic terazosin product it might market would infringe those patents; (3) Abbott agreed to make quarterly payments of $ 6 million dollars to Zenith until March 1, 2000 or the termination of the agreement; (4) Zenith agreed not to market any product containing terasozin hydrochloride until Abbott's '207 patent expired on February 17, 2000; and (5) Zenith agreed not to transfer any of its ANDA rights, including the 180-day exclusivity period it earned as the first ANDA filer. *Id. at 1300*.

Similarly, under the terms of the Geneva Agreement: (1) Abbott agreed to pay Geneva $ 4.5 million per month until another manufacturer brought a terazosin product to market, or Abbott **[*63]** won the '207 patent infringement suit; (2) Geneva agreed not to market any terazosin product until a second patent expired in February 2000 or until it obtained a court judgment of non-infringement or invalidity in the '207 patent infringement suit; (3) Geneva agreed not to transfer its rights under the ANDA, including its 180-day exclusivity period; and (4) Geneva agreed to challenge any subsequent ANDA filer's attempt to enforce the "successful defense" requirement. *Id.* On September 1, 1998, the district court hearing Abbott's infringement suit against Geneva declared the '207 Patent invalid. *Id. at*

[19] Abbott had multiple patents relating to terazosin hydrochloride, the active ingredient in Hytrin. *Id.* The patents covered various forms of the terazosin hydrochloride compound and methods for using it. *Id.*

1301 (citing Abbott Labs. v. Geneva Pharms., Inc., 1998 U.S. Dist. LEXIS 13864, 1998 WL 566884 (N.D. Ill. Sept. 1, 1998)). That decision was affirmed by the Federal Circuit, and Abbott's petition for certiorari was denied. *Id.* (citing 182 F.3d 1315 (Fed. Cir. 1999) and *528 U.S. 1078, 120 S. Ct. 796, 145 L. Ed. 2d 671 (2000))*.

In the subsequent private antitrust action, the Eleventh Circuit reversed the district court's decision granting summary judgment against the defendants. [20] Valley Drug, 344 F.3d at 1295. The Eleventh Circuit concluded that the district court misapplied the law when it found the agreements to be *per se* antitrust violations. Id. at 1295. **[*64]** The court reasoned that the "exclusionary potential of the ['207] patent" shielded the agreements' effects from *per se* antitrust evaluation. Id. at 1311. Thus, because the '207 patent would not expire until 2014, the effect of the agreements on competition was "no broader than the potential exclusionary effect of the '207 patent, and was actually narrower to the extent [they] permitted Zenith [and Geneva] to market [their] drug[s] before the '207 patent expired." Id. at 1305.

While the court noted that the agreements resembled a horizontal **[*65]** market allocation, it recognized that the patent rights held by Abbott changed the evaluation. Id. at 1304. The court emphasized that the patent grant involves the right to exclude, which can lead to lawful agreements allocating the market geographically or by customer type. Id. at 1304. The court concluded that the district court erred when it focused on market allocation without considering the lawful exclusionary rights granted to Abbott under the '207 Patent. Id. at 1305.

The court further concluded that it was inappropriate to analyze the agreements under a traditional rule of reason framework because "the anticompetitive effects of exclusion cannot be seriously debated." at 1311. Rather, the court reasoned, a threshold analysis of the exclusionary scope of the patent must precede any specific antitrust inquiry. Id. at 1312. If the terms of the agreements are found to have effects "beyond the exclusionary effects of Abbott's patent," they "may then be subject to traditional antitrust analysis to assess their probable anticompetitive effects in order to determine whether those provisions violate § 1 of the Sherman Act." *Id.*

The court identified a number of factors influencing its **[*66]** reasoning. First, it emphasized the competing regimes of patent and ***antitrust law***. Id. at 1305-06. Second, the fact that the '207 patent subsequently was found to be invalid was not dispositive. Id. at 1308. Rather, the court concluded, the "reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into." Id. at 1306 (citing Polk Bros. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985); SCM Corp. v. Zerox Corp., 645 F.2d 1195, 1209 (2d Cir. 1981)). Third, noting the "important role played by settlement in the enforcement of patent rights," the court rejected the notion that the mere existence or substantial size of a reverse payment was sufficient to trigger *per se* illegality, especially where the lack of any damages reduces the risk for the generic manufacturers in the infringement suit. Id. at 1309-10 (citing In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 251-52 (E.D.N.Y. 2003) ("*Cipro I*") (discussing the asymmetries of litigation risk create by Hatch-Waxman and rejecting argument that payments from the patentee to the infringer are subject to *per se* antitrust analysis)).

(b) *Schering v. FTC*

In Schering's **[*67]** appeal of the *Schering-FTC* decision, the Eleventh Circuit reversed the FTC and reaffirmed the reasoning first set forth in Valley Drug. Schering, 402 F.3d 1056. The court restated its view that "neither the rule of reason nor the *per se* analysis is appropriate in this context." Id. at 1065. Recognizing the tension between the antitrust and patent laws, the court observed:

> By their nature, patents create an environment of exclusion, and consequently, cripple competition. the anticompetitive effect is already present. "What is required here is an analysis of the extent to which antitrust

---

[20] On remand, the district court still applied a *per se* analysis and found the agreements at issue in *Valley Drug* to be *per se* illegal. *See* In re Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005). However, in its subsequent decision in *Schering,* the Eleventh Circuit found the agreements in *Valley Drug* to be "wholly different" from the Upsher and ESI Agreements. Schering, 402 F.3d at 1066, n.14. The court noted that the "critical difference" is that the agreements in *Valley Drug* did not involve final settlements of the patent litigation, and did not permit the generic company to market its product before patent expiration. *Id.*

> liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects."

Schering 402 F.3d at 1065-66 (quoting *Valley Drug, 344 F.3d at 1311, n.27*). Clarifying the standard it adopted in *Valley Drug,* the court explained that "the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects." *Id. at 1066*. Applying the foregoing analysis to **[*68]** the Upsher and ESI agreements, the Eleventh Circuit found them well within the scope of the patent and thus legal patent settlements.[21] *Id. at 1076*. In reaching this conclusion, the court emphasized the fact that the agreements permitted Upsher to enter the market more than five years before the '743 Patent expired, and ESI to enter the market more than two years before the expiration of the patent. *Id. at 1067-68*. The court further noted that "there has been no allegation that the '743 patent itself is invalid or that the resulting infringement suits against Upsher and ESI were 'shams.'" *Id. at 1068*. The court rejected the FTC's contention that, absent the payments to Upsher and ESI, the parties could have "simply compromised" on earlier entry dates. Finding no evidence in the record to support this conclusion -- which the court viewed as "somewhat myopic" -- the court reasoned:

> It is uncontested that parties settle cases based on their perceived risk of prevailing in and losing the litigation. Pre-Hatch-Waxman, Upsher and ESI normally would have had to enter the market with their products, incurring the costs of clinical trials, manufacturing and marketing. This market entry would **[*69]** have driven down Schering's profits, as it took sales away. As a result, Schering would have sued ESI and Upsher, seeking damages for lost profits and willful infringement. . . .
>
> By contrast, the Hatch-Waxman Amendments grant generic manufacturers standing to mount a challenge without incurring the cost of entry or risking enormous damages flowing from any possible infringement. *See In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 251 (E.D.N.Y. 2003)*. Hatch-Waxman essentially redistributes the relative risk assessments and explains the flow of settlement funds and their magnitude. *Id.* Because of the Hatch-Waxman scheme, ESI and Upsher gained considerable leverage in patent litigation: the exposure to liability amounted to litigation costs, but paled in comparison to the immense volume of generic sales and profits. This statutory scheme could then cost Schering its patent.
>
> By entering into the settlement agreements, Schering realized the full potential of its infringement suit -- a determination that the '743 patent was valid and that ESI and Upsher would not infringe in the future. Furthermore, although ESI and Uphser obtained less than they what they would have **[*70]** received from successfully defending the lawsuits (the ability to immediately market their generics), they gained more than if they had lost. A conceivable compromise, then, directs the consideration from the patent owner to the challengers. *Id.*

Schering, 402 F.3d at 1074.

Noting the "private and social benefits" of settlements in avoiding the "the inveterate and costly effects of litigation," the court reiterated its view that neither the presence of a reverse payment, nor its size, should "dictate the availability of a settlement remedy." *Id. at 1075* (citing D. Crane, *Exit Payments in Settlement of Patent Infringement Lawsuits; Antitrust Rules and Economic Implications,* 54 Fla. L. Rev. 747, 760 (2002)). The court further reasoned that "[a]n exception cannot lie, as the [FTC] might think, when the issue turns on validity (*Valley Drug*) as opposed to infringement (the Schering agreements)." *Id. at 1075-76*.

3. The Second Circuit's *Tamoxifen* [*71] Decision

[21] The Eleventh Circuit also rejected the FTC's conclusion that the Niacor license was not worth $ 60 million, but was a payment to keep Upsher off the market, and stated that the FTC's conclusion was "not supported by law or logic." *Id. at 1070*.

In *Tamoxifen II,* the Second Circuit considered a "reverse payment" settlement between the pioneer drug company, Zenica, [22] and generic manufacturer Barr Laboratories. [23] *Tamoxifen II, 466 F.3d at 190*. Zeneca held the patent rights to and manufactured tamoxifen citrate, a leading breast cancer drug. *Id. at 193*. Barr filed an ANDA for a generic version of tamoxifen, which it amended in 1987 to include a Paragraph IV certification. *Id.* After Zeneca timely sued Barr and Barr's raw material supplier for patent infringement, the district court declared Zeneca's patent invalid based on its conclusion that Zeneca deliberately withheld information from the PTO. *Id.* Zeneca appealed the invalidity decision, and in 1993, while the appeal was pending, the parties entered into a settlement agreement. *Id.*

Under the agreement's principal terms: (1) Barr agreed not to market its generic version of tamoxifen until Zeneca's patent expired in 2002 and thus amended its ANDA to a Paragraph III certification; (2) Barr received a non-exclusive license to sell tamoxifen tablets manufactured by Zeneca under Barr's own label; (3) Zeneca agreed to pay Barr $ 21 million plus an additional $ 45 million over ten years to Barr's raw material supplier; and (4) the parties agreed that if Zeneca's patent were subsequently declared invalid or unenforceable in a final, unappealable judgment, Barr would be allowed to revert to a Paragraph IV certification. *Id. 193-94*. In addition, pursuant to the settlement, the parties jointly moved for *vacatur* of the district court's patent invalidity judgment, which motion was granted by the Federal Circuit. *Id. at 194*.

The validity of Zeneca's patent was subsequently challenged by three other ANDA filers, all of whom were unsuccessful in their attempts to rely on the vacated invalidity judgment. *Id. at 195*. In each case, the court upheld the validity of Barr's patent. *Id.* In the meantime, the "successful defense" rule was invalidated, and **[*73]** Barr became eligible for the 180-day exclusivity period, which would only be triggered by Barr marketing its own generic version of tamoxifen. *Id. at 195-96*. In March 1999, the FDA confirmed Barr's entitlement to the exclusivity period. *Id. at 196*.

The private antitrust plaintiffs alleged that the settlement agreement unlawfully: (1) enabled Zeneca and Barr to "resuscitate" a patent that had been held invalid and unenforceable; (2) perpetuated Zeneca's monopolization of the tamoxifen market and allowed Zeneca and Barr to share the monopoly profits; and (3) maintained artificially high prices for tamoxifen and prevented competition from other generic manufacturers. *Id. at 196-97*.

The Second Circuit affirmed the district court's dismissal of the antitrust complaint and upheld the legality of the settlement. *Id. at 197-99*. In reaching its decision, the court noted the tension between the antitrust laws and an innovator's right under patent law to exclude competition. *Id. at 201*. The court further emphasized "our longstanding adherence to the principle that 'courts are bound to encourage' the settlement of litigation." *Id. at 202* (citing *Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004)*. **[*74]** The court observed:

> It is well settled that '[w]here there are legitimately conflicting [patent] claims . . ., a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act," although such a settlement may ultimately have an adverse effect on competition. . . .
>
> Rules severely restricting patent settlements might also be contrary to the goals of the patent law because the increased number of continuing lawsuits that would result would heighten the uncertainty surrounding patents and might delay innovation.

Id. (quoting *Standard Oil Co. v. United States, 283 U.S. 163, 171, 51 S. Ct. 421, 75 L. Ed. 926 (1931)* (other citations omitted).

---

[22] Zeneca refers collectively to Imperial Chemical Industries, PLC ("ICI") and its former subsidiaries, Zeneca, Inc., AstraZeneca Pharmaceuticals LP, and Astra Zeneca PLC, which succeeded to ICI's rights to the patent at issue. *Tamoxifen II, 466 F.3d at 190, 193*.

[23] The case was before the Second Circuit on plaintiffs' appeal of the district court's dismissal of their antitrust claims pursuant **[*72]** to *Fed. R. Civ. P. 12(b)(6)*. *Id.*

The court also declined to find the settlements unlawful based on plaintiffs' contention that the Federal Circuit would have affirmed the invalidity of Zeneca's patent. *Id. at 203-05*. "We cannot judge this post-trial, pre-appeal settlement on the basis of the likelihood *vel non* of Zeneca's success had it not settled but rather pursued its appeal." *Id. at 203* (citing, *inter alia, Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 993 (N.D. Ill. 2003)* (Posner, J., sitting by designation) ("No one can be *certain* that he will prevail in a patent suit."); **[*75]** *In re Ciprofloxacin Hydrochloride Anititrust Litig., 261 F. Supp. 2d 188, 200-01 (E.D.N.Y. 2003)* (noting that courts should not speculate about the outcome of litigation); *Valley Drug, 344 F.3d at 1306* ("[T]he reasonableness of agreements under the antitrust laws are to be judged at the time the agreements are entered into.")).

Citing with approval the reasoning of the courts in *Cipro I, Valley Drug, Schering,* and *Asahi Glass,* the court further held that the mere existence of a reverse payment, especially in the context of the Hatch-Waxman Act, is not enough to trigger *per se* unlawfulness. *Id. at 205-6* (citing *Valley Drug, 344 F.3d at 1309*; *Asahi Glass, 289 F. Supp. 2d at 994*; *Cipro I, 261 F. Supp. 2d at 252*; *Schering, 402 F.3d at 1074*). While the court acknowledged that reverse payments may seem "suspicious," it reasoned that this "suspicion abates upon reflection." *Id. at 208*. Rather, the court held, "*so long as the patent litigation is neither a sham nor otherwise baseless,* the patent holder is seeking to arrive at a settlement in order to protect that to which it presumably entitled: a lawful monopoly." *Id. at 208-09* (emphasis added). In this sense, the settlement did not exceed **[*76]** the scope of the patent. *Id. at 209 n.22*.

The court also noted its general agreement with the Eleventh Circuit regarding the importance of analyzing the scope of the patent, and concluded: "Whatever damage is done to competition by settlement is done pursuant to the monopoly extended to the patent holder by patent law unless the terms of the settlement enlarge the scope of that monopoly." *Id. at 212*. The court agreed that "'[u]nless and until the patent is shown to have been procured by fraud, or a suit for its enforcement shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.'" *Id. at 213* (quoting *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 535 (E.D.N.Y. 2005)* ("*Cipro II*").

4. *In re Cipro*

On October 15, 2008, the Federal Circuit Court of Appeals affirmed the district court's decision in *Cipro II* granting summary judgment in favor of the defendants. *In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, (Fed. Cir. 2008)* ("*Cipro III*"). The facts of the *Cipro* case are generally similar to those of the cases discussed above. **[*77]** Bayer held a patent for the active ingredient in the branded drug Cipro, which patent had an expiration date of December 9, 2003. *Id. at 1327-28*. In 1991, Barr Labs, Inc. filed an ANDA with a paragraph IV certification for a generic version of Cipro. *Id. at 1328*. Thereafter, Bayer sued Barr for patent infringement. *Id.*

Shortly before trial, Bayer entered into settlements with Barr and other generic manufacturers. Pursuant to Bayer's settlement with Barr, Barr agreed to convert its paragraph IV ANDA to a paragraph III ANDA, thus certifying that it would not market its generic version of Cipro until after Bayer's patent expired. *Id. at 1328-29*. In exchange, Bayer agreed to make a settlement payment of $ 49.1 million to Barr. *Id. at 1329*. Under a separate "Cipro Supply Agreement," Bayer agreed to either supply Barr with Cipro for resale or make quarterly payments to Barr until December 31, 2003. *Id.* Barr, in turn, agreed not to manufacture, or have manufactured, a generic version of Cipro in the United States. *Id.* Beginning at least six months before the expiration of Bayer's patent, Bayer agreed to allow Barr to sell a competing ciprofloxacin product. *Id.* Bayer and Barr then entered into **[*78]** a consent judgment under which Barr affirmed the validity and enforceability of Bayer's patent and admitted infringement. *Id.*

In the subsequent antitrust action brought by indirect and direct purchasers, the district court granted summary judgment in favor of defendants. *Id. at 1329* (citing *Cipro II, 363 F. Supp. 2d at 548*). Using a rule of reason analysis, the district court first determined that the relevant market was ciprofloxacin and that Bayer had market power within that market. *Id. at 1330*. The court then concluded that "any adverse effects on competition stemming from the Agreements were within the exclusionary zone of [Bayer's patent], and hence could not be redressed by ***antitrust law***." *Id.* Having determined that there was no evidence that the Agreements "created a bottleneck on challenges to [Bayer's patent] or otherwise restrained competition beyond the scope of the patent," the district court concluded that the plaintiffs had failed to show that the Agreements had an anticompetitive effect beyond that authorized by the patent. *Id.*

Affirming the district court, the Federal Circuit distinguished the Sixth Circuit's decision in *Cardizem* and stated:

> We find . . . the district **[*79]** court's analysis to be sound. . . .[T]he district court applied a rule of reason analysis in assessing the lawfulness of the Agreements. In that analysis, it considered whether there was evidence of sham litigation or fraud before the PTO, and whether any anticompetitive effects of the Agreements were outside the exclusionary zone of the patent. The application of a rule of reason analysis to a settlement agreement involving an exclusion payment in the Hatch-Waxman context has been embraced by the Second Circuit, and advocated by the FTC and the Solicitor General. And, although the Sixth Circuit found a per se violation of the antitrust laws in *In re Cardizem,* the facts of that case are distinguishable from this case and from the other circuit court decisions. In particular, the settlement in that case included, in addition to a reverse payment, an agreement by the generic manufacturer to not relinquish its 180-day exclusivity period, thereby delaying the entry of other generic manufacturers. *In re Cardizem, 332 F.3d at 907*. Furthermore, the agreement provided that the generic manufacturer would not market non-infringing versions of the generic drug. *Id. at 908 n. 13*. Thus, the agreement **[*80]** clearly had anticompetitive effects outside the exclusion zone of the patent. [citation omitted] To the extent that the Sixth Circuit may have found a per se antitrust violation based solely on the reverse payments, we respectfully disagree.

Id. at 1335.

Citing with approval the approaches adopted by the Eleventh and Second Circuits, the Federal Circuit concluded:

> [I]n cases such as this, wherein all anticompetitive effects of the settlement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under ***antitrust law*** by applying a rule of reason approach to evaluate the anti-competitive effects, or under patent law by analyzing the right to exclude afforded by the patent. The essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent. This analysis has been adopted by the Second and Eleventh Circuits and by the district court below and we find it to be completely consistent with Supreme Court precedent.

Id. at 1336 (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-77, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* (holding that there may be a violation of the Sherman Act when a patent is **[*81]** procured by fraud, but recognizing that a patent is an exception to the general rule against monopolies). The court further noted its agreement with the Second and Eleventh Circuits that "in the absence of evidence of fraud before the PTO or sham litigation, the court need not consider the validity of the patent in the antitrust analysis of a settlement agreement involving a reverse payment." *Id.*

E. Framework Applicable to the Upsher and ESI Settlements

Having considered the analyses of the cases summarized above, I first conclude that the Upsher and ESI settlements were not *per se* unlawful. DP Plaintiffs' arguments that a *per se* approach is consistent with "traditional antitrust principles" and the legislative purpose of the Hatch-Waxman Act ignore the important purpose underlying the exclusionary rights granted by patent law. *See* *Tamoxifen, 429 F.3d at 385*; *Cipro III, 544 F.3d at 1333*. Moreover, with the sole exception of the *Cardizem* case, all of the courts that have considered so-called "reverse payment" settlements, as well as the FTC, have declined to apply a *per se* analysis. *See* *Valley Drug, 344 F.3d at 1304*; *Schering, 402 F.3d at 1065*; *Tamoxifen II, 466 F.3d at 206*; *Schering-FTC, 2003 FTC LEXIS 187, at *13, 22-27*. **[*82]** *But see* *In re Cardizem, 332 F.3d at 908*. To the extent that the *Cardizem* court reached a contrary conclusion, the facts of that case are distinguishable.

Unlike the interim settlement in *Cardizem,* Schering's settlements in this case finally resolved its litigation with Upsher and ESI. Moreover, the settlement agreements in this case permitted the Upsher and ESI generic products to enter the market five years and almost three years, respectively, before the expiration of Schering's '743 Patent. Finally, the agreements in this case did not manipulate the 180-day exclusivity period to create a "bottleneck" precluding the entry of other generic drugs. Upsher's settlement with Schering did not preclude Upsher from transferring or relinquishing the 180-day exclusivity and, because the "successful defense" requirement was in place at the time of the settlement, Upsher arguably was not entitled to the exclusivity period.

I further decline to adopt the "FTC/Hovenkamp" framework proposed by DP Plaintiffs, and note that Plaintiffs have not cited -- nor am I aware of -- any case that has applied this legal framework. The standard articulated by the FTC treats settlements involving reverse payments **[*83]** as presumptively anticompetitive, but purports to allow rebuttal of that presumption with a showing of the pro-competitive effect of the settlement. *Schering-FTC, 2003 FTC LEXIS, at *57-58*. However, the order entered by the FTC prohibited settlements in which the generic company "receives anything of value," with an exception for payments, limited to $ 2 million, linked to litigation costs. *Id. at *176*. Similarly, the framework suggested by Professor Hovenkamp applies a rebuttable presumption of illegality, which the infringement plaintiff can rebut by showing both "(1) that the *ex ante* likelihood of prevailing in the infringement lawsuit is significant, and (2) that the size of the payment is no more than the expected value of the litigation and collateral costs attending the lawsuit." *See* Herbert Hovenkamp et al., Anticompetitive Settlement of Intellectual Property Disputes, *87 Minn. L. Rev. 1719, 1759 (2003)* (emphasis added).

Similar to a *per se* analysis, the FTC/Hovenkamp framework effectively discounts the fact that Schering's '743 Patent gave it the right to exclude infringing competitors. Moreover, it essentially requires a presumption that if the patent holder pays money to **[*84]** the generic company, the patent at issue must be either invalid or not infringed. In my view, the weight of authority counsels against adopting such a presumption. *See, e.g., Schering, 402 F.3d at 1066* (noting presumption of patent validity); *Tamoxifen, 466 F.3d at 208-09*; *Cipro II, 363 F. Supp. 2d at 534-35* (declining to infer invalidity based on reverse payment).

I recognize that in this case, the key disputed issues in the patent case involved infringement, rather than validity. In this regard, DP Plaintiffs note that although patents are presumptively valid by statute; *see* *35 U.S.C. § 282*, there is no corresponding presumption of infringement. *See* Framework Mem., p. 11. Thus, according the DP Plaintiffs, the probabilistic nature of patents is particularly relevant. *Id.* DP Plaintiffs further contend that Schering's payments to Upsher and ESI are *prima facie* evidence that the parties expected the litigation to result in more competition than was provided for under the settlement agreements. Plaintiffs' arguments are unpersuasive. Although there is no presumption of infringement, neither is there a statutory presumption that Schering's patent was not infringed. *See* *Schering-FTC, 2003 FTC LEXIS 187, at * 61* **[*85]** ("We cannot assume that Schering had a right to exclude Upsher's generic competition for the life of the patent any more than we can assume that Upsher had the right to enter earlier.") (emphasis added).

Accordingly, I decline to discount the exclusionary power of Schering's patent based on the *possibility* that it was not infringed by the Upsher and ESI products. *See* *Cipro II, 363 F. Supp. 2d at 514 and n. 19* (rejecting argument that exclusionary power of the patent should be discounted by the probability of an invalidity finding, and noting the applicability of its analysis to cases in which infringement is the dominant issue); *Tamoxifen, 466 F.3d at 211-12* (citing *Cipro II, supra*); *Asahi Glass, 289 F. Supp. 2d at 992-93* (***HN12***[] "It is not 'bad faith' to assert patent rights that one is not certain will be upheld in a suit for infringement pressed to judgment and to settle the suit to avoid risking the loss of the rights. No one can be *certain* that he will prevail in a patent suit."). In addition, I conclude that it is inappropriate to conduct an *ex post* inquiry into infringement issues that were resolved by the parties' settlement. As the *Cipro II* court observed regarding issues of patent **[*86]** validity, "[s]uch an inquiry would undermine any certainty for patent litigants seeking to settle their disputes." *Cipro II, 363 F. Supp. 2d at 530*. *See also* *Schering, 402 F.3d at 1072-73* (noting ***HN13***[] public policy favoring settlement of patent disputes); *Schering-FTC, 2003 FTC LEXIS 187, at *60* (expressing concern that "a mandated inquiry into [the merits of the patent case], as part of an antitrust review, would ultimately have a chilling effect on the efficient settlement of patent litigation").

Finally, I reject DP Plaintiffs' suggestion that Judge Greenaway previously weighed and rejected the analytical framework that has now been adopted by the Second, Eleventh and Federal Circuits. In his Sept. 29, 2004 opinion, Judge Greenaway denied Defendants' 12(b)(6) motion to dismiss, finding, *inter alia,* that Plaintiffs' had adequately *alleged* anti-competitive conduct. As summarized by Judge Greenaway, Defendants had argued that:

> Plaintiffs fail to allege that Defendants engaged in anti-competitive behavior by entering into the settlement agreements. [Defendants] argue that Plaintiffs have not established anti-competitive behavior because the settlement agreements in question do not have an **[*87]** anti-competitive effect. Rather, the settlement agreements are pro-competitive because they allowed Upsher and ESI to enter the market years before Schering's K-Dur patent expired, and such agreements, as a matter of law, are not antitrust violations. By not alleging that the settlements do not reasonably reflect the objective merits of the patent suits, or that Upsher or ESI would have won the patent suit, Plaintiffs have not stated anti-competitive behavior, and thus have no claim.

In re K-Dur, 338 F. Supp. 2d 517, 530-31. Defendants further argued that the settlements (and the payments by Schering allegedly for delay) could not be anti-competitive because Schering had a valid patent and, thus, was entitled to exclude generic competitors until the patent expired. Thus, according to Defendants, absent an allegation of patent invalidity or non-infringement, the entry dates in the agreement are beyond attack. *Id. at 531*.

Contrary to DP Plaintiffs' suggestion, Judge Greenaway did not decide that the framework DP Plaintiffs' now propose (or any other framework) would apply beyond the pleading stage, *i.e.,* at dispositive motions or trial. On the contrary, in denying Defendants' Motion to **[*88]** Dismiss, he stated that "[i]n this Court's view Plaintiffs can sustain a claim of anti-competitive conduct simply by *alleging* facts which show that the outcome of the settlement agreements would have been more pro-competitive absent the cash payments from Schering to Upsher and ESI." [24] *Id. at 532* (emphasis added). Moreover, Judge Greenaway noted the different standards that had been applied by the Sixth Circuit in *Cardizem* (reverse payments *per se* illegal) and the 11th Circuit in *Valley Drug* (rejecting *per se* approach), and expressly stated that he did not need to address whether Defendants' alleged conduct was *per se* illegal. *Id. at 533*. Further, although he noted that the FTC had found the Defendants' conduct unlawful and stated that the FTC's findings were "of some interest," he also stated that the FTC's findings were not binding, and he did not adopt the standard used by the FTC in its analysis.

Finally, Judge Greenaway's decision was issued in 2004, before the 11th Circuit's decision in *Schering* and before the decisions of the Second and Federal Circuits following the 11th Circuit approach. Thus, the Circuit Court case law regarding the appropriate analytical framework has developed significantly since Judge Greenaway decided Defendants' motion to dismiss in 2004.

In summary, I will not adopt the FTC/Hovenkamp framework, but, rather, will apply an analysis consistent with the approach that has been adopted by the Second, Eleventh and Federal Circuits. Under that framework, as long as the Upsher and ESI settlements restrained competition only within the scope of Schering's patent, and the underlying patent lawsuits were not objectively baseless, **[*90]** Defendants are entitled to summary judgment on DP Plaintiffs' antitrust claims.

1. The Settlements Do Not Exceed the Exclusionary Scope of the '743 Patent

It is undisputed that the Schering's '743 Patent gave it the right to exclude infringing products until September 5, 2006. It is likewise undisputed that the Upsher Settlement permitted Upsher to market its generic product more than five years before the '743 Patent expired; and the ESI Settlement permitted ESI to market its generic product more than two years before the patent's expiration. Thus, with respect to the entry dates the parties agreed upon, the Upsher and ESI Agreements clearly were well within the exclusionary scope of the '743 Patent.

---

[24] As Judge Greenaway noted, his opinion addressed a *Rule 12(b)(6)* motion to dismiss and was decided under the framework of that rule, which treats all of Plaintiffs' allegations as true and draws all inferences in Plaintiffs' favor. *Id. at 527* (noting that Plaintiffs' alleged that but **[*89]** for the reverse payments, Upsher and ESI would have settled on different terms and entered the market sooner); 528 (noting the standard for 12(b)(6) and 12(c) motions); 529 (noting that there is no heightened pleading standard in antitrust cases); 533 (stating that Plaintiffs had sufficiently pled anti-competitive conduct and noting that, at pleading stage, court must consider defendants' pro-competitive justifications as unproven).

Having reviewed the Agreements and the record in this case, I further conclude that there is no evidence that any other aspects of the settlement exceeded the exclusionary scope of the '743 Patent. [25] In the Upsher Settlement, Upsher agreed not to market Klor-Con M20(c) or "any other sustained release microencapsulated potassium chloride tablet," prior to Sept. 1, 2001. DP Plaintiffs' contend that by virtue of the above-quoted language, the agreement precluded Upsher from marketing non-infringing **[*91]** products and exceeded the scope of the patent. I disagree. First, there is no evidence in the record that Upsher had developed or planned to develop and market "any other sustained release microencapsulated potassium chloride tablet." Absent evidence that any other such generic product existed or was contemplated by Upsher, there is simply no basis upon which to conclude that the terms of the Upsher Agreement exceeded the scope of the '743 Patent. Moreover, I note that in *Schering,* the Eleventh Circuit determined, on the record before it, [26] that the Upsher Agreement's restraint covering "sustained release microencapsulated potassium chloride tablet[s]" covered the "identical reach of the '743 patent" and was a lawful ancillary restraint. *Schering, 402 F.3d at 1072* (***HN14***[] "Ancillary restraints are generally permitted if they are 'reasonably necessary' toward the contract's objective of utility and efficiency.").

With respect to the ESI Agreement, DP Plaintiffs have not even argued that its terms exceed the exclusionary scope of the patent. Although the terms of the ESI Settlement included ESI's agreement not to conduct, sponsor or support an application for AB rating or equivalence study for a potassium chloride product with respect to K-Dur, ESI also expressly stated in the agreement that neither it nor any of its affiliates were developing, or planned or intended to develop any such product. Accordingly, as with the Upsher Settlement, there is no evidence that **[*93]** the ESI Agreement excluded any non-infringing products.

Finally, I reject DP Plaintiffs' argument in their '743 Motion that under the doctrine of prosecution history estoppel and the "All Elements Rule," the scope of the '743 patent cannot extend to exclude Upsher's generic product. The DPP's '743 Motion would require me not only to conduct a detailed inquiry into the merits of the patent case, but to decide the infringement issues that were resolved when Schering and Upsher settled. For the reasons discussed above regarding the analytical framework applicable to the Upsher and ESI Settlements, I decline to conduct such an inquiry. *See* *Cipro II, 363 F. Supp. 2d at 524-30* (reviewing refusals of courts and the FTC to undertake an after-the-fact inquiry into the merits of the patent issues in a settled case). To the extent that I consider the infringement issues raised by DP Plaintiffs, I do so only to determine whether Schering's patent lawsuits were objectively baseless.

2. Schering's Patent Infringement Lawsuits Against Upsher and ESI Were Not Objectively Baseless

Because I have concluded that the Upsher and ESI settlements did not exceed the exclusionary scope of the '743 Patent, DP **[*94]** Plaintiffs' antitrust claims fail unless they can show that Schering's patent litigation against Upsher and ESI was objectively baseless. [27] As set forth below, I conclude that DP Plaintiffs cannot satisfy the objectively baseless standard with respect to either of the patent lawsuits. ***HN15***[] In order to establish that Schering's patent lawsuits were objectively baseless, DP Plaintiffs must show that the lawsuits were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors, Inc. v. Columbia Pictures, Indus., Inc., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("*PRE*"). If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome,

---

[25] Contrary to DP Plaintiffs' argument, Judge Greenaway did not decide that the terms of the Upsher and ESI Settlements exceeded the exclusionary scope of Schering's patent. Rather, he merely concluded that Plaintiffs had *alleged* that the settlement agreements exceeded the scope of **[*92]** the patent. *In re K-Dur, 338 F. Supp. 2d at 532*.

[26] The record in *Schering* included the ALJ's factual finding that the quoted language was included in the settlement so that "Upsher-Smith could continue to market its Klor Con 8 and Klor Con 10 wax matrix tablets without any restrictions," and because "Schering wanted to prevent Uphser-Smith from simply renaming its Klor Con M 20 product to get around the language and intent of the settlement agreement." *Schering-ALJ, 2002 FTC LEXIS 40, at * 62-63* (P 158). The ALJ found that "no other restrictions on any of Uphser-Smith's other products were intended by the settlement agreements." *Id.*

[27] DP Plaintiffs do not contend that Schering's '743 Patent was procured by fraud on the PTO.

the suit is [not objectively baseless], and an antitrust claim premised on the sham exception must fail." *Id. See also* *Cheminor Drugs, Ltd. v. Ethyl Corp., 993 F. Supp. 271, 281 (D.N.J. 1998)* (Greenaway, J.) (case must be shown to have "absolutely no objective merit"), *aff'd, 168 F.3d 119 (3d Cir. 1999)*. Where there is no dispute over the "predicate facts" of the underlying lawsuit, the question of whether the suit was objectively baseless is a matter **[*95]** of law. *PRE, 508 U.S. at 63-64*. Predicate facts are the facts and circumstances that were available to the party that brought the underlying lawsuit. *PRE, 508 U.S. at 63* (citing *Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 444 (Kan. 1980)*. *See also* *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 362 n. 7 (D. Mass. 2004)* (recognizing that probable cause is a question of law when the relevant predicate facts involve an unsettled condition of law).

HN16[] The party seeking to establish that a lawsuit was objectively baseless must do so with clear and convincing evidence. *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1369 (Fed. Cir. 1998)*; *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 (9th Cir. 1979)*. "The U.S. Supreme Court has defined 'clear and convincing evidence' as evidence that places in the Court, as factfinder, an 'abiding conviction that the truth of its factual contentions are highly probable.'" *Bayer Schering Pharma AG v. Barr Laboratories, Inc., No. 05-cv-2308, 2008 U.S. Dist. LEXIS 15917, * 50* (quoting *Colorado v. New Mexico, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1984)* (internal quotation marks omitted)). *See* ***[*96]*** *also A.K. Stamping Co., Inc. v. Instrument Specialties Co., Inc., 106 F. Supp. 2d 627, 639 n. 13 (D.N.J. 2000)* (Greenaway, J.) ("'Clear and convincing' falls between the 'reasonable doubt' standard governing criminal cases and the "preponderance of the evidence" standard typical of civil actions.").

(a) *The Upsher Case*

(i) *Prosecution History Estoppel*

DP Plaintiffs have argued that even if the objectively baseless standard applies, they have developed a record which establishes that it was virtually certain that Upsher would have won the patent case. DP Plaintiffs' principal argument is that Schering's primary infringement argument was legally baseless because, during prosecution of the '743 Patent, Schering amended its claims to require EC with a viscosity of "greater than 40 cp." Specifically, DP Plaintiffs note that during prosecution of the '743 patent -- in response to the examiner's rejection of its claims as obvious in light of the prior art -- Schering amended its claims to require an EC with a viscosity of "greater than 40 cp." Upsher's generic product, however, uses Ethocel 20, with a viscosity of 18-22 cp and, thus, did not literally infringe the '743 patent. Therefore, Schering **[*97]** could only claim infringement under the "doctrine of equivalents." According to DP Plaintiffs, however, having surrendered its claim to a product using EC with a viscosity of less than 40 cp, Schering was barred by the doctrine of prosecution estoppel from claiming that Upsher's product using Ethocel 20 was equivalent to Schering's product claimed in the '743 patent.

Defendants dispute DPPs' contention that Schering's reliance on the doctrine of equivalents was objectively baseless. In the patent lawsuit, Key conceded that it was estopped from claiming equivalency as to EC described in the prior art '399 Patent, which had a viscosity of 9-11 cp. Key contended, however, that under the applicable law, it was not estopped from claiming equivalency as to EC with a range between the 11 cp disclosed in the prior art and the 40 cp literally claimed in the '743 Patent. Upsher moved for summary judgment contending that Key's amendment of the patent to recite a viscosity of "greater than 40 cp," estopped Key from claiming equivalence as to any product with a viscosity lower than 40 cp.

Defendants note that at the time Schering filed its lawsuit against Upsher, Federal Circuit law imposed a "flexible **[*98]** bar" under which a claim amendment did not necessarily surrender all range of equivalency regarding the subject matter literally given up by the amendment. *See* *Hughes Aircraft Co. v. United States, 717 F.2d 1351, (Fed. Cir. 1983)*. However, shortly before the settlement, the Supreme Court issued a decision in the case of *Warner Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 117 S. Ct. 1040, 137 L. Ed. 2d 146 (1997)*, which called into question the applicability and scope of the "flexible bar" rule. Thus, by the time of the settlement, the law regarding Schering's ability to rely on the doctrine of equivalents was unsettled. *See* *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki, 234 F.3d 558, 574 (Fed. Cir. 2000)* (noting inconsistency in rules as to the scope of prosecution history estoppel), *vacated on other grounds, 535 U.S. 722, 122 S. Ct. 1831, 152 L. Ed. 2d 944 (2002)*. *See also* *In re Wellbutrin SR Antitrust Litig., 2006 U.S. Dist. LEXIS 9687, at *24 (E.D. Pa. Mar. 9, 2006)* (noting that during the 1980s and 1990s, there were two conflicting approaches to prosecution history estoppel, "the more prevalent of which was known as the flexible bar rule, according to which the doctrine of prosecution history estoppel extends only to the subject matter **[*99]** . . . relinquished during the prosecution"). In view of the unsettled state of the law regarding prosecution estoppel at the time of the Upsher litigation and settlement, I conclude that Schering's equivalence argument can not be deemed objectively baseless. To be sure, Schering might have lost the argument had the case proceeded to a decision on summary judgment or at trial. In this regard, I note that at the summary judgment argument, Judge Walls expressed doubt about Schering's infringement claim in light of the claim amendment. However, the test is not whether Schering might have lost the patent suit; it is whether the suit was so objectively baseless "that no reasonable litigant could realistically expect success on the merits." *PRE, 508 U.S. at 60*. I conclude as a matter of law that DP Plaintiffs cannot satisfy that test.

(ii) *Other Equivalence and Inequitable Conduct Issues*

Finally, DP Plaintiffs argue that as a factual matter, Schering's argument in the patent case that the SMO in Upsher's product was equivalent to the HPC and PEG required by the '743 patent was objectively baseless. According to DP Plaintiffs, the facts show that: (1) Schering misrepresented the function of **[*100]** HPC and PEG as plasticizers; (2) Schering misrepresented the function of SMO as a plasticizer; and (3) Schering improperly ignored the principal function of HPC and PEG. DP Plaintiffs further argue that summary judgment should be denied so that a jury can consider the invalidity and unenforceability claims that Schering would have had to overcome to prevail on its infringement claim.

DP Plaintiffs' opposition to the Upsher Motion, and the parties' extensive recitations of the conflicting evidence in the patent case regarding these issues, foreclose any finding that Schering's lawsuit was objectively baseless. In particular, the issue of whether SMO was equivalent to HPC was hotly disputed in the patent case, with both sides offering expert opinion in support of their positions. In addition, as Defendants note, Upsher argued in the patent case that multiple fact disputes precluded summary judgment in favor of Key on Upsher's inequitable conduct claim. Because it is clear that there were genuine factual and legal disputes regarding Schering's claims in the patent lawsuit, DP Plaintiffs cannot establish that those claims were objectively baseless.

(b) *The ESI Case*

DP Plaintiffs have not **[*101]** argued, nor identified any evidence, that Schering's patent litigation against ESI was objectively baseless. Moreover, it is undisputed that ESI had problems demonstrating the bioequivalence of its product to K-Dur and that the FDA had twice rejected ESI's bioequivalence studies. Additional undisputed evidence reflects that Schering believed ESI did not have a viable product and that Schering settled under some pressure from the presiding court. *See Schering-FTC, 2003 FTC LEXIS 187, at *165* (acknowledging that "Schering was subject to intense, and perhaps unseemly, judicial pressure to settle the patent litigation, and [that] Schering may well have been concerned about its future litigation prospects if it resisted."). In sum, there is no evidence that Schering's lawsuit against ESI was objectively baseless, and, thus, Defendants are entitled to summary judgment on DP Plaintiffs' claims relating to the ESI Settlement.

IV. CONCLUSION

For the reasons set forth above, I conclude that Defendants' Motions for Summary Judgment as to DP Plaintiffs' claims relating to the Uphser and ESI Settlements should be granted. I further conclude that DP Plaintiffs' Motions for Partial Summary Judgment **[*102]** as to the Applicable Framework for Analysis of Exclusion Payments and as to the Exclusionary Scope of the '743 Patent should be denied.

As provided in the Order entered by Magistrate Judge Arleo in this matter, the Special Master's decision on any motion can be appealed to Judge Greenaway in the manner, and subject to the standards of review set forth in *Rule 53 of the Federal Rules of Civil Procedure* and applicable Local Rules.

ENTERED this

6th day of February, 2009

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

ORDER

The Special Master having considered: (1) the Motion of Defendants Schering-Plough Corporation and Upsher-Smith Laboratories, Inc. (collectively, "Defendants") for Summary Judgment as to All Claims Brought By Direct Purchaser Plaintiffs ("DPPs") Related to the Upsher Settlement; (2) Defendants' Motion for Summary Judgment as to All Claims Brought By DPPs Related to the ESI Settlement; (3) DPPs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments; and (4) DPPs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent, the briefs submitted by all parties in support of and in opposition to **[*103]** the Motions, and the oral argument of counsel, for the reasons set forth in the foregoing Amended Report and Recommendation;

IT IS HEREBY ORDERED, this 6th day of February, 2009, that:

(1) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the Upsher Settlement is **GRANTED;**

(2) Defendants' Motion for Summary Judgment as to All Claims Brought By DP Plaintiffs Related to the ESI Settlement is **GRANTED;**

(3) DP Plaintiffs' Motion for Partial Summary Judgment as to the Applicable Framework for Analysis of Exclusion Payments is **DENIED;** and

(4) DP Plaintiffs' Motion for Partial Summary Judgment as to the Exclusionary Scope of the '743 Patent is **DENIED.**

ENTERED this

6th day of February, 2009

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SPECIAL MASTER

Fair Isaac Corp. v. Experian Info. Solutions

United States District Court for the District of Minnesota

February 9, 2009, Decided; February 9, 2009, Filed

CIVIL NO. 06-4112 (ADM/JSM)

Reporter
2009 U.S. Dist. LEXIS 146330 *

FAIR ISAAC CORPORATION and myFICO CONSUMER SERVICES, INC., Plaintiffs, v. EXPERIAN INFORMATION SOLUTIONS INC.; TRANS UNION, LLC; and VANTAGESCORE SOLUTIONS, LLC, Defendants.

Prior History: *Fair Isaac Corp. v. Equifax, Inc., 2007 U.S. Dist. LEXIS 71187 (D. Minn., Sept. 25, 2007)*

Core Terms

counterclaims, amended complaint, scoring, defendants', discovery, tortious interference, antitrust, affirmative defense, price-fixing, amend, parties, good cause, scheduling order, deadline, pleadings, trademark, motion to amend, cancellation, diligence, Answers, leave to amend, credit bureau, documents, prices, motion to strike, Plaintiffs', Sherman Act, settlement, amend a pleading, leave of court

Counsel: **[*1]** For Fair Isaac Corporation, Plaintiff: Charles F Rule, Ngoc Pham Hulbig, LEAD ATTORNEYS, Cadwalader, Wickersham & Taft LLP, Washington, DC; Joseph J Bial, LEAD ATTORNEYS, PRO HAC VICE, Cadwalader, Wickersham & Taft LLP, Washington, DC; Christopher K Larus, David W Beehler, K Craig Wildfang, Laura E Nelson, Michael A Collyard, Randall Tietjen, Ronald J Schutz, LEAD ATTORNEYS, Robins Kaplan LLP, Mpls, MN; Julia Dayton Klein, LEAD ATTORNEY, Lathrop GPM LLP, Minneapolis, MN; Martin L Seidel, LEAD ATTORNEY, Willkie Farr & Gallagher LLP, New York, NY; Mary E Kiedrowski, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi LLP, Mpls, MN; Michael V Ciresi, LEAD ATTORNEY, Ciresi Conlin LLP, Mpls, MN.

For myFICO Consumer Services, Inc., Plaintiff: Christopher K Larus, Laura E Nelson, Michael A Collyard, Randall Tietjen, Ronald J Schutz, LEAD ATTORNEYS, Robins Kaplan LLP, Mpls, MN; Joseph J Bial, LEAD ATTORNEY, PRO HAC VICE, Cadwalader, Wickersham & Taft LLP, Washington, DC; Julia Dayton Klein, Martin L Seidel, LEAD ATTORNEYS, Lathrop GPM LLP, Minneapolis, MN; Mary E Kiedrowski, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi LLP, Mpls, MN.

For Experian Information Solutions Inc., Defendant: Bruce H Little, **[*2]** LEAD ATTORNEY, Barnes & Thornburg LLP, Minneapolis, MN; Bryan D Gant, Christopher J Glancy, Jack E Pace, III, M Elaine Johnston, Robert A Milne, LEAD ATTORNEYS, White &6 Case LLP, New York, NY; David H Suggs, Heather M Burke, Martin M Toto, Megan DePasquale, Meghan McCurdy, Ross E Elfand, LEAD ATTORNEYS, PRO HAC VICE, White & Case LLP, New York, NY; Christopher R Sullivan, LEAD ATTORNEY, Lindquist & Vennum LLP, Mpls, MN; Mark A Jacobson, LEAD ATTORNEY, Cozen O'Connor, Minneapolis, MN; Mark H Zitzewitz, LEAD ATTORNEY Sapientia Law Group, Minneapolis, MN.

For Trans Union, LLC, Defendant: Christopher R Morris, Lewis A Remele, Jr, LEAD ATTORNEYS, Bassford Remele, PA, Minneapolis, MN; Dao L Boyle, James K Gardner, John A Cullis, Robert E Browne, Ralph T Russell, LEAD ATTORNEYS, Neal, Gerber & Eisenberg, LLP, Chicago, IL; John J Scharkey, Sarah G Malia, LEAD ATTORNEYS, PRO HAC VICE, Neal, Gerber & Eisenberg, LLP, Chicago, IL.

For VantageScore Solutions, LLC, Defendant: Barbara P Berens, Catherine A McEnroe, Justi R Miller, LEAD ATTORNEYS, Berens & Miller, PA, Mpls, MN.

For VantageScore Solutions, LLC, Counter Claimant: Barbara P Berens, Catherine A McEnroe, Justi R Miller, LEAD ATTORNEYS, Berens **[*3]** & Miller, PA, Mpls, MN.

For myFICO Consumer Services, Inc., Counter Defendant: Christopher K Larus, Michael A Collyard, Randall Tietjen, Ronald J Schutz, Randall Tietjen, LEAD ATTORNEYS, Robins Kaplan LLP, Mpls, MN; Joseph J Bial, LEAD ATTORNEY, PRO HAC VICE, Cadwalader, Wickersham & Taft LLP, Washington, DC; Julia Dayton Klein, Martin L Seidel, LEAD ATTORNEYS, Lathrop GPM LLP, Minneapolis, MN; Mary E Kiedrowski, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi LLP, Mpls, MN.

For Fair Isaac Corporation, Counter Defendant: Charles F Rule, Ngoc Pham Hulbig, LEAD ATTORNEYS, Cadwalader, Wickersham & Taft LLP, Washington, DC; Joseph J Bial, LEAD ATTORNEY, PRO HAC VICE, Cadwalader, Wickersham & Taft LLP, Washington, DC; Christopher K Larus, David W Beehler, K Craig Wildfang, Michael A Collyard, Ronald J Schutz, Randall Tietjen, LEAD ATTORNEYS, Robins Kaplan LLP, Mpls, MN; Julia Dayton Klein, Martin L Seidel, LEAD ATTORNEYS, Lathrop GPM LLP, Minneapolis, MN; Mary E Kiedrowski, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi LLP, Mpls, MN; Michael V Ciresi, LEAD ATTORNEY, Ciresi Conlin LLP, Mpls, MN.

For Trans Union, LLC, Counter Claimant: Christopher R Morris, Lewis A Remele, Jr, LEAD ATTORNEYS, Bassford **[*4]** Remele, PA, Minneapolis, MN; Dao L Boyle, James K Gardner, John A Cullis, Ralph T Russell, John J Scharkey, Robert E Browne, Sarah G Malia, LEAD ATTORNEYS, Neal, Gerber & Eisenberg, LLP, Chicago, IL; Ronald J Schutz, LEAD ATTORNEY, Robins Kaplan LLP, Mpls, MN.

For Experian Information Solutions Inc., Counter Claimant: Bruce H Little, LEAD ATTORNEY, Barnes & Thornburg LLP, Minneapolis, MN; Bryan D Gant, Christopher J Glancy, Jack E Pace, III, M Elaine Johnston, Robert A Milne, LEAD ATTORNEYS, White & Case LLP, New York, NY; David H Suggs, Heather M Burke, Martin M Toto, Megan DePasquale, Meghan McCurdy, LEAD ATTORNEYS, PRO HAC VICE, White & Case LLP, New York, NY; Christopher R Sullivan, LEAD ATTORNEY, Lindquist & Vennum LLP, Mpls, MN; Mark A Jacobson, LEAD ATTORNEY, Cozen O'Connor, Minneapolis, MN; Mark H Zitzewitz, LEAD ATTORNEY Sapientia Law Group, Minneapolis, MN; Ross E Elfand, LEAD ATTORNEY, PRO HAC VICE, White & Case LLP, New York, NY.

For Fair Isaac Corporation, Counter Defendant: Charles F Rule, Ngoc Pham Hulbig, LEAD ATTORNEYS, Cadwalader, Wickersham & Taft LLP, Washington, DC; Joseph J Bial, LEAD ATTORNEY, PRO HAC VICE, Cadwalader, Wickersham & Taft LLP, Washington, DC; Christopher **[*5]** K Larus, David W Beehler, K Craig Wildfang, Michael A Collyard, Randall Tietjen, Ronald J Schutz, Laura E Nelson, LEAD ATTORNEYS, Robins Kaplan LLP, Mpls, MN; Julia Dayton Klein, Martin L Seidel, LEAD ATTORNEY, Lathrop GPM LLP, Minneapolis, MN; Mary E Kiedrowski, LEAD ATTORNEY, Robins Kaplan Miller & Ciresi LLP, Mpls, MN; Michael V Ciresi, LEAD ATTORNEY, Ciresi Conlin LLP, Mpls, MN.

For Trans Union, LLC, Counter Claimant: Christopher R Morris, Lewis A Remele, Jr, LEAD ATTORNEYS, Bassford Remele, PA, Minneapolis, MN; Dao L Boyle, James K Gardner, John A Cullis, Ralph T Russell, Robert E Browne, LEAD ATTORNEYS; Neal, Gerber & Eisenberg, LLP, Chicago, IL; John J Scharkey, Sarah G Malia, LEAD ATTORNEYS, PRO HAC VICE, Neal, Gerber & Eisenberg, LLP, Chicago, IL.

Judges: JANIE S. MAYERON, United States Magistrate Judge.

Opinion by: JANIE S. MAYERON

Opinion

ORDER

The above matter came on before the undersigned on Defendants' Joint Motion in the Alternative for Leave to Amend Answers to Assert Counterclaims for Violations of the Antitrust Laws and Tortious Interference with Contract [Docket No. 485] and Plaintiffs' Motion to Strike Defendants' Filings on December 4, 2008 [Docket No. 491].

Charles Rule, Esq., Randall Tietjen, **[*6]** Esq., Ronald Schutz, Esq. and Joseph Bial, Esq. appeared on behalf of plaintiffs; Mark A. Jacobson, Esq. and Robert Milne, Esq. appeared on behalf of defendant Experian Information Solutions Inc.; James Gardner, Esq. and Christopher Morris, Esq. appeared on behalf of defendant Trans Union, LLC; and Barbara Berens, Esq. appeared on behalf of defendant VantageScore Solutions, LLC.

The Court, upon all of the files, records, proceedings herein, and for the reasons stated at the hearing, now makes and enters the following Order.

IT IS HEREBY ORDERED that:

1. Defendants' Joint Motion in the Alternative for Leave to Amend Answers to Assert Counterclaims for Violations of the Antitrust Laws and Tortious Interference with Contract [Docket No. 485] is **DENIED**; and

2. Plaintiffs' Motion to Strike Defendants' Filings on December 4, 2008 [Docket No. 491] is **GRANTED**.

3. Defendants Experian and Trans Union shall re-file and serve their respective answers and counterclaims to the Third Amended Complaint without the antitrust and tortious interference with contract counterclaims. VantageScore shall refile and serve its answer and counterclaim to the Third Amended Complaint without the lack of standing affirmative **[*7]** defense, and shall only allege the laches affirmative defense as it relates to plaintiffs' price-fixing claim.

Dated: February 9, 2009

/s/ *Janie S. Mayeron*

JANIE S. MAYERON

United States Magistrate Judge

MEMORANDUM

I. INTRODUCTION

This matter arises out of the creation of the credit scoring system, VantageScore, by credit bureaus Equifax Information Services LLC ("Equifax"), Experian Information Services, Inc. ("Experian"), and Trans Union LLC ("Trans Union"). This scoring system competes with Fair Isaac Corporation's and its wholly owned subsidiary myFICO Consumer Services, Inc.'s (collectively referred to as "Fair Isaac") credit scoring system (also referred to as "FICO" for the purpose of this Memorandum). The present issues before the Court arise out of the propriety of certain counterclaims and affirmative defenses asserted by defendants Experian, Trans Union and VantageScore on December 4, 2008, to Fair Isaac Third Amended Complaint.

II. FACTUAL BACKGROUND

A. Initial Action and the Court's Deadlines for Amending Pleadings

On October 11, 2006, Fair Isaac initiated the present action against Equifax and the other defendants. See Docket No. 1. Fair Isaac subsequently amended their complaint **[*8]** twice, with the Second Amended Complaint [Docket No. 81] being the operative Complaint in this case prior to the Third Amended Complaint, which led to defendants' addition of the antitrust and tortious interference with contract counterclaims that are the subject of the present motions before the Court. Counts One through Four, Six and Seven of Fair Isaac's Second Amended Complaint related to the alleged similarity of the credit scoring range for VantageScore (501-990) to the credit scoring range for FICO (300-850). In particular, Fair Isaac alleged that the use of the VantageScore scoring range of 501-990 constituted unfair competition under *15 U.S.C. § 1125(a)*; infringement of registered trademark under *15 U.S.C. § 1114*; trademark infringement under Minnesota common law; passing off under Minnesota common law; deceptive trade practices under Minn. Stat. § 523D.44; and unjust enrichment under Minnesota common law. See Second Amended Complaint, ¶¶ 177-196, 204-216. Count Five of the Second Amended Complaint alleged unfair competition and false advertising under *15 U.S.C. § 1125(a)*.

Count Eight claimed an unreasonable and illegal restraint of trade under Section One of the Sherman Act, *15 U.S.C § 1* for the joint creation and ownership by defendants of VantageScore and **[*9]** the agreement to limit competition among credit bureaus. Specifically, Fair Isaac alleged that by agreeing to create, own, and control credit scores through the commonly-owned VantageScore, defendants have combined, conspired and colluded unreasonably to restrain competition in the aggregated credit data and credit scoring markets, in part, by entering into agreements that would limit the credit bureaus' independent decision-making regarding price, output, otherwise reduce the credit bureaus' ability or incentive to compete independently and limited the ability of third-party vendors to compete in the market. See Second Amended Complaint, ¶¶ 222-25.

Count Nine alleged that the creation of VantageScore by defendants gave the bureaus 100% of the market for aggregated credit data and has decreased the competitors in the credit scoring market from four to two, thereby allowing defendants to directly and indirectly exchange competitively sensitive information on costs, prices, and innovations affecting their competition in the market for aggregated credit data and the credit scoring. Id., ¶¶ 233-35. Accordingly, Fair Isaac alleged that the credit bureaus' joint ownership of VantageScore **[*10]** amounted to illegal merger or acquisition under Section Seven of the Clayton Act, *15 U.S.C. § 18*, and Section One of the Sherman Act, *15 U.S.C. § 1*.

Count Ten asserted that defendants attempted to monopolize the market for consumer credit scores in violation of Section Two of the Sherman Act, *15 U.S.C. § 2*. Id., ¶ 241. Specifically, Fair Isaac alleged that defendants are jointly attempting to leverage their collective market power over aggregated credit data in order to provide VantageScore "with monopoly power through various discriminatory and exclusionary means . . . including, but not limited to, the use of unfair methods of competition to exclude Fair Isaac from the market and the manipulation of the relative prices of VantageScore Credit Scores and of Credit Scores generated from Fair Isaac scoring algorithms." Id., ¶ 242.

Count Eleven is a conspiracy to monopolize the market for credit scoring claim under Section Two of the Sherman Act, *15 U.S.C. § 2*. Id., ¶ 248. In this regard, Fair Isaac alleged that defendants are conspiring to use their collective market power over aggregated credit data to move the financial industry to the VantageScore product with the intent of acquiring and maintaining monopoly power over the credit scoring **[*11]** market through "the use of unfair methods of competition to exclude Fair Isaac from the market and the manipulation of the relative prices of Credit Scores generated by the VantageScore algorithm and those generated using Fair Isaac scoring algorithms." Id., ¶¶ 249-50.

Count Thirteen is a breach of contract claim against Trans Union, which alleged that Trans Union violated contract provisions obligating it to keep confidential and not to misuse Fair Isacc's confidential property or trade secrets, and required it to act as an agent for plaintiffs' products and services. Id., ¶ 260. The final Count, Count Fifteen, alleged interference with contract against VantageScore for intentionally inducing Trans Union to breach its contractual duties with Fair Isaac. Id., ¶¶ 270-275.[1]

On January 17, 2007, this Court entered its first pretrial scheduling order, which provided in relevant part that amendments to pleadings were required to be served and filed before April 1, 2007. See Pretrial Scheduling Order [Docket No. 72]. While this Court has issued amendments to the Pretrial Scheduling Order (resulting from the

[1] Counts 12 (state law anticompetitive claims) and 14 (misappropriation of trade secrets) have been dismissed by stipulation of the parties, along with all allegations of misappropriation of plaintiffs' trade secrets by Trans Union and VantageScore Solutions. See June 23, 2008 Order [Docket No. 373].

stipulations of the parties), the date by which amendments to pleadings must be served **[*12]** and filed has never changed. See Docket Nos. 72, 207, 245, 267, 374, 400, 433, 518. With respect to deadlines for fact discovery, expert discovery, dispositive motions, and trial, the parties have been operating under the following deadlines since August 19, 2008.

July 22, 2008 - All fact discovery of any kind shall be commenced in time to be completed by this date.

August 26, 2008 - Expert disclosures by plaintiffs

October 27, 2008 - Expert disclosures by defenda

November 19, 2008 - Rebuttal expert disclosures by plaintiffs

December 19, 2008 - All expert depositions to be completed by this date.[2]

March 1, 2009 - documents dated or created on or after February 16, 2008 and through December 1, 2008 to be produced on or before this date.

April 1, 2009 - All dispositive motions are to be served, filed and heard by this date.

July 1, 2009 - Trial ready date.

Fifth Amended Pretrial Scheduling Order [Docket No. 400].

B. Settlement Agreement Between Fair Isaac and Equifax and Defendants' Discovery Directed to this Agreement

On June 6, 2008, Fair Isaac and Equifax entered into a "Technology Development, Distribution and License Agreement" and a "Data License Agreement" as part of a settlement between **[*13]** Fair Isaac and Equifax. Defendants maintain that they learned of the settlement through a June 10, 2003 email from Fair Isaac' CEO, Dr. Mark Greene, which addressed the partnership with Equifax. See Memorandum of Law in Support of Defendants' Joint Motion in the Alternative for Leave to Amend Answers to Assert Counterclaims for Violations of the Antitrust Laws and Tortious Interference with Contract ("Defs.' Mem.") [Docket No. 487] at p. 8; see also Declaration of James K. Gardner [Docket No. 489] ("Dec. 12, 2008 Gardner Decl.") Ex. 4, FIC1397275 (June 10, 2008 Greene email). Fair Isaac's action against former defendants Equifax and Equifax Information Services LLC, was subsequently dismissed with prejudice, pursuant to a stipulation by the parties. See June 13, 2008 Order [Docket No. 362].

Defendants immediately propounded discovery on Fair Isaac regarding the settlement, as they believed those settlement documents bore on Fair Isaac' antitrust claims and defendants' defense to these claims. See June 27, 2008, Order [Docket No. 377] at p. 2. Fair Isaac, in turn, requested that this Court amend the Amended Protective Order to prohibit any outside litigation counsel for defendants involved **[*14]** in any settlement discussions with Fair Isaac from having access to any Equifax-settlement-related documents or information. Id. at p. 2. Alternatively, Fair Isaac proposed that rather than prohibiting outside litigation counsel for defendants from examining the settlement documents in their entirety, it would redact from the settlement materials those terms that Fair Isaac believed were not relevant to the claims or defenses in the suit. Id. at p. 3. To address Fair Isaac's request, the Court ordered Fair Isaac to deliver to the Court and defendants, on or before July 1, 2008, the Equifax settlement agreement and related business agreements memorializing the settlement and business relationship between Fair Isaac and Equifax with redactions, and a letter describing the nature of all terms redacted from these documents and the basis for each proposed redaction. Id. at p. 4. On July 8, 2008, this Court denied Fair Isaac's request to amend the Amended Protective Order and ordered Fair Isaac to produce to defendants the five documents reflecting the settlement agreement with Equifax and related business agreements without any redactions. See July 8, 2008 Order [Docket No. 383]. Defendants received the unredacted settlement **[*15]** agreement and associated agreements on July 10, 2008. See Declaration of Dao L. Boyle ("Boyle Decl.") [Docket No. 526], ¶ 2, Ex. 1 (July 10, 2008 Letter from Plaintiffs to Defendants Enclosing the Unredacted Agreements); see also Transcript of December 23, 2008 Hearing ("Tr.") [Docket No. 564] at pp. 15-16.

---

[2] On November 5, 2008, the Court issued the Sixth Amended Pretrial Scheduling Order that gave Fair Isaac until January 23, 2009 to depose expert Robert Anderson and defendants the right to depose by this same date any expert who submitted a report on behalf of Fair Isaac in response to the Anderson report. See Docket No. 434.

> On June 17, 2008, defendants issued their Tenth Set of Requests for the Production of Documents, which included a request for the projections and analyses pertaining to the Equifax agreement

On September 10, 2008, defendants moved this Court for an order compelling the production of documents responsive to Document Request No. 3 of their Tenth Set of Document Requests to Fair Isaac, including: the analyses of the impact of the Equifax deal on Fair Isaac; scoring business and/or the scoring marketplace; the analysis or projections and related documents, about which CEO Dr. Mark Greene testified at his deposition; any joint analyses conducted by Equifax and Fair Isaac; and witnesses, including CEO Greene and the head of scoring Lisa Nelson, to testify concerning the above analyses. See Memorandum of Law in Support of Defendants' Motion to Compel Fair Isaac to Provide Discovery of Non-Privileged **[*16]** Business Analyses Related to Business Agreements between Equifax and Fair Isaac [Docket No. 404] at pp. 4, 9-10; see also November 3, 2008 Order [Docket No. 431]. This Court denied defendants' motion. November 3, 2008 Order [Docket No. 431] at pp. 16-21. Defendants filed objections to this Court's Order on November 18, 2008. See Docket No. 437. On January 22, 2008, United States District Judge Ann D. Montgomery overruled defendants' objections and upheld this Court's November 3, 2008 Order on discovery. See Docket No. 566.

C. Events Leading to the Filing of the Amended Pleadings

On August 13, 2008, subsequent to defendants' discovery of the Equifax settlement agreements, defendants brought a Joint Motion (I) to Modify Scheduling Order to Permit Defendants to Move for Leave to Amend Pleadings, and (II) for Leave to Amend Answers to Assert Counterclaims for Cancellation of Registration for "300-850" Trademark [Docket No. 391]. The proposed amended answer only added a counterclaim for the cancellation of Fair Isaac' registration of the "300-850" trademark. Id. The hearing for the motion was noticed for September 24, 2008. See Docket No. 392.

On August 28, 2008, Fair Isaac's counsel sent **[*17]** an email to defendants' counsel asserting that Fair Isaac believed that its Second Amended Complaint was sufficiently broad to encompass a claim of a price-fixing arrangement between defendants under Section One of the Sherman Act. See Dec. 12, 2008 Gardner Decl., Ex. 3 (August 28, 2008, 2:23 p.m. email). To the extent that defendants did not agree with this assessment, Fair Isaac asked that defendants respond as soon as possible so that Fair Isaac could bring a motion to amend to add the claim. Id. Defendants responded by requesting an identification of the portions of the Second Amended Complaint that Fair Isaac believed asserted a price-fixing claim. Id. (August 28, 2008, 2:25 p.m. email). In response, Fair Isaac' counsel represented that the Second Amended Complaint contained sufficient allegations for price-fixing under the notice pleading standards, and also stated in relevant part:

> But we would like to know whether your clients will consent to this amendment or whether a motion will be necessary. As amendment would eliminate the need for your clients to go forward with their motion to amend the pleadings, given that they could do so as a matter of right in response to Fair Isaac's **[*18]** amended pleading.

Id. (August 28, 2008, 3:05 p.m. email). Fair Isaac's counsel sent a subsequent email on September 9, 2008, inquiring whether defendants would accept the proposed amendment without a motion to amend, and attaching the proposed claim for unreasonable and illegal restraint of trade under *15 U.S.C. § 1* (pertaining to defendants' alleged coordination and collusion regarding the pricing of VantageScore and output of in-house credit scores). See Declaration of Randall Tietjen [Docket No. 493] ("Dec. 12, 2008 Tietjen Decl."), Ex. 3.

This Court denied defendants' motion to amend to add the cancellation of registration for "300-850" trademark counterclaim as moot based on the parties' representations at the September 24, 2008 hearing that they had reached an agreement regarding the issues raised by this motion. See September 29, 2008 Order [Docket No. 428], ¶ 1. The parties continued to negotiate the stipulation for amending the pleadings after the September 24, 2008 hearing. See, e.g., Dec. 12, 2008 Tietjen Decl., Ex. 4 (September 28-29, 2008 email exchange between counsel). However, it was not until November 5, 2008, that the parties filed a Stipulation, which set forth their agreement **[*19]** to permit Fair Isaac to amend its Second Amended Complaint to assert a price-fixing claim pursuant to *15 U.S.C. § 1*, and to permit "[d]efendants [to] answer or otherwise plead in response to Plaintiffs' Third Amended Complaint within twenty days of service of the complaint." See Docket No. 434. On November 6, 2008, the Court issued an Order, based on the Stipulation, permitting Fair Isaac to file their Third Amended Complaint and also permitting defendants to "answer or otherwise plead in response to Fair Isaac' Third Amended Complaint within twenty days of service of the complaint." November 6, 2008 Order [Docket No. 435].

D. Defendants' Third Amended Complaint

On November 10, 2008, Fair Isaac filed and served its Third Amended Complaint. See Docket No. 436. The Third Amended Complaint added Count Twelve, alleging an unreasonable and illegal restraint of trade claim under Section One of the Sherman Act, *15 U.S.C. § 1*, for the coordination and collusion regarding the pricing of VantageScore and output of in-house credit scores. Specifically, Count Twelve alleged the following: the credit bureaus conspired to phase out their in-house credit scores in order to ensure that the bureaus were jointly promoting VantageScore; **[*20]** targeted large institutional customers in an attempt to deprive Fair Isaac of its largest customer base and to displace Fair Isaac's scores with VantageScore; and priced VantageScore at or above prices charged for certain scores from Fair Isaac in order to avoid price competition between the bureaus themselves on VantageScore. See Third Amended Complaint, ¶ 256. In support of these allegations, Fair Isaac alleged that since 2004, the credit bureaus planned to develop a credit score to displace Fair Isaac' score and thereby obtain the royalties they had been paying Fair Isaac for its scoring algorithm. Id., ¶ 258. To effectuate this plan, Fair Isaac alleged that the credit bureaus agreed not compete on the price for VantageScore and set a retail price floor below which VantageScore would not be sold. Id., ¶ 259. The alleged focus of the credit bureaus was not to use VantageScore to compete with each other in the national market of credit scores. Id., ¶¶ 260-61. Count Twelve also alleged that the credit bureaus agreed to phase-out their in-house credit scores and algorithms in order to focus their joint efforts to eliminate Fair Isaac as competition. Id., ¶ 265. In addition, Fair Isaac **[*21]** alleged that the credit bureaus agreed to conduct joint validation, marketing and discounted pricing of VantageScore to specific customers and lenders that were Fair Isaac's primary sources of income. Id., ¶ 266. In sum, by agreeing to fix the prices of VantageScore and restraining their separate in-house credit scores, Fair Isaac asserted that defendants have conspired unreasonably to restrain competition in the national market for aggregate credit data and credit scores, thereby resulting in a per-se violation of Section One of the Sherman Act, *15 U.S.C. § 1*. Id., ¶ 269.

E. Defendants' Amended Answers and Counterclaims

On December 4, 2008, defendants served and filed their amended answers and counterclaims to Fair Isaac's Third Amended Complaint. See Docket Nos. 475, 477, 478. Both defendants Trans Union and Experian added the agree-upon trademark cancellation counterclaim. See December 12, 2008 Declaration of Bryan Gant [Docket No. 488], Ex. 1 ("Proposed Experian Answer and Counterclaims") at pp. 50-63; Dec. 12, 2008 Gardner Decl., Ex. 1 ("Proposed Trans Union Answer and Counterclaims") at pp. 32-47. Experian and Trans Union also asserted two additional counterclaims in their December 4, 2008 **[*22]** pleadings. In their first counterclaim, Experian and Trans Union alleged anticompetitive conduct on the part of Fair Isaac in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, Minnesota ***antitrust law*** under *Minn. Stat. § 325D.52*, and an unfair competition claim under California law. See Prop. Experian Answer and Counterclaims at pp. 64, 84-85, ¶¶ 1, 63-75; Prop. Trans Union Answer and Counterclaims at pp. 47-70, ¶¶ 1, 77-86. Relying on the fact that Fair Isaac's scores are entrenched in institutional market and regulatory requirements, statements by industry analysts characterizing Fair Isaac as a monopoly and Fair Isaac's admissions that there is a high barrier into the scoring market, Trans Union and Experian alleged that since 2002, Fair Isaac has achieved a dominant position in the scoring market thereby allowing them to earn monopoly profits. See Prop. Experian Answer and Counterclaims at pp. 67, 68, 75, ¶¶ 16, 18, 39; Prop. Trans Union Answer and Counterclaims at pp. 50, 51, 58, ¶¶ 14, 18, 39. Trans Union and Experian further stated that Fair Isaac undertook steps to eliminate the competitive threat from VantageScore by entering into an anticompetitive business arrangement with former defendant Equifax in June **[*23]** of 2008, at which time Equifax received 20 million from Fair Isaac in the form of cash payments, advantageous licensing terms and dismissal of the action against it, in return for Equifax's agreement to engage in certain acts and refrain from other actions. See Prop.

Experian Answer and Counterclaims at p. 64, 79-84, ¶¶ 3, 50-62; Prop. Trans Union Answer and Counterclaims at pp. 47, 64-69 ¶¶ 3, 64-76. Trans Union and Experian also alleged that Fair Isaac has impermissibly used the present lawsuit to weaken the adoption of VantageScore by clients, in order to maintain control over the credit scoring market. See Prop. Experian Answer and Counterclaims at pp. 76-78, ¶¶ 43-47; Prop. Trans Union Answer and Counterclaims at pp. 59-61, ¶¶ 43-47. In addition, Trans Union asserted that Fair Isaac, as part of its Second Amended Complaint, attempted to maintain its dominant position in the scoring market by challenging Trans Union's attempts to sell competing generic scoring models that have features common to Fair Isaac's models, including VantageScore, and thereby blocking Trans Union's essential involvement in VantageScore, by: (1) bringing a misappropriation claim that was subsequently dismissed; **[*24]** and (2) using an impermissible interpretation of a confidentially provision entered into by Trans Union and Fair Isaac. Id. at pp. 54, 61-63, ¶¶ 26, 48-61. All of these actions, according to defendants have the effect of enhancing and preserving Fair Isaac's illegal monopoly power.[3]

The second counterclaim asserted by Trans Union and Experian was a claim of tortious interference with contract, which is also based on the June 2008 agreement between Fair Isaac and Equifax, and which defendants claim was intentionally undertaken by Fair Isaac to interfere with the contractual relationship between the members of the VantageScore joint venture. See Prop. Experian Answer and Counterclaims at pp. 86-87, ¶ 76-78; Prop. Trans Union Answer and Counterclaims at p. 71, ¶¶ 87-89.

Defendant VantageScore added to its answer the cancellation of the registration for Fair Isaac's "300-850" trademark counterclaim. See Defendant VantageScore Solutions, LLC's Answer, Affirmative Defenses and Counterclaim to Plaintiffs' Third Amended Complaint ("Prop. VantageScore Answer and Counterclaim") at pp. 40-53. VantageScore also added the affirmative defenses of laches, as to all claims, and based on the Court's June 23, 2008 Order **[*25]** dismissing any allegations of misappropriation of trade secrets, a lack of standing affirmative defense as it related to Fair Isaac's misappropriation or use of its trade secrets claim. Id. at pp. 36-37.

F. December 5, 2008 Hearing

At a hearing on December 5, 2008 to address motions brought by defendants and a third party, the Court learned that Fair Isaac had cancelled scheduled expert depositions because of the antitrust and tortious interference counterclaims served by defendants the previous day, and that Fair Isaac intended to file a motion to strike those counterclaims. The Court ordered the depositions to proceed, and after expressing concern at the eleventh-hour addition of the antitrust and tortious interference counterclaims, required the parties to formally submit the issue to the Court as either a motion to strike the answers by Fair Isaac or a motion to amend by defendants. As a consequent, the Court now has before it Plaintiffs' Motion to Strike Defendants' Filings on December 4, 2008 and Defendants' (Trans Union and Experian) Joint Motion in the Alternative for Leave to Amend Answers to Assert Counterclaims for Violations of the Antitrust Laws and Tortious Interference with Contract.

[*26] III. PLAINTIFFS' MOTION TO STRIKE

Fair Isaac brought a motion to strike defendants' December 4, 2008 filings pursuant to *Federal Rule of Civil Procedure 12(f)* on the grounds that Experian and Trans Union impermissibly added antitrust and tortious interference counterclaims, and VantageScore impermissibly added new affirmative defenses.[4] According to Fair Isaac, the counterclaims and affirmative defenses at issue were filed after this Court's deadlines for amending the pleadings, were filed without leave of the Court, were in breach of defendants' agreement with Fair Isaac, and if

---

[3] Included the "antitrust" category of counterclaims is Experian's California Unfair Competition claim. See Prop. Experian Answer and Counterclaims at pp. 86, ¶¶ 73-75.

[4] Fair Isaac did not object to the addition of the agree-upon trademark cancellation counterclaim. See See Plaintiffs' Memorandum of Law in Support of Motion to Strike Defendants' Filings on December 4, 2008 ("Pls.' Strike Mem.") at p. 2.

permitted, would greatly expand the scope of the suit and discovery, and would delay resolution of the case. Additionally, Fair Isaac submitted that defendants did not meet the standard of good cause required by *Rule 16(b)* for amending the scheduling order to permit the belated filing of these counterclaims to their answers.

A. Standard of Review

Under *Federal Rule of Civil Procedure 12(f)*, a court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Pursuant to *Rule 7*, pleadings include a complaint and answer. See *Fed. R. Civ. P. 7(a)*. Judges enjoy liberal discretion to strike pleadings under *Rule 12(f)*, however, striking a party's pleading is an **[*27]** extreme and disfavored measure. See *BJC Health Sys. V. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007)*; *Stanbury Law Firm, P.A. v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000)*.

B. Did Defendants Have a Right to Amend Pursuant to the Parties' November 5, 2008 Stipulation and This Court's November 6, 2008 Order?

Defendants argued that this Court's November 6, 2008 Order entitled Experian and Trans Union to propound their antitrust and tortious interference counterclaims, as well as VantageScore's additional affirmative defenses, as a matter of right. See Defs.' Mem. at p. 11. In support of their position, defendants relied on that portion of the Court's Order instructing defendants to "answer or otherwise plead in response to Plaintiffs' Third Amended Complaint within twenty days of service of the complaint." Id.; November 6, 2008 Order [Docket No. 435]. Fair Isaac countered that the Court's Order must be considered within the context of the stipulation that lead to the November 6 Order, which was the parties' agreement to allow defendants to file their trademark cancellation claim outside of the Court's deadline for amending pleadings, in exchange for allowing Fair Isaac to file its price-fixing claim. See Pls.' Strike Mem. at pp. 12-13.

It is true that the language of the parties' stipulation and this Court's November **[*28]** 6, 2008 Order, did not explicitly restrict defendants to asserting their trademark cancellation counterclaim. However, this Court agrees with Fair Isaac that the conduct of the parties leading up to the Stipulation and Order establishes that the parties intended the there was a quid pro quo arrangement — i.e. that in exchange for Fair Isaac agreeing to stipulate to defendants' proposed trademark counterclaim without a motion (the "quid"), defendants agreed to the addition of Fair Isaac's per se price-fixing claim without a motion (the "quo"). There is nothing in the record to suggest that by agreeing to stipulate to defendants' proposed trademark cancellation counterclaim that Fair Isaac agreed that defendants could assert whatever claims they wanted. The parties had reached an understanding as to what each was going to assert by way of claim and counterclaims, and thus, the extent to which the scope and theory of the case was going to be expanded. Defendants' answer to Fair Isaac's new counterclaim without leave of court was constrained by that agreement. It would be both inequitable and inappropriate to allow defendants to unilaterally redefine the bargain they reached with Fair **[*29]** Isaac. As such, this Court concludes that this Court's November 6, 2008 Order did not entitle Experian and Trans Union to propound their antitrust and tortious interference counterclaims, or VantageScore's additional affirmative defenses, as a matter of right.

C. Did Defendants Have the Right to File Their Counterclaims Without Leave of Court Because Fair Isaac's Price-Fixing Claim Changed the Theory or Scope of the Case?

Next, it was defendants' position that they did not need leave from the Court to file their antitrust and tortious interference counterclaims because Fair Isaac's addition of its price-fixing claim, as part of their Third Amended Complaint, changed the theory and scope of Fair Isaac's case. See Defendants' Response in Opposition to Fair Isaac' to Fair Isaac' Motion to Strike ("Defs' Resp.") at p. 8. Fair Isaac argued that its Second Amended Complaint was sufficiently broad to encompass the price-fixing claim, and that defendants' affirmative defenses and subsequent discovery pertaining to the Second Amended Complaint, further demonstrated that defendants believed it encompassed a price fixing claim. See Pls.' Strike Mem. at p. 10. As such, Fair Isaac submitted that **[*30]** its fully articulated price-fixing claim did not change the theory and scope of their case against defendants. Id.

Generally, "a party may amend its pleading only with the opposing party's written consent or the court's leave." See *Fed. R. Civ. P. 15(a)(2)*. Similarly, *Rule 15(d)*, addressing supplemental pleadings, requires that a party bring a motion to the Court to seek permission to file the supplementation. See *Fed. R. Civ. P. 15(d)*; see also *Fed. R. Civ. P. 13(e)* ("Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.") (emphasis added). However, there is an exception to this general rule:

> [W]hen a plaintiff files an amended complaint which changes the theory or scope of the case, the defendant is allowed to plead anew as though it were the original complaint filed by the Plaintiff. . . . The obvious corollary is that if an amended complaint does not change the theory or scope of the case, a [defendant] must seek leave of court pursuant to *Rule 15(a)* before it can amend its answer to assert a counterclaim.

Tralon Corp. v. Cedarapids, Inc., 966 F. Supp. 812, 832 (N.D. Iowa 1997) (quoting *Brown v. E.F. Hutton & Co., 610 F. Supp. 76, 78 (S.D. Fla. 1985))*, aff'd *205 F.3d 1347, 2000 WL 84400 (8th Cir. Jan. 21, 2000)*; see also *Intermedics, Inc. v. Cardiac Pacemakers, Inc., Civ. No. 4-95-716 (JRT/RLE), 1998 U.S. Dist. LEXIS 23751, 1998 WL 35253496 at *2 (D. Minn. July 07, 1998)* ("Where, **[*31]** as here, an Amended Complaint, or Counterclaim, does not change the theory or scope of the case, then the party, who responds to that amended pleading, must seek leave of the Court, pursuant to *Rule 15(a), Federal Rules of Civil Procedure*, before it can amend its Answer or Reply.") (citations omitted).

This Court concludes that Fair Isaac's per se price-fixing claim did not change the scope or theory of the case such that defendants were then free to allege whatever counterclaims they wanted. Fair Isaac had already alleged in Count Eight of its Second Amended Complaint an unreasonable and illegal restraint of trade claim under Section One of the Sherman Act, *15 U.S.C § 1*, for the joint creation and ownership by defendants of VantageScore and an agreement to limit competition among credit bureaus. Specifically, Fair Isaac alleged that by agreeing to create, own, and control a common credit scores through the commonly-owned VantageScore, defendants had combined, conspired and colluded unreasonably to restrain competition in the aggregated credit data market, in part, by entering into agreements that would will limit the credit bureaus' independent decision-making regarding price, limit the bureaus from selling credit scores using other scoring **[*32]** algorithms, otherwise reduce the credit bureaus' ability or incentive to compete independently, and limit the ability of third-party vendors to compete in the market. See Second Amended Complaint, ¶¶ 222-25. In addition, Counts Ten and Eleven alleged an attempt and conspiracy to monopolize the market for credit scoring in violation of Section Two of the Sherman Act, *15 U.S.C. § 2* --they alleged that defendants used their market power over aggregated credit data in order to provide VantageScore with monopoly power through, among other means, the manipulation of the relative prices of VantageScore Credit scores and of credit scores generated from Fair Isaac's scoring algorithm. See Second Amended Complaint, ¶¶ 241-42; 248-50. This Court finds that these allegations in the Second Amended Complaint generally encompassed a per se price-fixing claim as alleged by Fair Isaac.

Further, defendants' assertion that the per se price-fixing claim changed the scope or theory of the case lacks merit as evidenced by Experian's and Trans Union assertion of affirmative defenses in their answers to the Second Amended Complaint that any claims of per se violations of antitrust laws are barred. See Experian Answer to **[*33]** Second Amended Complaint [Docket Nos. 118, 119] at p. 41 ("Insofar as the Second Amended Complaint purports to allege that Experian committed a per se violation of the antitrust laws, such claims are barred . . . ."); Trans Union's Answer to Plaintiffs' Second Amended Complaint [Docket Nos. 123] at p. 31 ("Any affirmative defenses pleaded by other Defendants and not pleaded by Trans Union are incorporated herein to the extent they do not conflict with Trans Union's affirmative defenses."). In the same vein, defendants' claim that the price-fixing claim does not relate to the existing case is belied by their own discovery. In their First Set of Document Requests, propounded on January 17, 2007, they made the following request for documents on Fair Isaac:

> 74. All documents relating to any past, present, or future economic injury to the purchasers of credit reports by reason of the formation or operation of the VantageScore joint venture, including, without limitation, injury

> occurring by reason of an alleged conspiracy to fix prices, coordination of prices, or reduced incentive to innovate.

See Dec. 12, 2008 Tietjen Decl., Ex. 1 (emphasis added).[5]

More importantly, by the time that Fair **[*34]** Isaac proposed adding the per se price-fixing claim to its complaint (on August 28, 2008), fact discovery was over (fact discovery in this case ended on July 22, 2008). See Dec. 12, 2008 Gardner Decl., Ex. 3. Yet defendants never suggested that if the price-fixing claim was going to be part of the case, they needed the opportunity to do more (or any) discovery on it. This is so, even though the facts underlying Fair Isaac's price-fixing claim changed from Fair Isaac initially claiming that the credit bureaus agreed to sell VantageScore for less than what they were selling Fair Isaac's scores, to Fair Isaac claiming that the credit bureaus agreed to sell their product at or above the prices of Fair Isaac's scores. Compare, Second Amended Complaint, ¶¶ 45, 111, 124-26, *with* Third Amended Complaint, ¶¶ 266, 268.

For all the reasons stated above, this Court finds that the Fair Isaac's addition of the per se price-fixing claim to the Third Amended Complaint did not change the theory or scope of the case so as to allow Experian and Trans Union to serve and file their antitrust and tortious interference counterclaims without leave of the Court.

D. VantageScore's Affirmative Defenses

Fair Isaac **[*35]** asked that this Court strike VantageScore's answer because it alleged unspecified "different" affirmative defenses to Fair Isaac's Third Amended Complaint. See Pls.' Strike Mem. at pp. 2, 7. The only grounds offered by Fair Isaac for striking these portions of VantageScore's answer was that the affirmative defenses asserted did not adhere to the stipulation of the parties or this Court's November 6, 2008 Order. Id. at p. 2. As stated previously, VantageScore added the affirmative defenses of laches as to all claims, and a lack of standing as it related to the misappropriation or use of Fair Isaac' trade secrets. See Prop. VantageScore Answer and Counterclaims at pp. 36-37. Based on the same analysis the Court applied to Experian and Trans Union's antitrust and tortious interference counterclaims, the Court concludes that VantageScore did not have leave of the court to file additional affirmative defenses, and the addition of Fair Isaac' price-fixing claim did not change the scope or theory of the case so as to allow VantageScore to add, without leave of court, the affirmative defenses of laches or the lack of standing. On this basis, the Court strikes these affirmative defenses. However, as the laches affirmative **[*36]** defense can pertain to Fair Isaac's price-fixing claim, VantageScore will be allowed to assert this defense in its answer to Third Amended Complaint, as it relates to the per se price-fixing claim. The Court reaches this conclusion because VantageScore was authorized to respond to Fair Isaac price-fixing claim by this Court's November 6, 2008 Order, and the Federal Rules of Civil Procedure allow a party to assert an affirmative defense in response to a pleading. See *Fed. R. Civ. P. 8(c)*. In other words, VantageScore had the right to assert affirmative defenses that directly bear on Fair Isaac's price-fixing claim.

IV. DEFENDANTS' MOTION TO AMEND

Experian and Trans Union have a brought a motion to amend their answers to assert counterclaims for violations of the antitrust laws and tortious interference with contract. Defendants argued that they did not need leave from the Court to file these counterclaims pursuant to this Court's November 6, 2008 Order, which allowed them to "answer or otherwise plead in response to Plaintiffs' Third Amended Complaint. . . ." See Defs.' Mem. at p. 11. This Court has already rejected this argument in its analysis of Fair Isaac' motion to strike in this Order. See Section III, B,C,

---

[5] This Court notes that while the Amended Complaint was in effect during the January 17, 2007 First Set of Document Requests, the Amended Complaint already contained essentially the same allegations as those found in the Second Amended Complaint pertaining to unreasonable and illegal restraint of trade claim under Section One of the Sherman Act, *15 U.S.C § 1*, and attempt and conspiracy to monopolize the market for credit scoring in violation of Section Two of the Sherman Act, *15 U.S.C. § 2*. See Amended Complaint [Docket No. 9] at pp. 56-62, ¶¶ 166-203.

supra. Defendants **[*37]** also asserted that they should be given leave to add the counterclaims under *Rules 15* and *16 of the Federal Rules of Civil Procedure*. The Court now addresses that argument.

A. Standard of Review

The parties are in disagreement as to what section of *Rule 15 of the Federal Rules of Civil Procedure* applies to defendants' motion for leave. Defendants asserted that *Rule 15(d)* apples to their motion. See Defs.' Mem. at p. 12. *Rule 15(d)* provides in relevant part "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fair Isaac countered that defendants' proposed counterclaims are not supplemental and that *Rule 15(a)(2)* applies to defendants' motion to amend. See Fair Isaac's Response to Defendants Motion for Leave to Amend ("Pls.' Opp. Mem.") at pp. 9-10. *Rule 15(a)(2)* provides in the relevant part, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." The distinction between an amended pleading under *Rule 15(a)* and a supplemental pleading under *Rule 15(d) of the Fed. R. Civ. P.* has been stated as follows:

> An amended pleading is designed to include matters occurring before the filing of the bill **[*38]** but either overlooked or not known at the time. A supplemental pleading, however, is designed to cover matters subsequently occurring but pertaining to the original cause.

*U.S. ex rel. Kinney v. Stoltz, No. Civ. 01-1287 (RHK/JMM), 2002 U.S. Dist. LEXIS 6178, 2002 WL 523869 at *3 (D. Minn. April 05, 2002)* (quoting *United States v. Vorachek, 563 F.2d 884, 886 (8th Cir. 1977)*, quoting *Berssenbrugge v. Luce Mfg. Co., 30 F. Supp. 101 (W.D. Mo. 1939))*. The dispute here is whether the defendants' antitrust and tortious interference counterclaims alleged matters that occurred before or after the Second Amended Complaint.

On the one hand, Experian and Trans Union asserted, as part of their antitrust counterclaims, that since 2002, Fair Isaac has achieved a dominant and entrenched position in the scoring market, thereby allowing them to earn monopoly profits. See Prop. Experian Answer and Counterclaims at pp. 67, 68, 75, ¶¶ 16, 18, 39; Prop. Trans Union Answer and Counterclaims at pp. 50, 51, 58, ¶¶ 14, 18, 39. Trans Union and Experian also alleged that Fair Isaac has impermissibly used the present lawsuit to weaken the adoption of VantageScore by clients in order to maintain control the scoring business. See Prop. Experian Answer and Counterclaims at pp. 76-78, ¶¶ 43-47; Prop. Trans Union Answer and Counterclaims at pp. 59-61, ¶¶ 43-47. Based on these allegations, it is evident that some of the events leading to the establishment of the monopoly **[*39]** are, by defendants' own descriptions, based on events that took place well before or with the initiation of the present case. On the other hand, it is also clear the gravamen of and driving force behind Trans Union's and Experian's counterclaims is Fair Isaac's June 2008 agreement with Equifax, which occurred well after defendants' responsive pleadings to the April 2007 Second Amended Complaint and the deadline to amend pleadings. See Prop. Experian Answer and Counterclaims at p. 64, 79-84, ¶¶ 3, 50-62; Prop. Trans Union Answer and Counterclaims at pp. 47, 64-69 ¶¶ 3, 64-76.

Regardless, the distinction as to whether *Rule 15(a)* or *15(d)* applies is largely academic because this Court finds that the good cause requirement articulated in *Fed. R. Civ. P. 16(b)* applies to both amendments and supplemental pleadings. Trans Union and Experian's counterclaims were filed after this Court's April 1, 2007 deadline for amending pleadings. The Eighth Circuit has held that when a party has filed a motion to amend their complaint after the deadline provided for in a court's pretrial scheduling order, then the court may properly require, pursuant to *Federal Rules of Civil Procedure 16(b)*, that good cause be shown for leave to file a pleading that is out of time with that order. **[*40]** See *Freeman v. Busch, 349 F.3d 582, 589 (8th Cir. 2003)* (citing *In re Milk Prod. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999))* cert. denied, *529 U.S. 1038 (2000))*; see also *Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 (8th Cir. 2008)* (summarizing the interplay between *Rule 15* and *16*). If a court were only consider *Rule 15* without regard to *Rule 16(b)*, it "would render scheduling orders meaningless and effectively would read *Rule 16(b)* and its good cause requirement out of the Federal Rules of Civil Procedure." *In re Milk Prod. Antitrust Litig., 195 F.3d at 437-38* (citation omitted). However, neither the Eighth Circuit nor courts within this circuit have addressed whether a party seeking to supplement a pleading under *Rule 15(d)* must meet the good cause standard under *Rule 16(b)* to modify the scheduling order where the motion to supplement is filed after the deadline for amending the pleadings. Outside the Eighth Circuit, district courts have disagreed on the relationship between *Rules 15(d)* and *16(b)*. *Compare* *Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs, 243 F.R.D. 253, 256 (S.D. W.Va. 2007)* (finding *Rule 16* does not apply to motions to supplement because *Rule 16* does not require courts to set a deadline for supplemental pleadings and the Court did not set such a deadline in the Scheduling Order); *Fremont Inv. & Loan v. Beckley Singleton, Chtd., No. 2:03-CV-1406-PMP-RJJ, 2007 U.S. Dist. LEXIS 30234, 2007 WL 1213677 at *7 (D. Nev. Apr. 24, 2007)* (same) *with* *McGrotha v. Fed Ex Ground Package Sys., Inc., No. 5:05-CV391 (CAR), 2007 U.S. Dist. LEXIS 18794, 2007 WL 640457 at *2 (M.D. Ga. Feb. 24, 2007)* ("[w]hen a motion to supplement is filed after the scheduling order's deadline, . . . a party must first demonstrate good cause under *Rule 16(b)* before a court can consider **[*41]** whether supplementation is proper under *Rule 15(d)*.").

Rule 16(b)(3) describes the "Required Contents" of a pretrial scheduling order as follows, "[t]he scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." *Fed. R. Civ. P. 16(b)(3)*. Similarly, United States District Court Local Rule 16.2 requires that a pretrial schedule include "[a] date by which other parties may be joined and the pleadings may be amended." The plain language of *Rule 16* and Local Rule 16.2 governs any pleading that serves to change or amend the previous pleading. As such, this Court concludes that *Rule 16(b)* is equally applicable to supplemental pleadings under *Rule 15(d)* as it is to amendments under *Rule 15(a)*. Therefore, defendants must establish good cause for seeking to modify the operative scheduling order to permit the adding of their antitrust and tortious interference counterclaims at this juncture of the case.

B. Does Good Cause Exist to Add the Counterclaims Now?

Scheduling orders pursuant to *Rule 16(b)(1)* "assure[ ] that at some point both the parties and the pleadings will be fixed, . . ." *Rule 16(b), Federal Rules of Civil Procedure*, *Advisory Committee Notes--1983 Amendment*. Under *Rule 16(b)*, "[a] schedule shall not be modified except upon a showing of good cause and by leave of [court]." *Fed. R. Civ. P. 16(b)*.

The Eighth Circuit has described what constitutes good cause under **[*42]** *Rule 16* as follows:

> "The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." *Rahn v. Hawkins, 464 F.3d 813, 822 (8th Cir. 2006)*; see also *Fed. R. Civ. P. 16(b)*, advisory committee note (1983 Amendment) ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."). While the prejudice to the nonmovant resulting from modification of the scheduling order may also be a relevant factor, generally, we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines. See *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* (concluding that there was "no need to explore beyond the first criterion, [diligence,] because the record clearly demonstrate[d] that Bradford made only minimal efforts to satisfy the [scheduling order's] requirements"). Our cases reviewing *Rule 16(b)* rulings focus in the first instance (and usually solely) on the diligence of the party who sought modification of the order. See, e.g., *Rahn, 464 F.3d at 822* (affirming the district court's denial of Rahn's request for a modification of the scheduling order because the record made clear that Rahn did not act diligently to meet the order's deadlines); *Barstad v. Murray County, 420 F.3d 880, 883 (8th Cir. 2005)* (affirming the district court's denial of leave **[*43]** to amend the Barstads' complaint under *Rule 16(b)* because the Barstads had eight months to request an amendment of the scheduling order and "knew of the claims they sought to add when they filed the original complaint"); *Freeman v. Busch, 349 F.3d 582, 589 (8th Cir. 2003)* (affirming, under *Rule 16(b)*, the district court's denial of Freeman's motion to amend her complaint because she provided no reasons why the amendment could not have been made earlier or why her motion to amend was filed so late).

Sherman, 532 F.3d at 716-17; see also *Scheidecker v. Arvig Enterprises, 193 F.R.D. 630, 632 (D. Minn. 2000)* ("the 'good cause' standard [of *Rule 16(b)*] is an exacting one, for it demands a demonstration that the existing schedule cannot be reasonably be met despite the diligence of the party seeking the extension.") Consequently, a party does not meet the good cause standard under *Rule 16(b)* if the relevant information on which it based the amended claim was available to it earlier in the litigation. See *Parker v. Columbia Pictures Indus., 204 F.3d 326, 340-41 (2nd Cir. 2000)* (citing *Sosa v. Airprint Systems, Inc., 133 F.3d 1417, 1419 (11th Cir. 1998))*. In short, *Rule 16(b)* focuses on "the diligence of the party seeking to modify a Scheduling Order, as opposed to the litany of unpersuasive excuses, inclusive or inadvertence and neglect, which commonly undergird an untimely Motion to Amend." Id. n. 1 (citations omitted). *Rule 16(b)* does not look at prejudice to the non-moving party. See *Archer Daniels Midland v. Aon, 187 F.R.D. 578, 581-82 (D. Minn. 1999)* (citing *Luigino's, Inc. v. Pezrow Cos., Inc., 178 F.R.D. 523, 525 (D. Minn. 1998))*.

This Court does not find "good cause" **[*44]** for permitting the addition of Experian's and Trans Union's antitrust and tortious interference counterclaims in response to the Third Amended Complaint. Having found that defendants impermissibly filed their amended answers and counterclaims on December 4, 2008, the issue is whether defendants had good cause for bringing their motion for leave to amend on December 12, 2008? That is, did they act diligently in bringing their motion for leave to amend? While defendants certainly had good reasons to seek to amend their answer to assert their antitrust and tortious interference counterclaims after the deadline for motions to amend the pleadings (April 7, 2007) had expired, as the operative facts driving these counterclaims did not occur until June 2008 (when Equifax and Fair Isaac settled and entered into a business arrangement), the Court concludes that defendants did not have good cause for waiting 5 months -- until December 2008 -- to spring these new counterclaims on Fair Isaac. Defendants learned of the Fair Isaac's settlement with Equifax in June 2008; and they received the unredacted settlement agreement and business agreements on July 10, 2008. See Boyle Decl., ¶ 1, Ex. 1 (July **[*45]** 10, 2008 Letter from Fair Isaac to Defendants Enclosing the Unredacted Agreements); Tr. 15-16. It is these facts that they relied upon in their antitrust and tortious interference counterclaims (and other facts that occurred well before July 2008). Nonetheless, knowing that the deadline for fact discovery was imminent (July 22, 2008) and that expert discovery was scheduled to begin on August 26, 2008 (date for Fair Isaac's initial expert disclosures) and to be completed on December 19, 2008 (except for expert Anderson), defendants took no steps to address the possibility that they might seek to add the antitrust and tortious interference counterclaims. They did not move the Court to modify the deadlines for fact or expert discovery; they did not alert Fair Isaac that they might seek to add the claim which would clearly impact the timing, scope and substance of fact and expert discovery. This is especially concerning to the Court given that in conjunction with defendants' August 13, 2008 motion to add the trademark cancellation claim, defendants touted how they had moved to add the claim as soon as there was sufficient evidence to establish the claim (the last deposition bearing on **[*46]** claim was taken on July 20, 2008, and they moved on August 13), and they went so far as point out that they had filed their motion well in advance of the hearing date in order to give Fair Isaac an additional time to prepare a response. See Memorandum in Support of Defendants' Joint Motion (I) to Modify Scheduling Order to Permit Defendants to Move for Leave to Amend Pleadings, and (II) for Leave to Amend Answers to Assert Counterclaims for Cancellation of Registration for "300-850" Trademark [Docket No. 393] at pp. 5-6, 23. In other words, defendants moved diligently in bringing a new request for relief before the Court on their trademark cancellation counterclaim, and yet failed to do so in conjunction their antitrust and tortious interference with contract counterclaims.

Defendants argued that they did not immediately file the motion for leave to amend upon the discovery of the settlement agreement between Fair Isaac and Equifax because they were diligently attempting to collect the details of the agreement that Fair Isaac refused to produce. See Defs.' Mem. at p. 13; Defendants' Reply in Support of their Joint Motion in the Alternative for Leave to Amend Answers to Assert Counterclaims **[*47]** for Violations of the Antitrust Laws and Tortious Interference with Contract ("Defs.' Reply") at pp. 4-5. Defendants pointed to their September 10, 2008 motion to compel documents related to the Equifax agreement, which was not denied by this Court until November 3, 2008, and their November 18, 2008 objections to the Court's Order. See Reply at p. 5. Defendants also noted that discovery regarding the Equifax agreement was still ongoing. Id. Yet, at the hearing, defendants' counsel represented that the antitrust and tortious interference counterclaims were for the most part, based on those agreements provided to defendants on July 10, 2008, and this was evidence sufficient for defendants to bring their counterclaims under *Rule 11 of the Federal Rules of Civil Procedure*. Tr. 16. The Court then asked defendants' counsel why defendants waited until December 4, 2008 to present their antitrust and tortious interference counterclaims, given fact discovery was done, expert discovery was near completion, and the counterclaims were primarily based on the settlement agreement between Fair Isaac and Equifax. Id. Counsel's response was that they were attempting to obtain more information regarding the agreements via their failed motion to compel **[*48]** [6] and that they finally went forward when they did "[b]ecause a time period had come up, and the time that had come up was an amended complaint." Tr. 17-18. In summary, defendants stated that they waited to file their antitrust and tortious interference with contract counterclaims until December 4, 2008, as follows:

> Why we waited five months is that it was the time, Your Honor. It was the time to file this Counterclaim based on what happened, based on the discussions with the party, based on the fact that Your Honor entered an order that said by the agreement that we could answer or otherwise plead to their amended complaint.

Tr. 29.

This Court appreciates the fact that defendants may have wanted more facts before they brought their antitrust and tortious interference counterclaims, and wanted to properly analyze the merits of these claims before they brought it into the case. However, at the end of the day, they asserted claims based solely on the facts they possessed as of July 10, 2008, and they could have taken steps to inject the proposed counterclaims into the case long before December 4, 2008. Instead, despite their awareness of their antitrust and tortious interference claims at the time they moved in August to amend their answer to add the trademark cancellation claim, they limited their motion **[*50]** to the trademark cancellation claim. Similarly, as they engaged in discussions with Fair Isaac regarding its potential per se price-fixing claim, defendants made no mention of their potential antitrust and tortious interference counterclaims to Fair Isaac. Then, even after this Court denied their motion for the projections on November 3, 2008, which was two weeks before Fair Isaac's rebuttal expert report was due, they waited until December 4 to assert the antitrust and tortious interference counterclaims for the first time. These are all strategic decisions that parties are within their rights to make. But they are strategic decisions made at their peril, particularly when fact discovery had ended several months before and expert discovery was about to be completed. The timing for defendants' motion to amend their answer to add the antitrust and tortious interference counterclaims was not dictated by the exigencies of the case; it was driven by defendants' own strategic decisions and actions. For all of these reasons, this Court finds that defendants were not diligent in and did not have good cause for their belated effort to amend their answer to add the antitrust and tortious interference **[*51]** counterclaims.

C. Did Defendants Met the *Rule 15* Standard for Amending Their Answer to Assert the Counterclaims?

Even if the Court had concluded that defendants had good cause for bringing their belated counterclaims, the Court would still deny the motion to amend or to supplement under *Rule 15* based on undue delay and prejudice to Fair Isaac.[7] *Federal Rule of Civil Procedure 15(a)* provides that leave to amend pleadings "shall be freely given when

---

[6] In its November 3 decision, the Court summarized defendants' rationale for obtaining the projections considered by Fair Isaac in entering into the agreement with Equifax, despite a finding that they constituted work product:

> Defendants claim that they have substantial need of the revenue projections and analyses, uniquely in the possession of Fair Isaac, because they are "highly relevant" to Fair Isaac's claim in its Second Amended Complaint that it will be driven from the scoring industry due to a lack of access to credit data and distribution. See Defs.' Mem. at p. 22. According to defendants, it is unfair for Fair Isaac's witnesses to contend that the agreement with Equifax will not prevent harm to Fair Isaac's scoring business while at the same time not producing the facts, **[*49]** including the projections that the witnesses considered in entering into the agreement with Equifax. Id. at pp. 22-23. In other words, defendants' assertion of substantial need is that the documents are "highly relevant" and could provide useful impeachment material as to Greene, Campbell and Nelson. In opposition, Fair Isaac submitted that defendants' experts, armed with Fair Isaac's agreements with Equifax, have all of the data necessary to perform their own analysis of what Fair Isaac's revenue might be under the agreements.

November 3, 2008 Order [Docket No. 431] at p. 17. The Court notes that defendants never represented they needed the material to support a potential antitrust or tortious interference with contract counterclaims.

[7] Motions to amend under *Rule 15(a)* and motions to supplement under *Rule 15(d)* are subject to the same standard. See *Glatt v. Chicago Park District, 87 F.3d 190, 194 (7th Cir. 1996)* (standard under *Rule 15(d)* is the same as under *Rule 15(a)*) (citations omitted); *Roller Bearing Co. of America, Inc. v. American Software, Inc., 570 F. Supp.2d 376, 383 n. 1 (D. Conn. 2008)* ("the standards for permitting additional pleading under *Rule 15(a)* and *Rule 15(d)* are the same."); *Muhammad v. Bonner, No. 05 CV*

justice so requires." The determination as to whether to grant leave to amend is entrusted to the sound discretion of the trial court. See, e.g., *Niagara of Wisconsin Paper Corp. v. Paper Indus. Union Mgmt. Pension Fund, 800 F.2d 742, 749 (8th Cir. 1986)* (citation omitted). The Eighth Circuit has held that "[a]lthough amendment of a complaint should be allowed liberally to ensure that a case is decided on its merits, . . . there is no absolute right to amend." *Ferguson v. Cape Girardeau County, 88 F.3d 647, 650-51 (8th Cir. 1996)* (citing *Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989)*; *Chesnut v. St. Louis County, 656 F.2d 343, 349 (8th Cir. 1981))*. Denial of leave to amend may be justified by "undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party." *Sanders v. Clemco Indus., 823 F.2d 214, 216 (8th Cir. 1987)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))*.

According to defendants, Fair Isaac will not suffer any prejudice by the addition of the two new counterclaims because little, if any, discovery will be necessary to address the new counterclaims, as the parties have already obtained **[*52]** or are pursuing evidence critical to these claims. See Defs.' Mem. at p. 15. Further, defendants claim that the core issues related to the new counterclaims are also at issue in Fair Isaac' antitrust claims including market definitions, relative market power and the ability of the credit bureaus to compete with Fair Isaac. Id. at pp. 15-16. Defendants also maintained that they should be allowed to file the counterclaims in order to save the time, effort and expense that would be expended if they had to file the counterclaims in a separate law suit and subsequently move to consolidate the two actions under *Rule 42 of the Federal Rules of Civil Procedure*. Id. at pp. 16-17.

Fair Isaac countered that justice will not be served by allowing defendants leave to add their counterclaims because of the prejudice Fair Isaac would experience due to the new theories of recovery asserted and additional discovery it would require so late in this case. See Pls.' Opp. Mem. at p. 17; Pls.' Strike Mem. at pp. 20-21. In particular, Fair Isaac argued that the exclusionary antitrust conduct allegedly undertaken by Fair Isaac in the proposed counterclaims is not related to the exclusionary antitrust conduct allegedly undertaken by defendants as asserted by Fair Isaac. See Pls.' Strike **[*53]** Mem. at p. 21. Fair Isaac maintained that it would need to conduct additional discovery pertaining to whether defendants have standing to assert the antitrust counterclaim, i.e., whether defendants suffered an injury-in-fact as a result of the Fair Isaac's conduct; discovery from the parties and third parties into whether Fair Isaac has monopoly power (as opposed to whether defendants' had market power, which had been the previous focus); discovery into how Fair Isaac obtained a dominant market position, which will require production of information prior to the 1998 cut-off for discovery previously agreed to by the parties); discovery into the conduct and effect of the settlement, which occurred after the cut-off for discovery; fact discovery into whether defendants have been overcharged for royalties; retention of experts to address defendants' *Section 2* monopolization claims; and investigation and discovery into business justifications. See Declaration of Charles F. (Rick) Rule, ¶ 6. Further, Fair Isaac asserted that it will be forced to reopen discovery, including depositions, on issues already addressed, to the extent they may deal with the proposed antitrust counterclaims. Id., ¶ 4; see **[*54]** also Pls.' Strike Mem. at p. 22. Fair Isaac maintained that allowing the claims to go forward would mean that the trial of this case could not take place in 2009. See Pls.' Strike Mem. at p. 1.

For all of the same reasons the Court determined that defendants had not diligently sought to amend their answer, the Court concludes that they engaged in undue delay in moving to amend. In addition, the Court finds that Fair

---

*1851(RJD)(LB), 2008 U.S. Dist. LEXIS 27654, 2008 WL 926574 at *6 (E.D.N.Y. March 31, 2008)* ("Whether a motion for leave to amend under *Rule 15(a)* or under *Rule 15(d)*, the same factors are considered.") (citing *Novak v. National Broadcasting Co., 724 F. Supp. 141, 145 (S.D.N.Y. 1984)* (same standards apply to motions under *Rule 15* subsections (a) and (d)); ***Estate of Williams-Moore v. Alliance One Receivables Management, Inc., 335 F. Supp.2d 636, 644 (M.D. N.C. 2004)*** ("*Rule 15(d)* motions are to be evaluated under the same standards used to evaluate motions to amend pleadings under *Rule 15(a)*, which generally states that leave to amend shall be freely granted when justice requires unless there are valid reasons for denying leave, such as undue delay, bad faith, or futility.") (citing 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice And Procedure § 1504 (2d ed.1990) (discussing *Rule 15(d)*); *Schneeweis v. Northwest Technical College, No. Civ. 97-1742 (JRT/RLE), 1998 U.S. Dist. LEXIS 11389, 1998 WL 420564 at *13 (D. Minn. June 1, 1998)* (citations omitted) (finding that central among the factors, which should be considered in the exercise of the court's broad discretion in deciding whether to allow a complaint to be supplemented, is whether "the supplementation would hinder judicial efficiency, prejudice the rights of other parties to the action, or would insert a frivolous claim.").

Isaac would be substantially prejudiced if these claims were allowed to proceed in this case at this late date. This case has been going on since October of 2006. The schedule has been modified and extended seven different times. At the point that defendants moved to amend, fact discovery was completed (except for scheduled supplementation), and expert discovery was virtually finished. The parties are about to embark on dispositive motion practice (based on the requirement that all dispositive motions are to be served, filed and heard by April 1, 2009, initial moving papers are due to be filed on or about February 16, 2009 (assuming a hearing date of April 1), and the case is to be trial ready as of July 1, 2009. Whether the Court believes Fair Isaac's description of what **[*55]** is needed for discovery and its estimate of the time required to complete this discovery or defendants' description and estimate, the Court finds that defendants' additional counterclaims will require additional and significant fact and expert discovery, additional and significant expense, and will further delay the trial of the matter, all to the prejudice of Fair Isaac. See *Dairy Foods Inc. v. Farmers Co-Operative Creamery, 298 F. Supp. 774, 777 (D. Minn. 1969)* ("[T]his lawsuit is now within a month of three years old, and hope is held that a trial of one or some of the issues may be possible within the next few months. Discovery and extensive preparation has taken place. The court does not feel that the injection of this new issue even though otherwise appropriate is proper or permissible at this time and to allow such would work prejudice to plaintiff."). As the Court observed in Intermedics, Inc. v. Cardiac Pacemakers, Inc.:

> [D]iscovery has either been completed, or it is virtually complete, the time to amend the pleadings has long been expired, and the parties are filing their respective dispositive Motions. To wind back the progress of this case, so as to allow new claims to be alleged, discovered, and subjected to Motions, is inconsistent with the mandate of *Rule 1, Federal Rules of Civil Procedure*, **[*56]** that actions be resolved in a just, speedy, and inexpensive fashion. Absent compelling good cause, the allowance of leave to plead new claims would be the antithesis of *Rule 1*'s command.

*1998 U.S. Dist. LEXIS 23751, 1998 WL 35253496 at *3*.

Finally, the Court rejects defendants' argument that they should be permitted to proceed with their amended answer because it is likely that the Court would consolidate any separate action they might bring on the same claims. It is premature to determine if, and under what circumstances, consolidation would occur, when no separate suit has been filed and no motion for consolidation is before the Court.[8] If defendants are correct in their prediction that ultimately the cases will be consolidated, such a solution can be considered at such time as it is properly before the Court: after the case has been commenced, the motion has been brought, and the pros and cons of consolidation can properly be considered.[9] In any event, where, as defendants assert, they can and will pursue their claims in a separate lawsuit, then the prejudice to them by denying their motion for leave to amend is minimal.

---

[8] Pursuant to *Rule 42(a), Federal Rules of Civil Procedure*, the Court has broad discretion to consolidate actions that "involve a common question of law or fact." *Enterprise Bank v. Saettle, 21 F.3d 233, 235 (8th Cir. 1994)*. *Rule 42(a)* allows a court to "1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." The purpose of consolidation is to encourage convenience and economy of administration of cases and avoid unnecessary cost or delay, and in considering such a motion, a court should weigh:

> Whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications **[*57]** of common factual and legal issues, the burden on parties, witnesses and available judicial resources of common factual and legal issues, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

*Fratzke v. IC System, Inc., Civil Nos. 05-1115 (JRT/RLE), 06-232 (PJS/RLE), 2007 U.S. Dist. LEXIS 27750, 2007 WL 1114155 at *2 (D. Minn. April 13, 2007)* (quoting *Chill v. Green Tree Financial Corp., 181 F.R.D. 398, 405 (D. Minn. 1998)* (citations omitted). "The party seeking consolidation bears the burden of showing that it would promote judicial convenience, and economy." *Powell v. National Football League, 764 F. Supp. 1351, 1359 (D. Minn. 1991)*.

[9] Presumably any future motion to consolidate will address how a consolidation is merely not an attempt to contravene this Order or the ability of the Court to manage the cases brought before it.

V. CONCLUSION

For all of the reasons, this Court grants Fair Isaac's motion to strike Experian's and Trans Union's antitrust and tortious interference counterclaims, and denies Experian's and Trans Union's motion to amend their answers to add these counterclaims. In addition, Fair Isaac's motion to strike motion VantageScore's laches affirmative defense as to all claims asserted by Fair Isaac, and the lack of standing affirmative defense is granted.[10] On the other hand, Fair Isaac's motion to strike VantageScore's laches affirmative defense to the extent it applies to Fair Isaac' per se price-fixing claim is denied. Accordingly, Experian and Trans Union shall re-file and serve their answer and counterclaim to the Third Amended Complaint without the antitrust and tortious interference with contract counterclaims, and VantageScore shall re-file and serve its **[*58]** answer and counterclaim to the Third Amended Complaint without the lack of standing affirmative defense, and shall limit its laches defense to Fair Isaac's per se price-fixing claim.

J.S.M.

End of Document

[10] This Court notes that defendants' motion [Docket No 485] did not make a request to add affirmative defenses and therefore, the Court does not consider any proposed amendment to allow those defenses to be added to VantageScore's Answer and Counterclaims to the Third Amended Complaint.

Grynberg v. BP P.L.C.

United States District Court for the District of Columbia

February 9, 2009, Decided; February 9, 2009, Filed

Civil Action No. 1:08-CV-00301 - (JDB)

Reporter
596 F. Supp. 2d 74 *; 2009 U.S. Dist. LEXIS 9201 **

JACK J. GRYNBERG, et al., Plaintiffs, v. BP P.L.C., STATOILHYDRO ASA, BG GROUP P.L.C., BG NORTH AMERICA, JOHN BROWNE, ANTHONY HAYWARD, PETER SUTHERLAND, HELGE LUND, EIVIND REITEN, ROBERT WILSON, and FRANK CHAPMAN, individuals, Defendants.

Subsequent History: Injunction denied by *Jack J. Grynberg v. BP P.L.C., 643 F. Supp. 2d 1, 2009 U.S. Dist. LEXIS 113932 (D.D.C., July 31, 2009)*

Prior History: *Grynberg v. BP P.L.C., 585 F. Supp. 2d 50, 2008 U.S. Dist. LEXIS 95498 (D.D.C., Nov. 12, 2008)*

Core Terms

arbitration, default, plaintiffs', settlement agreement, courts, compel arbitration, motions, parties

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

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

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

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

HN1[ ] **Alternative Dispute Resolution, Validity of ADR Methods**

When considering a motion to compel arbitration, the appropriate standard of review for the district court is the same standard used in resolving summary judgment motions pursuant to *Fed R. Civ. P. 56(c)*. Thus, the motion should be granted when the pleadings and evidence demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

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

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

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

HN2[] **Alternative Dispute Resolution, Validity of ADR Methods**

In applying the standard for a motion for summary judgment to a motion to compel arbitration, the movant bears the burden of demonstrating the absence of a genuine dispute of material fact. The movant may support its motion by identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN3[] **Default & Default Judgments, Relief From Default**

A court may set aside an entry of default for good cause. *Fed. R. Civ. P. 55(c)*. Three factors guide courts in determining whether good cause exists: (1) whether the default was willful, (2) whether a set-aside would prejudice plaintiff, and (3) whether the alleged defense was meritorious.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN4[] **Default & Default Judgments, Relief From Default**

Strong policies favor resolution of disputes on their merits. Default is only necessary when a party is essentially unresponsive. Hence, on a motion for relief from the entry of a default or a default judgment, all doubts are resolved in favor of the party seeking relief.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN5[] **Conflict of Law, Forum Selection**

When deciding the enforceability of a foreign forum selection clause, courts focus on two factors: (1) is the arbitration agreement related to a business deal that is international in character, and (2) can the plaintiff vindicate alleged misdeeds under the laws of the chosen forum.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN6[] Conflict of Law, Forum Selection

Agreement in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. Forum-selection clauses should be given full effect when a freely negotiated private international agreement is unaffected by fraud.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN7[] Arbitration, Arbitrability

Like American Arbitration Association (AAA) Rule R-8(a), U.N. Commission on International Trade Law (UNCITRAL) article 16(1) provides that an arbitration panel may rule on its own jurisdiction in the first instance. Just as incorporation of the AAA rules provide clear and unmistakable evidence that the parties intend an arbitrator, not a court, to determine the arbitrability of certain claims, incorporation of the UNCITRAL rules demonstrates that the parties intended the arbitrator to determine whether certain of a plaintiff's claims can be arbitrated.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

HN8[] Arbitration, Arbitrability

U.S. public policy is not thwarted so long as the wrongs alleged by the party resisting arbitration may be vindicated under the laws of the foreign forum selected. There is no basis for a judgment that only United States laws and United States courts should determine a controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere. To hold that the complained-of wrongs can only be properly addressed in the United States reflects a parochial concept that all disputes must be resolved under our laws and in our courts.

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

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The wrongs that the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1962*, seek to prevent can be vindicated in arbitrations applying foreign law.

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

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Torts > Business Torts > Fraud & Misrepresentation > General Overview

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

HN10[] **Claims, Fraud**

A plaintiff's claim of fraud, a fraudulent scheme under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1962*, conspiracy, and breach of fiduciary duties is substantially the same as a claim under Alberta, Canada law alleging fraud, an oppressive scheme, conspiracy, and breach of fiduciary duties for the purposes of collateral estoppel.

Counsel: [1]** For JACK J. GRYNBERG, GRYNBERG PRODUCTION CORPORATION (TX), GRYNBERG PRODUCTION CORPORATION (CO), PRICASPIAN DEVELOPMENT CORPORATION (TX), Plaintiffs: Kelly Pride Hebron, LEAD ATTORNEY, PRIDE LAW OFFICE, LLC, Largo, MD; Daniel L. Abrams, PRO HAC VICE, LAW OFFICE OF DANIEL L. ABRAMS PLLC, New York, NY.

For BP P.L.C., doing business as BP CORPORATION NORTH AMERICA, INC., JOHN BROWNE, ANTHONY HAYWARD, PETER SUTHERLAND, Defendants: Daryl Andrew Libow, LEAD ATTORNEY, SULLIVAN & CROMWELL, LLP, Washington, DC; Bruce William Hickey, SULLIVAN & CROMWELL, LLP, Washington, DC.

For STATOILHYDRO ASA, Defendant: Paul T. Weinstein, LEAD ATTORNEY, EMMET, MARVIN & MARTIN, LLP, New York, NY; Kenneth Marc Bialo, Matthew Kennedy McCoy, EMMET, MARVIN & MARTIN, LLP, New York, NY.

For BG GROUP P.L.C., doing business as BG GROUP NORTH AMERICA, LLC, Defendant: Robert A. Burgoyne, LEAD ATTORNEY, FULBRIGHT & JAWORSKI LLP, Washington, DC; Anne Rodgers, PRO HAC VICE, FULBRIGHT & JAWORSKI, Houston, TX; Layne E. Kruse, PRO HAC VICE, FULBRIGHT & JAWORSKI, Houston, TX.

For HELGE LUND, Defendant: Kenneth Marc Bialo, Matthew Kennedy McCoy, Paul T. Weinstein, LEAD ATTORNEYS, EMMET, MARVIN & MARTIN, LLP, New York, NY.

Judges: JOHN **[**2]** D. BATES, United States District Judge.

Opinion by: JOHN D. BATES

Opinion

[*76] ***MEMORANDUM OPINION***

On November 12, 2008, this Court dismissed plaintiffs' complaint against BP P.L.C., individual BP defendants, and Statoilhydro ASA and granted those defendants' motion to compel arbitration. Two motions remain pending in this case, both relating to BG Group, P.L.C. ("BG") -- the last defendant standing. BG, a United Kingdom corporation, was served with summons and plaintiffs' complaint on June 10, 2008. [1] By August 4, 2008, BG had not answered or otherwise responded to plaintiffs' complaint and the Clerk declared BG in default. Plaintiffs filed a motion for default judgment on August 7, 2008. BG filed a motion to set aside the default on August 13, 2008, which also sought to dismiss plaintiffs' complaint and to compel arbitration.

BACKGROUND

The parties in this case have a long and complicated history that does not need to be recounted here. The Court described some of this history in its earlier November 12 opinion. *See* Memorandum Opinion ("Mem. Op.") at 2-3. But some **[**3]** background on an ongoing arbitration between plaintiffs and BG is needed to resolve the pending motions. Like BP and Statoil, BG entered into a settlement agreement with plaintiffs to resolve a dispute arising out of a business deal in Kazakhstan that turned sour. BG's settlement agreement was essentially the same as the other defendants' and requires the **[*77]** parties to submit all claims arising out of business dealings in Kazakhstan to arbitration. *See* BG Settlement Agreement at § 10.04. However, one notable difference between BG's settlement agreement and the other settlement agreements prevents a straightforward application of the Court's November 12 opinion to the pending motions. Whereas BP and Statoil entered into arbitration agreements governed by New York law, *see* Mem. Op. at 3, BG entered into an arbitration agreement governed by the law of Alberta, Canada, *see* BG Settlement Agreement at § 10.02. Pursuant to that agreement, plaintiffs initiated arbitration against BG in Alberta in July 2005.

Dissatisfied with proceedings before the Canadian arbitration tribunal, plaintiffs filed suit in this Court on February 21, 2008. Plaintiffs allege that BG, along with the other defendants, **[**4]** violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*, and various state laws. *See* Compl. at PP 57-86. BG, believing that such claims fall within the scope of the settlement agreement (and must therefore be arbitrated), asked the arbitration tribunal to enjoin plaintiffs from pursuing their RICO suit in this Court. Through a series of steps that need not be detailed here, on June 11, 2008 BG obtained an injunction from the Court of Queen's Bench of Alberta -- the court designated to supervise the arbitration -- which enjoined plaintiffs from "taking any further steps" in their RICO claim and enjoined them from pursuing any "issues or matters related to [BG's] business or activities in Kazakhstan . . . in any proceedings other than in an Alberta arbitration." *See* BG's Memorandum in Support of Its Motions ("BG Mem.") at Ex. C-5 at 432. Despite the injunction from the Alberta Court, plaintiffs have filed numerous affidavits and motions in this case seeking to hold BG in default. Upon each filing, BG sought -- and obtained -- a holding from the Alberta Court that plaintiffs were in contempt of that court's orders.

STANDARD

HN1[] When considering a motion to **[**5]** compel arbitration, "the appropriate standard of review for the district court is the same standard used in resolving summary judgment motions" pursuant to *Federal Rule of Civil Procedure 56(c)*. *Brown v. Dorsey & Whitney, LLP, 267 F.Supp.2d 61, 67 (D.D.C. 2003)* (internal quotation marks omitted); *see also* *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 & n.9 (3d Cir. 1980)*. Thus, the

---

[1] BG was served in compliance with the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters.

motion should be granted when the pleadings and evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN2***[] The movant bears the burden of demonstrating the absence of a genuine dispute of material fact. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The movant may support its motion by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id*. (quoting *Fed. R. Civ. P. 56(c)*).

ANALYSIS

The first issue is whether to set aside the default entered by the Clerk against BG. ***HN3***[] A court may set aside an entry **[**6]** of default for "good cause." *Fed. R. Civ. P. 55(c)*. Three factors guide courts in determining whether good cause exists: "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." *See* *Keegel v. Key West & Caribbean Trading Co., 200 U.S. App. D.C. 319,* ***[*78]*** *627 F.2d 372, 373 (D.C. Cir. 1980)*. ***HN4***[] "[S]trong policies favor resolution of disputes on their merits." *Jackson v. Beech, 205 U.S. App. D.C. 84, 636 F.2d 831, 836 (D.C. Cir. 1980)*. Default is only necessary when a party is "essentially unresponsive." *Id*. (quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 139 U.S. App. D.C. 256, 432 F.2d 689, 691 (D.C. Cir. 1970))*. Hence, "[o]n a motion for relief from the entry of a default or a default judgment, all doubts are resolved in favor of the party seeking relief." *Id*.

Based on the history of the Canadian arbitration recounted above, BG has made an ample good cause showing to set aside the Clerk's entry of default. Courts examine the circumstances of the default to determine whether it was willful. *See* *Keegel, 627 F.2d at 374*. Here, BG reasonably assumed that plaintiffs would not (repeatedly) violate the Alberta Court's orders enjoining them from prosecuting the case before this **[**7]** Court. Good faith reliance that another party will not seek entry of default demonstrates that default was not willful. *Id*. Nor would setting aside default prejudice plaintiffs. As discussed below, plaintiffs should have submitted this claim to arbitration under the settlement agreement, and hence should not have been before this Court in the first place. Finally, BG's defense is meritorious for the same reason -- plaintiffs' claim should be arbitrated, not litigated in court.

The second issue, then, is whether to dismiss plaintiffs' complaint against BG and to compel arbitration. The Court did so as to the other defendants -- BP, individual BP defendants, and Statoil -- in its November 12 order. The difference between those defendants and BG, however, is that arbitration with BG is taking place in Alberta, Canada under Alberta law. *See* BG Settlement Agreement at § 10.02. Plaintiffs argue that this difference is crucial and that it defeats BG's motion to compel arbitration. Plaintiffs rely in large part on a footnote from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. In dictum, the *Mitsubishi* Court wrote that:

> [I]n the event the choice-of-forum **[**8]** and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. Plaintiffs contend that granting BG's motion to compel would operate as a waiver of plaintiffs' right to pursue its statutory RICO suit and would therefore be against public policy. Plaintiffs' Memorandum in Opposition to BG's Motion at 3.

The *Mitsubishi* footnote notwithstanding, courts that have addressed the argument plaintiffs raise here have nonetheless enforced agreements to arbitrate. Indeed, many courts confronted with the *Mitsubishi* footnote have found it inapplicable. [2] ***HN5***[] When deciding the enforceability **[*79]** of a foreign forum selection clause, courts

---

[2] *See, e.g.,* *Richards v. Lloyd's of London, 135 F.3d 1289, 1295 (9th Cir. 1998)* ("Without question this case would be easier to decide if this **[**9]** footnote in *Mitsubishi* had not been inserted. Nevertheless, we do not believe dictum in a footnote regarding ***antitrust law*** outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law."); *Haynsworth v. The Corporation, 121 F.3d 956, 968 (5th Cir. 1997)* ("We do not read *Mitsubishi* so broadly. Setting aside the fact that it is dictum, the quoted statement, by its own terms, is limited to the antitrust context, as is *Mitsubishi*

instead focus on two factors: is the arbitration agreement related to a business deal that is international in character? And can the plaintiff vindicate alleged misdeeds under the laws of the chosen forum? *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-19, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974).

The business deal that plaintiffs and BG agreed to arbitrate is plainly international in character. Plaintiffs are U.S. citizens, BG is a British company, the forum chosen is in Canada, and the business deal involved energy exploration in Kazakhstan. ***HN6***[] Agreement in advance "on a forum acceptable to both parties is an indispensable element in international trade, **[**10]** commerce, and contracting." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). "[F]orum-selection clauses 'should be given full effect' when 'a freely negotiated private international agreement [is] unaffected by fraud.'" Scherk, 417 U.S. at 519 n.14 (quoting The Bremen, 407 U.S. at 13). [3] The need for certainty in international business deals thus counsels strongly in favor of compelling arbitration.

That plaintiffs may seek redress for the wrongs BG allegedly committed further counsels in favor of compelling arbitration. As a threshold matter, the Canadian arbitration tribunal has already determined that plaintiffs' RICO claims are arbitrable under the parties' settlement agreement. *See* BG Mem. Ex. C-5 PP 24-25. That agreement incorporated the Model Law of the U.N. Commission on International Trade Law ("UNCITRAL"). BG Settlement Agreement § 10.04(a). ***HN7***[] Like American Arbitration Association Rule R-8(a), UNCITRAL article 16(1) provides that the arbitration panel may rule on its own jurisdiction in the first instance. Just as incorporation of the AAA rules **[**11]** provided "clear and unmistakable evidence" that the parties intended the arbitrator, not a court, to determine arbitrability, *see* Mem. Op. at 7-9, incorporation of the UNCITRAL rules demonstrates that the parties intended the arbitrator to determine whether plaintiffs' RICO claims can be arbitrated. *See Wal-Mart Stores, Inc. v. PT Multipolar Corp., 202 F.3d 280*, *[published in full-text format at 1999 U.S. App. LEXIS 31578], 2007 WL 1079625 at *2 (9th Cir. Nov. 30, 1999)*; *see generally* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 369 n.230 (1999) (citing cases).

Compelling arbitration is the correct result even if plaintiffs cannot pursue their claims under the RICO statute itself. ***HN8***[] U.S. public policy is not thwarted so long as the wrongs alleged by the party resisting arbitration may be vindicated under the laws of the foreign forum selected. *See* Scherk, 417 U.S. at 517, 519. There is "no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere." *Id. at 517*. To hold that the complained-of wrongs could only be properly addressed in the United States would "reflect **[**12]** a 'parochial concept that all disputes must be resolved under our laws and in our courts.'" *Id. at 519* (quoting The Bremen, 407 U.S. at 9).

[*80] Here, the laws of Alberta, Canada allow plaintiffs to pursue their claims. Plaintiffs' RICO allegations boil down to claims for conspiracy, fraud, bribery, and theft. Courts have routinely held that ***HN9***[] the wrongs RICO seeks to prevent can be vindicated in arbitrations applying foreign law. *See* Richards, 135 F.3d at 1296; Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1366 (2d Cir. 1993); *cf.* De Shazo v. Nations Energy Co., Civ.A.No. H-05-3277, 2007 U.S. Dist. LEXIS 21787, 2007 WL 951568 (S.D. Tex. Mar. 27, 2007) (holding that ***HN10***[] a plaintiff's claim of "fraud, a fraudulent scheme under RICO, conspiracy, and breach of fiduciary duties" was "substantially the same" as a claim under Alberta, Canada law alleging "fraud, an oppressive scheme, conspiracy, and breach of fiduciary duties" for the purposes of collateral estoppel). Hence, plaintiffs' claims are arbitrable even if the RICO statute itself is not the vehicle for those claims.

CONCLUSION

---

more generally."); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (10th Cir. 1992) ("[Plaintiff] relies on an isolated sentence in a footnote in *Mitsubishi* . . . [but] [o]n these facts, we do not read *Mitsubishi* as restrictively as plaintiff when *Mitsubishi* is viewed against the backdrop of Supreme Court decisions in the area.").

[3] Plaintiffs here do not allege that BG fraudulently induced them into selecting Alberta as the forum for their arbitration.

For the foregoing reasons, the Court sets aside the Clerk's entry of default against BG and holds that the arbitrator is the proper entity to decide whether **[**13]** plaintiffs' claims are arbitrable. Accordingly, BG's motion to compel arbitration will be granted and plaintiffs' complaint will be dismissed without prejudice. A separate Order has been issued on this date.

SO ORDERED.

/s/

JOHN D. BATES

United States District Judge

Dated: February 9, 2009

Advanced Sci. Applications v. Pac. Bell Tel. Co.

Court of Appeal of California, Fourth Appellate District, Division Three

February 10, 2009, Filed

G039287

Reporter
2009 Cal. App. Unpub. LEXIS 1155 *; 2009 WL 323278

ADVANCED SCIENTIFIC APPLICATIONS, INC., Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE COMPANY et al., Defendants and Respondents.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 8.1115.

Prior History: [*1] Appeal from a judgment of the Superior Court of Orange County, No. 01CC00337, Ronald L. Bauer, Judge.

Disposition: Affirmed.

Core Terms

cause of action, demurrer, tariffs, unfair competition, third amended complaint, unfair, allegations, circuits, damages, restitution, trial court, Cartwright Act, modems, summary judgment, pricing, statutory penalty, treble damages, undisputed, transport, notice, first cause, predatory, lines, memorandum of points and authorities, second amended complaint, injunctive relief, judicial notice, end user, Defendants', substituted

Counsel: Shahram Manighalam, in pro. per.; and Law Offices of Tabone and Derek L. Tabone for Plaintiff and Appellant. [Retained.]

Pillsbury Winthrop Shaw Pittman, Douglas R. Tribble, Connie J. Wolfe and Kevin M. Fong for Defendants and Respondents.

Judges: MOORE, J. WE CONCUR: SILLS, P. J., IKOLA, J.

Opinion by: MOORE

Opinion

Advanced Scientific Applications, Inc. (ASA), an Internet service provider, filed a complaint for unlawful tying under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), predatory pricing under the Unfair Practices Act (*Bus. & Prof. Code, § 17000 et seq.*), and unfair competition under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) against Pacific Bell Telephone Company and SBC Advanced Solutions, Inc. (collectively, Pacific Bell). [1] A

[1] All subsequent statutory references are to the Business and Professions Code, except as otherwise expressly stated herein.

demurrer was sustained without leave to amend as to the predatory pricing cause of action. Summary judgment was later granted with respect to the remaining causes of action. ASA assigned all of its interests with respect to the litigation to its chief executive officer, president, and sole shareholder, Shahram Manighalam (Manighalam). Manighalam **[*2]** appeals.

With respect to procedural matters, we conclude that Manighalam, as assignee, has standing to maintain the appeal as to ASA's claims other than those for statutory penalties, which are not assignable. ASA's informal request to be substituted into the litigation in place of Manighalam is denied, inasmuch as ASA has no remaining rights in the litigation left to pursue.

As for the merits, on the sparse record before us, we conclude the court did not err in sustaining the demurrer without leave to amend or in granting summary judgment. With respect to the demurrer, Manighalam has failed to provide an adequate record to show that the trial court erred in concluding that applicable tariffs barred the *section 17043* cause of action for predatory pricing. In opposing the motion for summary judgment, ASA failed to raise a triable issue of material fact as to whether the alleged tying item was a product that would support a cause of action under *section 16727* or a service that would not. Also, its *section 17200 et seq.* unfair competition cause of action failed as a **[*3]** matter of law because the only relief ASA sought was unavailable under that body of law. We affirm.

I

FACTS

A. NATURE OF DISPUTE:

For the purposes of this introduction, we provide a description of the nature of the underlying situation from the perspective of Manighalam, as taken from his opening brief on appeal. This brief provides a more cogent and concise explanation of the underlying technicalities, from the viewpoint of the plaintiff/appellant, than do ASA's filings in the trial court. The statements contained in this introduction are not to be construed as factual findings.

ASA is an Internet service provider (ISP). Pacific Bell owns the Internet access infrastructure in ASA's service area. In order to provide Internet access to its digital subscriber line (DSL) customers, or end users, ASA must contract with Pacific Bell.

ASA needed to use a physical line to access to Pacific Bell's infrastructure. Either a "T1" line or a "T3" line was available for this purpose. A "T1" line handles a smaller volume of data than a "T3" line and is less expensive than a "T3" line. ASA chose to contract for the use of the less expensive "T1" line.

In order to connect either a "T1" or a "T3" line to the **[*4]** equipment of the end user who purchased DSL Internet access from an ISP, an ATM circuit was required. Pacific Bell limited the number of ATM circuits it would provide with respect to a "T1" line to 32, thus limiting to 32 the number of end users with whom an ISP using a "T1" line could contract. Pacific Bell made 255 ATM circuits available with respect to "T3" lines. Consequently, an ISP that desired to sell DSL Internet access to more than 32 end users was required to contract for the use of a "T3" line, even if the "T1" line had a large enough capacity to handle the volume of data from more than 32 end users.

Pacific Bell also offered certain marketing programs to ISP's that contracted for the use of "T3" lines. However, it did not make those same programs available to ISP's using "T1" lines.

In addition, Pacific Bell offered DSL Internet access to individual consumers who chose to contract with it directly, rather than going through ISP's. Pacific Bell provided modems to its direct customers.

ASA filed suit against Pacific Bell, alleging unlawful tying of ATM circuits, unlawful tying of advertizing, predatory pricing, and unfair competition.

B. PROCEDURAL HISTORY:

This is the second **[*5]** appeal arising out of the underlying litigation. In the prior appeal (*Advanced Scientific Applications, Inc. v. Pacific Bell Telephone Company* (Apr. 15, 2004, G030660) [nonpub. opn.]), we reversed a judgment of dismissal following the sustaining of a demurrer without leave to amend. ASA had repeatedly failed to appear in court, and indeed the court had sustained the demurrer when ASA had failed to attend a hearing on the demurrer. Manighalam, as the chief executive officer of ASA, had attended several hearings without an attorney, each time explaining that he had been unable either to contact ASA's original attorney or to hire a new one.

In our opinion, the majority stated: "Clearly, at each hearing, the court underscored the fact that Advanced Scientific could not proceed without an attorney. [Citations.] Having received explicit instruction to hire an attorney, Advanced Scientific nonetheless failed to do so." It further stated: "In our view, it was a clear abuse of discretion not to give substantial time for Advanced Scientific to obtain competent counsel, before the court ruled on the demurrer."

On remand, the court sustained, without leave to amend, a demurrer to ASA's third cause **[*6]** of action, leaving the first, second and fourth causes of action in tact. The court later granted Pacific Bell's motion for summary judgment and judgment was entered accordingly.

A notice of appeal was filed. It stated that notice was given "that Plaintiff, Advanced Scientific Applications, Inc. appeals" from the judgment. The quoted language was repeated thrice more, with respect to: (1) an order denying an application for a stay and denying a request to vacate the summary judgment; (2) an order granting the motion of ASA's counsel to be relieved; and (3) the order sustaining the demurrer as to the third cause of action. [2] The notice of appeal was signed by Manighalam. Below the signature line appeared the following words: "Shahram Manighalam[,] Assignee of All Advanced Scientific Applications, Inc.'s claims against All Defendants, Pacific Bell and SBC Advanced Solutions, Inc."

The **[*7]** civil case information statement identified the party without attorney as "Advanced Scientific Applications, Inc. ('ASA') AND Shahram Manighalam the ASSIGNEE of all of ASA's Claims against all Defendants." The document was signed by Manighalam.

We issued an order inviting the parties to file supplemental letter briefs addressing whether Manighalam was an aggrieved party with standing to maintain the appeal, whether the rights assigned to him were assignable choses in action, and, if not, whether dismissal was required for lack of jurisdiction or whether the problem could be cured by substituting a licensed attorney. Pacific Bell Telephone Company et al. and Manighalam each filed a supplemental letter brief and a responsive supplemental letter brief. We then issued an order stating that the determination of the issues of standing and jurisdiction would be made in conjunction with the decision on appeal.

Thereafter, an appellant's opening brief, a respondent's brief, and an appellant's reply brief were filed. The appellant's opening brief states in the body thereof: "Now that ASA has counsel, appellant requests that ASA be substituted in for and in the place of Shahram Manighalam. The **[*8]** request is made by this reference, as Appellant reads this court's prior order to require handling the issue as to whether Appellant is an 'aggrieved party' as to maintain standing as part of the appeal. Should a formal motion be necessary, Appellant is prepared to file one. In anticipation of this request being granted this brief treats ASA as the Appellant."

We subsequently issued another order stating: "Shahram Manighalam and Advanced Scientific Applications, Inc. are directed to provide this court with copies of any and all assignments relating to the plaintiff's and/or appellant's claims or causes of action that are the subject matter of the underlying litigation in this matter and/or this appeal." We received a copy of a document providing: "Advanced Scientific Applications' Inc. . . . ('ASA') hereby ASSIGNS and TRANSFERS, without any limitation, all of its RIGHTS and CLAIMS for all causes of actions in the California

[2] In his opening brief, Manighalam has not addressed either the order denying an application for a stay and a request to vacate the summary judgment or the order granting the motion of ASA's counsel to be relieved. Consequently, he has abandoned his appeal with respect to those two orders. (*Tanner v. Tanner (1997) 57 Cal.App.4th 419, 422, fn. 2*.)

Superior Court County of Orange, Case Number: 01CC00337, titled as: Advanced Scientific Applications, Inc. . . . [Plaintiff] vs. Pacific Bell Telephone Company . . . , SBC Advanced Solutions, Inc. . . . [Defendants], TO ASA's CEO, President and 100% Share holder, **[*9]** Shahram Manighalam as an INDIVIDUAL and PERSON." The document was dated May 30, 2007, the day after the order granting summary judgment was filed, and was signed by Manighalam as "President, CEO and Owner of 100% of all of all of the Shares of Advanced Scientific Applications, Inc."

II

DISCUSSION

A. STANDING:

(1) As Assignee -

Manighalam says that, as the assignee of ASA's claims, he has standing to appeal. [3] Pacific Bell disagrees. It contends that the causes of action ASA purported to assign are causes of action for statutory penalties, that are not assignable. It also asserts that if any of the causes of action might give rise to remedies other than statutory penalties, the entire assignment should fail in any event because of severability issues.

In assessing the arguments of the parties, we first note the remedies available with respect to the various causes **[*10]** of action. The first two causes of action as described in the third amended complaint are for unlawful tying in violation of *section 16727*. Section 16750 allows for treble damages and injunctive relief in connection with an injury under *section 16727*. The third cause of action is for predatory pricing in violation of *section 17043*. Two separate statutes address damages in connection with *section 17043*. Section 17070 provides for actual damages and injunctive relief and section 17082 provides for treble damages. (*G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 277* (*G.H.I.I.*).) The fourth cause of action is for unfair competition, in violation of *section 17200 et seq.* Where such violations are concerned, *section 17203* allows injunctive and restitutionary relief. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 179* (*Cel-Tech*).)

It is immediately apparent that, contrary to Pacific Bell's assertion, not all of the causes of action ASA purported to assign give rise to statutory penalties. Where the damages remedies are concerned, we observe that statutory remedies include both some for treble damages and at least one for actual damages.

"[T]he settled **[*11]** rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature [citations] . . . ." (*G.H.I.I., supra, 147 Cal.App.3d at p. 277*.) Therefore, the treble damages statutes in question here are penal in nature.

Pacific Bell argues that the penalties available under those statutes are not assignable, citing *Peterson v. Ball (1931) 211 Cal. 461, 462-463, 468-470* (*Peterson*). Manighalam, on the other hand, insists that they are assignable, citing *Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal.4th 1252* (*Essex*). We agree with Pacific Bell, for reasons we shall show.

In *Essex, supra, 38 Cal.4th 1252*, the court addressed "whether assignment of a tort action against an insurer for wrongfully withholding policy benefits includes the right to recover *Brandt* fees." [4] (*Id. at p. 1257*.) In addressing this issue, the court stated: "California, as set forth both in case law and by statute, maintains a policy encouraging the free transferability of all types of property. [Citations.]" (*Id. at p. 1259*, fn. omitted.) It also stated: "'As a general

---

[3] Manighalam also asserts several other bases for standing, claiming he is aggrieved as sole shareholder, and is a party of record as one who filed a motion to vacate and as a cross-defendant. However, inasmuch as he professes to pursue the claims as the assignee of ASA, we need not address the significance of these other matters.

[4] See *Brandt v. Superior Court (1985) 37 Cal.3d 813*.

proposition it can be said '"that the **[*12]** only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable.'" [Citations.]" (*Id. at p. 1260*.)

Manighalam focuses on this language, stating that statutory penalties are not on the list of items the court identified as being nonassignable. Although that is true, the Essex court was expressing a general rule and clearly did not intend the quoted language to constitute a comprehensive or exhaustive list. Indeed, Manighalam overlooks the subsequent portion of the opinion wherein the *Essex* court noted that punitive damage claims are not assignable. (*Essex, supra, 38 Cal.4th at pp. 1261-1262*.) This is consistent with the court's prior holding in *Peterson, supra, 211 Cal. 461*, to the effect that statutory penalties, being punitive in nature, are not assignable. (*Id. at pp. 462-463, 468-470*.) **[*13]** Consequently, we conclude that the treble damages claims asserted in the underlying litigation are not assignable.

This is not the end of our inquiry, however. Our conclusion prompts the question raised by Pacific Bell, that is, whether ASA's assignment is void in its entirety because some of ASA's claims give rise to nonassignable statutory penalties. Pacific Bell argues, albeit without much detail, that to permit the appeal to proceed only on claims not involving statutory penalties would be to cause substantial issues concerning severability and partial assignments. It asserts that the bulk of ASA's assignment is prohibited and argues that the assignment therefore is unenforceable in its entirety, unless Manighalam can separate the consideration given for the assignable portion and the consideration given for the nonassignable portion, so that only the assignable portion could be enforced and the appeal would be limited to that portion.

Pacific Bell perhaps makes the issue more complicated than it needs to be. In this case, we need not delve into issues of consideration. *Civil Code section 1599* provides: "Where a contract has several distinct objects, of which one at least is lawful, **[*14]** and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." "It is settled that where a contract has both void and valid provisions, a court may sever the void provision and enforce the remainder of the contract. [Citations.] California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered. [Citations.]" (*Adair v. Stockton Unified School Dist. (2008) 162 Cal.App.4th 1436, 1450*.) *Civil Code section 1599* does not mandate severance. (*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal.4th 974, 992*.) Rather, the question of severance "in an individual case must be informed by equitable considerations. [Citation.] *Civil Code section 1599* grants courts the power, not the duty, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality. [Citation.]" (*Ibid.*)

The issue of severability of claims in the context of certain of the Business and Professions Code provisions implicated in this case was addressed in *G.H.I.I., supra, 147 Cal.App.3d 256*. **[*15]** In that case, the court, in its analysis of a statute of limitations issue, stated that a claim for actual damages under section 17070 was "patently severable" from a claim for treble damages pursuant to section 17082. (*Id. at p. 279*.) We see no reason to disagree. The *Essex* court acknowledged that there could be times when a '"hybrid cause of action'" was at issue, in other words, when the cause of action was assignable but an aspect of the damage claim was not. (*Essex, supra, 38 Cal.4th at pp. 1261, 1263*.) As the *Essex* court stated with respect to the issues in question there: "Although some damages potentially recoverable in [the] action, including . . . punitive damages, are not assignable [citation], the cause of action itself remains freely assignable as to all other damages [citation]." (*Essex, supra, 38 Cal.4th at p. 1263*.) This rule fits the case before us as well. Here, the claims are assignable, but the statutory penalties are not. [5]

---

[5] Given our ultimate conclusions in this case, we need not decide whether the treble damages awards made available by statute should be divisible into assignable and nonassignable portions -- that is, whether one-third of the statutory damages **[*16]** should be assignable as the compensatory portion and the remaining two-thirds of the statutory damages should be nonassignable as the penal portion.

To fail to sever the void portions of the assignment, involving statutory penalties, and to hold the entire assignment void, would not be in the interests of justice. Rather, to preclude Manighalam from pursuing any claims at all against Pacific Bell would result in a potential windfall to Pacific Bell, if any of the claims in question had merit. Manighalam has standing to pursue the appeal in his capacity as assignee, but only as to the assignable portions of the claims.

As an aside, we note that Pacific Bell can have no concern over the splitting of causes of action. To the extent that the nonassignable penalty claims could be construed to remain with ASA, it matters not. Since ASA failed to file a notice of appeal from the judgment, the judgment is final as to ASA. Any unassigned claims that ASA may have had with respect to the judgment are now time barred.

As for ASA's informal request to be substituted into the litigation as appellant, the request is denied. ASA has no remaining interest in the litigation to pursue.

(2) Lack of Substitution ***[*17]*** *-*

Pacific Bell, citing *Code of Civil Procedure section 368.5*, claims that there is another reason why Manighalam cannot maintain the appeal. It says that he has no standing because he did not make a formal request to be substituted into the action in his own name.

Code of Civil Procedure section 368.5 provides as follows: "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." It is true that Manighalam did not request to be substituted into the action in the place of ASA. However, he was not required to, as *section 368.5* makes clear. (*Casey v. Overhead Door Corp. (1999) 74 Cal.App.4th 112, 121*, disapproved on another ground in *Jimenez v. Superior Court (2002) 29 Cal.4th 473, 481, fn. 1*.) He may continue to pursue the action in the name of ASA, as the original party. To hold otherwise would be to deprive Manighalam of a determination of his appeal. "The law abhors the forfeiture of the right to a determination of a cause **[*18]** of action on the merits. [Citation.] Under these facts, the court's refusal to allow [Manighalam] to proceed on the assigned [claims would act] as such a forfeiture." (*Id. at p. 122*.)

B. DEMURRER:

(1) Introduction -

Pacific Bell filed a demurrer to ASA's second amended complaint. The court sustained the demurrer with leave to amend.

ASA then filed a third amended complaint, to which Pacific Bell filed another demurrer. In that demurrer, it challenged each of ASA's four causes of action. The court overruled the demurrer with respect to the first, second and fourth causes of action. It sustained, without leave to amend, the demurrer as to the third cause of action. Manighalam contends the court erred with respect to its ruling on the third cause of action.

At the outset, we observe that Manighalam has not provided this court with as complete a record for review of this matter as would be desirable. Although the caption of Pacific Bell's notice of hearing, demurrer and memorandum of points and authorities would indicate that Pacific Bell filed a memorandum of points and authorities in support of its demurrer to the third amended complaint, the appellant's appendix contains no copy of any such **[*19]** memorandum of points and authorities. Furthermore, the appellant's appendix contains only the face page of ASA's memorandum of points and authorities in opposition to the demurrer and only the face page of Pacific Bell's reply memorandum.

In addition, the minute order on the demurrer to the second amended complaint discloses that Pacific Bell "properly [sought] judicial notice of the FCC Tariffs." This shows that Pacific Bell filed a request for judicial notice of applicable Federal Communications Commission (FCC) tariffs, germane to the determination of issues on demurrer, and that the request was granted. However, our record on appeal contains no copies of the request for judicial notice or its attachments. Therefore, we cannot review those tariffs in connection with the issues on appeal.

Finally, as we shall show, Pacific Bell raises an issue that requires a comparison of the allegations of the second amended complaint to the allegations of the third amended complaint. However, the record does not contain a copy of the second amended complaint, so we cannot make the comparison.

We will review the ruling on the third cause of action as contained in the third amended complaint based **[*20]** on the limited record before us. However, as will become evident, the defects in the record impact the outcome of the appeal.

(2) Standard of Review -

"The standard of review on an appeal from judgment of dismissal following sustaining of a general demurrer is guided by long settled rules. We treat the demurrer as admitting all material facts properly pleaded, as well as those which reasonably arise by implication, but not contentions, deductions or conclusions of fact or law. [Citations.] 'Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action on any theory. [Citations.] Moreover, '"the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties."' [Citations.] A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. [Citation.]" (*Yue v. City of Auburn (1992) 3 Cal.App.4th 751, 756-757*.)

(3) Predatory Pricing -

(a) Applicable statutes

Section 17043 **[*21]** provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

The application of this statute is limited by section 17024. Section 17024 provides in pertinent part: "Nothing in this chapter [Bus. & Prof. Code, div. 7, pt. 2, ch. 4, *§ 17000 et seq.*] applies: [P] (1) To any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission of this State and sold or furnished by any public utility corporation, or installation and repair services rendered in connection with any services, articles or products. [P] (2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products."

(b) Analysis

In its third **[*22]** cause of action, ASA asserted that Pacific Bell engaged in predatory pricing, in violation of *section 17043*. ASA alleged: "Based on ASA's best estimate of defendants' costs, in dollars, of providing ISP services and DSL modems, defendants, and each of them, have provided their customers with ISP services and have given away DSL modems at a cost below that which it itself incurs to provide them. [P] . . . ASA further alleges that there is a dangerous probability that defendants' conduct, as alleged, will enable them to obtain a monopoly over the DSL market in ASA's market area." ASA alleged more specifically that Pacific Bell gave away for free modems worth approximately $ 80-$ 90 apiece and that Pacific Bell charged residential customers approximately $ 30 per month for providing DSL service, when the actual cost of providing such service was approximately $ 73 per month.

In its demurrer, Pacific Bell asserted that the third cause of action failed because section 17024 made *section 17043* inapplicable to public utility companies selling services pursuant to tariffs. Pacific Bell also said that the cause of action was uncertain, was barred by the ruling in *Verizon Commun. v. Law Off. of Curtis Trinko (2004) 540*

U.S. 398, **[*23]** was barred by the filed rate doctrine, and was insufficient because ASA failed to allege facts to demonstrate that it was injured by restraints on competition.

In the minute order on the demurrer, the trial court stated that *Verizon Commun. v. Law Off. of Curtis Trinko, supra, 540 U.S. 398* did not bar any of the causes of action. However, it held that the third cause of action failed because Pacific Bell's "services were sold under tariffs filed with the [California Public Utilities Commission]" (CPUC) and that such services were not subject to a *section 17043* claim.

On appeal, Manighalam acknowledges that section 17024 barred the portion of his cause of action having to do with the price Pacific Bell charged for its DSL service, because the price was set by tariff. However, he claims that the portion of the cause of action having to do with the allegation that Pacific Bell gave modems away for free was not barred by section 17024. Manighalam claims that he is not aware of any tariff establishing the prices Pacific Bell is permitted to charge for modems.

However, as we stated at the outset, our record on appeal does not contain copies of the applicable tariffs, of which the trial court **[*24]** apparently took judicial notice. Therefore, we cannot review those tariffs to see whether they address only the pricing for the residential DSL service, or whether they also address the pricing for modems. We could, therefore, stop at this point in the analysis and affirm the decision of the trial court with respect to the demurrer on the ground that ASA has not provided an adequate record for review. On appeal, we presume that the order of the trial court is correct. (*Virtanen v. O'Connell (2006) 140 Cal.App.4th 688, 709*.) It is the appellant's burden to show reversible error, by an adequate record. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal.App.4th 1422, 1433*.)

However, we observe that, while not explicitly conceding the point, Pacific Bell does not directly challenge the assertion that the applicable tariffs did not set a price for modem sales. Rather, Pacific Bell argues, without citation to legal authority, that ASA's pleading was defective because it asserted a violation of *section 17043* based on the *combined* conduct of providing ISP services and DSL modems below cost.

In addition, Pacific Bell maintains that ASA failed to avail itself of a prior opportunity to **[*25]** amend its complaint to cure this defect. As noted above, the court sustained Pacific Bell's demurrer to ASA's second amended complaint, with leave to amend. With respect to the third cause of action, the court stated: "The 3rd cause of action fails as [Pacific Bell's] services were sold under tariffs filed with the CPUC. Such services are not subject to a *B&P § 17043* claim."

Pacific Bell says that ASA did not amend its complaint as to the third cause of action, but rather, that ASA, in its third amended complaint, repeated the allegations of the second amended complaint verbatim, at least as to the third cause of action. Pacific Bell contends that, under the circumstances, case law compels this court to affirm the ruling. "'When a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]' [Citation.]" (*Soliz v. Williams (1999) 74 Cal.App.4th 577, 585*.)

In considering Pacific Bell's point, we are again hampered by the paucity of the record before us. It does not contain copies **[*26]** of either the second amended complaint or the demurrer thereto. Therefore, the record affords us no basis for affirming the ruling on the particular ground offered by Pacific Bell.

What we know is that, in the third amended complaint, ASA alleged that Pacific Bell gave modems away for free and sold its residential DSL service below its cost. The trial court held that the *section 17043* claim was barred because Pacific Bell's services were sold under tariffs. Manighalam asserts that the court erred because the tariffs did not address the issue of the sales price of modems. While Pacific Bell does not attack this assertion, we conclude that Manighalam has failed to provide an adequate record to prove his point. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra, 65 Cal.App.4th at p. 1433*.)

C. SUMMARY JUDGMENT:

(1) Introductory Comment -

Before reaching the merits of the summary judgment issues, we must again note the deficiencies in the record that plague our review. The appellant's appendix contains a copy of the three-page notice of motion and motion for summary judgment. However, it contains only a copy of the face page of Pacific Bell's memorandum of points and authorities in support **[*27]** of its motion. In addition, it contains only the first two pages of ASA's memorandum of points and authorities in opposition to the motion and only the face page of Pacific Bell's reply memorandum. Consequently, we have been deprived of seeing the "guts" of Pacific Bell's motion.

Furthermore, the order granting motion for summary judgment states: "Defendants requested judicial notice of certain tariffs and decisions of the CPUC and FCC in support of their Motion for Summary Judgment. As tariffs and the official acts of administrative agencies are a proper subject for judicial notice, and no objection to such notice was brought, Defendants' Request for Judicial Notice is hereby granted." However, the appellant's appendix, once again, fails to include copies of the request for judicial notice and attachments thereto. Consequently, we are deprived of the opportunity to review the tariffs and certain other materials that Pacific Bell presented in support of its motion.

What ASA has provided is Pacific Bell's separate statement of undisputed facts in support of its motion and ASA's response thereto. It would appear that ASA viewed these items as the only ones of import on appeal. This is **[*28]** not the case. Nonetheless, we will review Manighalam's assertions of error to the extent we are able, based on the parched record before us.

(2) Summary Judgment Review -

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his [or her] favor on a cause of action . . . or defense (*Code Civ. Proc., § 437c, subd. (a)*) -- a plaintiff 'contend[ing]

. . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id., § 437c, subd. (c)*) -- that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations] -- and that the 'moving party is entitled to a judgment as a matter of law' (*Code Civ. Proc., § 437c, subd. (c)*)." (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843*.)

"[I]n moving for summary judgment, a 'defendant . . . has met' his [or her] 'burden of showing that a cause of action has no merit if' he [or she] 'has shown that one or more elements of the cause **[*29]** of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. . . .' (*Code Civ. Proc., § 437c, subd. (o)(2)*.)" [6] (*Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849*.)

On review of a summary judgment, we "examine the record de novo and independently determine whether [the] decision is correct. [Citation.]" (*Colarossi v. Coty US Inc. (2002) 97 Cal.App.4th 1142, 1149*.)

(3) Third Amended Complaint -

In the third amended complaint, ASA stated: "Plaintiff, a small Internet Service Provider ('ISP') contracted with defendants to provide Digital Subscriber Line ('DSL') services to consumers." It alleged "that defendants violated

---

[6] See now *Code of Civil Procedure section 437c, subdivision (p)(2)*.

Bus. & Prof Code Sections 16727, 17043 and 17200, et seq. by 1) engaging in the unlawful tying of services; 2) engaging in predatory pricing; and 3) by unfairly competing in the marketplace, all to the detriment of plaintiff."

The section 17043 cause of action, **[*30]** for predatory pricing, was resolved by demurrer, as we have already discussed. Only the causes of action based on sections 16727 and 17200 et seq. are at issue in the summary judgment review. However, in his briefing on appeal, Manighalam has failed to address the second cause of action, for violation of section 16727 based on tying of advertising services. [7] Consequently, he has abandoned his appeal as to the ruling on that cause of action. (*Tanner v. Tanner, supra, 57 Cal.App.4th at p. 422, fn. 2*.) We address, in turn, the first cause of action, based on section 16727 and the fourth cause of action, based on section 17200 et seq.

(4) First Cause of Action: Business and Professions Code Section 16727 -

Section 16727 provides: "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State."

(a) ASA's allegations

In its third amended complaint, ASA stated in support of its first cause of action: "ASA alleges that at all relevant times defendants . . **[*32]** . provided only 32 ATM circuits to ISPs who leased a T1 circuit, including plaintiff, and dedicated 255 circuits to ISPs who leased a faster and more expensive T3 connection. Plaintiff alleges that there is no technical reason for this distinction; defendants could just as easily assign 255 ATM circuits to both T1 and T3 connections. Plaintiff further alleges that most ISPs, including ASA, neither need nor want the additional speed of the T3. [P] . . . ASA alleges that this condition links the sale of the tying product to the tied product. Specifically, ASA is required by defendants' unlawful condition to lease a product it does not want -- a T3 connection -- in order to obtain a product it does require -- additional ATM circuits."

(b) Pacific Bell's defense

In the three-page notice of motion and motion for summary judgment, Pacific Bell stated: "Plaintiff cannot establish that Defendants sold it any goods, merchandise, machinery, supplies, [or] commodities, an essential element of a cause of action under Business and Professions Code section 16727." Since we do not have Pacific Bell's memorandum of points and authorities in support of its motion, we do not know what legal authorities **[*33]** Pacific Bell cited therein.

However, Manighalam, without citation to the record, assures us that Pacific Bell, in making its motion, "relied heavily upon" *Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534*. As that case states, "section 16727 does not apply when the tying item is a service. [Citation.]" (*Id. at p. 546*.) "The term 'services' [as contained in the statute] is used to describe tied items and is not used to described tying items." (*Ibid.) Morrison v. Viacom, Inc., supra, 66*

---

[7] For informational purposes, in framing the second cause of action, ASA, in the third amended complaint, stated: "ASA alleges that . . . defendants . . . would only provide marketing on their own website for customers . . . who purchased T3 lines. Plaintiff alleges that there is no technical reason for doing so; defendants could just as easily provide website marketing for customers purchasing T1 lines. Plaintiff further alleges that most ISPs, including ASA, neither need nor want the additional speed of a T3." The court held that there was no triable issue **[*31]** of fact regarding the second cause of action. It stated, inter alia, that advertising is a service, so no cause of action lies under section 16727, which does not support a cause of action when the tying item is a service.

Cal.App.4th 534 evidently was raised at the trial level, because the court, in granting summary judgment, relied upon it at least in part.

In its order granting summary judgment, the court first stated that ASA proffered no evidence whatsoever in opposition to the motion. It said that ASA did nothing other than repeat its own allegations as contained in the third amended complaint, and that allegations do not constitute evidence in opposition to a motion for summary judgment.

Next, the court, citing Morrison v. Viacom, Inc., supra, 66 Cal.App.4th 534, stated that no cause of action lies under section 16727 when a service is the tying item. It then concluded that the undisputed facts showed that ASA purchased **[*34]** only DSL transport services from Pacific Bell, so that the first cause of action, based on section 16727, necessarily failed.

The court gave six reasons in support of its conclusion, including: "a. Plaintiff's Second Amended Complaint and Third Amended Complaint admit that ATM, T1, and T3 are services. [Citations.] [P] . . . [P] d. Internet Service Providers ('ISPs') such as Plaintiff package Defendants' DSL transport service with their own Internet access service for sale to consumers, but ISPs do not receive equipment, or access to Defendants' equipment, from Defendants. [Citations.] [P] e. Defendants' tariffs, from which Plaintiff placed its orders, define the DSL transport offerings as a service. [Citations.] The terms of these tariffs become incorporated into any contract with a utility and have the force and effect of law. [Citations.] [P] f. Decisions and orders of the California Public Utilities Commission ('CPUC') and the Federal Communications Commission ('FCC') define DSL transport as a service under state and federal law. [Citations.]"

In reviewing this order, we are somewhat hampered by the inadequacy of the record. What we have available to review is Pacific Bell's statement **[*35]** of undisputed facts and ASA's response thereto. As it turns out, this information is enough to show that the trial court was correct.

In its statement of undisputed facts, Pacific Bell quoted four portions of the third amended complaint wherein ASA characterized "T1" lines, "T3" lines, and/or ATM circuits as "services." In its response, ASA did not dispute it had so characterized them, although we happen to observe that ASA was inconsistent in its characterizations in its third amended complaint.

Pacific Bell also quoted two statements from CPUC schedules, five statements from CPUC orders and decisions, four statements from FCC tariffs, and twelve statements from FCC reports, orders, notices and opinions, all describing "T1" lines, "T3" lines, ATM circuits and/or DSL, as services of one nature or another. ASA did not dispute any of the statements. [8]

One of the quoted statements was from a CPUC schedule providing: "'Pacific Bell's FasTrak ATM Cell Relay Service is a fast packet service **[*36]** offering networking capabilities using an industry-recognized technology -- Asynchronous Transfer Mode (ATM). With this high speed, connection-orientated transport service the Utility transmits information in fixed-size segments or cells . . . over various bandwidth capacities.'" It also cited two FCC tariffs and quoted statements therefrom that contained similar information, although they did not name Pacific Bell specifically.

Pacific Bell also cited a CPUC schedule which it characterized as providing that "[a] T1 circuit is simply a service provided over a wire: 'a high performance service providing transmission of 1.544 [T1 or DS1], 3.152, 6.312, 44.736 (DS3, DS3x3, or DS3x12) or 274.176 Mbps . . . . with either an electrical or fiber optic [interface].'"

Furthermore, Pacific Bell quoted an FCC tariff explaining: "'Wholesale Digital Subscriber Line (DSL) Transport Service is a virtual session between Company's ATM network and Customer's designated End User premises utilizing asymmetrical DSL technology over a DSL Line. A DSL Line is the physical facility between the Company's

---

[8] While not disputing any of the statements, ASA did object to the relevancy of some of them. The evidentiary objections were overruled, and Manighalam does not challenge the evidentiary ruling on appeal.

DSLAM . . . and the Network Interface Device (NID) located at the End User premises. Company retains ownership **[*37]** of the overall DSL Line. Company may place special equipment within its DSL Transport and ATM network, to allow for the provisioning and management of multiple applications on each DSL Line. Wholesale DSL Transport Service is intended primarily for Internet Service Provides (ISPs), but may be purchased by any information Service provider or carrier to connect to their End User for the purposes of providing a retail Service.'"

In addition to this FCC tariff addressing ownership of the DSL line, Pacific Bell, in its statement of undisputed fact, cited the declarations of three of its managers who provided explanations concerning such things as ownership of the lines in question. For example, it cited the declaration of Drew Armbruster, product manager of DSL transport for SBC Services, Inc., who said: "Various types of equipment are used by Defendants in order to provide DSL transport service to ISP customers. However, the equipment remains the property of Defendants . . . ." [9]

Reviewing Pacific Bell's statement of undisputed facts, including the aforementioned statements and many others, it is clear that Pacific Bell proffered an abundance of evidence to show that the CPUC and the FCC characterize DSL service, "T1" and "T3" lines, and ATM circuits as part and parcel of a service. Some of the evidence was in the form of tariffs, the significance of which the trial court properly noted.

"The PUC has been vested by the Legislature with broad supervisory and regulatory powers. [Citation.] Pac Bell as a public utility is subject to applicable provisions of the Public Utilities Code. [Citations.] It is required to file tariffs with the PUC covering the terms and conditions, including rates, classifications and attendant liabilities, under which it renders service. [Citation.] 'A public utility's tariffs filed with the PUC have the force and effect of law.' [Citations.]" (*Colich & Sons v. Pacific Bell (1988) 198 Cal.App.3d 1225, 1232*, fns. omitted.)

Pacific Bell met its burden to show that ASA could not establish an element of the first cause of action for violation **[*39]** of *section 16727*, inasmuch as, under that statute, the tying item cannot be a service and Pacific Bell put on evidence to show that only services were at issue.

(c) ASA's burden

The burden shifted to ASA to raise a triable issue of material fact with respect to the first cause of action or a defense thereto. However, ASA did not dispute the statements from the CPUC and FCC schedules, tariffs, reports, opinions, decisions and orders, except with respect to certain relevancy objections that were overruled, as previously noted. Moreover, ASA proffered no contrary evidence. ASA did not meet its burden. The trial court was correct that the first cause of action failed.

(d) Manighalam's arguments on appeal

Manighalam disagrees. He claims that the court decided whether ATM circuits and DSL Internet access are products or services as a matter of law, and erred in doing so. He insists that the issue of whether ATM circuits and DSL Internet access are products or services is a question of fact, which cannot be resolved on summary judgment.

Manighalam misapprehends both the court's orders and the nature of summary judgment proceedings. In the order granting summary judgment, the court cited *Morrison v. Viacom, Inc., supra, 66 Cal.App.4th 534* **[*40]** for the proposition that *section 16727* does not support a cause of action based on a service as the alleged tying item. It did not hold that, based on that case or any other, ATM circuits and DSL Internet access are services as a matter of law. Rather, in the order overruling the demurrer as to the first cause of action, the court stated that the question of whether products or services were at issue required a consideration of fact. Later, in the order granting summary judgment, the court clearly addressed the question as one of fact, and stated that there was no triable issue of material fact as to the first cause of action, because the undisputed facts established that ASA purchased only services.

---

[9] Although ASA objected to the declarations, its objections were overruled in the order granting summary judgment. On appeal, Manighalam does not challenge the order overruling ASA's objections. Moreover, he concedes **[*38]** the one point we note from the declaration of Drew Armbruster, concerning control over the equipment.

Manighalam has cited no portion of the record to show that was error. Rather, the record provided demonstrates that Pacific Bell proffered evidence that ASA did not dispute and ASA proffered no contrary evidence. The court treated the question as one of fact and ASA failed to meet its burden to raise a triable issue of material fact.

(5) Fourth Cause of Action: Business and Professions Code Section 17200 et seq. -

The unfair competition law, set forth in *section 17200 et seq.*, "does not proscribe **[*41]** specific practices. Rather, . . . it defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] Its coverage is 'sweeping, embracing "'anything that can properly be called a business practice and that at the same time is forbidden by law.'"' [Citations.]" (*Cel-Tech, supra, 20 Cal.4th at p. 180*, fn. omitted.) "The statutory language referring to 'any unlawful, unfair or fraudulent' practice . . . makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." (*Ibid.*)

(a) ASA's allegations

With respect to the fourth cause of action, the third amended complaint stated: "ASA alleges that defendants fill the orders of their PacNet subsidiary faster than the orders of competing ISPs, including plaintiff, coerces ISPs to lease an expensive T3 connection they neither want [n]or require in order to obtain the ATM ports they do need, and give away modems and ISP service to customers, even though defendants incur a loss to do so." ASA further alleged: "The acts and practices of defendants . . . constitute unlawful, unfair, or fraudulent business practices in violation of *California Business and Professions Code Sections 17200, et seq.* **[*42]** Defendants' conduct involves and threatens an incipient violation of California ***antitrust law***, including the above-specified provisions of the Cartwright Act, or otherwise violates the policy or spirit of one of those laws because its effects are comparable to or the same as violations of the law, or otherwise significantly harms or threatens competition." ASA requested general damages, treble damages, special damages, and "restitution or unjust enrichment."

(b) Pacific Bell's defense

In the notice of motion and motion for summary judgment, Pacific Bell stated: "Plaintiff cannot establish that Defendants committed any unfair business practice, an essential element of a cause of action under *Business and Professions Code section 17200*." Once again, because the record on appeal does not contain a copy of Pacific Bell's memorandum of points and authorities in support of the motion for summary judgment, we do not know what legal authorities Pacific Bell cited with respect to its arguments on *section 17200 et seq.* We could end our discussion of the fourth cause of action right here, and hold that Manighalam cannot meet his burden to show error because he has not provided an adequate record **[*43]** for review. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra, 65 Cal.App.4th at p. 1433*.) However, we will continue the discussion with what little information we have in the record.

The statement of undisputed fact was directed to only two matters. The first, as we already know, was whether ASA purchased products or services. The second was the nature of Pacific Bell's advertising program. The statement of undisputed fact, then, was geared toward the determination of the viability of the first and second causes of action under *section 16727*. Because the statement of undisputed fact pertained only to those two matters, we assume that Pacific Bell made only legal arguments with respect to the *section 17200* issues. Whether the legal arguments it made before the trial court were the same as it makes on appeal, we do not know.

In the order granting summary judgment, the court observed that ASA's alleged Cartwright Act violations had failed. Perhaps because the Cartwright Act was the only body of law ASA cited in its third amended complaint in support of its unfair competition claim, and the Cartwright Act claims had failed, the trial court held that Pacific Bell had met its burden to **[*44]** show that one or more elements of the fourth cause of action could not be established or that there was a complete defense thereto, and further that ASA had "failed to plead or present any evidence of an injury to competition from restraints on competition, any statutory violation, or any public policy violation tethered to a specific statute . . . ." Consequently, it held that there were no triable issues of material fact with respect to the fourth cause of action.

The trial court relied upon *Cel-Tech, supra, 20 Cal.4th 163* in rejecting ASA's arguments. As the *Cel-Tech* court stated, in determining whether a plaintiff has stated a cause of action under the unfair competition law, "any finding of unfairness to competitors under *section 17200* [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Id. at pp. 186-187*.) "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects **[*45]** are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187*, fn. omitted.)

As we read the third amended complaint, we too see that ASA alleged no incipient violation of an ***antitrust law*** other than the Cartwright Act. Since, as we have already held, the Cartwright Act provision in question, *section 16727*, does not apply when the alleged tying item is a service, there was no violation, and consequently, no incipient violation, of the Cartwright Act.

There is a separate question as to whether the alleged facts could violate the policy or spirit of the Cartwright Act, without violating the Cartwright Act itself. Again, what arguments the parties made in their papers in support of and in opposition to the motion for summary judgment, we do not know. We are not persuaded by Pacific Bell's assertion on appeal that when a plaintiff fails to state a cause of action under the Cartwright Act any derivative claim he or she may assert under the unfair competition law must necessarily fail. Pacific Bell reads too much into its cited authority.

The Supreme Court in *Cel-Tech, supra, 20 Cal.4th 163* concluded that even if the defendant's **[*46]** actions did not violate the Unfair Practices Act, they might nonetheless violate the unfair competition law. (*Id. at p. 169*.) It expressly stated that "a practice may be deemed unfair [under the unfair competition law] even if not specifically proscribed by some other law." (*Id. at p. 180*.) The case thus left room for an argument that an allegation that was insufficient to state a cause of action under the Cartwright Act might, in a given case, still state a cause of action under the unfair competition law.

The *Cel-Tech* court explained: "'[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.' [Citation.]" (*Cel-Tech, supra, 20 Cal.4th at p. 181*, fn. omitted.) True enough, the court also stated that "[a] plaintiff may . . . not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' [Citation.]" (*Id. at p. 182*.) At the same time, it further explained: "The rule does not, however, prohibit an action under the unfair competition law merely because some other **[*47]** statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful." (*Id. at pp. 182-183*.) Here, *section 16727* does not make the tying of services unlawful under the Cartwright Act, yet it also does not make such tying lawful.

Whether or not it would theoretically be possible to state a cause of action under the unfair competition law based on the alleged conduct of Pacific Bell, we are persuaded by Pacific Bell's argument that the cause of action as framed is defective because the unfair competition law does not make available any remedy ASA sought in the third amended complaint. As we recall, ASA requested general and special damages, treble damages, restitution and "unjust enrichment." As Pacific Bell points out in its respondent's brief, those remedies are not available under the unfair competition law.

Under the unfair competition law, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution. **[*48]** [Citations.] Plaintiffs may not receive damages, much less *treble* damages, or attorney fees. [Citations.]" (*Cel-Tech, supra, 20 Cal.4th at p. 179*.) As Pacific Bell points out, ASA, in its third amended complaint, sought restitution, but alleged no basis for the remedy. Indeed, ASA alleged in its third amended complaint that it did not obtain the additional ATM circuits it desired "because it could not justify the cost of a T3 cable." In other words, it did not expend monies on a T3 cable that it sought to have restored to it through restitution.

In his reply brief, Manighalam states: "Restitution of money [Pacific Bell] obtained that, had it not been for [Pacific Bell's] unfair competition, would have been received by ASA is an available remedy." Not surprisingly, he cites no legal authority in support of this proposition. The Supreme Court has rejected such an allegation as the basis for restitution under the unfair claims act, in Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134 (*Korea Supply*).

The *Korea Supply* court "defined an order for 'restitution' as one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in **[*49]** interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.' [Citation.]" (Korea Supply, supra, 29 Cal.4th at pp. 1144-1145.) It held that the remedy the plaintiff therein sought was "not restitutionary because plaintiff [did] not have an ownership interest in the money it [sought] to recover from defendants," explaining that the plaintiff was "not seeking the return of money or property that was once in its possession." (Id. at p. 1149.) The court concluded that "disgorgement of profits allegedly obtained by means of an unfair business practice [was not] an authorized remedy under the UCL where these profits [were] neither money taken from a plaintiff nor funds in which the plaintiff [had] an ownership interest." (Id. at p. 1140.)

Likewise, in the case before us, Manighalam does not seek the return of funds ASA paid to Pacific Bell, or even funds in which ASA had an interest. Rather, "plaintiff relies on general principles of the law of remedies, e.g., that restitution in the broad sense focuses on the defendant's unjust enrichment, rather than the plaintiff's loss. Plaintiff's generalization fails **[*50]** to acknowledge the specific limitation applicable in the UCL context--that restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it. [Citation.] Although this restitution serves to thwart the wrongdoer's unjust enrichment, courts ordering restitution under the UCL 'are not concerned with restoring the violator to the status quo ante. The focus instead is on the victim.' [Citation.] The object is to return to the plaintiff funds in which he or she has an ownership interest. [Citation.] Thus, plaintiff's assertion that defendants received ill-gotten gain does not make a viable UCL claim unless the gain was money in which plaintiff had a vested interest." (Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 455.)

As noted above, restitution is not the only remedy available under the unfair competition law; injunctive relief is also available. (Bus. & Prof. Code, § 17203.) As Pacific Bell points out, however, ASA did not request injunctive relief in its third amended complaint. In response, Manighalam states in his reply brief: "ASA's complaint is sufficiently broad to encompass injunctive relief precluding [Pacific Bell] **[*51]** from continuing its specific unfair practices (limitations on ATM circuits, giveaway modems, preferential connection times, etc) or other unfair practices that are proved at time of trial." Whether or not the allegations would have supported a request for injunctive relief had such relief been requested, it remains the case that ASA did not in fact request injunctive relief in its third amended complaint. Since ASA sought only damages, including a damages request disguised as a request for restitution, and damages are unavailable under the unfair competition law, ASA's claim failed as a matter of law.

III

DISPOSITION

The judgment is affirmed. Pacific Bell and SBC shall recover their costs on appeal.

MOORE, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.

End of Document

[Savarirayan v. White County Cmty. Hosp.]

United States District Court for the Middle District of Tennessee, Nashville Division

February 10, 2009, Filed

Case No. 2:07-0055

Reporter
2009 U.S. Dist. LEXIS 10933 *; 2009 WL 362462

FRANCIS J. SAVARIRAYAN, Plaintiff, v. WHITE COUNTY COMMUNITY HOSPITAL, et al., Defendants.

Core Terms

Clayton Act, recommended, state court, motions, amend, motion for leave, res judicata, allegations, principles, antitrust, magistrate judge, antitrust claim, summary judgment motion, remaining defendant, summary judgment, amended complaint, plaintiff's claim, defendants', reasons, futile, motion to dismiss, leave to amend, discovery, network, notice

Counsel: **[*1]** Francis J. Savarirayan, M.D. Ex-Major USAF/R Chairman and CEO of Commission on Quality Health Care in America, Plaintiff, Counter Defendant, Pro se, Oswego, IL.

For White County Community Hospital, Community Health Systems, Inc., Defendants, Counter Plaintiffs: Brian D. Cummings, LEAD ATTORNEY, Gideon & Wiseman, Nashville, TN.

For Mark Cain, previous CEO of White County Community Hospital, individually and in his official capacity, Gary Newsome, President of Community Health Systems, Inc., individually and in his official capacity, Defendants: Brian D. Cummings, Clarence J. Gideon, Jr., LEAD ATTORNEYS, Gideon & Wiseman, Nashville, TN.

For Chad Griffin, M.D., Defendant: Daniel Hurley Rader, III, LEAD ATTORNEY, Moore, Rader, Clift & Fitzpatrick, P.C., Cookeville, TN.

For Daniel Barnett, M.D., Blue Cross-Blue Shield of Tennessee, Defendants, Counter Plaintiffs: C. Crews Townsend, LEAD ATTORNEY, Neil A. Brunetz, Miller & Martin, Chattanooga, TN.

For John Wayne Allen, JD, attorney, Defendant: John W. Allen, LEAD ATTORNEY, Cookeville, TN.

Judges: ALETA A. TRAUGER, United States District Judge.

Opinion by: ALETA A. TRAUGER

Opinion

MEMORANDUM

Several matters are pending before the court in this litigation in which the plaintiff **[*2]** is proceeding *pro se.* First, there is Magistrate Judge Griffin's Report & Recommendation ("R&R") (Docket No. 101) and the eight motions that it addressed, that is, defendant John Wayne Allen's two Motions to Dismiss (Docket Nos. 28 and 47), defendants White County Community Hospital ("the Hospital"), Community Health Systems, Inc., ("CHS") and Gary Newsome's Motion for Summary Judgment and two Motions to Dismiss (Docket Nos. 30, 53, and 55, respectively), defendant

Chad Griffin's Motion for Summary Judgment and Motion to Dismiss (Docket Nos. 42 and 46, respectively), and defendants Daniel Barnett and Blue Cross/Blue Shield of Tennessee's (Blue Cross's) Motion for Summary Judgment (Docket No. 59).

Second, there are several motions that have been filed by the plaintiff, Dr. Savarirayan, following the issuance of the R&R. [1] (Docket Nos. 104, 109, 112, 121, 125, and 145.) Docket Nos. 104, 109, and 121, while being captioned as "Motion[s] to Dismiss the Motion for Summary Judgment" of a particular defendant, should properly be considered continued or supplemental responses to the particular defendant(s) motion for summary judgment. Consistent with the approach of the Magistrate, the court **[*3]** will "grant" these "motions" for the limited and sole purpose of considering the material therein. Similarly, Docket Nos. 112 and 125, while titled as an "Omnibus Motion" or an "appeal" are, in fact, simply the plaintiff's objections to the R&R, and, therefore, the court will "grant" these "motions," again, only for the limited and sole purpose of considering the argument therein. Docket No. 145, on the other hand, is the plaintiff's motion for leave to amend the Complaint, a motion that the court will consider, and deny, for the reasons expressed below. Finally, the Hospital has filed a Motion to Strike, for privacy reasons, a document from this court's ECF system and the case file. (Docket No. 146.) The court will grant that motion, for the reasons expressed below.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this case was thoroughly addressed by Magistrate Judge Griffin in the R&R, and, therefore, it is not necessary to fully recount that history. (See Docket No. 101 at 2-7.) For the purposes of understanding the basis for this opinion, however, it is worthwhile to briefly discuss some of the undisputed key points, which are drawn from the R&R. First, this case involves a physician, Dr. Francis J. Savarirayan, who, in October 2002, entered into a Recruitment Agreement with the Hospital. In January 2004, after a period of discord between the parties, the Hospital and Dr. Savarirayan parted ways, with Dr. Savarirayan signing a "Settlement Agreement and Release of Claims" (the "Release"), which provided that Dr. Savarirayan broadly relinquished any claims against the Hospital (and its related entities and employees) arising out of the Recruitment Agreement. In exchange for this Release, the Hospital released its rights to pursue repayment **[*5]** of $ 260,789.44 in salary that it had previously paid to Dr. Savarirayan.

Despite signing the Release, Dr. Savarirayan pursued litigation against the Hospital and other entities. After initial discussions with attorney Tom Nebel, Dr. Savarirayan retained defendant attorney John Wayne Allen, who filed a lawsuit in the Tennessee Circuit Court for White County on January 26, 2007, asserting various claims on behalf of Dr. Savarirayan against various defendants. On March 14, 2007, a notice of voluntary dismissal with prejudice was filed by Allen, and an order of non-suit was entered by the Tennessee state court on April 9, 2007, dismissing all claims against all defendants with prejudice. The plaintiff, apparently disturbed by Allen's actions, fired Allen and pursued his state court litigation *pro se.* By order entered on November 19, 2007, the Tennessee state court set aside the prior order of dismissal. The state court subsequently conducted a hearing on the merits and dismissed all of the plaintiff's claims against all defendants with prejudice, concluding proceedings on January 17, 2008.

While the state court litigation was in flux, on August 24, 2007, the plaintiff, proceeding *pro se,* **[*6]** filed this action, which, while based largely on the same set of facts as the state court action, added additional defendants and additional claims, that is, a Clayton Act (antitrust) claim against defendants Cain, Griffin, Barnett and Blue Cross, and a RICO claim against all defendants. (Docket No. 1.) In an Amended Complaint filed on September 6, 2007, the plaintiff added additional factual allegations against defendant Pincus and added a request for declaratory and

---

[1] Consistent with Magistrate Judge Griffin's assessment, the court considers Dr. Savarirayan to be the lone plaintiff in this case. As the R&R notes, "[t]he caption of the complaint lists both the plaintiff and the Commission on Quality Health Care in America ("CQHCA"), which is described as a 'Federal entity set up under Title IV of *Public Law 99-660*-The Health Care Quality Improvement Act of 1986.' … However, the CQHCA **[*4]** is not specifically named as a plaintiff in the body of the complaint and all references to 'plaintiff' in the complaint are clearly intended to mean the plaintiff." (Docket No. 101 at 5.)

injunctive relief directed at defendant Pincus, who was, as discussed below, subsequently dismissed without prejudice from this litigation. [2] (Docket No. 6.)

On December 21, 2007, the plaintiff filed a notice to dismiss this case, without prejudice. **[*7]** By order dated January 7, 2008, Magistrate Judge Griffin dismissed defendants Cain, Nebel, Pincus, Pekalo, PDBB, NPDB, and the three "John Doe" defendants. Pursuant to *Federal Rule of Civil Procedure 41*, however, the plaintiff could not dismiss, without prejudice, the remaining defendants, that is, the Hospital, CHS, Newsome, Griffin, Barnett, Blue Cross, and Allen, because those defendants had either filed an answer or moved for summary judgment at the time the request for dismissal was filed.

After summary judgment and motion to dismiss briefing, Magistrate Judge Griffin issued her Report & Recommendation on September 12, 2008. (Docket No. 101.) Judge Griffin concluded (1) that the claims against the Hospital, CHS, and Newsome were barred by the doctrine of *res judicata* and the Release; (2) that the claims against Blue Cross, Barnett, and Griffin were barred by *res judicata* and, therefore, it was not necessary to consider these defendants' other stated grounds for relief; and (3) that the claims against defendant Allen should be dismissed for failure to state a claim upon which relief could be granted. Therefore, the R&R made a recommendation as to how all of the pending motions should **[*8]** be resolved and recommended that the case be dismissed as to all remaining defendants. (*Id.* at 17.) [3]

On September 26, 2008 and again on September 29, 2008, the plaintiff filed what can fairly be considered to be objections to the R&R. (Docket Nos. 112 and 125.) The plaintiff did not make specific objections to specific provisions of the R&R. Rather, he argued that the R&R should be vacated because it is supposedly unfounded in "the truth or the facts," because the plaintiff did not have adequate time for discovery, and because Judge Griffin issued the R&R on the same day that the plaintiff filed a series of materials responsive to various defendants' motions. (*Id.*)

In light of these objections, the plaintiff asked (1) for "a *de novo* review of the entire case"; (2) that the stay of discovery be lifted; (3) that Judge Griffin recuse herself and vacate her orders if she has any of several listed biases or interests; (4) that the defendants' dispositive motions be dismissed and all defendants be re-instated for trial; (5) that the plaintiff be provided with notice and an opportunity to cure from this court if there are any "magic words" that he failed to use in his filings that might make a difference in the outcome of the litigation; and, finally, (6) that his **[*10]** objection serve as notice of appeal to the Sixth Circuit if this court rejected his arguments therein. (*Id.*)

On January 20, 2009, the plaintiff filed his motion for leave to amend his Complaint, asking that the court allow him to amend his Complaint such that his claims would, allegedly, no longer be barred by *res judicata* principles. (Docket No. 145.) That day, for reasons that are somewhat unclear, the plaintiff filed an affidavit re-stating his medical qualifications and certain other points. (Docket No. 146.) The plaintiff also attached about forty pages of additional documents, tangentially related to the allegations in this case. (*Id.*) The next day, the Hospital filed a

---

[2] In a response to defendant Pekalo's motion to dismiss, the plaintiff attached another amended Complaint, which added a Title VII claim directed against defendant Pekalo. (Docket No. 35 Ex. 1.) There was no motion for leave to amend filed, and defendant Pekalo has been dismissed, without prejudice, from this litigation. Therefore, consistent with Magistrate Judge Griffin's assessment, the court views the Docket No. 6 Amended Complaint as the plaintiff's operative Complaint.

[3] Formally, Judge Griffin recommended that (1) defendant Allen's First Motion to Dismiss (Docket No. 28) be granted and his Second Motion to Dismiss (Docket No. 47) be denied; (2) the Hospital, CHS, and Newsome's Motion for Summary Judgment and their two Motions to Dismiss (Docket Nos. 30, 53, 55) be granted; (3) defendant Griffin's Motion for Summary Judgment (Docket No. 42) be granted and his Motion to Dismiss (Docket No. 46) be denied; and that (4) Barnett and Blue Cross' Motion for Summary Judgment (Docket No. 59) be granted. According to the R&R, the denial of Allen and Griffin's second motion to dismiss would be technical, and the Magistrate recommended that the plaintiff's claims be dismissed against these defendants on the basis of their respective initial dispositive motion. Judge Griffin also noted that the counterclaims of the Hospital, CHS, Newsome, Barnett, and Blue Cross were not affected by the R&R. (Docket No. 101 at 17.) Since the R&R was issued, the parties have provided no further briefing on any counterclaims, and, therefore, this court's opinion does not bear on **[*9]** any counterclaims either.

motion to strike one of those pages because, it claims, confidential patient information is improperly disclosed on that page. (Docket No. 147.)

I. Standard of Review

Under *Federal Rule of Civil Procedure 72(b)* and *28 U.S.C. § 636(b)(1)*, the court is required to make a *de novo* determination of any part of the Magistrate Judge's R&R to which specific objection has been made. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate **[*11]** judge with instructions. *Fed. R. Civ. P. 72(b)(3)*.

II. Analysis

As noted above, pending before the court are Magistrate Judge Griffin's R&R, the motions that were addressed therein, and two additional motions, that is, the plaintiff's motion for leave to amend his Complaint, and the Hospital's Motion to Strike. When a motion for leave to amend is filed while the R&R is pending, it is proper for the district court to address the R&R first. [4] *City of Columbus v. Hotels.com, L.P., 2007 U.S. Dist. LEXIS 49775, 2007 WL 2029036, *2 (S.D. Ohio July 10, 2007)*.

II. Magistrate Judge Griffin's R&R

As discussed above, Magistrate Judge Griffin recommended that the plaintiff's case be dismissed, with prejudice, against all remaining defendants, that is, the Hospital, CHS, Newsome, Griffin, Barnett, Blue Cross, and Allen. (Docket No. 101 at 14-17.) With the exception of defendant Allen, the primary basis for Judge Griffin's recommendation is that the plaintiff's claims against these defendants are barred by *res judicata* principles. [5] (*Id.* at 9-14.) Judge Griffin also noted that, even if *res judicata* did not bar the plaintiff's claims, the Hospital, CHS, and Newsome should still be entitled to summary judgment on the plaintiff's claims against them because of the Release that the plaintiff signed in January 2004. (*Id.* 12-13.) As to defendant Allen, Judge Griffin recommended that his first Motion to Dismiss be granted, because the plaintiff failed to plead any facts by which one could construe that the alleged legal malpractice caused the plaintiff an injury. (*Id.* at 16.)

As noted above, in his "Omnibus Motions," which this court interprets as the plaintiff's objections to the R&R, the plaintiff did not make any specific objections to Judge Griffin's specific findings, instead arguing that the R&R should be vacated because it is supposedly unfounded in "the truth or the facts," because the plaintiff did not have adequate time for discovery, and because Judge Griffin issued the R&R on the same day that the plaintiff filed a series of materials responsive to various motions. (Docket Nos. 112 and 125.) As to the latter two arguments, they are plainly without merit. The plaintiff has failed to show how additional time for discovery would change the result in this case, which rests entirely on legal principles that will not change no matter the time for discovery allotted. Further, this court has reviewed the materials that the plaintiff filed on the day Judge Griffin issued her R&R, and this court makes the final order. The court will consider, however, whether Judge Griffin's R&R is supported by "the

---

[4] The Hospital's Motion to Strike cites a provision in the Tennessee Rules of Court -- Federal and the Health Insurance Portability and Accountability Act (HIPAA) for the notion that the private information about certain patients disclosed on page 15 of the plaintiff's 44-page filing contained in Docket No. 146 should be stricken. (Docket No. 147.) While the Hospital has failed to show its standing to enforce these patients' HIPAA rights, it is inappropriate and unnecessary for the private medical information of patients not remotely involved in this proceeding to be part of the publicly available case file or to be posted on the ECF. The court will order the page removed **[*12]** from the case file and the ECF but will not sanction the plaintiff, as the Hospital also requested. (*Id.*)

[5] Apparently, the Tennessee state court never issued a final order on the plaintiff's **[*13]** legal malpractice claim against Allen, and, therefore, the R&R concluded that this claim is not barred by *res judicata* principles. (See Docket No. 145 Ex. 1.)

[*14] truth or the facts," that is, based on the plaintiff's objection, the court will consider the legal foundation for the recommendations in the R&R. [6]

This court concludes, with one exception that does not affect the outcome of the litigation as to the remaining defendants, that Judge Griffin's recommendation as to how the motions pending before her should be resolved was well founded.

As noted above, Judge Griffin concluded that the claims **[*15]** against the Hospital, CHS, Newsome, Griffin, Blue Cross and Barnett should be dismissed based on *res judicata* principles. In the R&R, Judge Griffin correctly noted that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered, here Tennessee. (Docket No. 101 at 10, citing, among other case law, *Hutcherson v. Lauderdale County, 326 F.3d 747, 758 (6th Cir. 2003))*. Judge Griffin also correctly found that, under Tennessee law, the doctrine of *res judicata* bars "all claims that were actually litigated or *could* have been litigated in the first suit between the same parties." (*Id.* citing *Am. Nat'l Bank & Trust Co. of Chattanooga v. Clark, 586 S.W. 2d 825, 826 (Tenn. 1979))* (emphasis added). Noting that the "instant action is a virtual carbon copy of the action which was dismissed with prejudice on the merits by the state court," Judge Griffin concluded, for every defendant but defendant Allen, that all of the claims in the federal action could have been brought in state court and, therefore, were barred by *res judicata* principles. (Docket No. 101 at 10.)

By way of review, in **[*16]** his state court Amended Complaint (Docket No. 42 Ex. B), the plaintiff alleged claims for (1) breach of contract, (2) violation of *42 U.S.C. § 1981*, (3) tortious interference with a business relationship, (4) violation of the Tennessee Consumer Protection Act, and (5) legal malpractice and fraud. In his federal Amended Complaint, the plaintiff re-alleged these five claims, and added Clayton Act (antitrust) and RICO claims. (Docket No. 6.)

Obviously, the state law causes of action and the *section 1981* claim could have been brought in the state court, and, indeed, they were brought in state court. Therefore, Judge Griffin correctly concluded that those claims are barred here by *res judicata* principles. That said, the R&R does not review, claim by claim, whether the federal claims that the plaintiff added in his federal complaint (RICO and the Clayton Act) could have been brought in the state court action. This court's review of the law indicates that it is well settled that claims under RICO may be properly brought in either state or federal court. *Tafflin v. Levitt, 493 U.S. 455, 466, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990)*. Therefore, the R&R correctly recommended that the RICO claim be dismissed based on *res judicata* **[*17]** principles.

The Clayton Act claim, however, is a different story; jurisdiction for Clayton Act claims is exclusively federal. *See e.g. Tafflin, 493 U.S. at 463* (contrasting Clayton Act and RICO); *In re Copper Antitrust Litig., 436 F.3d 782, 796 (7th Cir. 2006)* (noting the Clayton Act's "exclusive federal jurisdiction"); *Roma Const. Co. v. aRusso, 96 F.3d 566, 582 (1st Cir. 1996)* (Lynch, J. concurring) (noting "the fact that actions under the Clayton Act may only be brought in federal court.") The fact that Clayton Act claims may only be brought in federal court means that the R&R is incorrect when it recommends that the plaintiff's Clayton Act claims be dismissed because they could have been brought in state court. Therefore, the court must consider the merits of the plaintiff's Clayton Act/antitrust claim, in light of the relevant defendants' motions for summary judgment. [7]

---

[6] As mentioned in the factual discussion, following Judge Griffin's R&R, the plaintiff has continued to file various materials, motions, and responses, and, in one of those responses, the plaintiff specifically challenges the *res judicata* finding by arguing that the finding is "irrelevant" because the Tennessee court was not "fair and impartial" and a federal court should not be "subservient" to a state court. (Docket No. 134.) This argument is not supported by anything more than the plaintiff's rampant speculation and innuendo. Further, it is a well-settled principle of comity that the forum in which the civil plaintiff must complain about any unfair treatment at the state court trial level is the state court of appeals, not the federal district court.

[7] *Federal Rule of Civil Procedure 56(c)* provides that summary judgment shall be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. **[*18]** To prevail, the moving party must meet the burden of

In his Clayton Act/antitrust claim, the plaintiff alleges that former defendant Cain, and current defendants Griffin, Barnett and Blue Cross "acted in a concerted coordinated manner to limit and destroy [the plaintiff's] practice, so that he will not be able to compete against the white ethnic American Medical School graduates practicing in that area." (Docket No. 35 Ex. 1 at 21.) The plaintiff argues that the defendants achieved this result through a two-step process: (1) Cain, as the plaintiff's superior, took a number of administrative measures to undermine the plaintiff's practice and (2) Barnett and Blue Cross denied the plaintiff's request to participate in the Blue Cross/Blue Shield network, but allowed a less qualified "white ethnic American" to participate in the network. (*Id.* at 21-22.) The plaintiff alleges that Blue Cross believes it is "untouchable" because of the large financial contributions **[*19]** it, allegedly, makes to influential political officials. (*Id.* at 22.)

The remaining defendants subject to the plaintiff's Clayton Act/antitrust claim, that is, defendants Griffin, Barnett and Blue Cross, all moved for summary judgment on this claim for reasons aside from *res judicata.* In Barnett and Blue Cross's Brief in Support of their Motion of Summary Judgment, they argue that their only involvement with the plaintiff was to review the plaintiff's 2003 request for "Network Credentialing," which they denied after determining that the plaintiff had not been honest in providing information in support of his request. (Docket No. 60 at 8.) In light of this, these defendants argue that the plaintiff has "failed to plead even the most basic facts supporting" his Clayton Act/antitrust claim. (*Id.* at 9.) In support of his motion for summary judgment, defendant Griffin likewise argues that there are no facts to support the plaintiff's claims, including his Clayton Act/antitrust claim. (Docket No. 44 at 7.)

These defendants are entitled to summary judgment on the plaintiff's Clayton Act/antitrust claims. In order to maintain an antitrust claim, the plaintiff must allege an "antitrust injury," **[*20]** that is an injury of the sort that the antitrust laws were designed to prevent; in other words, the plaintiff must allege an injury to competition, not just allege anti-competitive behavior or behavior that is otherwise tortious or violates federal law. *Expert Masonry v. Boone County, 440 F.3d 336, 347-48 (6th Cir. 2006)*.

Plainly, there are several fatal problems with the plaintiff's Clayton Act/antitrust claim. First, as to defendant Griffin, there is no actual allegation of antitrust wrongdoing, which makes Griffin entitled to summary judgment on this claim. As to Barnett and Blue Cross, the plaintiff alleges behavior that, perhaps, if shown to be true, might be considered discriminatory, but the behavior alleged certainly does not implicate federal ***antitrust law*** and the required "antitrust injury." *Id.* Indeed, an "antitrust injury" arises in a narrowly defined circumstance, in which the plaintiff alleges that, in addition to being potentially tortious or otherwise unlawful, the conduct was injurious to competition generally. *Id.* It is hard to conceive of a circumstance in which one doctor being denied network privileges or being removed from practice at a hospital could be injurious **[*21]** to competition generally, and the plaintiff has certainly failed to allege such a circumstance here. Therefore, the defendants are entitled to summary judgment on the plaintiff's Clayton Act/antitrust claim.

As a final point on the R&R, Judge Griffin recommended that defendant Allen's first Motion to Dismiss be granted, because the plaintiff failed to allege, as required, that any mistakes by Allen as an attorney were the cause of the plaintiff's damages. (Docket No. 101 at 15 citing *Gibson v. Trant, 58 S.W. 3d 103, 108 (Tenn. 2001))*. As Judge Griffin pointed out, because the state court judge set aside the order of dismissal and allowed the state court case to proceed after the plaintiff had discharged Allen, "any damages suffered by the plaintiff which were attributable to how the case had been previously handled by Defendant Allen were cured and the plaintiff remained in the same position in that lawsuit as he had been prior to the entry of dismissal." (*Id.* at 16.) On the basis of this sound reasoning, the court concludes that the R&R makes the appropriate recommendation as to the disposition of defendant Allen's Motion to Dismiss.

Therefore, the court will adopt the R&R's recommendation **[*22]** as to how the motions that were before Magistrate Judge Griffin should be resolved. The court provides the more extended discussion above only to clarify an important point of law related to the Clayton Act. [8]

---

proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Logan v. Denny's, Inc., 259 F.3d 558, 566 (6th Cir. 2001)*.

III. Motion For Leave To Amend

The plaintiff filed a motion for leave to amend his Complaint on January 20, 2009. (Docket No. 145.) In his motion, the plaintiff claims that recently "in Illinois, for the first time [the plaintiff] was able to get legal opinion with reference to **[*23]** Matters of Law. It is the firm opinion of his attorney for matters of law, that a second amended complaint should be filed, to prevent the defendants from escaping the consequences of their actions, on legal technicalities." (Docket No. 145 at 1.) While the proposed amended Complaint contains the same factual allegations as the operative Complaint (including those against dismissed defendants), the plaintiff is very clear that this proposed amended Complaint is only directed at the parties who were not dismissed, without prejudice, from this litigation. (*Id.*)

As to the remaining defendants, the factual allegations in the proposed Complaint and the operative Complaint appear identical. The only distinction between the two Complaints is that some of the claims are different. As with the previous Complaint, based on the same allegations, the plaintiff asserts antitrust and RICO claims. The plaintiff adds a claim for fraud (primarily against CHS, the Hospital and Newsome), defamation, violation of "Title VII/federal Civil Rights" law, and conspiracy to violate his rights under the *Seventh*, *Thirteenth*, and *Fourteenth Amendments to the U.S. Constitution*. (Docket No. 145 Ex. 1.) The plaintiff **[*24]** also recasts his legal malpractice claim, alleging that defendant Allen took money from Blue Cross and the Hospital to "throw the case." (*Id.*) On various grounds, the remaining defendants have all filed briefing objecting to the plaintiff's motion for leave to amend.

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a pleading should be freely given "when justice so requires." *Fed. R. Civ. P. 15(a)*. The district court is to consider several factors when determining whether to grant a motion for leave to amend, such as "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Wade v. Knoxville Utilities Bd., 259 F.3d 452, 458 (6th Cir. 2001)*. Delay in filing, by itself, is not a sufficient reason to deny a motion for leave to amend. *Id.*

Here, delay, prejudice, and futility all dictate that the court should deny the plaintiff's motion for leave to amend. As to delay and prejudice, the *Wade* case is squarely on point. There, the plaintiff, without excuse, "waited a year and a half" before filing his **[*25]** motion for leave to amend. *Id.* Here, the plaintiff also waited about a year and one-half, without any reasonable excuse for doing so. [9] In *Wade,* the Sixth Circuit noted that, "when amendment is sought at a late stage in the litigation, there is an increased burden to show justification for failing to move earlier." *Id.* Here, the plaintiff utterly fails to meet that burden.

Recognizing that delay, by itself, is an insufficient basis for denying a motion for leave to amend, the *Wade* court, in circumstances very similar to this case, determined that prejudice to the defendants, combined with the delay, also indicated that the court should deny the motion for leave to amend. In *Wade,* motions for summary judgment on all of the claims in the initial complaint had already been filed at the time the motion for leave to amend was filed, as is the case here. *Id.* Given the delay and the status of the case, the *Wade* court concluded that it would be unduly prejudicial to the defendants **[*26]** to ask them to now prepare defenses to a whole new set of claims. *Id. at 459*. The same burden is imposed here; the defendants have now been defending this litigation in two forums for several years, and it would be unduly prejudicial, at this late stage, to ask the defendants to commit more time and

---

[8] As noted above, in his R&R objections, the plaintiff asked to be provided with notice and an opportunity to cure from this court if there are any "magic words" that he failed to use in his briefing that might make a difference in the outcome of the litigation, and the plaintiff asked that his R&R objection serve as a notice of appeal to the Sixth Circuit if this court rejected his arguments therein. (Docket Nos. 112 and 125.) The request for "notice of magic words" is unsupported by any law of which this court is aware. Also, importantly, the plaintiff's R&R objections do not serve as a notice of appeal to the Sixth Circuit. The plaintiff must make a formal appeal based on the relevant rules of procedure.

[9] The court does not view the plaintiff's receiving some kind of advice from a lawyer in Illinois who has not entered an appearance of record in this case on behalf of the plaintiff as a reasonable excuse for the delay.

resources to defending this case, particularly in light of the plaintiff's delay in filing his motion for leave to amend and his limited justification for that delay.

Further, it would be futile for the court to grant this motion for leave to amend. Plainly, for the reasons discussed above in the R&R section, the antitrust and RICO claims would not be viable. While it is not clear who is the target of the plaintiff's "Title VII/Civil Rights Act" claims, even assuming that these claims are broadly directed at all remaining defendants, these claims could have been brought in the state court litigation and are, therefore, barred under *res judicata* principles. *See* *Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990)*. Additionally, the plaintiff's fraud claim (directed at CHS, Newsome and the Hospital and their conduct in inducing the plaintiff to sign the Recruitment Agreement) is **[*27]** barred by *res judicata* principles and the Release that the plaintiff signed when he left the Hospital, which released the Hospital, its parent (i.e. CHS) and their employees (i.e. Newsome) from liability for any and all claims "in any way relating to or arising out of the Recruitment Agreement." (Docket No. 9 Ex. H.) As the R&R noted, "the terms of the Settlement Agreement are clear and unambiguous and bar [the plaintiff] from pursuing" such claims against the Hospital, CHS, and Newsome. (Docket No. 101 at 13 citing *Evans v. Tillett Bros. Const. Co., 545 S.W.2d 8, 11 (Tenn. Ct. App. 1976))*. [10]

Likewise, the plaintiff's defamation claim would not be successful. In one of his more tempered allegations, the plaintiff contends that Blue Cross' refusal to grant him Network privileges and the Hospital's refusal to **[*28]** employ him "caused a cloud to hang over Plaintiff's qualifications as a Physician," resulting in a loss of business. (Docket No. 145 Ex. 1.) This claim, despite its increased focus and clarity, would still fail. Not only would this claim be barred by *res judicata* principles, but, setting aside that and the requirements to state a *prima facie* case of defamation, as Blue Cross points out, the defamation claim would be time-barred, as it concerns events that occurred in 2003 and 2004, and the statute of limitations is six months for slander and one year for libel. (Docket No. 150 at 4 citing *T.C.A. § 28-3-103*; *T.C.A. § 28-3-104*.)

The plaintiff's conspiracy claim is similarly futile. The plaintiff does not explain the basis of his allegation of conspiracy to violate the *Seventh*, *Thirteenth*, and *Fourteenth Amendments*. As to the *Seventh Amendment*, which concerns the right to a civil trial by jury, the plaintiff does frequently mention his frustration with the fact that this case has not been heard by a jury, but the facts of this case fail to show any sort of conspiracy by these defendants to violate that right. As to the *Thirteenth* and *Fourteenth Amendment* violations, it is possible that **[*29]** the plaintiff is attempting to state a claim under *Section 1983*, but the plaintiff would have to show a constitutional violation by a person acting under color of state law, something which does not appear implicated by the facts of this case. *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*.

Finally, while the plaintiff has re-cast his legal malpractice claim, he has failed to address the fundamental issue raised in the R&R, which is that the plaintiff cannot show that any of Allen's legal mistakes caused him any harm. Therefore, it would likewise be futile to bring this claim. In sum, the plaintiff's motion for leave to amend will be denied because of delay, substantial prejudice, and futility.

CONCLUSION

For the reasons stated herein, the court agrees with the disposition of the motions as described in Judge Griffin's Report and Recommendation. Also, the plaintiff's motion for leave to amend will be denied, and the Hospital's Motion to Strike will be granted. The court considers all pending motions resolved, and all claims raised by the plaintiff in this action will be dismissed, with prejudice, as to Defendants White County Community Hospital, Community Health Systems, Inc., Gary Newsome, Chad **[*30]** Griffin, Daniel Barnett, Blue Cross/Blue Shield of Tennessee, and John Wayne Allen.

---

[10] The rest of the "fraud" claim is a lengthy discussion of what the plaintiff perceives as a "fraudulent liaison" between the defense attorneys in this case and the Tennessee judicial system to get his case transferred to favorable, hand-picked judges. (*Id.*) The court does not view this allegation as helpful to the plaintiff's fraud claim against the defendants in this case.

An appropriate order will enter.

/s/ Aleta A. Trauger

ALETA A. TRAUGER

United States District Judge

Flying J, Inc. v. Van Hollen

United States District Court for the Eastern District of Wisconsin

February 11, 2009, Decided; February 11, 2009, Filed

Case No. 08-C-110

Reporter

597 F. Supp. 2d 848 *; 2009 U.S. Dist. LEXIS 10306 **; 2009-1 Trade Cas. (CCH) P76,505

FLYING J, Inc., Plaintiff, -vs- J.B. VAN HOLLEN, Attorney General of Wisconsin, ROD NILSESTUEN, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection, Defendants.

Subsequent History: Motion granted by *Flying J, Inc. v. Van Hollen, 2009 U.S. Dist. LEXIS 132922 (E.D. Wis., Mar. 16, 2009)*

Motion denied by *Flying J, Inc. v. Van Hollen, 2009 U.S. Dist. LEXIS 30793 (E.D. Wis., Mar. 27, 2009)*

Reversed by, Remanded by *Flying J, Inc. v. Van Hollen, 621 F.3d 658, 2010 U.S. App. LEXIS 18439 (7th Cir. Wis., 2010)*

Prior History: *Lotus Bus. Group LLC v. Flying J Inc., 532 F. Supp. 2d 1011, 2007 U.S. Dist. LEXIS 96160 (E.D. Wis., 2007)*

Core Terms

Unfair, markup, prices, retailers, gasoline, Sherman Act, terminal, motor vehicle fuel, provisions, diesel, argues, summary judgment, antitrust, competitors, supervision, horizontal, preemption, fuel, rule of reason, retail price, motor fuel, enforcing, wholesale, parties, posted, collateral estoppel, restraint of trade, private party, built in, intervene

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

HN1[] **Antitrust & Trade Law**

Federal ***antitrust law*** exists for the protection of competition, not competitors.

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

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN2[] **Sherman Act, Scope**

The motor vehicle fuel provisions of the Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, are unconstitutional because they violate the Sherman Act's prohibition against restraints of trade. *15 U.S.C.S. § 1*.

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

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

HN3[] **Summary Judgment, Supporting Materials**

Under *Fed. R. Civ. P. 56(c)*, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

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

HN4[] **Burdens of Proof, Absence of Essential Element**

The plain language of *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN5[] **Estoppel, Collateral Estoppel**

Collateral estoppel, also known as "issue preclusion," refers to the effect of a judgment in foreclosing litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN6[] **Estoppel, Collateral Estoppel**

Collateral estoppel is a judge-made doctrine that serves the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Although there is no strict test for privity, the focus is whether the non-party was adequately represented in the original action. A conclusion that the interests of nonparties are sufficiently aligned with earlier litigants would be impossible unless, among other things, the earlier litigants would have been adequate representatives of the later litigant(s).

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Governments > State & Territorial Governments > Claims By & Against

HN7[] **Estoppel, Collateral Estoppel**

As a general matter, an alignment of interests does not compel a conclusion in favor of privity and adequate representation. This is particularly true when collateral estoppel is asserted against a governmental entity. A state, representing the interests of the people of the state, should not be prevented from litigating an issue on behalf of the people merely because the issue has been previously litigated by private parties in an action to which the state was not a party.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Parties > Intervention > General Overview

Governments > Legislation > General Overview

HN8[] **Estoppel, Collateral Estoppel**

There is no authority for the proposition that a governmental entity provided notice of a constitutional challenge to one of its statutes in the context of private litigation must intervene or suffer the consequences. Such a construction is plainly wrong. While a state attorney general may have a general duty to defend state statutes against constitutional attack, this does not mandate intervention and justify the application of preclusion principles. For better or worse, intervention is a strategic decision left to the better judgment of the attorney general.

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN9[] **Supremacy Clause, Supreme Law of the Land**

U.S. Const. art. VI provides that the laws of the United States shall be the supreme law of the land, any thing in the Constitution or laws of any state to the contrary notwithstanding. *U.S. Const. art. VI, cl. 2*.

Constitutional Law > Supremacy Clause > Federal Preemption

HN10[] **Supremacy Clause, Federal Preemption**

The doctrine of preemption is derived from the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, which operates to prevent the enforcement of state laws that conflict with federal laws or regulations.

Constitutional Law > Supremacy Clause > Federal Preemption

HN11[] **Supremacy Clause, Federal Preemption**

A federal law may preempt a state law expressly, impliedly through the doctrine of conflict preemption, or through the doctrine of field (also known as complete) preemption. Put simply, when federal and state laws conflict, the doctrine of preemption is applied, and it resolves the conflict in favor of the federal statute.

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

HN12[] Sherman Act, Scope

See 15 U.S.C.S. § 1.

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

HN13[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Courts normally apply a "rule of reason" analysis when analyzing a particular restraint of trade. Under the rule of reason, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect.

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

HN14[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Per se antitrust liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

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

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

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

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

HN15[] Per Se Rule & Rule of Reason, Per Se Violations

The Wisconsin Unfair Sales Act, Wis. Stat. § 100.30, authorizes and enforces resale price maintenance among competitors, a per se violation of 15 U.S.C.S. § 1 of the Sherman Act since the early years of national antitrust enforcement.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN16[] Scope, Exemptions

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of 15 U.S.C.S. § 1 of the Sherman Act. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under *§ 1*. The Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, is a "hybrid" restraint. When a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids.

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

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

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

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To the extent that the provisions of the Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, create vertical price restraints, they also facilitate the creation of horizontal price fixing. A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful.

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

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

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

HN18[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, is inconsistent with *15 U.S.C.S. § 1* of the Sherman Act under both the rule of reason and the per se rule.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN19[] **Scope, Exemptions**

The Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. Therefore, even if a state statute conflicts with the Sherman Act, it may be saved from preemption under Parker and the doctrine of "antitrust immunity." The United States Supreme Court espouses a two-part test for antitrust immunity. First, the challenged restraint must be clearly articulated and affirmatively expressed as state policy. Second, the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN20[] **Exemptions & Immunities, Parker State Action Doctrine**

For purposes of state antitrust immunity, a statute's effectiveness in accomplishing its purpose is immaterial to whether the statute is clear in stating its purpose.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN21[] **Exemptions & Immunities, Parker State Action Doctrine**

To determine whether a pricing restraint is "actively supervised" for purposes of state antitrust immunity, courts examine whether the state establishes prices or reviews the reasonableness of the price schedules; whether it regulates the terms of fair trade contracts; and whether it monitors market conditions or engages in any pointed reexamination of the program.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN22[] **Exemptions & Immunities, Parker State Action Doctrine**

A state may not simply authorize price setting and enforce the prices established by private parties.

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN23[] **Cartels & Horizontal Restraints, Price Fixing**

For purposes of state antitrust immunity, enforcement matters little when the act being enforced creates a horizontal pricing mechanism. The national policy in favor of competition cannot be thwarted by casting a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN24[] **Exemptions & Immunities, Parker State Action Doctrine**

Mere debate or discussion without the undertaking of any action does not satisfy the active supervision requirement for state antitrust immunity. The mere presence of some state involvement or monitoring does not suffice.

Constitutional Law > Supremacy Clause > Federal Preemption

HN25[] **Supremacy Clause, Federal Preemption**

The legislative enactments of a state must comply with federal law. Failure to comply simply results in preemption under the *Supremacy Clause, U.S. Const. art. VI, cl. 2*.

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN26[] **Antitrust Issues, Pricing Conduct**

Under the Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, the State of Wisconsin has displaced competition among gasoline retailers without substituting an adequate system of regulation. This the state cannot do, no matter the rationale.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN27[] **Exemptions & Immunities, Parker State Action Doctrine**

The Wisconsin Unfair Sales Act, *Wis. Stat. § 100.30*, creates an illegal restraint of trade in violation of *15 U.S.C.S. § 1* of the Sherman Act as it pertains to the sale of motor vehicle fuel in the State of Wisconsin. Moreover, the Unfair Sales Act does not qualify for antitrust immunity under Parker. Therefore, the Unfair Sales Act is unconstitutional with respect to its motor vehicle fuel provisions.

Civil Procedure > Remedies > Injunctions > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN28[] **Remedies, Injunctions**

A court may enjoin state officers who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution. The prospect of suit to enforce an unconstitutional law supplies the necessary irreparable injury.

Counsel: [1]** For Flying J Inc, Plaintiff: John W. Mackay, Jonathan A Dibble, LEAD ATTORNEYS, Ray Quinney & Nebeker PC, Salt Lake City, UT; Jon E Fredrickson, LEAD ATTORNEY, Kravit Hovel & Krawczyk SC, Milwaukee, WI.

For J B Van Hollen, Attorney General of Wisconsin, Rod Nilsestuen, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection, Defendants: Christopher J Blythe, Gwendolyn J Cooley, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

Judges: HON. RUDOLPH T. RANDA, Chief Judge.

Opinion by: RUDOLPH T. RANDA

Opinion

[*851] DECISION AND ORDER

At issue in this case are the motor vehicle fuel provisions of the Wisconsin Unfair Sales Act (the "Unfair Sales Act"), *Wis. Stat. § 100.30*. The express purpose of this depression-era legislation is to restrain the "practice of selling certain items of merchandise below cost" and to protect "merchants who fail because of the competition of those who use such methods…" *§ 100.30(1)*. At the same time, ***HN1***[] federal ***antitrust law*** exists for "the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L.*

Ed. 2d 701 (1977). The Court finds **[**2]** that ***HN2***[] the Act's motor vehicle fuel provisions are unconstitutional because they violate the Sherman Act's prohibition against restraints of trade. *See* *15 U.S.C. § 1*.

BACKGROUND

Flying J, Inc. ("Flying J") is a Utah corporation that operates travel plazas in Black River Falls and Oak Creek, Wisconsin. The defendants, J.B. Van Hollen and Rod Nilsestuen, are charged with enforcement of the Unfair Sales Act.

I. The Unfair Sales Act

The Unfair Sales Act was enacted in 1939, when the average retail price of gasoline was 18.8 cents per gallon. *See* *Wis. Stat. § 100.30*. The Unfair Sales Act currently mandates a minimum mark-up of 9.18% above the "average terminal price," a proxy for wholesale costs. The purported purpose of the 9.18% markup is to "cover a proportionate part of the cost of doing business." *§ 100.30(2)(am)(1m)(c)*. In the 69 years following its enactment, the minimum markup formula (originally 6%) was amended only once. In 1997, the Wisconsin legislature amended the markup formula to require a 6% markup above **[*852]** certain actual costs *or* a 9.18% markup above the "average terminal price," whichever is greater. *§ 100.30(2)(am)(1m)(c)*. This amendment took effect in Wisconsin on August 1, 1998.

In August **[**3]** 1998, the average retail price of regular gasoline in the United States was $ 1.03, and the average retail price of diesel was $ 1.01. Applying Wisconsin's 9.18% minimum markup to 1998 prices, and assuming that the retailer purchases at "average terminal price" under the Act, a gallon of motor fuel that retails at between $ 1.01 and $ 1.03 per gallon has a built in markup price between $ .08 and $ .09 per gallon.

Since the 1997 bill, the Wisconsin legislature has not adjusted the markup formula despite intervening changes in technology, economic conditions, and rising prices in the oil and gas industries. In May 2007, gasoline and diesel prices were as follows:

> . In the Midwest region of the United States, the retail price of regular gasoline per gallon reached **$ 3.32** per gallon, and the price of diesel fuel reached **$ 2.78** per gallon.
>
> . Prices for fuel in Wisconsin (charged by competitors of Flying J) reached **$ 3.49** per gallon for regular gasoline and **$ 2.99** per gallon for diesel fuel.
>
> . Applying Wisconsin's 9.18% minimum markup and assuming that the retailer purchases at "average terminal price" under the statute, a gallon of gasoline that retails at **$ 3.43** per gallon has a built in markup **[**4]** price of approximately **$ .29** per gallon. Likewise, a gallon of diesel that retails at **$ 2.99,** has a built in markup price of approximately **$ .25** cents per gallon. *(See* D. 36, Decl. of Richard Peterson, P 6).

In May/June 2008, gasoline and diesel prices were as follows:

> . In the Midwest region of the United States, the retail price of regular gasoline per gallon reached **$ 3.98** per gallon, and the average price of diesel fuel reached **$ 4.61** per gallon.
>
> . In May 2008, prices for fuel in Wisconsin (charged by competitors of Flying J) reached **$ 4.199** per gallon for regular gasoline and **$ 4.859** per gallon for diesel fuel.
>
> . Applying Wisconsin's 9.18% minimum markup and assuming that the retailer purchases at "average terminal price" under the statute, a gallon of gasoline that retails at **$ 3.98** per gallon has a built in markup price of approximately **$ .33** per gallon. Likewise, a gallon of diesel that retails at **$ 4.61,** has a built in markup price of approximately **$ .39** cents per gallon. *(See* D. 36, Decl. of Richard Peterson, P 7).

While gasoline and diesel prices increased between 300% and 360% from 1998 through 2008, during the same ten years inflation has been approximately 33%. Flying J, because **[**5]** of its efficiencies, can sell motor fuel with substantially less markup than the imposed 9.18% markup over the "average terminal price" and still make a reasonable profit.

II. Prior Action

On March 12, 2007, Flying J filed its amended answer and affirmative defenses in a previous case, *Lotus Business Group LLC v. Flying J Inc.,* Case No. 07-C-144. Therein, Flying J challenged the constitutionality of the Unfair Sales Act as it applies to motor vehicle fuel. The parties consented to jurisdiction before Magistrate Judge William Callahan.

In a letter to Attorney General J.B. Van Hollen, Flying J informed the State of Wisconsin of its constitutional challenge to the Statute. Flying J attached copies of the Complaint and Amended Answer. **[*853]** Flying J filed a motion for summary judgment, contending that the Statute was unconstitutional under the Sherman Act and the *Supremacy Clause*. Flying J provided a copy of this motion to Attorney General Van Hollen. In a letter directly to Judge Callahan, the Wisconsin Attorney General's Office acknowledged receiving Flying J's letters and its notice of the proceedings, and informed Judge Callahan of the State's decision not to appear or participate. The letter **[**6]** further informed Judge Callahan that the "Attorney General may seek to appear if the issue of the constitutionality of a statute or ordinance is raised on appeal."

On October 12, 2007, after full summary judgment briefing by the parties and the submission of a record of undisputed evidence, Judge Callahan granted Flying J's motion for summary judgment. Judge Callahan held that the motor vehicle fuel provisions of the Statute were unconstitutional under the *Supremacy Clause of the United States Constitution*. *See Lotus Business Group LLC v. Flying J, Inc., 532 F. Supp. 2d 1011 (E.D. Wis. 2007)*. Judge Callahan then denied a motion to alter or amend judgment. *Id.* The State of Wisconsin chose not to intervene in the Prior Action at any time, including for purposes of reconsideration, and neither Lotus Business Group nor the Wisconsin Attorney General's Office appealed the Court's final judgment.

Despite the Court's ruling in the Prior Action, the State of Wisconsin continues to require Flying J to issue motor fuel reports to the State under the Unfair Sales Act. Thus, on October 12, 2007, the State of Wisconsin sent an enforcement letter to Flying J under the statute concerning Flying J's **[**7]** alleged fuel prices. On October 30, 2007, Flying J responded by informing the State of Wisconsin of Judge Callahan's decision and order finding the Act unconstitutional. Despite Judge Callahan's ruling, the State of Wisconsin continues to require Flying J and other motor fuel retailers to issue pricing reports to the Department of Agriculture under the Statute, with the implicit threat of enforcement actions, civil penalties or other remedies to follow.

Flying J brought the instant action to enjoin the State of Wisconsin from enforcing the Unfair Sales Act. Both parties filed motions for summary judgment.

ANALYSIS

HN3[] Under *Rule 56(c)*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN4***[] The "plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that **[**8]** party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

I. Collateral Estoppel

Flying J argues that the State of Wisconsin should be collaterally estopped from litigating the constitutionality of the Unfair Sales Act. ***HN5***[] Collateral estoppel, also known as "issue preclusion," refers to the "effect of a judgment in foreclosing litigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action." *LaSalle Nat'l Bank v. County of DuPage, 856 F.2d 925, 930 n.2 (7th Cir. 1988)*.

[*854] ***HN6***[] Collateral estoppel is a judge-made doctrine that serves the "dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*. Although there is no strict test for privity, the focus is whether the non-party was adequately represented in the original action. *See* *United States ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 664 (D.S.D. 1996)* (citing *Meza v. General Battery Corp., 908 F.2d 1262, 1266 (5th Cir. 1990))*; **[**9]** *Tice v. American Airlines, Inc., 162 F.3d 966, 972 (7th Cir. 1998)* ("a conclusion that the interests of the nonparties were sufficiently aligned with the earlier litigants would be impossible unless, among other things, the earlier litigants would have been adequate representatives of the later litigant(s)").

Flying J argues that Lotus Group was an adequate representative for the State of Wisconsin in the Prior Action. ***HN7***[] As a general matter, an alignment of interests does not compel a conclusion in favor of privity and adequate representation. This is particularly true when, as here, estoppel is asserted against a governmental entity. *See* *Kerr-McGee Chemical Corp. v. Hartigan, 816 F.2d 1177, 1180-81 (7th Cir. 1987)* (the State of Illinois, "representing the interests of the people of the state, [should not] be prevented from litigating an issue on behalf of the people merely because the issue has been previously litigated by private parties in an action to which the state was not a party").

Flying J presumes adequate representation because Lotus Group argued in support of the Unfair Sales Act's constitutionality, and the Attorney General is now pursuing many (if not all) of the same arguments. **[**10]** A private party necessarily has different motives for the pursuit and allocation of resources to litigation than does a governmental entity. That many of the same arguments are being parroted by the Attorney General is not surprising. The Attorney General still brings his own perspective and expertise into the equation. He should not be precluded from having his day in court only because the same issue arose in the context of a private dispute. *See* *Kerr-McGee, 816 F.2d at 1180 n. 4* ("to assume that private individuals can properly be viewed as representative of a particular government" is a "daring analytical leap").

To continue the point, in the Prior Action, Lotus Group sought relief under the Statute's parallel enforcement scheme. *See* *Wis. Stat. § 100.30(5m)* (allowing a private cause of action for "temporary or permanent injunctive relief or an action against the person for *3 times the amount of any monetary loss sustained or an amount equal to $ 2,000,* whichever is greater, multiplied by each day of continued violation, together with costs, including accounting fees and reasonable attorney fees") (emphasis added). Therefore, Lotus Group's interest at least potentially related to **[**11]** the recovery of its own economic losses that were caused by Flying J's unfair sales practices. In this action, Flying J is attempting to enjoin the State of Wisconsin from enforcing the penalty provisions of the Unfair Sales Act. [1] The distinction **[*855]** between the State seeking enforcement and a private party (Lotus Group) attempting to recover damages is obvious. The State's interest in enforcing the Act relates to the regulation of unfair competition in the sale of motor vehicle fuel. A private suit may encourage compliance with the Act's provisions, but this does not mean that Lotus Group was an adequate representative for the State of Wisconsin as it relates to enforcement of the Unfair Sales Act. *See* *Kerr-McGee at 1181* (comparing the private interests of those living near a waste facility with the interests of the State of Illinois, which is "interested not only in improving the welfare of those who live around the facility but also with ensuring that the interests of the people of the State of Illinois as a whole are not adversely affected").

---

[1] The State may "commence an action on behalf of the state to recover a forfeiture of not less than $ 50 nor more than $ 500 for the first violation **[**12]** and not less than $ 200 nor more than $ 2,500 for each subsequent violation." *§ 100.30(4)*. The State may also issue a "special order" requiring a retailer (such as Flying J) to cease and desist sales in violation of the Unfair Sales Act, under penalty of forfeiture "not less than $ 200 nor more than $ 5,000 for each violation." *§ 100.30(5)(a)*.

Finally, Flying J argues that the Attorney General should be collaterally estopped because he was given notice and an opportunity to intervene in the Prior Action. *See* *Fed. R. Civ. P. 5.1(a)(2)*; *28 U.S.C. § 2403(b)* (requiring certification to the Attorney General of a State and an opportunity to intervene when the constitutionality of a state statute is drawn in question); *Wis. Stat. § 806.04(11)*. To the contrary, ***HN8***[] there is no authority for the proposition that a governmental entity provided notice of a constitutional challenge to one of its statutes in the context of private litigation must "intervene or suffer the consequences. Such a construction is plainly wrong." *Estate of Kunkel v. United States, 689 F.2d 408, 420 (3d Cir. 1982)* (Becker, J., concurring) (citing legislative history). While the Attorney General may have a general duty to defend **[**13]** Wisconsin statutes against constitutional attack, this does not mandate intervention and justify the application of preclusion principles. For better or worse, intervention is a strategic decision left to the better judgment of the Attorney General.

II. Preemption

HN9[] Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const. art. VI, cl. 2*. ***HN10***[] The doctrine of preemption is derived from the *Supremacy Clause*, which "operates to prevent the enforcement of state laws that conflict with federal laws or regulations." *Fifth Third Bank ex rel. Trust Officer v. CSX Corp., 415 F.3d 741, 745 (7th Cir. 2005)*. ***HN11***[] "A federal law may preempt a state law expressly, impliedly through the doctrine of conflict preemption, or through the doctrine of field (also known as complete) preemption." *Boomer v. AT & T Corp., 309 F.3d 404, 417 (7th Cir. 2002)*. Put simply, when federal and state laws conflict, the doctrine of preemption is applied, and it resolves the conflict in favor of the federal statute. *See* *United States v. Palumbo Bros., Inc., 145 F.3d 850, 862 n.6 (7th Cir. 1998)*.

A. [14] The Sherman Act**

Section 1 of the Sherman Act provides that ***HN12***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN13***[] Courts normally apply a "rule of reason" analysis when analyzing a particular restraint. Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the **[*856]** relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect." *County Materials Corp. v. Allan Block Corp., 502 F.3d 730, 735 (7th Cir. 2007)*. ***HN14***[] *Per se* liability "is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

Flying J challenges the Unfair Sales Act's motor fuel provisions as a *per se* restraint of trade in violation of the Sherman Act. The Court agrees that ***HN15***[] the Act authorizes and enforces resale price **[**15]** maintenance among competitors,"a *per se* violation of *§ 1* of the Sherman Act since the early years of national antitrust enforcement." *324 Liquor Corp. v. Duffy, 479 U.S. 335, 341, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)*.

To illustrate, the Act allows motor fuel retailers to match (but not undercut) their competitors' prices. *See* *Wis. Stat. § 100.30(6)(a)7*; *Wis. Admin. Code § ATCP 105.009(4)*. It forbids retailers from selling motor vehicle fuel below cost, which is based on the average posted terminal price plus a minimum markup of 9.18%. *See* *Wis. Stat. §§ 100.30(2)(am)(1m)(c)*; *100.30(2)(a)*; *100.30(3)*. In addition, the State's evidence confirms that retailers must hold their posted prices for at least 24 hours. (D. 28, Grunewald Affidavit, P 6). The minimum markup percentage creates a range in which competitors may engage in collusive parallel pricing, which is exacerbated as the wholesale price of gasoline fluctuates. Therefore, the Act is a *per se* restraint of trade because it authorizes and enforces a parallel (or horizontal) pricing policy. "Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers **[**16]** from allowing or requiring retail price competition." *324 Liquor Corp., 479 U.S. at 342*.

The State argues that the Unfair Sales Act does not violate the Sherman Act because there is no "concerted action." Rather, the State attempts to characterize the restraint of trade as nothing more than a "unilateral act" of its legislature. The State relies on *Fisher v. City of Berkeley, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1985)*, which involved a rent control ordinance. The Court held that there was no concerted action and no Sherman Act violation because "control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board." *Fisher, 475 U.S. at 267*. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Id.*

However, the Court in *Fisher* clarified that ***HN16***[] "[n]ot all restraints imposed upon private actors by government **[**17]** units necessarily constitute unilateral action outside the purview of *§ 1* [of the Sherman Act]. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted 'a degree of private regulatory power,' the regulatory scheme may be attacked under *§ 1*." *Id. at 267-68* (internal citations omitted). For many of the reasons already stated, the Unfair Sales Act is a "hybrid" restraint. When a **[*857]** state "compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id. at 268* (quoting *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951)*); *see also* *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 103, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (State of California's system for wine pricing "plainly constitutes resale price maintenance in violation of the Sherman Act" because "the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers").

Finally, the State argues that the restraint should be judged according to a "rule of reason" analysis. *See* *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. **[**18]** *Leegin* overruled longstanding precedent and held that vertical price restraints (typically between a manufacturer and a retailer) should be judged according to a "rule of reason" and are no longer *per se* unreasonable. *Leegin, 127 S. Ct. at 2725*. Presumably, the State means to say that the restraint imposed by the Unfair Sales Act is a vertical restraint. However, the restraint here is also horizontal because it effects competing gasoline retailers in Wisconsin. *See Lotus Business Group, 532 F. Supp. 2d at 1028* (***HN17***[] "to the extent that the provisions of the Wisconsin statute create vertical price restraints, they also facilitate the creation of horizontal price fixing"). *Leegin* reaffirmed that a "horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." *Leegin at 2717*.

Admittedly, the Supreme Court's pronouncements in *Midcal* and *324 Liquor* are somewhat confusing regarding the distinction between horizontal and vertical restraints. *See* *324 Liquor at 342* ("Although the horizontal restraint in *Midcal* may have provided an additional reason for invalidating the statute, **[**19]** our decision in *Midcal* rested on the 'vertical control' of wine producers, who held 'the power to prevent price competition by dictating the prices charged by wholesalers'"). To the extent the distinction is relevant, the Court agrees with Judge Callahan when he states that ***HN18***[] the Unfair Sales Act "is inconsistent with *§ 1* of the Sherman Act under both the rule of reason and the *per se* rule." *Lotus Business Group at 1028*.

As in *Lotus Business Group,* Flying J submitted a Federal Trade Commission study and a report from the Wisconsin Policy Research Institute, both of which conclude that the Unfair Sales Act restricts competition and harms consumers in the form of higher gas prices. (D. 35-4, Exhibit C; D. 35-5, Exhibit D). According to the FTC,

> the Act aims to protect individual competitors, not competition, thereby discouraging pro-competitive price-cutting. Moreover, the Act defines 'cost' in a way that lacks a firm economic foundation and likely leads to significantly higher prices. Finally, we believe that the Act is unnecessary, both because scholarly studies and court decisions indicate that anticompetitive below-cost pricing happens infrequently, and because the federal antitrust **[**20]** laws already prohibit below-cost pricing.

(D. 35-4 at 2). Similarly, the Wisconsin Policy Research Institute analyzed data which suggested that "the law has indeed kept gasoline prices higher than would otherwise be the case." The Institute concluded that the Act "benefits retail gas station owners at the expense of consumers **[*858]** and should be repealed." (D. 35-5 at 7). The State fails to contradict or undermine this evidence. In other words, the State confusingly argues in favor of a rule of reason but then fails to argue why the Act is a reasonable restraint.

B. Antitrust immunity

In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court held that ***HN19***[] the Sherman Act does not apply to "the anticompetitive conduct of a State acting through its legislature." *Town of Hallie v. Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. Therefore, even though the Unfair Sales Act conflicts with the Sherman Act, it may be saved from preemption under *Parker* and the doctrine of "antitrust immunity." The Supreme Court espouses a two-part test for antitrust immunity. First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy." *Midcal, 445 U.S. at 105*. Second, the policy must be **[**21]** "actively supervised" by the State itself. *See 324 Liquor at 343*.

The parties are in essential agreement that the first part of the test is met. In this respect, the Court agrees with Judge Callahan that the purpose of the Unfair Sales Act -- to regulate the sale of merchandise below cost in order to prevent deceptive advertising and unfair methods of competition -- is clearly stated by the Act itself. *See Lotus Business Group at 1019* (noting that ***HN20***[] the statute's "effectiveness in accomplishing its purpose is immaterial to whether the statute is clear in stating its purpose"). However, the second part of the test -- active supervision -- is not satisfied.

As an initial matter, the State argues that the Unfair Sales Act meets the active supervision requirement because it does not delegate any degree of control over the markup percentage to private parties. The State seizes on a footnote in *324 Liquor Corp.* where the Court observed that a "simple 'minimum markup' statute requiring retailers to charge 112 percent of their *actual wholesale cost* may satisfy the 'active supervision' requirement, and so be exempt from the antitrust laws under *Parker." 324 Liquor Corp. at 345 n.6* (emphasis added). **[**22]** While it is true that the Unfair Sales Act's markup percentage is fixed, the markup is not based on actual costs. Instead, it is based on the "average posted terminal price" without regard to actual costs. *See Wis. Stat. §§ 100.30(2)(am)(1m)(c)*; *100.30(2)(a)*. As the Court explained, the statute at issue in *324 Liquor Corp.* was not a "simple minimum markup statute because it impose[d] a markup on the 'posted bottle price,' a price that may greatly exceed what the retailer actually paid for the liquor." *Id.* The same is true here as in *324 Liquor Corp.* The "average posted terminal price" may be significantly higher than the actual cost to a particular retailer.

Therefore, some type of state supervision is required, both with regard to the markup percentage and the "average posted terminal price." ***HN21***[] To determine whether a pricing restraint is "actively supervised," courts examine whether the State "establishes prices" or "reviews the reasonableness of the price schedules;" whether it "regulate[s] the terms of fair trade contracts;" and whether it "monitor[s] market conditions or engage[s] in any 'pointed reexamination' of the program." *Midcal at 105*. The Unfair Sales Act's markup percentage was **[**23]** changed by the Wisconsin legislature only one time, from 6% to 9.8% in 1997. [2] More **[*859]** glaring, there is no program or effort to "determine whether the 'average posted terminal price' bears a close (or any) relationship to the actual price paid by retailers." *Lotus Business Group at 1023*. ***HN22***[] A State may not "simply authorize price setting and enforce the prices established by private parties." *Midcal at 105*.

The State argues that it undertakes enforcement efforts to ensure compliance with the Unfair Sales Act. These efforts do nothing to ensure the reasonableness of gas prices in Wisconsin. In other words, ***HN23***[] enforcement

---

[2] As the FTC observed, the Act employs "one of the steepest minimum markups on retail fuels in the country. . . . [T]he Act's use of the 9.18% measure -- as well as the 3% and 6% measures -- appears completely arbitrary. . . In fact, the minimum markup percentages do not, as the Act suggests they should, accurately reflect a 'proportionate part of the cost of doing business.'" D. 35-4 at 5.

matters little when the Act being enforced creates a horizontal pricing mechanism. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement **[**24]** over what is essentially a private price-fixing arrangement." *Midcal at 105*.

The State argues that it engages in analysis at the administrative and legislative level. ***HN24***[] "Mere debate or discussion without the undertaking of any action" does not satisfy the active supervision requirement. *Lotus Business Group at 1024*; *see also 324 Liquor at 345 n.7* ("Neither the 'monitoring' by the SLA, nor the periodic reexaminations by the state legislature, exerts any significant control over retail liquor prices or markups"); *Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)* ("The mere presence of some state involvement or monitoring does not suffice"). The Court also rejects the State's arguments that these are policy arguments best left to the state legislature. To the contrary, ***HN25***[] the legislative enactments of the State of Wisconsin must comply with federal law. Failure to comply simply results in preemption under the *Supremacy Clause*. Stated another way, ***HN26***[] the State of Wisconsin "has displaced competition among [gasoline] retailers without substituting an adequate system of regulation." *324 Liquor at 345*. This the State cannot do, no matter the rationale.

IV. Declaration -- Permanent Injunction

For the foregoing **[**25]** reasons, ***HN27***[] the Unfair Sales Act creates an illegal restraint of trade in violation of *§ 1* of the Sherman Act as it pertains to the sale of motor vehicle fuel in the State of Wisconsin. Moreover, the Act does not qualify for antitrust immunity under *Parker.* Therefore, the Unfair Sales Act is unconstitutional with respect to its motor vehicle fuel provisions.

Under *Ex Parte Young, 209 U.S. 123, 156, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, ***HN28***[] the Court may enjoin state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." Flying J filed this lawsuit as a "first strike" to prevent the defendants' attempts to enforce the Unfair Sales Act. The "prospect of suit" to enforce an unconstitutional law supplies the necessary irreparable injury. *See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 382, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)*.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Flying J's motion for summary judgment [D. 15, 37] is **GRANTED;**

2. The defendants' motion for summary judgment [D. 27] is **DENIED;**

[*860] 3. The motor vehicle fuel provisions of the Unfair Sales Act are unconstitutional; and

4. **[**26]** The defendants are enjoined from enforcing the motor vehicle fuel provisions of the Unfair Sales Act.

Dated at Milwaukee, Wisconsin, this 11th day of February, 2009.

SO ORDERED,

/s/ Rudolph T. Randa

HON. RUDOLPH T. RANDA

Chief Judge

End of Document

Sabry Lee, Inc. v. Genera Corp.

United States District Court for the Central District of California

February 12, 2009, Decided; February 12, 2009, Filed

CV 08-5758-GW(PJWx); CV 08-7018-GW(PJWx); CV 08-7204-GW(PJWx); CV 08-7613-GW(PJWx); CV 08-7634-GW(PJWx); CV 08-8470-GW(PJWx); SACV 08-1158-GW(PJWx); CV 09-982-GW(PJWx)

Reporter
2009 U.S. Dist. LEXIS 144549 *

Sabry Lee, Inc. v. Genera Corporation, et al.;Amy Heathfield v. Genera Corporation, et al.;Flash Sales, Inc. v. Genera Corporation, et al.;Pete Sahagian, et al. v. Genera Corporation, et al.;DJ's Autobody, Inc. v. Genera Corporation, et al.;Prevatte Auto Supply, Inc. v. Genera Corporation, et al.;Dynacorn Autobody Parts v. Genera Corporation, et al.;California Customs, Inc. v. Genera Corporation, et al.

Core Terms

pricing, allegations, recoupment, predatory, products, competitors, costs, Sherman Act, intentional interference, antitrust, appropriate measure, motion to dismiss, manufacturer, lighting, variable, economic relations, predation

Counsel: **[*1]** Attorneys Present for Plaintiffs: Max Blecher/Courtney A. Palko - Sabry Lee, Inc. Jay L. Himes/Mark L. Labaton - Flash Sales, Inc. Donald F. Woods, Jr. - Sahagian Michael P. Lehmann/Henry A. Cirillo - DJ's Autobody, Inc. Justin B. Farar - Prevatte Jason S. Hartley/Bonny E. Sweeney - Dynacorn Autobody Tomas Shpall (via tel.) - California Customs, Inc.

Attorneys Present for Defendants: Counsel for dfts Depo and Maxzone: Deborah K. Croyle/David Brownstein Counsel for dfts E-Lite Automotive: Kate P. Wallace/Eric P. Enson Counsel for dfts Genera Corporation: Thomas J. Lang/Andrea S. Ordin.

Judges: GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. WU

Opinion

CIVIL MINUTES - GENERAL

PROCEEDINGS: CV 08-5758-GW(PJWx) - DOMESTIC DEFENDANTS' MOTION TO DISMISS (filed 11/21/08)

DEFENDANT DEPO AUTO PARTS INDUSTRIAL CO., LTD.'S JOINDER TO DOMESTIC DEFENDANT'S MOTION TO DISMISS (filed 01/28/09)

SACV08-1158-GW(PJAVx) - PLAINTIFF'S MOTION FOR APPOINTMENT OF INTERIM LEAD COUNSEL AND FOR ENTRY OF SCHEDULING ORDER (filed 12/18/08)

Hearing is held. The tentative circulated is hereby adopted as the Court's final ruling (attached). In the matter of, CV 08-5758-GW(PJWx), the Domestic Defendants' Motion to Dismiss and Defendant **[*2]** Depo Auto Parts Industrial Co., Ltd.'s Joinder to Domestic Defendant's Motion to Dismiss, are **granted with leave to amend**. Plaintiff will file an amended complaint by no later than February 23, 2009.

In the matter of SACV 08-1158-GW(PJWx), the Plaintiff's Motion for Appointment of Interim Lead Counsel and for Entry of Scheduling Order is **continued** to **February 19, 2009 at 8:30 a.m.**

A Scheduling Conference is set for **February 19, 2009 at 8:30 a.m.**

IT IS SO ORDERED.

I. BACKGROUND

Plaintiff Sabry Lee, Inc. ("Sabry Lee" or "Plaintiff") is suing Defendants Genera Corporation ("Genera"), Maxzone Vehicle Lighting Corp. ("Maxzone"), E-Lite Automotive, Inc. ("E-Lite"), TYC Brother Industrial Co., Ltd. ("TYC"), Depo Auto Parts Industrial Co., Ltd. ("Depo") and Eagle Eyes Traffic Industrial Co., Ltd ("Eagle Eyes") (collectively, "Defendants") based on an alleged "predatory pricing" scheme in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. This action is the first-filed of many actions (and the only one that is not a putative class action) bringing the same or similar claims, all of which have now been related and transferred to this Court. The factual allegations are as follows.

Defendants are charged with engaging **[*3]** in a conspiracy to fix prices below cost to eliminate Plaintiff as a competitor in the importation, distribution and sale of aftermarket automotive lighting products as retribution for Plaintiff's unwillingness to "abide" an agreement to fix high and arbitrary prices. (Complaint ¶¶ 1, 21(a)). Defendants, in order to subsidize the below cost prices, also allegedly entered into and engaged in an agreement to raise prices above competitive levels on products on which Plaintiff was not a competitor. Id. at ¶¶ 1, 21(b). The relevant product market, for antitrust purposes, is allegedly the market for aftermarket automotive lighting products. Id. at ¶ 13. The relevant geographic market is the United States as a whole. Id. at ¶ 14.

Defendants Genera, Maxzone, and E-Lite are direct competitors of Sabry Lee. Id. at ¶ 2. Sabry Lee is a former customer of the manufacturer defendant, Eagle Eyes. Eagle Eyes allegedly owns or partly owns E-Lite. Id. at ¶¶ 2,15. (Analogous relationships are alleged to exist between manufacturers TYC and Depo and importer-distributers Genera and Maxzone, respectively). Id. at ¶ 2. Because Sabry Lee "failed to abide Eagle Eyes pricing directives," it was forced to seek **[*4]** out a new manufacturer in China, i.e. Vision Auto Parts Industrial Co., Ltd. ("Vision Auto"). Id. Vision Auto has a much more limited product line than the defendant manufacturers, rendering plaintiff "vulnerable to the tactics employed by [D]efendants to eliminate it as a price-cutting competitor." Id.

Sabry Lee alleges that, beginning as early as 2004, the representatives of the manufacturer defendants met in Taiwan to fix the prices at which each manufacturer would sell to its distributors. Id. at ¶ 22. The United States distributors, in turn, held their own price-fixing meetings, usually at the offices of Defendant Genera or at an industry trade show in Las Vegas. Id. Sabry Lee allegedly participated in these meetings until 2005, when Eagle Eyes started selling through its own distributor. Id.

By eliminating other "actual and potential" importer-distributors, Defendants now allegedly control approximately 90% of the relevant market. Id. at ¶¶ 16, 17. Plaintiff has alleged various anticompetitive effects of Defendants' actions, see id. at ¶ 23(a)-(e), and substantial economic injury to itself in an unspecified sum, id. at ¶¶ 24, 25.

The Complaint alleges six counts consisting of (1) **[*5]** violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) violation of California's Cartwright Act, *Cal. Bus. & Prof Code § 16720, et seq.*; (3) Intentional Interference with Actual and Prospective Economic Advantage; (4) violation of *Cal. Bus. & Prof. Code § 17043*; (5) violation of *Cal. Bus. & Prof. Code § 17047*; and (6) violation of *Cal. Bus. & Prof. Code § 17048*.

II. LEGAL STANDARD

Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (U.S. 2007)*. Dismissal is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp.Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*.

In deciding a *12(b)(6)* motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all factual allegations as true. *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the complaint. *Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998)*. In its consideration of the motion, the Court is limited to the allegations on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents **[*6]** are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." See *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*; *Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir.)*, cert. denied, *512 U.S. 1219, 114 S. Ct. 2704, 129 L. Ed. 2d 832 (1994)*.

III. ANALYSIS

A. Sherman Act

Count One of Plaintiff's Complaint alleges a scheme to restrain trade by engaging in predatory pricing in violation of *Section 1* of the Sherman Act. The "two prerequisites" for recovery on such a theory under *Section 2* of the Sherman Act have been clearly articulated by the Supreme Court. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S. 1993)*. Second, a plaintiff must demonstrate that the competitor had a "dangerous probability" of recouping its investment in below-cost prices. *Id. at 224*. The principal point in dispute regarding Count One of the Complaint is whether these requirements also apply to claims alleging a conspiracy to set maximum prices under *Section 1*. They do, but this does not render Plaintiff's Sherman Act claim fatally defective.

1. Pricing Below Cost

In contending that it need not plead pricing below cost, Plaintiff solely relies on dicta found in footnote *8 of the Supreme Court*'s decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, a case alleging, as **[*7]** here, a horizontal conspiracy to engage in predatory pricing. See Plaintiff's Opposition to Domestic Defendant's Motion to Dismiss ("Opp.") at 5-6. The Court in Matsushita wrote that it did not have to resolve the question of what constitutes the relevant measure of costs because, "[f]or purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (U.S. 1986)*. Thus, Plaintiff argues, it need only allege pricing below a market level. In Brooke Group, however, the Supreme Court referred expressly to Matsushita. Noting that Matsushita had reserved the question whether recovery should ever be available for below market pricing, the Court wrote that its "reasoning . . . suggests that only below-cost prices should suffice." *Brooke Group, 509 U.S. at 223*. Moreover, the Court noted that it had "rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to the competition cognizable under the antitrust laws." Id. (citing **[*8]** *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. It is unlikely that footnote 8 in *Matsushita* survives the holding in *Brooke Group*.

Similarly, while the Ninth Circuit, in *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014 (9th Cir. 1981)*, appeared to leave open the possibility that pricing below some appropriate measure of cost was not a necessary element of a predatory pricing claim, more recently (without between *§1* and *§2* claims) it has written: of incremental cost," it has never gone so far as to hold that in every predatory pricing case a plaintiff must prove pricing below cost. *Id. at 901*. Nevertheless, it wrote, "the Court's opinions strongly suggest that, in the normal case, above-cost pricing will not be considered exclusionary conduct for antitrust purposes." Id.

> In a number of cases decided before Brooke Group, we held that pricing below marginal cost or average variable cost provided evidence that a pricing scheme was predatory, but also held that that mode of proof was not exclusive. See *Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1385 (9th Cir. 1983)*; *Inglis, 668 F.2d at 1033*. We suggested that an above-cost pricing policy could be predatory if accompanied by evidence of predatory intent, market power, or "long-run behavior." See *Transamerica, 698 F.2d at 1387*. Other circuits rejected the notion that predation could be proved through evidence of intent alone, see, e.g., *Barry Wright, 724 F.2d at 232*, and Brooke Group's holding that "a plaintiff **[*9]** seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs" put to rest any notion that predation can be proven through evidence of intent alone, *Brooke Group, 509 U.S. at 222*.

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 910 n.20 (9th Cir. 2008). Thus, the rule in this Circuit would appear to be that, generally, below cost pricing is a requirement for any predatory pricing claim.[1] The Ninth Circuit mildly cautioned, however, that while "the Supreme Court has forcefully suggested that we should not condemn prices that are above some measure

Finally, although no Ninth Circuit case has explicitly applied the Brooke Group standard to *§ 1* predatory pricing claims, at least one other circuit has adopted that criteria as the relevant standard for *§ 1* claims. See *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof' 1 Pubs., Inc., 63 F. 3d 1540, 1548-9 (10th Cir. 1995)*. Plaintiff has offered no compelling reason to deviate from this rule, which "as commentators have pointed out . . . is not based on a theory that above-cost pricing strategies can never be anticompetitive, but rather on a cost-benefit rejection of a more nuanced rule. [Citations]." *Cascade Health Solutions, 515 F.3d at 904*.

Notwithstanding the strong likelihood that Plaintiff will be required to prove pricing below cost, the Court rejects Defendants' contention **[*10]** that Count One should be dismissed for failing to plead average variable cost. See Memorandum in Support of Domestic Defendant's Motion to Dismiss ("Motion") § III A(2). Defendants are likely correct that average variable cost is the only appropriate measure of cost in a predatory pricing case.[2] Cascade Health Solutions holds "that the appropriate measure of costs for our cost-based standard is average variable cost," *515 F.3d at 910*, although it is not completely clear from that case that, outside of the context of product bundling, some other measure might not apply. Even if average variable cost were the only applicable standard, however,

---

[1] An exception may still exist for below-tariff pricing. See *Cost Mgmt. Servs. v. Washington Natural Gas Co., 99 F.3d 937, 954 (9th Cir. 1996)* ("[I]n [a] particular, narrow set of circumstances, 'below-tariff pricing may serve as a surrogate for below-cost pricing . . .' [Citation].") (discussing cases).

[2] The dominance of the "average variable cost" standard in predatory pricing cases reflects the influence of the classic law review article by Professors Areeda and Turner. See ***Cascade Health Solutions, 515 F.3d at 909***; see generally Phillip Areeda & Donald F. Turner, Predatory Pricing and Related Practices Under *Section 2* of the Sherman Act, 88 Harv. L. Rev. 697, 712 (1975). Areeda and Turner wrote that marginal cost is the optimal measure of a firm's costs. Areeda & Turner, supra, at 716. "Marginal cost is the increment to total cost that results from producing an additional increment of output." Id.at 700. This cost, however, is often difficult to determine. "Thus, the professors adopted average variable cost as a surrogate for marginal cost." ***Cascade Health Solutions, 515 F.3d at 909***. Average variable cost is defined as follows:

> Variable costs, as the name implies, are costs that vary with changes in output. They typically include such items as materials, fuel, labor directly used to produce the product, indirect labor such as foremen, clerks, and custodial help, utilities, repair and maintenance, and per unit royalties and license fees. The average variable **[*11]** cost is the sum of all variable costs divided by output.

Areeda & Turner, supra, at 700.

Plaintiff's more general allegation of selling below cost is probably sufficient at the pleading stage. See Complaint ¶¶ 21(a), 21(b), 24, 28, 38, 29, 42.

2. Recoupment

The second element of a claim for predatory pricing is proof that there is a "dangerous probability" of the competitor's recouping its investment in below-cost prices. *Brooke Group, 509 U.S. at 224*. Plaintiff's argument that it is not required to allege recoupment flows from its misapprehension regarding the applicability of the rule regarding pricing below cost. Plaintiff argues that, because "selling below market prices does not require a loss," if Matsushita's footnote 8 were still applicable, then "recoupment" would not be a necessary element of a *§ 1* predation claim.

Defendants contest this logic, arguing that recoupment is an important element of any predatory pricing scheme because it is only by the subsequent price increases above competitive levels (and, even then, only if the price increases are "greater overall than the challenged price decreases") that consumers are harmed. See Reply 5:20-28. In any event, footnote 8 is inapplicable, and recoupment is repuired.

Plaintiff also asserts that, even "[a]ssuming recoupment was required," it has been adequately alleged. Opp. at 6:20. It has not been. As noted in Brooke Group, "[r]ecoupment is **[*12]** the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation." *509 U.S. at 224*. At ¶ 21(b) of its Complaint, Plaintiff alleges that "defendants are able to recoup their below cost prices on those lighting products on which they compete with plaintiff, by offsetting price increases on lighting products with which they do not compete with plaintiff" This is not an allegation of recoupment, but, rather, an explanation of the means by which Defendants are able to subsidize their predatory pricing scheme. To properly plead recoupment, Plaintiffs must allege facts showing that there is a dangerous probability that defendants will be able to recoup their losses by raising prices on the same products that they are currently pricing below costs once their competitors have been driven from the market.

Defendants aptly note that even if Plaintiff's premise were correct - i.e., that it could plead recoupment by alleging that plaintiffs charged higher prices within "the very same relevant product market and . . . geographic market," see Opp. at 7:23-24 - the Complaint would still be insufficient. The boundaries of the "product" market are determined by **[*13]** eliminating from the market all products that are not reasonably interchangeable substitutes for the product in question. See *United States v. E.I. Dupont De Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. By alleging that Defendants simultaneously charged lower than competitive prices for products sold by Plaintiff and higher than competitive prices for other aftermarket automotive lighting products, Plaintiff is foreclosed from arguing that consumers view the products as interchangeable.

Plaintiff concedes that it has no standing to allege an injury from its allegations of minimum price fixing. See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("A competitor may not complain of conspiracies . . . that set minimum prices at any level.) (citation and internal quotes omitted). Thus, because the Court agrees that Plaintiff is required to allege recoupment in order to state Sherman Act *§ 1* claim for predatory pricing, Defendants' Motion to Dismiss is GRANTED WITH LEAVE TO AMEND with respect to Count One.

B. Cartwright Act

Defendants contend that Sabry Lee cannot state a claim for violation of the Cartwright Act for the same reasons that it cannot state a claim under *§ 1* of the Sherman Act. (Motion § III C).

The analysis under California's Cartwright Act mirrors the analysis under federal law because the act was modeled **[*14]** after the Sherman Act. *County of Tuolumne v. Sonora Community Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 851-52, 107 Cal. Rptr. 2d 841, 24 P.3d 493 (2001)*; *Cal. Bus. & Prof Code § 16700, et seq.*; see also *Cryptography Research, Inc. v. Visa Int'l Serv. Ass'n, 2008 U.S. Dist. LEXIS 106974 (N.D. Cal. Aug. 12, 2008)*.

Accordingly, the Court, consistently with the above analysis of Plaintiff's Sherman Act claim, finds that the Complaint fails to state a claim for violation of the Cartwright Act because it does not adequately allege recoupment.

C. Intentional Interference with Economic Relations

Count Three of Plaintiff's Complaint is for "intentional interference with actual and prospective economic advantage." The tort of intentional interference with economic relations has the following elements:

> (1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and wrongful conduct designed to interfere with or disrupt this relationship; (4) interference with or disruption of this relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's wrongful conduct.

Sole Energy Co. v. Petrominerals Corp., 128 Cal. App. 4th 212, 241, 26 Cal. Rptr. 3d 798 (2005). The interference must be wrongful, i.e., "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*. Here, Sabry Lee alleges that Defendants interfered with its economic relations **[*15]** by pricing below cost, fixing minimum prices, and "making false and misleading statements to Sabry Lee's actual and prospective customers, suppliers, and vendors." We need not decide whether Plaintiffs lack of standing to assert the price fixing allegations should bar it from using them as a basis for its claim of intentional interference. As Defendants correctly observe, the alleged minimum price-fixing agreement involved products that did not compete with Sabry Lee's products, and could not have affected its economic relations.

The allegations of "false and leading statements" are not pled with sufficient specificity to support a claim of intentional interference. See *Fed. R. Civ. P. 9(b)* (requiring specific pleading for allegations grounded in fraud).

What is left is the allegations of pricing below cost, which are insufficient for the reasons previously stated. When Plaintiff perfects its Sherman and Cartwright Act allegations, it will also have stated a claim for wrongful conduct which will support the intentional interference claim, but only on those bases.

In its Reply, Defendants also complain that the intentional interference claims are deficient because the Plaintiff fails to identify any specific **[*16]** contractual relations that were the subject of Defendants' alleged interference. Unless Plaintiff intends to expressly plead a claim for intentional interference with contract, the allegations that Defendants interfered with Defendants' relations with prospective customers are probably sufficient for notice pleading.

D. California's Unfair Practices Act ("UPA")

1. Pleading Requirements for UPA Claims

Plaintiff concedes that the Fourth, Fifth, and Sixth Counts of its Complaint are all interrelated. With these claims, Plaintiff asserts that Defendants violated the UPA, *Cal. Bus. & Prof Code §§ 17000-17101*, by selling certain products at price less than their costs. As Defendant observes, Sabry Lee seeks treble damages dating back to 2004 for these alleged violations.[3]

Count 4 of the Complaint asserts a direct claim under *§ 17043* for pricing below cost. Counts 5 and 6 are claims for violations of, respectively, *§§ 17047* and *17048*, both of which are predicated upon establishing a violation of *§ 17043*. "[T]o satisfy the pleading requirements of *section 17043*, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business. And the various costs must be stated in other than conclusionary terms." *G.H.I.I., 147 Cal. App. 3d at 275 (1983)*. It is perhaps debatable **[*17]** whether Sabry Lee is in a position to be able to give a rough estimate, based on information and belief, of Defendants' costs. If it is, then it is required to

---

[3] Although not germane to the instant motion to dismiss, it is noted that these claims are governed by a one-year statute of limitations. See *G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 277, 195 Cal. Rptr. 211 (1983)* ("[T]he settled rule in California is that statutes which provide for recovery of damages additional to actual losses incurred, such as double or treble damages, are considered penal in nature and thus governed by the one-year period of limitations stated in section 340, subdivision (1).") (citations omitted).

amend its Complaint to satisfy the pleading requirements of *section 17043*, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business. See *Independent Journal Newspapers v. United Western Newspapers, Inc. 15 Cal.App.3d 583, 587, 93 Cal. Rptr. 299 (1971)*. Otherwise, it would be futile "to require a speculative allegation of cost which adds nothing to the notice given by the pleadings in their present state," and the present pleading permitted to stand with respect to Counts 4, 5, and 6. See *G.H.I.I., 147 Cal. App. 3d at 276*.

2. Preemption

Defendants' final argument relating to Plaintiff's claims under the UPA is that the UPA is preempted by federal ***antitrust law*** because it provides for liability for pricing below fully allocated costs as opposed to just marginal costs.[4] Although Plaintiff's brief does not adequately address the preemption argument, the Court concludes that the UPA is not preempted by federal ***antitrust law***. In Exxon Corp. v. Governor of Maryland, the Supreme Court considered whether a Maryland law preventing producers of petroleum products from operating service stations in the state, and requiring them to extend voluntary **[*18]** allowances to the service stations they supplied, conflicted with federal law. Observing that the law clearly had an anticompetitive effect, the Court wrote:

> In this sense, there is a conflict between the statute and the central policy of the Sherman Act -- our "charter of economic liberty." [Citation]. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133-134, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978).

Distinguishing this case, United States District Judge, Judge William W. Schwarzer, wrote in Murphy Tugboat Co. (the principal case upon which defendants rely):

> The question remains, however, whether it would be permissible for plaintiff to recover damages on a theory which, for reasons discussed above, is barred by the pro-competitive policy underlying the Sherman Act. Under *Section 17082*, a plaintiff is entitled to recover treble damages for violation of the state statute. For a state to permit recovery of three times the amount of revenue lost by plaintiff by reason of its competitor's failure **[*19]** to raise its prices above full costs would inflict so large a penalty that it would operate as a potent force compelling price increases.

Murphy Tugboat Co., 454 F. Supp. at 857. The Ninth Circuit, however, has explicitly rejected the type of preemption analysis undertaken by Judge Schwarzer. Writing that "the possibility of proscription by California of conduct that federal law might permit is not sufficient to warrant preemption," the Ninth Circuit held:

> [A]ny conflict between state and federal law, on the facts of this case, is entirely speculative. The California statute does not make all sales below average total cost illegal per se. Instead, such sales must have been made "for the purpose of injuring competitors or destroying competition." [Citations]. The statute enables a plaintiff to create a presumption of unlawful purpose by introducing evidence of sales below cost plus proof of injury to competitors or competition. *Cal. Bus. & Prof. Code § 17071*. However, this presumption may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, see *Cal. Bus. & Prof Code § 17050*, or by showing that the sales "were made in good faith and not for the purpose of injuring competitors or destroying competition." [Citation].

William Inglis & Sons Baking Co., 668 F.2d at 1049. Defendant argues that **[*20]** Inglis's reasoning is no longer apt after Brooke Group, because that case established "that there is a specific, considered federal policy to allow price cutting unless prices go below variable, not total cost and there is a likelihood of recoupment" Motion 16 n.10. In the

---

[4] The California statute expressly defines cost as the full cost of doing business, including overhead, depreciation and interest cost. *Cal. Bus. & Prof Code §§ 17026*, *17029*, *17073*; *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 857 (N.D. Cal. 1978)*.

more than fifteen years since Brooke Group was decided, however, no case has held the UPA to be preempted by federal ***antitrust law***.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted as to each Count of Plaintiff's Complaint. As the Complaint's deficiencies are quite technical, there is no reason to believe - assuming that Plaintiff can, in good faith, allege a likelihood of recoupment-that the Complaint cannot be successfully amended to state a claim under each count. Leave to amend is granted.

In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.

United States District Court for the District of Connecticut

February 13, 2009, Decided; February 13, 2009, Filed

CIVIL ACTION NO. 3:03md1542 (SRU)

Reporter
256 F.R.D. 82 *; 2009 U.S. Dist. LEXIS 11089 **; 2009-1 Trade Cas. (CCH) P76,583

IN RE: ETHYLENE PROPYLENE DIENE MONOMER (EPDM) ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO ALL ACTIONS

Subsequent History: Summary judgment denied by, Motion to strike denied by *In re Ethylene Propylene Diene Monomer (EDPM) Antitrust Litig., 2009 U.S. Dist. LEXIS 120770 (D. Conn., Dec. 29, 2009)*

Prior History: *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 2009 U.S. Dist. LEXIS 5591 (D. Conn., 2009)*

Core Terms

prices, damages, plaintiffs', class certification, conspiracy, variable, class-wide, predominate, antitrust, regression, merits, collusive, price list, factors, class period, increases, suppliers, increased price, purchasers, oil, injury-in-fact, demonstrating, customers, calculation, defendants', underwriter, cartel, products, plant, common question

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Class Actions, Certification of Classes**

A district court should no longer grant class certification when the plaintiffs had merely made some showing of the *Fed. R. Civ. P. 23* prerequisites, nor should an expert's report be accepted to establish a *Rule 23* requirement on the basis that it was not fatally flawed. Before certifying a class, the district court must undertake a rigorous analysis to determine whether each of the *Rule 23* requirements has been met. Significantly, the judge must resolve any factual dispute material to a *Rule 23* requirement. That obligation is not lessened if the necessary factual finding overlaps with a merits issue--rather, the court should resolve the dispute as it would any other threshold issue.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN2[] **Class Actions, Certification of Classes**

The determination as to a Fed. R. Civ. P. 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge. However, considering facts for purposes of determining whether the plaintiff had established all the Rule 23 requirements is not a license to delve into all merits issues, and the district court should not assess any aspect of the merits unrelated to a Rule 23 requirement. Finally, the district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to assure that a class certification hearing does not become a pretext for a partial trial of the merits. Keeping these precautions in mind, however, the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN3[] **Special Proceedings, Class Actions**

Any findings on the merits at the class certification stage would not be binding for the ultimate fact-finder--a trial judge's finding on a merits issue for purposes of a Fed. R. Civ. P. 23 requirement no more binds the court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] **Class Actions, Prerequisites for Class Action**

Fed. R. Civ. P. 23(b)(3) requires a plaintiff first to prove the four threshold requirements under Rule 23(a)--numerosity, common questions of law or fact, typicality of the lead plaintiff's claims or defenses, and adequacy of representation--and two additional requirements under Rule 23(b)(3) that: questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action would be superior to other methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(a), (b)(3). Rule 23(b)(3) also considers the following factors relevant when determining whether common issues predominate and whether class certification is a superior method of adjudication: the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. These requirements ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN5[] **Sherman Act, Claims**

Section 1 of the Sherman Act provides that every conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. 15 U.S.C.S. § 1. The Clayton Act permits private litigants to seek treble damages for violations of the antitrust laws. 15 U.S.C.S. § 15. A successful antitrust claim requires the plaintiff to prove: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. The injury and causation element has also been referred to as antitrust injury and causation or impact.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN6[] **Antitrust & Trade Law**

To prevail in a motion for class certification, the plaintiffs must demonstrate that common questions of law or fact predominate over individual ones on the issues relevant to the three elements of an antitrust claim. The predominance requirement is met if the plaintiff can establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole predominate over those issues that are subject only to individualized proof.

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

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

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

HN7[] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontal price-fixing agreements are per se violations of the Sherman Act. In general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered the antitrust injury.

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

HN8[] **Sherman Act, Scope**

A plaintiff must make a two-part showing to establish the antitrust injury element. One prong is the familiar factual question whether the plaintiff has indeed suffered harm, or injury-in-fact. The other is the legal question whether any such injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

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

HN9[] **Sherman Act, Scope**

To demonstrate the legal question prong of the antitrust injury element, the plaintiff must prove that the defendants engaged in an anti-competitive manipulation of the markets.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN10[] Sherman Act, Scope

The factual question prong of the antitrust injury element requires the plaintiffs to show that harm actually resulted from the antitrust violation--the injury-in-fact, or impact. To meet the predominance requirement of *Fed. R. Civ. P. 23* for class certification, the plaintiffs must show that injury-in-fact, or impact, can be proven by evidence common to the class.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

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

HN11[] Remedies, Damages

Impact (or injury-in-fact) and damages are two distinct elements of an antitrust claim--injury-in-fact is whether the plaintiffs were harmed and damages quantify by how much. At times these terms have been conflated, which can lead to confusion about what a plaintiff's burden precisely is at the motion for class certification stage. Generally speaking, antitrust injury-in-fact and damages are often determined by comparing the but-for price--the price a customer would have paid in the absence of a conspiracy--and the actual price paid. The extent of the difference between the but-for price and the actual price paid is relevant to the question of damages, but it is from a comparison between the two that a court would be asked to decide question of injury-in-fact. In such a scenario, the plaintiff has shown impact and damages in a single calculation: if he paid a higher actual price than the but-for price, he has shown impact; by calculating the extent of that difference he has shown damages. Hence, one way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the but-for level for all plaintiffs.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

Where other methods of common proof exist to show class-wide impact such as lock-step increases of national price lists in an oligopolistic market, comparing but-for prices with actual transaction prices is not the only way for plaintiffs to succeed in a motion for class certification. Whenever actual prices are higher than but-for prices, a plaintiff suffers damages and must necessarily have been impacted, or injured-in-fact, too. Using a damages calculation is often the only way to show impact in antitrust scenarios where the industry is not served by a small number of distributors, where sales occur between diverse and independent merchants and customers, or where there is no direct evidence of class-wide conspiratorial effect. In such scenarios, proving damages may be the only way to show impact.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

HN13[] **Remedies, Damages**

Proving damages proves injury because damages necessarily indicate that the plaintiff has been impacted or injured by the antitrust violation; the converse, however, is not necessarily true. That is, it is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive. By expending resources to negotiate down from the supracompetive prices established by the cartel, plaintiffs who have suffered no damages may still have suffered an injury-in-fact from the antitrust conspiracy. The fact that a plaintiff may have successfully employed bargaining power to fend off the effect of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that the price range was affected generally. The proof necessary to demonstrate that the defendants conspired to maintain an inflated base from which all pricing negotiations began and that this base price was higher than the base price which would have been established by competitive conditions would be common to all members of the class. Proof of a conspiracy to establish a base price would establish at least the fact of damage, even if the extent of the actual damages suffered by the plaintiffs would vary. The proof with respect to the base price from which these negotiations began, or the structure of the conspiracy to affect individual negotiations, would be common to the class. Accordingly. the fact of damage is predominantly, if not entirely, a common question.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN15[] **Class Actions, Certification of Classes**

Courts are not to grant motions for class certification if plaintiffs have merely made some showing of the *Fed. R. Civ. P. 23* requirements or because their expert's report is not fatally flawed. The important point is that the requirements of *Rule 23* must be met, not just supported by some evidence. Actual, not presumed, conformance with *Rule 23(a)* remains indispensable. When assessing the predominance requirement of *Rule 23(b)(3)*, however, the court need only determine whether the element of injury-in-fact can be proven by evidence common to the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN16[] **Class Actions, Certification of Classes**

The task of a district court at the class certification stage is to determine whether the defendants have successfully debunked the plaintiffs' claim that a class-wide approach can be used to prove impact and damages. The defendants should be focused on disputing the use of the methodology itself, not the results of the methodology. The failure to include certain variables in a multiple regression analysis will affect the analysis probativeness, not its admissibility. In other words, if the defendants' experts are merely disputing the results of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue. If plaintiffs can present a feasible multiple regression analysis that purports to establish impact and damages using data and information common to the class, they will have met the requirement of demonstrating that damages can be proved by evidence common to the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Class Actions, Prerequisites for Class Action**

A district court is required to parse the plaintiffs' legal theory on the merits where it overlaps with the threshold inquiry of *Fed. R. Civ. P. 23(b)(3)* predominance.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Class Actions, Prerequisites for Class Action**

Common questions predominate where even if each class member were to bring suit individually, each plaintiff would have to allege and prove virtually identical facts.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Class Actions, Certification of Classes**

The fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification. Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damages issues.

Counsel: **[**1]** For Reeves Brothers Inc, Plaintiff: Brian P. Daniels, David R. Schaefer, LEAD ATTORNEYS, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Jason S. Hartley, LEAD ATTORNEY, Ross Dixon & Bell, San Diego, CA; Joseph M. Barton, Steven O. Sidener, LEAD ATTORNEYS, Gold Bennet Cera & Sidener, San Francisco, CA; Merril Hirsh, Ross, LEAD ATTORNEY, Dixon & Bell, LLP, Washington, DC.

For Diamond Holding Corp, Plaintiff: David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, Robert N. Kaplan, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Jeffrey S. Nobel, LEAD ATTORNEY, Izard Nobel PC-Htfd, Hartford, CT; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC.

For Richard Immerman, Plaintiff: Daniel Richard Karon, LEAD ATTORNEY, Goldman Scarlato & Karon PC, Cleveland, OH; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Lisa J. Rodriguez, LEAD ATTORNEY, Trujillo Rodriguez & Richards, Haddonfield, NJ; Robert S. Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff LLC-PA, Philadelphia, PA.

For Rubber Eng & Dev Co, **[**2]** Freudenberg-Nok, Plaintiffs: Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Joseph M. Barton, Steven O. Sidener, LEAD ATTORNEYS, Charles A. Dirksen, Gold Bennet Cera & Sidener, San Francisco, CA.

For Alco Indust Inc, Plaintiff: Anthony J. Bolognese, Joshua H. Grabar, LEAD ATTORNEYS, PRO HAC VICE, Michael E. Gehring, LEAD ATTORNEY, Bolognese & Associates, Philadelphia, PA; David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, Robert N. Kaplan, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC; Laurence D. King, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, San Francisco, CA.

For Robbins LLC, Plaintiff: Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri Inc., San Francisco, CA.

For Polymerics Inc, Plaintiff: David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Douglas A. Millen, Steven A. Kanner, William H. London, LEAD ATTORNEYS, Freed, Kanner, London & Millen, LLC, Bannockburn, IL; Gregory K. Arenson, LEAD ATTORNEY, **[**3]** Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Joel C. Meredith, LEAD ATTORNEY, Greenfogle & Skirnick, Philadelphia, PA; Joseph M. Patane, LEAD ATTORNEY, Law Office of Joseph M. Patane, San Francisco, CA; Julio Ramos, LEAD ATTORNEY, The Furth Firm, San Francisco, CA; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC; Mario N. Alioto, LEAD ATTORNEY, Trump Alioto Trump & Prescott LLP, San Francisco, CA; Michael P. Lehmann, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Steven J. Greenfogel, LEAD ATTORNEY, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA; William R. Edwards, LEAD ATTORNEY, The Edwards Law Firm LLP, Corpus Christi, TX.

For Industrial Rubber Products, Inc, Plaintiff: Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Joseph J. Tabacco, Jr., LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pu, San Francisco, CA; Mary Jane Fait, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman Herz-IL, Chicago, IL; Susan G. Kupfer, LEAD ATTORNEY, Glancy & Binkow, San Francisco, CA.

For Schlegel Corp, Plaintiff: Charles A. Dirksen, Joseph M. Barton, Steven O. Sidener, LEAD ATTORNEYS, Gold Bennet Cera & Sidener, San Francisco, **[**4]** CA; David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC.

For Duraplas Corp, Plaintiff: David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Joseph M. Barton, Steven O. Sidener, LEAD ATTORNEYS, Gold Bennet Cera & Sidener, San Francisco, CA; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLP, Washington, DC.

For Synaflex Rubber Prod, Plaintiff: Bernard Persky, LEAD ATTORNEY, PRO HAC VICE, Craig L. Briskin, Hollis L. Saltzman, LEAD ATTORNEYS, Labaton Sucharow LLP-NY, New York, NY; David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Howard J. Sedran, LEAD ATTORNEY, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC.

For Precision **[**5]** Assoc Inc, Plaintiff: David R. Schaefer, LEAD ATTORNEY, Brenner, Saltzman & Wallman, New Haven, CT; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; James A. Harrod, LEAD ATTORNEY, Wolf Popper, New York, NY; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC; Richard A. Lockridge, W. Joseph Bruckner, Yvonne M. Flaherty, LEAD ATTORNEYS, Lockridge Grindall Nauen PLLP, Minneapolis, MN; Robert M. Kornreich, LEAD ATTORNEY, Wolf Popper, New York, NY.

For RBX Indus Inc, Plaintiff: Dianne M. Nast, Michael Nast, LEAD ATTORNEYS, Roda Nast PC, Lancaster, PA; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY.

For Carlisle Co Inc, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Daniel S. Mason, Joseph William Bell, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Steven J. Ford, LEAD ATTORNEY, Carlisle Companies Incorporated, Syracuse, NY; Kristin A. Suga, Zelle, Hofmann, Voelbel, Mason & Gette-MA, Waltham, MA.

For Carlisle Corp, Carlisle Syntec Inc, Carlisle Power Transmission Prod Inc, Plaintiffs: Gregory K. Arenson, **[**6]** LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Steven J. Ford, LEAD ATTORNEY, Carlisle Companies Incorporated, Syracuse, NY; Kristin A. Suga, Zelle, Hofmann, Voelbel, Mason & Gette-MA, Waltham, MA.

For Carlisle Engineered Products Inc, Plaintiff: Gregory K. Arenson, LEAD ATTORNEY, Kaplan Fox & Kilsheimer, LLP-NY, New York, NY; Kathleen Konopka, LEAD ATTORNEY, Cohen Milstein Sellers & Toll-DC, Washington, DC; Steven J. Ford, LEAD ATTORNEY, Carlisle Companies Incorporated, Syracuse, NY; Kristin A. Suga, Zelle, Hofmann, Voelbel, Mason & Gette-MA, Waltham, MA.

For Crompton Corp, Defendant: Benjamin G. Bradshaw, LEAD ATTORNEY, O'Melveny & Myers - DC, Washington, DC; Bradford S. Babbitt, Craig A. Raabe, LEAD ATTORNEYS, Robinson & Cole, Hartford, CT; Michael F. Tubach, LEAD ATTORNEY, O'Melveny & Myers LLP - SF, CA, San Francisco, CA; Thomas J. McGarrigle, LEAD ATTORNEY, Reed Smith LLP - PA, Philadelphia, PA.

For Uniroyal Chemical Co Inc, Defendant: Benjamin G. Bradshaw, LEAD ATTORNEY, O'Melveny & Myers - DC, Washington, DC; Bradford S. Babbitt, Craig A. Raabe, LEAD ATTORNEYS, Robinson & Cole, Hartford, CT; Thomas J. McGarrigle, LEAD ATTORNEY, Reed Smith LLP - PA, Philadelphia, **[**7]** PA.

For EI Dupont De Nemours & Co, Defendant: Elizabeth J. Stewart, LEAD ATTORNEY, Murtha Cullina LLP, New Haven, CT; Robert J. Dwyer, LEAD ATTORNEY, Boies Schiller & Flexner - NY, New York, NY; William J. Wenzel, LEAD ATTORNEY, Pullman & Comley, Bridgeport, CT.

For Dow Chemical Co, Defendant: G. Hamilton Loeb, LEAD ATTORNEY, Paul, Hastings, Janofsky & Walker - DC, Washington, DC; James R. Bliss, John S. McGeeney, LEAD ATTORNEYS, Paul, Hastings, Janofsky & Walker, Stamford, CT; Kevin C. McCann, LEAD ATTORNEY, Paul, Hastings, Janofsky & Walker - SF-CA, San Francisco, CA.

For Dupont Dow Elastomers LLC, Defendant: George D. Ruttinger, LEAD ATTORNEY, Crowell & Moring-DC, Washington, DC; James T. Shearin, LEAD ATTORNEY, Pullman & Comley, Bridgeport, CT; William J. Wenzel, LEAD ATTORNEY, Pullman & Comley, Bridgeport, CT.

For Exxon Mobil Chemical Co, Defendant: Diane C. Mokriski, Michael D. O'Connell, LEAD ATTORNEYS, O'Connell, Flaherty & Attmore, Hartford, CT; Steven A. Reiss, LEAD ATTORNEY, Weil, Gotshal & Manges, New York, NY.

For Bayer Corp, Defendant: James A. Read, LEAD ATTORNEY, Jones Day-DC, Washington, DC; Robert M. Langer, LEAD ATTORNEY, Wiggin & Dana, Hartford, CT.

For DSM Elastomers **[**8]** BV, Defendant: Andrew S. Marovitz, Britt M. Miller, LEAD ATTORNEYS, Mayer Brown LLP - IL, Chicago, IL; Richard J. Favretto, LEAD ATTORNEY, Mayer Brown LLP - DC, Washington, DC; Shelley R. Sadin, LEAD ATTORNEY, Zeldes, Needle & Cooper, Bridgeport, CT.

For DSM Copolymer Inc, Defendant: Andrew S. Marovitz, Britt M. Miller, LEAD ATTORNEYS, Mayer Brown LLP - IL, Chicago, IL; Gary A. Winters, LEAD ATTORNEY, Mayer Brown LLP - DC, Washington, DC; Richard J. Favretto, LEAD ATTORNEY, Mayer Brown LLP - DC, Washington, DC; Shelley R. Sadin, LEAD ATTORNEY, Zeldes, Needle & Cooper, Bridgeport, CT.

For Polimeri Europa Amer Inc, Defendant: Barry L. Cohen, LEAD ATTORNEY, Thorp Reed & Armstrong, LLP-PA, Philadelphia, PA; Jason S. Weathers, Michael P. Shea, LEAD ATTORNEYS, Day Pitney LLP-Htfd-CT, Hartford, CT; Leah Brannon, LEAD ATTORNEY, Cleary, Gottlieb, Steen & Hamilton-Penn. Ave.-DC, Washington, DC; Shelley R. Sadin, LEAD ATTORNEY, Zeldes, Needle & Cooper, Bridgeport, CT.

For DSM Elastomers Europe BV, Defendant: Andrew S. Marovitz, Britt M. Miller, LEAD ATTORNEYS, Mayer Brown LLP - IL, Chicago, IL; Gary A. Winters, LEAD ATTORNEY, Mayer Brown LLP - DC, Washington, DC; Shelley R. Sadin, LEAD ATTORNEY, **[**9]** Zeldes, Needle & Cooper, Bridgeport, CT.

For Stone Paradise, Inc, Movant: David W. Stanley, LEAD ATTORNEY, Cuneo Gilbert & LaDuca, LLP-DC, Washington, DC; Karen Leser Grenon, Patrick A. Klingman, LEAD ATTORNEYS, Sheperd Finkelman Miller & Shah, LLP-CT, Chester, CT.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

[*83] **RULING ON MOTION FOR CLASS CERTIFICATION**

This multidistrict litigation arises out of allegations that the defendants conspired to fix, raise, maintain, and stabilize the price of ethylene propylene diene monomer ("EPDM") synthetic rubber at artificially high, non-competitive levels in violation of federal ***antitrust law***. The named plaintiffs, a group of EPDM purchasers, seek to certify a class in this antitrust suit on behalf of all **[*84]** individuals and entities that purchased EPDM from January 1, 1997 to December 31, 2001. The plaintiffs are seeking injunctive relief and treble damages, plus costs, including reasonable attorneys' fees. All the defendants named in the Second Consolidated Amended Complaint have been dismissed or have entered into settlement agreements with the plaintiffs, except for defendants DSM Copolymer, Inc. and DSM Elastomers Europe B.V. (collectively, **[**10]** the "defendants").

The plaintiffs contend they have met their burden of meeting all the requirements of *Federal Rule of Civil Procedure 23*, which governs the procedure for class certification. The defendants dispute that the plaintiffs have met these requirements, specifically contending that the plaintiffs have failed to demonstrate how common questions of law or fact will predominate over individual ones on the issue of antitrust injury. Because I find that plaintiffs have met their burden under *Rule 23*, for the reasons explained more fully below, the motion for class certification is granted.

I. Factual Background

EPDM is a synthetic rubber used primarily in the automotive and roofing industries, but it is also found in glass-run channels, radiators, garden and appliance hoses, tubing, belts, electrical insulation, rubber mechanical goods, plastic impact modifications, thermoplastic vulcanizates, and motor oil additive applications. [1] EPDM is the third-largest type of synthetic rubber consumed worldwide and is popular for its resistence to heat, oxidation, ozone, and weather aging. It is one of the fastest growing synthetic rubber products, reaching sales of 870,000 metric tons in **[**11]** 2002 from 289,000 metric tons in 2000 (an increase of approximately 300%).

The automotive industry accounts for two-thirds of the overall demand for EPDM. Approximately 20% of the rubber used in a typical automobile is EPDM. It is also extremely prevalent in the roofing industry, where it is the most widely used roofing material, accounting for over one billion square feet of new roof coverings in the United States.

The plaintiffs have alleged that the defendants conspired to fix, maintain and/or stabilize EPDM prices in the United States in violation section 1 of the Sherman Act, *15 U.S.C § 1*, by engaging in collusive discussions, meetings, agreements, and understandings to raise prices to supracompetitive levels in tandem and to stabilize the supply of EPDM from competitors outside the cartel. The plaintiffs allege that the defendants met regularly to discuss EPDM

[1] The factual background about the EPDM industry is drawn primarily from the Second Amended Consolidated Complaint. These facts are not material for purposes of this motion and are included for informational purposes only.

prices -- at trade association meetings or at their offices -- and engaged in regular written communications **[**12]** with one another to maintain their collusive agreement. The plaintiffs contend that, pursuant to their collusive agreements, the defendants took turns leading EPDM price increases, conferring months in advance of an announced price increase about whose turn it was to raise prices.

Plaintiffs allege that defendants sought to cut off new sources of capacity by buying up new production in Asia and eventually setting up market allocation agreements between North American suppliers and those Asian suppliers. The plaintiffs allege the global conspiracy was most effective in the U.S. and Canadian markets where prices were approximately 10-15% higher than in the Western Europe market.

The plaintiffs allege that the defendants were so protective of their cartel that when a defendant's production capacity dropped due to plant or production problems, its competitors would provide that defendant with EPDM, so that it could continue to supply its customers, rather than taking the opportunity to compete for those customers directly. In return for receiving the additional supply of EPDM, the plaintiffs allege the struggling supplier would agree not to compete for the supplying party's customers. Thus, **[**13]** set market share and customer allocations were maintained despite individual supplier disruptions.

[*85] The alleged conspiracy was not disclosed to the public until December 2002, when defendant Crompton announced that it was being investigated by competition authorities in the United States, Canada, and Europe. The plaintiffs allege that, despite their exercise of due diligence, they would not have been able to discover the conspiracy prior to December 2002 due to the defendants' active and purposeful concealment of the cartel and its activities.

The plaintiffs wish to certify the following class:

> All individuals or entities (excluding governmental entities, Defendants and their parents, predecessors, subsidiaries, affiliates, and co-conspirators) who purchased ethylene propylene diene monomer ("EPDM") in the United States directly from one or more of the Defendants or any predecessor, subsidiary or affiliate of any Defendant at any time during the period from January 1, 1997 to December 31, 2001.

The plaintiffs allege the class is readily definable, and can be definitively proven through the sales and invoice records of the defendants.

In support of their motion for class certification, the **[**14]** plaintiffs have submitted evidence of six national lock-step price list increases within two broad categories of EPDM products: clear elastomers and oil extended elastomers. [2] Table 1 to the Report of Dr. Martin Asher ("Asher Report"). These price list increases indicate that the five primary EPDM suppliers increased the cost of their products by the same amount, at about the same time, at least six times during the class period. The plaintiffs allege those price hikes were not in line with input prices and were the result of communications between the defendants to sustain supracompetitive prices.

In addition, the plaintiffs have submitted an econometric multiple regression analysis that purports to calculate class-wide damages. The plaintiffs' experts explain that regression modeling reveals that the price of EPDM was affected by more than just the cost of its input and the level of demand for the products, meaning there was an active conspiracy at work to maintain EPDM prices **[**15]** at supracompetitive levels.

II. Standards for Class Certification

The Second Circuit recently clarified the standard of review for assessing motions for class certification in *In re Initial Public Offerings Securities Litigation ("In re IPO"), 471 F.3d 24, 41-42 (2d Cir. 2006)*. The Court disavowed the previous standard of review, holding that ***HN1***[] a district court should no longer grant class certification when the plaintiffs had merely made "some showing" of the *Rule 23* prerequisites, nor should an expert's report be accepted to establish a *Rule 23* requirement on the basis that it was "not fatally flawed." *Id. at 32, 40, 42* (quoting,

[2] Oil extended elastomer EPDM is created by adding petroleum-based extender oil during the manufacturing process, which alters the properties of the polymer and lowers the manufacturing cost. Asher Report at P 22.

respectively, *Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999)* and *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001))*.

Before certifying a class, the district court must undertake a "rigorous analysis" to determine whether each of the *Rule 23* requirements has been met. *Id. at 33, 41* (quoting *General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. Significantly, the judge must resolve any factual dispute material to a *Rule 23* requirement. *Id.* That obligation is not lessened if the necessary **[**16]** factual finding overlaps with a merits issue -- rather, the court should resolve the dispute as it would any other threshold issue. *Id. at 41-42*. ***HN2***[] "[T]he determination as to a *Rule 23* requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." *Id. at 41*. [3] The Court **[*86]** cautioned, however, that considering facts for purposes of determining whether the plaintiff had established all the *Rule 23* requirements is not a license to delve into *all* merits issues, and that the district court should not assess "any aspect of the merits unrelated to a *Rule 23* requirement." *Id.* Finally, the "district judge has ample discretion to circumscribe both the extent of discovery concerning *Rule 23* requirements and the extent of a hearing . . . to assure that a class certification hearing does not become a pretext for a partial trial of the merits." *Id.* Keeping these precautions in mind, however, "the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each *Rule 23* requirement has been met." *Id.*

The plaintiffs here seek to certify a class under***HN4***[] *Rule 23(b)(3)*, which requires them first to prove the four threshold requirements under *Rule 23(a)* -- numerosity, common questions of law or fact, typicality of the lead plaintiff's claims or defenses, and adequacy of representation by the lead plaintiff -- and two additional requirements under *Rule 23(b)(3)*: (1) "that questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) that a class action would be "superior to other methods for fairly and efficiently adjudicating the controversy." [4] *Fed. R. Civ. P. 23(a)* and *(b)(3)*; *McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008)*. These requirements "ensure[] that the **[**18]** class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 104 (2d Cir. 2007)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*.

At the February 8, 2008 hearing on the issue of class certification, the defendants conceded that the plaintiffs have met the four threshold requirements under *Rule 23(a)* and I find that they have. The only real **[**19]** issue on this motion for class certification is whether the plaintiffs have met their burden of proving that common questions predominate over individual ones as required by *Rule 23(b)(3)*. The defendants contest the superiority prong of *Rule 23(b)(3)* on the same ground that they contest the predominance prong -- that a class action is not a superior method of adjudication because individual questions predominate over common questions, thus making it more efficient to litigate the claims on an individual basis. Therefore, this ruling will focus on *Rule 23(b)(3)*'s predominance requirement -- whether or not individual questions of law and fact predominate over common questions.

---

[3] Analogizing the *Rule 23* inquiry to the preliminary injunction process, **[**17]** the Court held that ***HN3***[] any findings on the merits at the class certification stage would not be binding for the ultimate fact-finder -- "[a] trial judge's finding on a merits issue *for purposes of a Rule 23 requirement* no more binds the court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction." *Id. at 39* (emphasis in original).

[4] In addition, *Rule 23(b)(3)* considers the following factors relevant when determining whether common issues predominate and whether class certification is a superior method of adjudication:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

III. Discussion

A. Elements of an Antitrust Claim

The plaintiffs filed suit under *section 1 of the Sherman Act*, alleging, *inter alia*, that the defendants conspired "to fix, raise, maintain and/or stabilize the price of EPDM sold in the United States, including limiting supply and/or allocating markets and customers for the sale of EPDM in the United States." Second Consolidated Amended Complaint P44a.***HN5***[] *Section 1 of the Sherman Act* provides that "[e]very . . . conspiracy, in restraint of trade or commerce among the **[**20]** several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. The Clayton Act permits private litigants to seek treble damages for violations of the antitrust laws. *15 U.S.C. § 15*. A successful antitrust claim requires the plaintiff **[*87]** to prove: "(1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages." *Cordes, 502 F.3d at 105* (internal alterations omitted) (quoting *In re Visa Check, 280 F.3d at 136*). The injury and causation element has also been referred to as "antitrust injury" and "causation or impact." *Id. at 105*.

B. Antitrust Elements and the Predominance Requirement

As explained above, ***HN6***[] to prevail in their motion for class certification, the plaintiffs must demonstrate that common questions of law or fact predominate over individual ones on the issues relevant to the three elements of an antitrust claim. "The predominance requirement is met if the plaintiff can 'establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.'" *Id. at 107-08* (quoting *In re Visa Check, 280 F.3d at 136*). In **[**21]** support of their class action motion, the plaintiffs have proferred the six national price lists and their econometric modeling, which they assert show that the relevant antitrust issues -- and more specifically, antitrust injury -- are susceptible to generalized proof. The defendants argue that the antitrust injury element is not susceptible to common proof and that the econometric model presented by the plaintiffs is incapable of demonstrating class-wide injury or damages.

1. *Violation of* ***Antitrust Law***

HN7[] "Horizontal price-fixing agreements are *per se* violations of the Sherman Act." *Id. at 105*. "In general, the person who has purchased directly from those who have fixed prices at an artificially high level in violation of the antitrust laws is deemed to have suffered the antitrust injury . . . ." *State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1079 (2d Cir. 1988)*. In *Cordes*, the plaintiffs alleged that the defendants, a group of IPO underwriters, entered into a horizontal price-fixing agreement to fix their fees at seven percent of the IPO proceeds for all corporations conducting "mid-sized IPOs" (IPOs that generated between $ 20 million and $ 80 million). *Cordes, 502 F.3d at 96*. **[**22]** Because "allegations of the existence of a price-fixing conspiracy are susceptible to common proof," the Court determined that common questions predominated over individual ones on this first element of an antitrust claim, violation of ***antitrust law***. *Id. at 105*. *See also In re Foundry Resins Antitrust Litig., 242 F.R.D. 393, 409 (S.D. Ohio 2007)* (holding that the plaintiffs' allegations of horizontal price-fixing were sufficient to establish a *per se* violation of ***antitrust law***).

Similarly, the plaintiffs here have alleged that EPDM producers engaged in an illegal price-fixing agreement to raise, maintain, and/or stabilize the price of EPDM in the United States. That issue is common to the class, and if proven true, would satisfy the first element of an antitrust cause of action, namely, a violation of ***antitrust law***. Therefore, the plaintiffs have met their burden of showing predominance on this element.

2. *Antitrust Injury*

In *Cordes*, the Second Circuit held that ***HN8***[] plaintiffs must make a two-part showing to establish the antitrust injury element. *502 F.3d at 106*. "One [prong] is the familiar factual question whether the plaintiff has indeed suffered harm, or 'injury-in-fact.' The other is **[**23]** the legal question whether any such injury is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

a. Legal Question Prong

HN9[] To demonstrate the legal question prong of the antitrust injury element, the plaintiff must prove that the defendants engaged in an anti-competitive manipulation of the markets. *Id. at 105-07*. In *Cordes,* the Court held the plaintiffs successfully established that the legal question was common to the class and thus predominated over individual questions because the plaintiffs alleged only one type of injury in the complaint -- "overcharges paid to a horizontal price-fixing conspiracy." *Id. at 107*. "Because each class member allegedly suffered the same **[*88]** type of injury, the legal question of whether such an injury is 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful,' is a common one." *Id.* (internal citations omitted) (quoting *Brunswick, 429 U.S. at 489*).

Like the plaintiffs in *Cordes*, the EPDM plaintiffs have met the first part of the antitrust **[**24]** injury showing: that the legal question of the antitrust injury is common to the class. The plaintiffs have alleged only one type of injury in the complaint, namely that they paid supracompetitive prices for EPDM due to an illegal conspiracy to raise, maintain, and/or stabilize the prices of EPDM on the U.S. market. The legal question of injury is common to the class.

b. Factual Question Prong

HN10[] The factual question prong of the antitrust injury element requires the plaintiffs to show that harm actually resulted from the antitrust violation -- the "injury-in-fact," *id. at 106*, or "impact." To meet the predominance requirement of *Rule 23* for class certification, the plaintiffs must show that injury-in-fact, or impact, can be proven by evidence common to the class. *Id. at 106*. Plaintiffs have offered two forms of common proof to assert that impact was class-wide: six national price list increases adhered to by all the major EPDM suppliers, showing that the defendants conspired to maintain an elevated "base" price for EPDM, and an economic regression model.

It is important to note at the outset that HN11[] "impact" (or "injury-in-fact") and "damages" are two distinct elements of an antitrust claim **[**25]** -- injury-in-fact is *whether* the plaintiffs were harmed and damages quantify *by how much. Id. at 107 n.11*; *see also In re Urethane Antitrust Litig. ("Urethane II, Polyether Polyol"), 251 F.R.D. 629, 638 (D. Kan. 2008)* ("'[T]he issue in the common impact analysis is the *fact*, not the amount, of injury.'") (quoting *In re Potash Antitrust Litig., 159 F.R.D. 682, 695 (D. Minn. 1995))*. At times these terms have been conflated, which can lead to confusion about what a plaintiff's burden precisely is at the motion for class certification stage. It is true that, generally speaking, antitrust injury-in-fact and damages are often determined by comparing the "but-for" price -- the price a customer would have paid in the absence of the conspiracy -- and the actual price paid. *Cordes, 502 F.3d at 107*. "[T]he *extent* of the difference between the but-for [price] and the actual [price] paid is relevant to the question of *damages*, but it is from a *comparison* between the two that the court would be asked to decide question of *injury-in-fact*." *Id*. (emphasis added). In such a scenario, the plaintiff has shown impact and damages in a single calculation: if he paid a higher actual price than the but-for **[**26]** price, he has shown impact; by calculating the extent of that difference he has shown damages. Hence, one way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.

However, HN12[] where other methods of common proof exist to show class-wide impact such as lock-step increases of national price lists in an oligopolistic market, comparing "but-for" prices with actual transaction prices is not the *only* way for plaintiffs to succeed in a motion for class certification. Whenever actual prices are higher than "but-for" prices, a plaintiff suffers damages and must necessarily have been impacted, or injured-in-fact, too. Using a damages calculation is often the only way to show impact in antitrust scenarios where the industry is not served by a small number of distributors, where sales occur between diverse and independent merchants and customers, or where there is no direct **[**27]** evidence of class-wide conspiratorial effect. In such scenarios, proving damages may be the only way to show impact.

HN13[] Proving damages proves injury because damages necessarily indicate that the plaintiff has been impacted or injured by the antitrust violation; the converse, however, is not necessarily true. That is, it is possible for a plaintiff to suffer antitrust injury-in-fact **[*89]** and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive. By expending resources to negotiate down from the supracompetive prices established by the cartel, plaintiffs who have suffered no damages may still have suffered an injury-in-fact from the antitrust conspiracy. The fact that a plaintiff may have successfully employed bargaining power to fend off the *effect* of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy.

HN14[] "Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . **[**28]** the price range was affected generally." *In re Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996)*.

> The proof necessary to demonstrate that the defendants conspired to maintain an inflated "base" from which all pricing negotiations began and that this "base" price was higher than the "base" price which would have been established by competitive conditions *would be common to all members of the class*. Proof of a conspiracy to establish a "base" price would establish at least the *fact* of damage, even if the extent of the actual damages suffered by the plaintiffs would vary. . . . [T]he proof with respect to the "base" price from which these negotiations began, or the structure of the conspiracy to affect individual negotiations, would be common to the class. Accordingly . . . the fact of damage is predominantly, if not entirely, a common question.

Id. (emphasis added) (quoting *Hedges Enterprises, Inc. v. Continental Group, Inc., 81 F.R.D. 461, 475 (E.D. Pa. 1979))*. *See also* *Urethane II, Polyether Polyol, 251 F.R.D. at 638* ("[E]vidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline **[**29]** from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *In re Urethane Antitrust Litig. ("Urethane I, Polyester Polyol"), 237 F.R.D. 440, 450-51 (D. Kan. 2006)* (accepting the plaintiffs' expert's structural analysis of the urethane market and opinion that price lists can be used as proof of common impact; "conspiratorial behavior elevates list prices and list prices serve as a reference or benchmark for pricing or pricing negotiations"); *Fears v. Wilhelmina Model Agency, Inc., 2003 U.S. Dist. LEXIS 11897, 2003 WL 21659373, at *6 (S.D.N.Y. 2003)* (noting that, even if the plaintiffs had been able to negotiate for a lower commission rate with the defendant modeling agencies, they were nonetheless impacted by the conspiracy because those negotiations still began at the artificially elevated rate established by the cartel); *In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996)* (noting that "[t]he theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves that the alleged **[**30]** conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury").

The plaintiffs here assert that the six across-the-board list price increases for EPDM, which the defendants do not dispute, suffice as common proof of impact to the class, particularly when the EPDM market's characteristics tending to support collusive activity are also considered, because those price list increases had the effect of raising prices for all EPDM purchasers. Defendants argue that, because the plaintiffs have not conclusively demonstrated how those price increases raised prices for each transaction with each plaintiff, they cannot serve as common proof of impact, pointing to individual discounts, price rebates, and contract terms that would have lowered the price of EPDM below the list price for certain plaintiffs. The defendants misconstrue the plaintiffs' burden at the class certification stage. The plaintiffs need not demonstrate to an absolute certainty that *all* EPDM purchasers ultimately suffered damages as a result of inflated list prices. Addressing a similar argument in *Urethane II, Polyether* ***[**31]*** *Polyol,* the **[*90]** Court noted that the absence of an actual price increase for an individual plaintiff following a price list increase was not a relevant issue at the class certification stage. *251 F.R.D. at 637 n.6*. "Aside from the fact that this argument goes to the merits of the case and not the issue of whether plaintiffs' case concerning impact is amenable to class-wide proof, the mere fact that prices did not *increase* at the seemingly appropriate times does not conclusively establish that they were not artificially inflated so as to keep them from falling to the extent that they might have done so in a competitive market." *Id.* (emphasis in original).

In re IPO directs HN15[] courts not to grant motions for class certification if plaintiffs have merely made "some showing" of the Rule 23 requirements or because their expert's report is "not fatally flawed." As the In re IPO Court stated, "the important point is that the requirements of Rule 23 must be met, not just supported by some evidence. . . . '[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable.'" [5] 471 F.3d at 33 (quoting Falcon, 457 U.S. at 160). When assessing the predominance requirement of Rule 23(b)(3), **[**32]** however, I need only determine whether the element of injury-in-fact can be proven by evidence common to the class. Urethane II, Polyether Polyol, 251 F.R.D. at 636 (noting that the pertinent legal inquiry at class certification is not whether the plaintiffs have proven on the merits that they paid an artificially high price due to the defendants' alleged price-fixing conspiracy, but rather "'whether class-wide impact may be proven by evidence common to all class members.'") (quoting In re Bulk (Extruded) Graphite Prods. Antitrust Litig., 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, at *2 (D.N.J. 2006)). The plaintiffs have offered sufficient proof and explanation to convince me that these six national price list increases *could* have the effect of affecting the base price for EPDM, from which all negotiations started, on a class-wide basis.

The plaintiffs have not merely alleged that these price lists existed and that they affected all EPDM purchasers -- they have shown undisputed evidence of lock-step price increases and provided expert opinions that the structural characteristics **[**33]** of the EPDM market would support collusive increases of prices to artificially high levels. As discussed more fully below, the defendants do not dispute the price list increases, nor do their experts truly contest the nature of the EPDM market, but instead argue that the plaintiffs cannot prevail on the merits, because they cannot prove that every class member ultimately suffered damages. That argument is best reserved for their argument that common questions do not predominate on the issue of damages and for trial on the merits.

The plaintiffs' expert, Dr. Martin Asher, compiled the following chart, demonstrating that the defendants participated in at least six across-the-board announced list price increases during the class period:

Effective Date	**Type of Elastomer**	**Bayer (Miles)**	**Crompton/ Uniroyal**	**DSM**
October/ November 1997	Clear Oil Extended	$ 0.04/ lb.	$ 0.04/ lb. Increased commensurate with polymer content	$ 0.04/ lb. $ 0.03 /lb.- 50 and/or 75 part oil extended $ 0.02/ lb. - 100 part oil extended
March/ April 1998	Clear Oil Extended	$ 0.05/ lb. $ 0.03/ lb.	$ 0.05/ lb. $ 0.03/ lb.	$ 0.05/ lb. $ 0.03/ lb.
January/ February 1999	Clear Oil Extended	$ 0.05/ lb. $ 0.04/ lb. - medium oil extension $ 0.03 /lb. - high oil	$ 0.05/ lb. $ 0.03/ lb.	$ 0.05/ lb. $ 0.03/ lb.

[5] As discussed above, the Court held this requirement applies with "equal force to all Rule 23 requirements." In re IPO, 471 F.3d at 33 n.3.

Effective Date	Type of Elastomer	Bayer (Miles)	Crompton/ Uniroyal	DSM
		extension		
January/ February 2000	Clear	$ 0.05/ lb.	$ 0.05/ lb. ($ 0.07/ lb. for palletized)	$ 0.05/ lb.
	Oil Extended	$ 0.04/ lb. - medium oil extension $ 0.03 /lb. - high oil extension	$ 0.03/ lb.	$ 0.03/ lb.
July 2000	Clear	$ 0.06/ lb.	$ 0.06/ lb. ($ 0.07/ lb. for palletized)	$ 0.06/ lb.
	Oil Extended	$ 0.05/ lb. - medium oil extension $ 0.04 /lb. - high oil extension	$ 0.04/ lb.	$ 0.04/ lb.
February/ March 2001	Clear	$ 0.06/ lb.	$ 0.06/ lb. ($ 0.07/ lb. for palletized)	$ 0.06/ lb. ($ 0.06/ lb. for palletized)
	Oil Extended	$ 0.05/ lb. - medium oil extension $ 0.04 /lb. - high oil extension	$ 0.04/ lb.	$ 0.04/ lb.

Effective Date	DuPont Dow	Exxon Mobil
October/ November 1997	$ 0.04/ lb. $ 0.04/ lb. on all grades of Nordel EPDM	$ 0.04/ lb.

Effective Date	DuPont Dow	Exxon Mobil
March/ April 1998	$ 0.05/ lb. $ 0.05 lb. on all grades of Nordel EPDM	$ 0.05/ lb. $ 0.03/ lb.
January/ February 1999	$ 0.05/ lb. $ 0.05 lb. on all grades of Nordel EPDM	$ 0.05/ lb. $ 0.03/ lb.
January/ February 2000	$ 0.05/ lb.	$ 0.05/ lb. ($ 0.07/ lb. for palletized)
	$ 0.05 lb. on all grades of Nordel EPDM	$ 0.03/ lb.
July 2000	$ 0.06/ lb.	$ 0.05/ lb. ($ 0.07/ lb. for palletized)
	$ 0.06 lb. on all grades of Nordel EPDM	$ 0.03/ lb.
February/ March 2001	$ 0.06/ lb.	$ 0.05/ lb. ($ 0.07/ lb. for palletized)
	$ 0.06 lb. on all grades of Nordel EPDM	$ 0.03/ lb.

Effective	DuPont	Exxon
Date	Dow	Mobil

[*91]

Source: **[**34]** Table 1 -- "Announced Price Increases," Asher Report at P 11.

(a) Plaintiffs' Expert Reports

Plaintiffs' experts, Drs. Martin Asher, John Beyer, and Keith Leffler, [6] also explain precisely why the EPDM market was susceptible to collusive activity. Each expert concludes that the EPDM market was conducive to creation and implementation of an antitrust conspiracy to raise and/or maintain prices, and therefore, if the alleged collusive activity did occur -- i.e., in the form of the six lock-step price increases -- those structural characteristics make it more likely that the impact of those price increases would be felt class-wide.

Specifically, they assert that because of: (1) EPDM's commodity-like nature; (2) the lack of economic substitutes; (3) the product's price inelastic demand; (4) defendants' dominance of the market; **[**35]** (5) the barriers to market entry; (6) and defendants' use of national (as opposed to regional) price lists and price increase announcements, the EPDM market was susceptible to collusive behavior, which would have had a class-wide impact on EPDM purchasers. The experts **[*92]** interpret these factors as limiting the possibility of competition and making the EPDM market conducive to a price-fixing scheme. They lay the groundwork for plaintiffs' argument that, if collusive behavior did occur, it would have been effective in raising prices across the class, thus demonstrating class-wide injury-in-fact.

Market power. Over the relevant class period, the defendants controlled over 90% of the domestic EPDM market. Asher Report, P 15; Report of Dr. John Beyer ("Beyer Report"), Ex. 1; Report of Dr. Keith Leffler ("Leffler Report") P 28. According to Beyer, the EPDM market can be described as an oligopoly -- "a market with relatively few producers . . . account[ing] for a large percent of the total market" -- which is particularly susceptible to coordinated behavior. Beyer Report, P 10; Leffler Report, P 22. Under basic economic theory, the more concentrated market power is (i.e., a relatively small number **[**36]** of firms possess a large percentage of the market), the more easily firms can assert collusive power over production/supply and prices in a market. Beyer Report at P 11.

Barriers to Entry. When industry profits are high, it encourages new firms to enter the market or existing firms to add capacity. Increased supply will eventually drive prices and profits down. However, where there are high barriers to entry, new firms will be dissuaded from entering the market, potentially leaving prices artificially high, resulting in more profits for existing firms. *Id*. at P 12. Barriers to entry also create incentives for existing firms to raise prices out of line with the cost of inputs, knowing that the higher profits will not be enough to attract new firms. Examples of barriers to entry include: high investment costs and long production facility construction schedules.

The average cost to build a 100,000-ton EPDM plant is between $ 300 and $ 500 million, taking approximately three to five years to complete. *Id*. at P 13; Reply Report of Dr. Martin Asher ("Asher Reply Report"), Ex. 31 (Declaration of James R. McKinley), at P 37-40. Furthermore, possessing the technology to produce EPDM requires **[**37]** proprietary information, which also raises a barrier to entry. *Id*. Beyer concludes these facts present high barriers to entry. Beyer Report at P 13; Leffler Report at P 33-38.

---

[6] Dr. Leffler is the opt-out plaintiffs' (Parker Hannifin Corporation, PolyOne One Corporation, and The Goodyear Tire & Rubber Company) expert. Although those plaintiffs are not party to the class certification motion, I will include Leffler's analysis of the EPDM market because the defense experts address Leffler's analysis in an expert report submitted in this action.

Fungible, commodity-like product. Drs. Asher, Beyer, and Leffler assert that EPDM is a commodity-like product, meaning it is easy to substitute one producer's EPDM for another's (i.e., "supply-side substitutibility"). This has two implications for the EPDM market: first, the defendants could easily compete over customers and, second, that price was the primary factor for purchasers in choosing the supplier from which to buy EPDM. Beyer Report at P 26. Beyer relies on various internal documents from the defendants that show which grades and brands of their competitors' EPDM products were the equivalent of their own grades and brands. Beyer Report, Ex. 2; Asher Reply Report, Ex. 27. This demonstrates not only that the defendants were aware of the commodity-like nature of their product, but also that they could easily produce each other's products if they so desired. Leffler Report at P 40-42. Without a collusive agreement to maintain and/or raise prices, it is likely that any EPDM supplier could have increased market **[**38]** share vis-a-vis its competitors by lowering or refusing to raise its own prices. To Beyer, this indicates a high probability of collusive potential in the EPDM market. Beyer Report at P 16.

No viable economic substitutes & price inelastic demand. According to Beyer, EPDM has several unique characteristics that make it difficult for purchasers to substitute another product for EPDM. This keeps demand relatively inelastic -- without other options, purchasers are essentially held hostage to price increases. *Id*. at P 17. Knowing that purchasers will not turn elsewhere if the price increases, EPDM suppliers would be able to raise prices without losing demand, painlessly increasing their profits. *Id*. at P 19-21; Asher Reply Report at P 35-43, Exs. 32-33; Leffler Report at P 30-32. Furthermore, the demand for EPDM is dependent primarily on the downstream demand for the end-use products that contain EPDM. As long as end-use consumers continue to demand those products, manufacturers of those products (the plaintiffs) would **[*93]** need to continue to purchase EPDM. Beyer Report at P 21.

Price Lists. There were no regional differences in price, meaning the defendants' price lists applied to the national **[**39]** market. Beyer Report at P 22. The defendants consistently raised prices in tandem, alternating which supplier was the first to raise prices. *Id*., Exs. 3-4, Asher Reply Report, Ex.10. Plaintiffs allege this was the result of illegal collusive activity. If so, the price lists are proof common to the class, which demonstrate a class-wide impact on prices -- "[t]he character and purpose of the announced price increases demonstrates that all purchasers of EPDM would have paid elevated prices." Beyer Report at P 26.

Communication. Leffler focused on the high level of communications between competitors, noting the exchanges of emails on prices and capacity and numerous meetings held in the guise of industry association meetings and planning meetings for potential joint ventures, raw material purchases, and buy-sell arrangements. Leffler Report at P 44. According to Leffler, "[c]ooperation creates an atmosphere of trust in which understanding rather than explicit agreements can be implemented." *Id*. at P 43.

(b) Defendants' Expert Reports

Defendants' expert, Dr. Kenneth Elzinga, was charged with examining the structural characteristics of the EPDM market relied upon by plaintiffs' experts Beyer **[**40]** and Leffler. Report of Dr. Kenneth Elzinga ("Elzinga Report") at 17-34. At the outset, Elzinga states that he "agree[s], for the most part, that the factors on the Beyer-Leffler list are present in the market for EPDM." *Id*. at 19. Rather than attacking their analyses of the EPDM market, Elzinga takes issue with the idea that the EPDM market fits as neatly into the traditional oligopoly model as they suggest it does, and questions the relevancy of those structural characteristics where they are present. *Id*.

On the issue of commodity-like fungibility, Elzinga concedes that EPDM is "often substitutable across defendants." *Id*. However, he notes that many EPDM brands do *not* have corresponding competing products, suggesting that EPDM purchasers of those grades are locked into a single supplier. Essentially, Elzinga disputes that EPDM is as easily substitutable as the plaintiffs' experts claim.

On the issue of demand inelasticity, Elzinga argues that there are available EPDM substitutes, though he acknowledges that "[m]arket demand may tilt to being inelastic." *Id*. at 22. Plaintiffs' experts do not assert a complete absence of viable substitutes, but note that the available substitutes are **[**41]** not so interchangeable with EPDM that a price increase would cause significant numbers of purchasers to switch from EPDM to a substitute. Elzinga appears to agree with that point, but emphasizes that switching products is easier than Beyer and Leffler claim it is.

Moving to market concentration, Elzinga again agrees that the EPDM market is "characterized by a small number of sellers." *Id*. at 23. He takes issue, however, with the fact that the plaintiffs have not concentrated enough on ExxonMobil's participation in the alleged conspiracy, noting that they have not called any ExxonMobil witnesses. *Id*. The plaintiffs' experts did note ExxonMobil's market share when analyzing market concentration, so this point is not particularly relevant to the issue of market concentration. Elzinga also believes that Beyer and Leffler have not fully accounted for producers not named as defendants, which he claim hold a 16% stake in the global EPDM market. *Id*. at 24. Given that plaintiffs are arguing that there was a conspiracy to set prices in the domestic EPDM market, I am not persuaded that the global market share held by foreign EPDM suppliers is particularly relevant to this antitrust suit.

Elzinga **[**42]** does not disagree that the cost to build a new EPDM plant is high and that barriers to entry generally help cartel members to control prices. *Id*. at 25-26. Elzinga strives to point out that, despite these high costs, new and existing EPDM suppliers added capacity during the alleged conspiracy period, pointing to one new plant by a new EPDM supplier and one new plant by an existing EPDM supplier. *Id*. at 25. As he later notes in his report, however, one of **[*94]** those plants -- the DDE Plaquemine plant -- "struggled to produce acceptable material and to operate at capacity through 2001." *Id*. at 52-53. The other new plant that opened during the class period, the Seadrift Plant, never produced at rates higher than 15% through 2001. *Id*. at 54. Also, Elzinga notes that during the class period, several existing EPDM producers announced plans to add additional capacity, though I am not sure that *announcing* plans to open new plants during the class period would affect the plaintiffs' barriers to entry analysis. Those plants opened well after the alleged conspiracy period and one was in the Netherlands, not the United States. *Id*. at 26. Furthermore, the effect of the new capacity on the alleged conspiracy's **[**43]** ability to control prices above what they would otherwise have been is an issue for the merits. The bottom line is that Elzinga does not contest that the EPDM market has high barriers to entry, just that those barriers did not entirely thwart new capacity.

Finally, Elzinga takes strong issue with the plaintiffs' experts' lack of explanation regarding the mechanics of the cartel's operations. Elzinga disputes Leffler's "atmosphere of trust" theory, arguing that cartels do not operate in such a nebulous fashion, but actually require explicit agreements and enforcement between players to operate properly. *Id*. at 30-31. As a contrast to the EPDM scheme alleged by plaintiffs, Elzinga points to studied cartels in the vitamin, lysine, and citric acid industries. He notes that, in those industries, executives met frequently to discuss pricing of their products and that "none of these cartels . . . left the functioning of their conspiracy up to a vague understanding that their members would like prices to be higher or complaints that prices were too low." *Id*. at 33. Elzinga notes that the few documents produced by the defendants suggesting the need to avoid price wars or make industry-wide lock-step **[**44]** price increases contrast with the level of "intense competition" demonstrated by the majority of documents produced in this litigation. *Id*. at 34. Elzinga believes that there is simply not enough evidence to show that EPDM producers met with sufficient frequency and with the required attendance by all major players to adequately form and manage a working cartel. *Id*. Beyer's response to this criticism is that there is enough documentation of industry-wide price increases to support the allegation of an explicit conspiracy. Beyer Response Report P 9. This is an issue for the merits, because it touches on the ultimate question of the of the antitrust lawsuit -- whether the defendants explicitly agreed to engage in price-fixing, thus violating the antitrust laws prohibiting collusion to stifle competition in the market.

My understanding is that the primary purpose of Elzinga's report on EPDM structural characteristics is not to show that the plaintiffs' experts have mischaracterized the dynamics of the EPDM market, but rather to assert that there is not enough evidence to prove that a conspiracy occurred. At this stage of the proceedings, however, the issue for the court is not whether **[**45]** the conspiracy actually occurred -- that is the ultimate issue in the case and one for the factfinder to decide at the merits stage. The narrow issue at this juncture is whether the elements of an antitrust cause of action are demonstrable across the class on the basis of common proof, or whether individual questions predominate.

The other defense expert, Dr. Edward Snyder, disputes Asher's theory that the lock-step price increases can serve as common proof of impact. In his report, Snyder discusses how it is not necessarily true that the lock-step price list increases resulted in higher "but-for" prices for all class plaintiffs due to list price rebates, discounts, and non-price factors such as research and development, shipping costs, and technical services provided to customers in lieu of discounts. Although those issues may be relevant for calculating *damages* -- those rebates, discounts, and non-price factors might mean that a particular plaintiff suffered no damages -- they do not mean that the plaintiffs were not *impacted* in some way. Having a higher but-for price is one way of proving impact, but not the only way. Snyder's disagreements with Asher are primarily focused on the **[**46]** merits of whether the plaintiffs can ultimately demonstrate the three necessary elements of an antitrust claim on the merits. **[*95]** That is not the issue for this motion for class certification. I need only determine whether the plaintiffs have demonstrated that the issue of antitrust impact is susceptible to proof applicable to the whole class.

The fact that Elzinga supports the plaintiffs' characterization of the EPDM market is noteworthy: they make their point on structural characteristics primarily to show that the market was conducive to a conspiracy, i.e., that if those six price list increases indicate the workings of a conspiracy, then it had a good chance of being successful, not whether a conspiracy actually existed. Therefore, in light of the general agreement among the experts that the EPDM market was susceptible to a conspiracy, I find that the plaintiffs have met their burden of demonstrating that the element of injury-in-fact can be proved by evidence common to the class -- the six national price lists that ostensibly applied to every customer, in conjunction with the general analysis of the characteristics of the EPDM market, support the notion that the price list increases **[**47]** had class-wide impact.

Pursuant to *In re IPO*, of course, these findings about the EPDM market are not binding on the ultimate fact-finder who would remain free to determine whether the price lists and structural characteristics demonstrate adequate classwide antitrust impact on the merits. I am merely finding that the plaintiffs have met their burden of demonstrating how proof common to the class is available to demonstrate the injury-in-fact element of an antitrust claim.

3. *Damages*

Proving damages is the final element of a successful antitrust claim, although courts have routinely held that class certification is not defeated by the need to undertake individualized damages determinations. *See, e.g., In re Visa Check, 280 F.3d at 139-40*. Nonetheless, the plaintiffs have offered the econometric multiple regression analysis of their experts, Asher and Beyer, to demonstrate that damages can be proven on a class-wide basis (and simultaneously demonstrate class-wide impact).

a. Methods and Standards

Multiple regression analysis is "a statistical tool for understanding the relationship between two or more variables." Daniel L. Rubinfeld, *Reference Guide on Multiple Regression* 181 (Federal Judicial **[**48]** Center, 2d ed. 2000). The "dependent variable" is the variable to be explained (here, the price of EPDM) and the "independent variables" are factors that are thought to influence the dependent variable. Using multiple regression analysis allows economists to estimate whether a certain market factor has an effect on the dependent variable and to what degree. By determining whether a particular variable in the equation influences the dependent variable, the economist can accept or reject that variable as having an influence on the dependent variable. This statistical tool is used frequently in employment discrimination and antitrust lawsuits. For example, in employment discrimination suits, an employee may argue that sex or race is a statistically significant variable on the value of the dependent variable -- the employee's salary. The Supreme Court has already accepted the use of multiple regression analysis in employment discrimination suits. *See Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*. In an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate that a "conspiracy" variable has influence over the dependent variable (price) -- that is, class members **[**49]** paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work.

In a multiple regression analysis, the model must be correctly set up for the results to be valid. The expert's choices are crucial for the success of the analysis and the ultimate fact-finder should consider the following when evaluating the efficacy of the expert's analysis: has the expert correctly identified the dependent variable; has he or she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing and/or irrelevant; is the form of the analysis correct? Rubinfeld, *Reference* ***[*96]*** *Guide on Multiple Regression*, at 186-88.

Notwithstanding the unique posture of this case -- full merits discovery is essentially complete and the parties have submitted their expert reports, ordinarily presented for the first time at summary judgment or trial -- what the court must decide at the class certification stage remains the same. Based on the standard of proof required by *IPO Securities*,***HN16***[] the task of the district court at the class certification stage is to **[**50]** determine whether the defendants have successfully debunked the plaintiffs' claim that a class-wide approach can be used to prove impact and damages. *Cordes, 502 F.3d at 107*. The defendants should be focused on disputing the use of the methodology itself, not the results of the methodology. As the Supreme Court noted in *Bazemore*, the failure to include certain variables in a multiple regression analysis "will affect the analysis' *probativeness*, not its admissibility." *478 U.S. at 400*. In other words, if the defendants' experts are merely disputing the results of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue. If plaintiffs can present a feasible multiple regression analysis that purports to establish impact and damages using data and information common to the class, they will have met the requirement of demonstrating that damages can be proved by evidence common to the class.

In *Cordes,* the Second Circuit was primarily concerned with whether a single formula could be constructed, because of the individualized nature of the underwriting industry. *502 F.3d at 107*. The district **[**51]** court identified the ten factors that the defendants' expert believed accounted for an IPO underwriter's fee: "1) underwriter costs; 2) analyst coverage; 3) price stabilization and market making; 4) other underwriter compensation; 5) regulatory issues; 6) prospective issuer investment banking business; 7) the risk of the offering; 8) underwriter prestige and reputation; 9) share pricing; and 10) syndicate composition." *In re Public Offering Fee Antitrust Litig., 2006 U.S. Dist. LEXIS 21076, at *22 (S.D.N.Y. 2006)*, *vacated by* *Cordes, 502 F.3d at 109*. As the defense expert explained, "[b]ecause underwriting services are not fungible products but, rather, are customized by differentiated underwriter suppliers for each issuer . . . an assessment of whether a particular issuer's net proceeds were reduced by the alleged conspiracy involves an individualized inquiry based on non-common factors that will vary from one issuer and IPO to the next." *Public Offering Fee, 2006 U.S. Dist. LEXIS 21076, at *21*. That expert claimed that the multitude of factors accounting for an underwriter's fee made it impossible to create a working multiple regression model. *Id. at *30*. The plaintiffs' expert claimed **[**52]** that he could create a working multiple regression model, despite acknowledging that there are at least six factors that accounted for an underwriter's fee (risk of the offering, quality and reputation of the underwriter firm, whether the IPO involved the privatization of a government-owned entity, whether the initial stock price was relatively low, the year the IPO was conducted, and the type of IPO process used). *Id. at *22 n.7, *26*. The plaintiffs' expert never presented an actual equation and consequently the defendants did not offer specific methodological criticisms beyond the claim that no such formula could be created. The district court accepted the defense expert's report, which focused on the relevant issue -- whether antitrust impact can be proven by evidence common to the class -- whereas the plaintiffs' expert report was focused on whether damages could be proven on a class-wide basis. *Id. at *27-28*. On appeal, the Second Circuit noted that the two experts' analyses were actually directed to the same question, "whether injury-in-fact is susceptible to common proof in this case," and concluded that, if such a formula could be constructed, "the injury-in-fact question is **[**53]** common to the class. Otherwise, it poses individual ones." *Cordes, 502 F.3d at 107*. Therefore, the Court remanded the case to the district court to determine "which expert **[*97]** is correct," i.e., whether a single formula can be created, or whether there really were too many factors at work for a multiple regression model to be methodologically sound. *Id*.

Before proceeding further, I must note several key points. First, the plaintiffs in *Cordes* were depending on their multiple regression models to prove class-wide injury-in-fact *and* damages. The plaintiffs here present not only an econometric analysis to prove damages (which also demonstrates injury-in-fact) but have presented six lock-step national price list increases for a fungible product in an industry with structural characteristics supporting the efficacy of collusive activity. Without that type of evidence, the *Cordes* plaintiffs were necessarily dependent on their econometric model to meet the requirements of *Rule 23*. Second, unlike an underwriter fee that necessarily depends on a combination of highly individualized factors, EPDM is a commodity-like product whose price results from only a small number of variables that are readily **[**54]** determined using publicly available data. Therefore, the plausibility of a multiple regression analysis in the EPDM context is necessarily higher than in the IPO underwriting context. In *Cordes,* the Second Circuit was not asking the district court to assess the efficacy of the plaintiffs' modeling on the merits, but rather to determine why, given the individualized nature of the IPO underwriting industry as acknowledged by both sides' experts, a single formula could nonetheless be constructed. As discussed more fully below, the biggest problem for the EPDM defendants is that, although they claim to be attacking the methodology employed by the plaintiffs' experts, they are, in practice, attacking the multiple regression analysis on the merits by challenging the results of the modeling rather than the conception of the modeling.

b. Plaintiffs' Economic Experts

Plaintiffs seek to show that class-wide damages can be proven by relying, in part, on Beyer's econometric modeling. Beyer's model is a "reduced-form multiple regression equation, i.e., a single equation that takes into consideration factors of both supply and demand, as well as the impact of the alleged conspiracy." [7] Beyer Report **[**55]** at P 28. Beyer next identifies a class period: October 1997 to December 2001. *Id*. at P 29. Beyer explains that it is during the latter portion of 1997 that the coinciding price increases became most apparent. *Id*. at P 29-31. By 2002, however, Beyer's analysis of the market indicates a price war had begun, thus indicating an end to collusive dealings among EPDM producers. *Id*. at P 31. Having identified the class period, Beyer explains that he will compare prices during the class period to EPDM prices after the class period (aka the "benchmark period"). *Id*. at P 32. He notes that, because he believes that collusive dealings began even before 1997, pre-class period pricing would offer an unacceptable benchmark for comparison. *Id*.

Beyer's reduced form equation is: "P[EPDM] = f(D[EPDM], [SEPDM], Cons)" [8] -- the price of EPDM is a function of the demand for EPDM, the supply of EPDM, and the conspiracy. *Id*. at P 36. **[**56]** Beyer conjectures that the supply of EPDM is a function of the cost of its inputs. *Id*. at P 33. Identifying the primary inputs for the production of EPDM -- ethylene, propylene, energy, and labor -- Beyer states that, all other things being equal, he would expect that an increase in the cost of the inputs will increase the price of EPDM. *Id*. at P 34. Beyer calculated the supply variable by multiplying each input's percentage of overall input cost for EPDM by price indices collected from the U.S. Bureau of Labor Statistics or Platts [9] and then adding all the results together. *Id*. at P 40.

The D[EPDM] variable is determined by the demand in industries that use EPDM in their **[*98]** products. *Id*. at P 35. As demand for those downstream products increases (or decreases), the demand for EPDM increases (or decreases). *Id*. As the demand increases (decreases), basic economic theory dictates that the price of EPDM would increase **[**57]** (decrease) as a result. "The demand index was created by multiplying the percentages for each of the individual components [shown in Exhibit 6] by its respective industrial output index as reported by the U.S. Federal Reserve Bank." *Id*. at P 41.

The Cons variable becomes relevant in the equation during the class period by taking on a value of "1" between October 1997 and December 2001 and "0" at all other times. *Id*. at P 36. The "Cons" variable is Beyer's "dummy" variable, that is, it captures all unexplained impact on the price of EPDM in a single variable. Beyer concludes that the "regression analysis shows that, while supply and demand factors were at work in determining the price of

---

[7] Beyer's regression technique is described as "Ordinary Least Squares" ("OLS") and uses "fixed effects." *Id*. at P 38. Beyer explains that using "fixed effects" enables the considerations of customer buying power, negotiating strength, and the like to be taken into consideration. *Id*.

[8] "P[EPDM]" stands for the price of EPDM, "D[EPDM]" stands for the demand of EPDM, "S[EPDM]" stands for the supply of EPDM. "Cons" stands for the conspiracy variable.

[9] According to Beyer, Platts is a "leading global supplier of energy and metals related information." P 40 n.56.

EPDM, they do not alone explain the price of EPDM during the damage period," meaning collusive activity must also have been at work. *Id*. at P 44.

c. Defendants' Economic Experts

Essentially, the defendants' experts' critique of Beyer's methodology centers on the one-size-fits-all nature of his dummy variable, which they argue is too indefinite to capture any true data because key variables are missing. The defendants attack plaintiffs' experts' conclusions, relying primarily on Dr. Christopher James's **[**58]** expert report, which purports to demonstrate the fallacy of Beyer's multiple regression analysis calculations. Although James claims to show how Beyer's regression is methodologically flawed, an examination of his report reveals that his primary dispute is with the *conclusions* that Beyer draws from his calculations, not whether a single formula can be used to estimate class-wide damages. James's report does not appear to be disputing that the plaintiffs would be able to use common proof, i.e., a single formula, to show that there was a classwide impact or damages. Rather, he appears to dispute the efficacy of that calculation by arguing that Beyer has omitted key variables that would explain the positive value of his "conspiracy" variable. Whether the price of EPDM increased disproportionately to the cost of inputs as the result of a conspiracy to raise/maintain prices, or instead resulted from a non-collusive cause, is a question on the ultimate merits of the case.

Rather than dispute that it is not feasible to measure antitrust damages or impact in the way Beyer proposes, James disputes the accuracy of his calculations. He criticizes how Beyer calculated the demand and supply variables. **[**59]** James says that Beyer: (1) failed to properly calculate the variables used in the demand index, (2) failed to properly account for changes in the structure of demand from the downstream industries -- i.e., that it cannot account for such factors as "changes such as long-term substitution between materials or changes in the manufacturing of downstream applications that might increase or decrease their reliance on EPDM," (3) has not captured changes in the buyers' bargaining power over the course of the conspiracy, (4) has not properly accounted for changes in U.S. consumption through 2000, and (5) makes findings inconsistent with the economic theory that cartels in general should not lead to both higher prices and higher demand. *Id*. at PP 23-30. James argues that Beyer's supply index variable is also inaccurate because it does not account for capacity-related effects on supply. *Id*. at PP 31-32. James contends that higher capacity utilization over the alleged class period is what caused the higher prices for EPDM, not a conspiracy. *Id*. at P 32. James claims to test the Beyer model's predictive ability outside the alleged conspiracy period, when the conspiracy variable would hypothetically **[**60]** be statistically insignificant, and finds that even outside the class period Beyer's model shows unexplained influences on EPDM pricing. *Id*. at P 34.

In their reply brief, defendants acknowledge that in order to defeat class certification they must demonstrate that "Beyer's own reduced form model is not capable of answering the question of antitrust injury on a classwide basis." Defendants' Reply at 3. Even accepting the structure of Beyer's model, defendants contend that they can demonstrate that nearly half of the class members **[*99]** paid lower prices than they would have in Beyer's hypothetical non-conspiratorial world. Declaration of Christopher James (attached to Defendant's Reply), at P 4, 6. To show this using Beyer's model, James created a customer-specific conspiracy dummy for each customer in Beyer's dataset that purchased EPDM during and after the class period. James Declaration, at P 5. He then replaced Beyer's single conspiracy variable with his new customer specific variables, known in econometrics as "interaction effects." *Id*. With interaction effects, each customer's average price *outside* the class period acts as the benchmark against which its average price *during* the alleged **[**61]** conspiracy period is measured. The customer-specific conspiracy dummy variable accounts for the difference between these two averages. *Id*. Using that method to test whether there was a uniform effect across EPDM customers, James found that the effects varied widely and therefore, contrary to Beyer's contention that the alleged conspiracy had uniform effects, no common damages can be proven. James Report, P 46. Therefore, the defendants argue, plaintiffs have not met their burden of establishing that common questions predominate.

James then goes on to construct his own model using class-wide proof that he claims better demonstrates what factors were affecting the price of EPDM during the alleged class period. Calling this model a "structural model" of supply and demand, James says it better accounts for the "joint determination of price and capacity utilization in the marketplace," which the plaintiffs' reduced form model does not adequately account for. *Id*. at P 41. James explains that Beyer's reduced form model erroneously conflates the effects of supply and demand factors on the dependent variable, without isolating the extent to which those factors affected price.

Using a two-step **[**62]** analysis known as the "two-stage least squares" technique, James first estimates the effect of plaintiffs' experts' variables on capacity utilization (the first stage's dependent variable) in order to control for the effect of demand on capacity utilization. James adds in the result of the first stage calculation as the variable in the second stage, making *price* the new dependent variable. Any remaining unexplained supply-side effect could be attributed to a hypothetical conspiracy variable. *Id*. at P 42. James says the results of his model show that price was barely higher during the conspiracy period and that the conspiracy variable (once he controls for his additional variables) is statistically insignificant. Thus, there was no conspiracy. *Id*. at P 43.

In summary, James concludes that, contrary to Beyer's report, he can prove that nearly half of the class members paid *lower* prices during the conspiracy than in Beyer's "but for" hypothetical, non-conspiratorial world. Therefore, James concludes, there is no way of demonstrating class-wide impact or damages due to the conspiracy. James purports to offer another model for demonstrating effects on the class, which the plaintiffs in turn **[**63]** challenge.

Defendants also rely on Elzinga's report to refute plaintiffs' claim of proof of classwide impact. The pertinent portion of Elzinga's report is focused on substantive arguments about whether or not a conspiracy existed in the EPDM market, which is not the question before the court at the class certification stage. For instance, Elzinga devotes whole sections of his report to discussing reasons why the six price increases were the result of unilateral increases, not collusion (Section VI Part C.2); offering a variety of explanations for several plants' low output to explain that EPDM producers did not collude to limit supply of EPDM, (Section VII); and arguing that, contrary to the plaintiffs' allegations in the complaint, there was no coordination among EPDM producers for allocating customers. Elzinga cites evidence that EPDM purchasers switched between various suppliers and that market shares among EPDM suppliers were not consistent over the class period (Section VIII). These arguments all go to the ultimate issue whether there was a conspiracy among EPDM producers to raise and/or maintain EPDM prices above competitive levels. Although Elzinga's report sets forth valid arguments **[**64]** on the merits, those arguments are not relevant when determining whether the plaintiffs have met their **[*100]** burden to demonstrate all the *Rule 23* requirements for class certification.

Elzinga's focus on the plaintiffs' multiple regression analysis comes in Section X of his report, where he faults Beyer and Leffler for failing to include a provision controlling for capacity in their cost input variable. Elzinga Report, at 70. Elzinga argues that Beyer and Leffler "both ignore the effects of capacity on prices, thereby undercutting their analysis of pricing trends and their attempt to identify the effect of an alleged cartel on prices." *Id*. at 71. Elzinga's analysis focuses on the role of the Plaquemine and Seadrift plants before and after the class period. Those plants did not open when planned, so EPDM producers experienced significant capacity constraints throughout the class period. As a result, existing plants ran at or near capacity, which put an upward pressure on prices. *Id*. at 71-75. Price pressure eased when new capacity finally came on line, a period that coincided with the end of the class period in 2001. *Id*. at 76. "The surge in productive capacity and resulting decrease in prices **[**65]** coincides with what Plaintiffs claim is the end of the alleged cartel period. But by elementary economic logic, prices fell because of increased supply, not the end of the alleged cartel." *Id*.

Next Elzinga debunks Beyer and Leffler's demand variable, arguing they have omitted "certain aspects of demand" and overall that the index "appears out of step with actual trends in industry demand." *Id*. at 78. First, Elzinga notes the steady growth of EPDM sales between 1997 and 2000. By 2001, however, the demand for EDPM had dropped due to the economic recession precipitated by the terrorist attacks on September 11, 2001. Elzinga says Beyer and Leffler mistakenly assign the drop in prices to the end of the cartel period, rather than to an economy-wide recession. *Id*. at 81. Elzinga asserts that Beyer and Leffler's demand index erroneously indicates that demand was higher in 2002 than it was in 2001, when in reality price and quantity data indicate that demand fell in 2002 from 2001. Beyer and Leffler's failure to accurately reflect a drop in demand, Elzinga argues, calls into question the accuracy of their demand index. *Id*. at 82.

d. Discussion

The defendants, I believe, have misconstrued the extent **[**66]** of the "merits" inquiry that a court must make under the class certification analysis required by *In re IPO*. The defendants and their experts have focused their opposition to the motion for class certification primarily on the *merits* of the plaintiffs' antitrust claims. Although characterized as a dispute over the very feasibility of plaintiffs' analysis, defendants are actually arguing that plaintiffs' multiple regression analysis, done a slightly different way (i.e., the "right" or "better" way), does not prove what they claim it proves, classwide damages. The defendants claim the model, done slightly differently, demonstrates that at least half the class suffered no damages and thus plaintiffs have not presented a feasible method for proving classwide damages. In essence, the defendants are asking the court to determine which multiple regression model is *most* accurate, which is ultimately a merits decision.

The real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works*, because the issue at class certification is not which expert is the most credible, or the most accurate modeler, **[**67]** but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof. The defendants contend that James has successfully refuted the efficacy of Beyer's model to show class-wide damages (and injury). It seems to me, however, that rather than refuting the *efficacy* of Beyer's model, defendants are disputing the results by manipulating Beyer's model to show that no common impact can be shown and then, in the alternative, proffering their own model using common class-wide data to show there is *not* a class-wide impact. Beyer contests James's use of individual customer-conspiracy variables; James claims Beyer's model is flawed because Beyer does not use that type of variable. Each has arrived at a polar opposite finding concerning **[*101]** common impact to the class of EPDM purchasers, but significantly both employ single formulas.

Certainly, *In re IPO* heightened the plaintiffs' burden on a class certification motion. No longer may plaintiffs slide by the class certification stage on unsupported legal conclusions or merely plausible expert methodologies. Even *In re IPO,* however, does not require plaintiffs to prove the merits of their case-in-chief **[**68]** at the class certification stage. They need not demonstrate that their multiple regression analysis captures all the proper variables and thus reaches the "right" answer, as the defendants would require them to do. The defendants have failed to convince me that it is methodologically impossible to use a single formula to estimate class-wide damages. It is unnecessary to delve further into the merits by going point-by-point through each expert's theory to decide who has designed the "better" multiple regression equation.

A brief analysis of the facts of *In re IPO* reveals how the heightened standard is intended to work in practice. In that case, the Second Circuit vacated the district court's grant of class certification, holding that the plaintiffs' allegations and evidence could *never* meet the *Rule 23* requirements *as a matter of law*. *In re IPO, 471 F.3d at 42*. Although the district court accepted that the plaintiffs had established the presence of an "efficient" market, enabling them to invoke the "fraud-on-the-market" theory to show that common questions of reliance would predominate over individual questions, the Second Circuit did not accept that conclusion on its face. [10] *Id.*

Under the "some showing" standard, the district court accepted that the plaintiffs had satisfied their burden of demonstrating that the fraud-on-the-market presumption was applicable in their case. *Id*. Upon closer examination, however, the Second Circuit determined that it would be impossible for the plaintiffs to *ever* establish the fraud-on-the-market theory because there is no developed market for newly offered securities and thus the market for initial public offerings ("IPOs") is not an "efficient" market by definition. *Id*. Furthermore, the Court concluded that the plaintiffs' own allegations that the market was slow to correct the collusive price inflation, despite widespread knowledge of the scheme, belied the essential theory of how an "efficient" market, which relies on price to **[**70]** reflect accurate value, is expected to work. *Id. at 43*.

---

[10] The **[**69]** "fraud-on-the-market" doctrine established in *Basic Inc. v. Levinson, 485 U.S. 224, 245-37, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)*, creates a rebuttable presumption that (1) an issuer's misrepresentations will affect the price of securities that are traded on the open market, and (2) investors rely on market price to reflect an accurate value for that security. *Id*. (citing *Hevesi v. Citigroup, Inc., 366 F.3d 70, 77 (2d Cir. 2004))*.

The Second Circuit concluded that, in the absence of the fraud-on-the-market presumption, individual questions of reliance *necessarily* would predominate over common questions. *Id*. Because the plaintiffs could not show that they would ever meet the *Rule 23* requirement of showing that common questions of reliance would predominate over individual questions as a matter of law, class certification was not warranted. *Id*. Even though determining whether the fraud-on-the-market theory applied was a necessary inquiry on the merits, it was also an essential stepping-stone for the plaintiffs' predominance showing under *Rule 23(b)(3)*. Therefore, *In re IPO* established that ***HN17***[] a district court is required to parse the plaintiffs' legal theory on the merits where it overlaps with the threshold inquiry of *Rule 23(b)(3)* predominance.

Here, the defendants are not arguing that any legal theory that the plaintiffs are relying on to demonstrate predominance is inapplicable as a matter of law. They are instead claiming that plaintiffs' common proof does not sufficiently demonstrate the merits of their antitrust claim. In *Cordes*, the plaintiffs were attempting **[**71]** to prove both impact and damages through the use of multiple regression analysis. *502 F.3d at 96-97*. Unlike the EPDM plaintiffs, however, the *Cordes* plaintiffs did not have, in addition to their econometric modeling, common proof in the form of six national lock-step price list increases, in combination with largely unchallenged structural economic characteristics **[*102]** that support the efficacy of such lock-step increases. The *Cordes* defendants' expert contested whether a single formula could be constructed to determine whether a particular plaintiff would have paid a lower "but-for" underwriter fee. *Id. at 106*. The defense expert believed that no such formula could be constructed because calculating the "but for" fee, against which the actual fee paid could be compared, required "an individualized, plaintiff-by-plaintiff analysis of ten factors including underwriter costs, price stabilization, and the risk of the offering." *Id. at 97*. The Second Circuit remanded the case in order for the district court to determine "which expert is correct," that is, whether a single formula could or could not be employed to make a valid comparison between the but-for and actual fee paid. *Id. at 107*. I **[**72]** do not understand the Second Circuit to be asking the district judge to determine which expert's report is more persuasive on the merits, but rather which expert is correct about whether or not the plaintiffs' method of proof is a form of common evidence.

The same problem is not present in this case. I understand the defendants to be contesting the merits of the plaintiffs' analysis, that is, that their econometric model does not properly account for the correct variables, and that a model that incorporates the correct factors will show that at least half the class suffered no damages. Whether the plaintiffs' multiple regression analysis incorporates the necessary variables/factors to reach the correct economic conclusion is an issue to be reserved for the merits, because it has no bearing on whether the plaintiffs can meet the predominance prong or *Rule 23(b)(3)* by establishing that common proof of impact is available in this case. "While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable **[**73]** as evidence of discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore, 478 U.S. at 400* (internal citations omitted, quoting the appellate court ruling).

In *Hnot v. Willis Group Holdings, Ltd*., District Judge Gerald E. Lynch considered and rejected a similar interpretation of *In re IPO*. *241 F.R.D. 204, 210 (S.D.N.Y. 2007)*. Where the plaintiffs and defendants disagreed about whose experts' statistical findings were more persuasive, Judge Lynch noted that:

> this disagreement is relevant only to the merits of plaintiffs' claim . . . and not to whether plaintiffs have asserted common *questions* of law or fact. By asking the Court to decide which expert report is more credible, defendants are requesting that the Court look beyond the *Rule 23* requirements and decide the issue on the merits, a practice *In re IPO* specifically cautions against.

Id. *Cf. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008)* (vacating class certification order on ground that the district court did not undertake the necessary rigorous analysis of the parties' experts' opinions and remanding with the direction that the district [**74] court should resolve the dispute between the experts whether impact was susceptible to class-wide proof or not). [11]

[*103] In any event, regardless of the efficacy of the plaintiffs' econometric modeling to show impact and/or damages, the plaintiffs have presented factual evidence of the allegedly collusive activity -- the six lock-step price increases and the EPDM market's structural characteristics -- that would be common to all plaintiffs. ***HN18***[] Common questions predominate where "even if each Class Member . . . were to bring suit individually, each plaintiff would have to allege and prove virtually identical facts." *In re Merrill Lynch & Co. Research Reports Sec. Litig., 246 F.R.D. 156, 165 (S.D.N.Y. 2007)*. That is certainly the case here; a primary component of an individual EPDM plaintiff's case would revolve around proving how the price list increases are evidence of illegal collusive activity.

Furthermore, even if the defendants are correct that the measure of damages is not susceptible to classwide proof, that is not enough to defeat class certification. *McLaughlin, 522 F.3d at 231*. ***HN19***[] "[T]he fact that damages may **[**76]** have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *Id*. (citing *In re Visa Check, 280 F.3d at 140*). "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damages issues." *In re Visa Check, 280 F.3d at 139*. *See also* *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 535 (6th Cir. 2008)* (affirming district court's grant of class certification where "the court found that the 'fact of damages' was a question common to the class even if the amount of damages sustained by each individual class member varied."); *Urethane II, Polyether Polyol, 251 F.R.D. at 639* ("The possibility that individual issues may predominate on the issue of damages, however, does not defeat class certification by making this aspect of the case unmanageable."); *In re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, 2005 WL 102966, at *20 (D. Mass. 2005)* ("Even if the damage assessments end up being too individualized to resolve as a class, that does not warrant denial of the plaintiffs' motion at this stage."). In the present case, it may very well be that damages will need to be calculated individually, **[**77]** particularly if some plaintiffs received sufficient rebates, discounts, and other quantifiable favored treatment to mitigate all damages from the defendants' allegedly illegal, collusive behavior.

The defendants have made a strong argument that it may be impossible to calculate damages on a class-wide basis, that there is no single percentage of overcharge that can be applied to the class as whole. It may be that a customer-by-customer examination is necessary to determine pricing provisions of long-term contracts, negotiated rebates, and other discounts off the artificially inflated list price. However, those pricing incentives may have been available even in the absence of a conspiracy, to lower prices below even the non-inflated competitive level. It could be that industry custom or course of dealing between a particular supplier and purchaser dictated those types of rebates and discounts even in the absence of supracompetitive pricing. Thus, it seems to me that individual questions of damages could predominate over common questions.

That is not enough to defeat class certification, however, on the issue of liability. The Second Circuit has suggested at least five ways to address **[**78]** individualized damages issues:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial

---

[11] The facts of *Hydrogen Peroxide* are distinguishable from the present case. At the 11 class certification stage, the plaintiffs' expert -- the same Dr. Beyer employed by plaintiffs in this case - merely asserted that he *could* create an economic model using proof common to the class, but never actually completed his proposed models/analyses. *Hydrogen Peroxide, 552 F.3d at 313, 315*. The defendants' expert, on the other hand, contended that Beyer's modeling would fail. *Id. at 313-14*. In this case, Beyer has actually presented an econometric model that purports to show that antitrust impact is susceptible to common proof. Although the defense experts claim to dispute the feasibility of constructing an econometric model using proof common to the class, their reports are better characterized as disputing the results of the plaintiffs' modeling. To resolve this dispute would be to place myself in the role of the ultimate factfinder by choosing which expert's econometric model or theory is "correct." Therefore, having presented a working econometric model that demonstrates class-wide **[**75]** impact and injury using proof common to the class, the plaintiffs here have gone further than the plaintiffs in *Hydrogen Peroxide* in establishing that the requirements of *Rule 23* have been met.

> and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. at 141 (internal footnote omitted). Because the defendants have presented a strong argument that damages may need to be determined on an individual basis, one or more of these alternatives may be appropriate in this case.

For the foregoing reasons, I find that the plaintiffs have met their burden of demonstrating how common questions will predominate over individual ones on the three elements of an antitrust claim.

[*104] C. Superiority

The final *Rule 23* requirement the plaintiffs must meet is that a class action is superior to other methods of adjudicating this dispute. The plaintiffs contend that individual lawsuits would be duplicative and a waste of judicial resources given the large number of affected EPDM purchasers with overlapping legal claims that arise out of the same course **[**79]** of conduct. Furthermore, they argue that the relatively small amount of damages that each class member stands to recover makes individual adjudication financially impractical for most class members who could not afford to mount a full-scale antitrust suit against the defendants on their own. Finally, given the similarity in claims and ease of determining members of the class, the plaintiffs assert that a class action here would comply with *Rule 23(b)(3)*'s directive that it be a superior method for the fair and efficient adjudication of the claims. The defendants argue that it would be more efficient to litigate the claims on an individual basis because individual questions of impact and damages predominate over common questions.

Having found that the plaintiffs have successfully demonstrated that common liability questions predominate over individual ones, I also find that a class action is a superior method of adjudication. A risk of inconsistent results and conservation of judicial resources dictate that this case should be litigated as a class action, at least on the issue of liability. Considering that a large number of class plaintiffs would have little or no financial incentive **[**80]** to prosecute the alleged antitrust violation individually, class certification is clearly a superior method of adjudication because it is most likely to promote fairness and efficiency.

IV. Conclusion

For the foregoing reasons, the plaintiffs' motion for class certification (**doc. # 184**) is **GRANTED**.

It is so ordered.

Dated at Bridgeport, Connecticut, this 13th day of February 2009.

/s/ Stefan R. Underhill

Stefan R. Underhill

United States District Judge

End of Document

[Aventis Pharma S.A. v. Amphastar Pharms. Inc.]

United States District Court for the Central District of California

February 17, 2009, Decided; February 17, 2009, Filed

Case Nos. 5:03-00887-MRP (PLA) [lead]; 5:04-00333-MRP (PLA)

Reporter

2009 U.S. Dist. LEXIS 132345 *; 2009 WL 8727693

AVENTIS PHARMA S.A. and AVENTIS PHARMACEUTICALS, INC., Plaintiffs, v. AMPHASTAR PHARMACEUTICALS, INC., Defendant.

Subsequent History: Related proceeding at *[Amphastar Pharms. Inc. v. Aventis Pharma SA, 2012 U.S. Dist. LEXIS 162900 (C.D. Cal., Nov. 14, 2012)]*

Prior History: *In re Aventis Pharma S.A., 314 Fed. Appx. 291, 2008 U.S. App. LEXIS 17615 (Fed. Cir., July 23, 2008)*

Core Terms

FDA, patent, allegations, antitrust, citizen's petition, enoxaparin, sham, petitioning, causation, notice, baseless, immunity, course of conduct, lawsuits, generic, infringement, competitor, fraudulent, dockets, suits, manufacturing process, damages, survive, ripe, legal standard, preparedness, manufacture, merits, inequitable conduct, unfair competition

LexisNexis® Headnotes

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

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

A motion to dismiss tests whether the allegations in a complaint, if true, amount to an actionable claim. In evaluating a defendant's motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all allegations of material fact in the complaint and read the complaint in the light most favorable to the nonmoving party. However, a court should not accept as true unreasonable inferences; nor should it accept legal conclusions cast in the form of factual allegations. A court reads the complaint as a whole, together with facts appropriate for judicial notice, rather than isolating allegations and taking them out of context.

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

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

The principles of notice pleading do not eliminate the requirement that a plaintiff plead sufficient factual allegations to demonstrate a plausible claim. Where a particularly complex claim or set of claims is alleged, the factual burden to overcome a motion to dismiss is more difficult in practice: a court may require more detail to assess the plausibility of complex allegations. For example, antitrust allegations must be sufficiently detailed for a court to determine whether they are economically plausible. Such demands are all the more reasonable when the factual basis underlying the allegations is within the plaintiff's knowledge. None of this gives courts license to blur the line between a motion to dismiss and summary judgment: a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.

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

HN3[] Actual Monopolization, Claims

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

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

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

HN4[] Standing, Requirements

For a plaintiff to maintain private antitrust claims, it must show injury and causation. Therefore, a plaintiff must adequately plead that the defendant's misconduct caused an injury to competition or the competitive process that harmed the plaintiff.

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

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

HN5[] Standing, Requirements

On a private antitrust claim, the minimum required injury for standing is some damage flowing from the unlawful antitrust misconduct; inquiry beyond this minimum point goes only to the amount and not the fact of damage. Standing also requires that the antitrust violation be a material cause of that damage. Material causation and injury in fact are jurisdictional issues; even if they are satisfied at the pleading stage, the requirements must continue to be satisfied at all stages of the case.

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

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

HN6[] Standing, Requirements

The antitrust injury element of a substantive antitrust offense asks whether the injury in fact is the type the antitrust laws remedy; not whether there has been injury in fact.

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

HN7[] Private Actions, Sherman Act

Judicial precedent recognizes that, at the fact-finding stage, antitrust plaintiffs are entitled to the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. That is, relevant circumstantial evidence should be considered in making a fact determination. The same principle applies at the pleading stage: allegations should generally be taken as a whole, together with matters appropriate for judicial notice.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN8[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine serves *First Amendment* interests by protecting the petitioning and political activity of market participants. Subject to a limited sham exception, speech directed to obtaining government action cannot give rise to an antitrust violation. The Noerr-Pennington doctrine applies equally to federal and state claims.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN9[] Noerr-Pennington Doctrine, Right to Petition Immunity

Pleading a sham under the Noerr-Pennington doctrine does not suffice to state a claim. Rather, a plaintiff must survive the Noerr-Pennington doctrine and adequately plead *15 U.S.C.S. § 2*'s elements.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] Noerr-Pennington Doctrine, Sham Exception

Although the Noerr-Pennington doctrine applies to activities directed at any branch of government, the scope of the sham exception depends on the type of governmental entity involved.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN11[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine itself recognized that objectively legitimate petitioning conduct, even when undertaken in subjective bad faith, is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. However, some petitioning conduct may be aggregated into a petitioning scheme to determine whether the Noerr-Pennington doctrine applies to that conduct.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN12[] Noerr-Pennington Doctrine, Sham Exception

Under the broadest possible range of exceptions, litigation activity constitutes a sham for purposes of the Noerr-Pennington doctrine by meeting any of three tests: (1) the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; (2) a party commits knowing fraud on a court by making intentional misrepresentations severe enough to deprive the litigation of its legitimacy; or (3) the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN13[] **Noerr-Pennington Doctrine, Sham Exception**

The United States Court of Appeals for the Federal Circuit expressly recognizes only two types of sham litigation: (1) the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful, and (2) a party commits knowing fraud on a court by making intentional misrepresentations severe enough to deprive the litigation of its legitimacy.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN14[] **Noerr-Pennington Doctrine, Sham Exception**

The United States Court of Appeals for the Ninth Circuit reconciles two precedents that coexist in some tension by recognizing a third type of sham litigation, i.e., where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose. The Ninth Circuit has long held that type (b) sham litigation, i.e., where a party commits knowing fraud on a court by making intentional misrepresentations severe enough to deprive the litigation of its legitimacy, applies to determine whether a single action constitutes sham petitioning. Type (b) sham litigation is essentially retrospective.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN15[] **Noerr-Pennington Doctrine, Sham Exception**

Type (c) sham litigation, i.e., where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose, is prospective. It applies when there is a series of lawsuits and other legal actions without regard to the merits because when dealing with a series of lawsuits, the question is not whether any one of them has merit, some may turn out to, just as a matter of chance, but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. This amounts to potential liability for a petitioning scheme.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN16[] **Noerr-Pennington Doctrine, Sham Exception**

Judicial precedent requires all Noerr-Pennington shams to pass both an objective and a subjective test.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN17 [] **Noerr-Pennington Doctrine, Sham Exception**

Under the Noerr-Pennington doctrine, a type (c) theory must allege both (1) a subjective policy of starting legal proceedings for the purpose of injuring a market rival; and (2) an objective policy of starting legal proceedings without regard to the merits. Precisely how the objective prong works is unclear, but it appears that the Ninth Circuit favors determining whether a substantial number of the suits lacked objective merit.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN18 [] **Noerr-Pennington Doctrine, Sham Exception**

The first method of alleging sham litigation has two steps. First, the litigation must be alleged to be objectively baseless. Second, the defendant must subjectively intend to use the judicial process, as opposed to the outcome of that process, as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN19 [] **Noerr-Pennington Doctrine, Sham Exception**

As to the objective test for determining sham litigation under the Noerr-Pennington doctrine, the challenged lawsuit's legal viability is assessed first. Thus, conduct that includes ignoring the law, filing administrative or legal actions that do not request reasonable extensions or development of the law and mischaracterization of the relevant issues or legal standards may be stripped of immunity. If the lawsuit is legally viable, a court may turn to whether the defendant had factual probable cause to institute the suit.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN20 [] **Ripeness, Tests for Ripeness**

Prudential ripeness involves two over-arching considerations: the fitness for judicial review and the hardship to the parties of withholding court consideration.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN21 [] **Noerr-Pennington Doctrine, Sham Exception**

In the patent context, the second method of alleging sham litigation comes from the Walker Process theory. The thrust of a Walker Process theory is that the obtaining, maintaining, and enforcing a patent are all premised on a knowing and willful fraud.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN22 [] **Defenses, Fraudulent Procurement of Patent**

The Walker Process theory requires the knowing assertion of a patent procured by fraud on the United States Patent and Trademark Office. Further, the patent must have been enforced with awareness that the patent was fraudulently obtained. In contrast to the Columbia Pictures test, which protects litigants' legal and factual positions, the Walker Process theory looks only to whether there was an actual fraud in patent procurement and whether the defendant knew of the fraud when asserting the patent.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

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

HN23[] **Defenses, Fraudulent Procurement of Patent**

The United States Court of Appeals for the Federal Circuit has repeatedly emphasized that the Walker Process theory, unlike inequitable conduct, requires all elements of traditional fraud, including actual reliance, causation, and damages. One implication of the traditional fraud requirement is that a mere technical violation in the patent office does not satisfy the Walker Process theory. Another implication is that *Fed. R. Civ. P. 9(b)*'s heightened pleading requirements apply to the circumstances constituting fraud.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN24[] **Defenses, Fraudulent Procurement of Patent**

The Walker Process theory requires (1) fraud in patent procurement and (2) fraudulent enforcement of the patent, including awareness of its fraudulent procurement.

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

HN25[] **Private Actions, Sherman Act**

One indispensable element to a *15 U.S.C.S. § 2* claim is antitrust injury.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN26[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

To determine how the Noerr-Pennington doctrine applies to such a proceeding, the court must first characterize the proceeding.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN27[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

If petitioning in an administrative proceeding bears the indicia of a true adjudicatory proceeding, then Noerr-Pennington rules developed for the judicial branch will apply. This is because only where administrative officials must follow rules is it meaningful to ask whether a petition before an agency was objectively baseless, or whether there has been a pattern of petitioning without regard to the merits of the petitions. Adjudicatory indicia include public hearings, written and oral statements, representation by counsel, and questioning witnesses.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN28[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where administrative petitioning more closely resembles petitioning in the legislative realm, few or no exceptions under the Noerr-Pennington doctrine may apply. This is because legislative lobbying is the quintessential political realm in which petitioning rights enjoy their greatest protection; where legislative action supersedes private action and thereby makes determining causation impossible; and where it is inappropriate for the judiciary to intrude, even assuming it could divine manageable standards.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN29[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

To the extent a drug is challenged on a statute binding upon the Food and Drug Administration and not admitting of administrative discretion, Noerr-Pennington rules developed for the judiciary apply. And to the extent an application is challenged based on specific factual allegations, Noerr-Pennington rules developed for the judiciary apply.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN30[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

To the extent a citizen petition urges the Food and Drug Administration to exercise administrative discretion, the process more closely resembles traditional legislative or executive lobbying. In this context, courts must exercise great caution, if not abstain from interfering with the process entirely.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN31[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A type (a) theory under the Noerr-Pennington doctrine, using the Columbia Pictures test, is designed for in-court litigation. Its inquiry into the legal and factual bases of an action translates only roughly to the administrative context. It can only apply to the extent the petition makes arguments on the law.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN32[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Columbia Pictures test requires that the alleged conduct be objectively baseless. Second, the defendant must subjectively intend to use the petitioning process, as opposed to the outcome of that process, as an anticompetitive weapon.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN33[] Exemptions & Immunities, Noerr-Pennington Doctrine

Pleading a Noerr-Pennington type (b) theory outside the patent context requires a plaintiff to allege that the defendant so misrepresented the truth that the entire proceeding was deprived of its legitimacy.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

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

HN34[] Exemptions & Immunities, Noerr-Pennington Doctrine

A Noerr-Pennington type (b) theory requires fraud. The United States Court of Appeals for the Ninth Circuit therefore applies *Fed. R. Civ. P. 9(b)*'s heightened pleading standard. *Rule 9(b)* applies to all circumstances constituting fraud. Which elements of fraud are subject to *Rule 9(b)* is somewhat unsettled, but falsity, materiality, and reliance are subject to *Rule 9(b)*, at least where plaintiffs can reasonably be expected to have access to the underlying facts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN35[] Exemptions & Immunities, Noerr-Pennington Doctrine

Judicial precedent's demanding fraud requirements, the fraud must be so great that the entire proceeding is deprived of its legitimacy, recognizes that ***antitrust law*** does not give courts carte blanche to regulate the regulators. Almost always, the agency's expertise puts it in a better position than a court to determine whether a petitioner is making fraudulent arguments.

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

HN36[] Private Actions, Sherman Act

The United States Court of Appeals for the Federal Circuit held that a company lacking Food and Drug Administration (FDA) approval can still allege causation if it can allege the intent and capacity to enter the market but for the defendant's antitrust violation. Without this causation test, the Hatch-Waxman Act's automatic stay would always bar causation, even if the FDA or patent enforcement conduct was plainly anticompetitive. *21 U.S.C.S. § 355(c)(3)(C)*.

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

HN37[] Private Actions, Sherman Act

Only an actual competitor or one ready to be a competitor can suffer antitrust injury. Patent defense expenses alone may constitute antitrust injury if the defendant is an actual competitor or ready to be a competitor.

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

HN38[] **Private Actions, Sherman Act**

In the Hatch-Waxman Act context, a company alleging an antitrust claim is ready to be a competitor if it meets the Andrx intent and preparedness test.

Counsel: [*1] For Aventis Pharma SA (5:03-cv-00887), Plaintiff: Allen M Sokal, Bryan C Diner, Donald R. Dunner, PRO HAC VICE, Esther H Lim, LEAD ATTORNEYS, Geoffrey C Mason, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Donald L Ridge, LEAD ATTORNEYS, Morris Polich & Purdy LLP, Los Angeles, CA; Christopher D Dusseault, Megan S Wynne, LEAD ATTORNEYS, Brenda Lynn Kleidosty, James L Zelenay, Jr, Gibson Dunn and Crutcher, Los Angeles, CA; John D Livingston, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner LLP, Atlanta, GA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; M Sean Royall, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Dallas, TX; Mark A Perry, LEAD ATTORNEY, Gibson Dunn and Crutcher, Washington, DC; Michael J McCabe, II, PRO HAC VICE, Robert C Stanley, LEAD ATTORNEYS, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO; Richard J Smith, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner, Stanford Research Pk, Palo Alto, CA.

For Aventis Pharmaceuticals Inc (5:03-cv-00887), Plaintiff: Allen M Sokal, Bryan C **[*2]** Diner, Donald R. Dunner, PRO HAC VICE, Esther H Lim, LEAD ATTORNEYS, Geoffrey C Mason, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Donald L Ridge, LEAD ATTORNEYS, Morris Polich & Purdy LLP, Los Angeles, CA; Brenda Lynn Kleidosty, Christopher D Dusseault, Megan S Wynne, LEAD ATTORNEYS, James L Zelenay, Jr, Gibson Dunn and Crutcher, Los Angeles, CA; John D Livingston, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner LLP, Atlanta, GA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; M Sean Royall, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Dallas, TX; Mark A Perry, LEAD ATTORNEY, Gibson Dunn and Crutcher, Washington, DC; Michael J McCabe, II, PRO HAC VICE, Robert C Stanley, LEAD ATTORNEYS, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO; Richard J Smith, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner, Stanford Research Pk, Palo Alto, CA.

For Amphastar Pharmaceuticals Inc (5:03-cv-00887), Defendant: Jan P Weir, Taylor Crellin Foss, LEAD ATTORNEYS, K&L Gates LLP, Irvine, CA; Allen M Sokal, Bryan **[*3]** C Diner, Donald R. Dunner, PRO HAC VICE, Esther H Lim, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Morris Polich & Purdy LLP, Los Angeles, CA; Megan S Wynne, Morris Polich & Purdy, Los Angeles, CA; Michael J McCabe, II, PRO HAC VICE, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA.

For Amphastar Pharmaceuticals Inc (5:03-cv-00887), Counter Claimant: Jan P Weir, Taylor Crellin Foss, LEAD ATTORNEYS, K&L Gates LLP, Irvine, CA.

For Aventis Pharma SA (5:03-cv-00887), Counter Defendant: Allen M Sokal, Donald R. Dunner, PRO HAC VICE, Esther H Lim, LEAD ATTORNEYS, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Donald L Ridge, LEAD ATTORNEYS, Morris Polich & Purdy LLP, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Megan S Wynne, LEAD ATTORNEY, Morris Polich & Purdy, Los Angeles, CA; Michael J McCabe, II, PRO HAC VICE, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Aventis Pharmaceuticals Inc (5:03-cv-00887), Counter Defendant: Allen M Sokal, Donald R. Dunner, **[*4]** PRO HAC VICE, Esther H Lim, LEAD ATTORNEYS, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Donald L Ridge, LEAD ATTORNEYS, Morris Polich & Purdy LLP, Los Angeles, CA; Geoffrey C Mason, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Megan S Wynne, LEAD ATTORNEY, Morris Polich & Purdy, Los Angeles, CA; Michael J McCabe, II, PRO HAC VICE, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Amphastar Pharmaceuticals Inc (5:03-cv-00887), Counter Claimant: Taylor Crellin Foss, LEAD ATTORNEYS, K&L Gates LLP, Irvine, CA; Allen M Sokal, Donald R. Dunner, PRO HAC VICE, Esther H Lim, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Anthony G Brazil, Morris Polich & Purdy LLP, Los Angeles, CA; Donald L Ridge, Morris Polich & Purdy LLP, Los Angeles, CA; Megan S Wynne, Morris Polich & Purdy, Los Angeles, CA; Michael J McCabe, II, PRO HAC VICE, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Jan P Weir, K&L Gates LLP, Irvine, **[*5]** CA.

For Aventis Pharma SA (5:03-cv-00887), Counter Defendant: Allen M Sokal, Donald R. Dunner, PRO HAC VICE, Esther H Lim, LEAD ATTORNEYS, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Donald L Ridge, LEAD ATTORNEY, Morris Polich & Purdy LLP, Los Angeles, CA; Geoffrey C Mason, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Michael J McCabe, II, LEAD ATTORNEY, PRO HAC VICE, Finnegan Henderson Farabow Garrett & Dunner, Atlanta, GA; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Aventis Pharma SA (5:03-cv-00887), Counter Defendant: Allen M Sokal, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Donald L Ridge, LEAD ATTORNEY, Morris Polich & Purdy LLP, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Aventis Pharmaceuticals Inc (5:03-cv-00887), Counter Defendant: Allen M Sokal, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Brenda **[*6]** Lynn Kleidosty, LEAD ATTORNEY, Gibson Dunn and Crutcher, Los Angeles, CA; Donald L Ridge, LEAD ATTORNEY, Morris Polich & Purdy LLP, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Amphastar Pharmaceuticals Inc (5:03-cv-00887), Counter Claimant: Taylor Crellin Foss, LEAD ATTORNEY, Jan P Weir, K&L Gates LLP, Irvine, CA.

For Aventis Pharmaceuticals Inc (5:03-cv-00887), Counter Defendant: Allen M Sokal, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Donald L Ridge, LEAD ATTORNEY, Morris Polich & Purdy LLP, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Aventis Pharma SA , Aventis Pharmaceuticals Inc (5:03-cv-00887), Counter Defendants: Allen M Sokal, LEAD ATTORNEY, Finnegan Henderson Farabow Garrett and Dunner, Washington, DC; Monique M Drake, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Denver, CO.

For Aventis Pharma SA, Aventis Pharmaceuticals Inc (5:04-cv-00333), Plaintiffs, Counter Defendants: **[*7]** Anthony G Brazil, Donald L Ridge, LEAD ATTORNEYS, Morris Polich & Purdy LLP, Los Angeles, CA; Christopher D Dusseault, LEAD ATTORNEY, Gibson Dunn and Crutcher, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; M Sean Royall, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Dallas, TX; Megan S Wynne, LEAD ATTORNEY, Morris Polich & Purdy, Los Angeles, CA.

For Amphastar Pharmaceuticals Inc (5:04-cv-00333), Defendant: Jan P Weir, LEAD ATTORNEY, K&L Gates LLP, Irvine, CA.

For Teva Pharmaceuticals USA Inc (5:04-cv-00333), Defendant: Francis C Lynch, Laurie S Gill, LEAD ATTORNEYS, Goodwin Procter, Boston, MA.

For Amphastar Pharmaceuticals Inc (5:04-cv-00333), Counter Claimant: Jan P Weir, LEAD ATTORNEY, K&L Gates LLP, Irvine, CA; Jennifer A Trusso, Steven M Hanle, LEAD ATTORNEYS, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA.

For Aventis Pharma SA, Aventis Pharmaceuticals Inc (5:04-cv-00333), Counter Defendants: Christopher D Dusseault, LEAD ATTORNEY, Gibson Dunn and Crutcher, Los Angeles, CA; Joshua Lipton, LEAD ATTORNEY, PRO HAC VICE, Gibson Dunn and Crutcher LLP, Washington, DC; M Sean Royall, LEAD ATTORNEY, PRO HAC **[*8]** VICE, Gibson Dunn and Crutcher LLP, Dallas, TX.

Judges: Hon. Mariana R. Pfaelzer, United States District Judge.

Opinion by: Mariana R. Pfaelzer

Opinion

ORDER GRANTING Aventis' Motion to Dismiss and DENYING Amphastar's Discovery Application

INTRODUCTION

One of the plaintiff-counterdefendants (collectively, "Aventis") holds a patent covering enoxaparin, an important anti-clotting drug. Aventis sells enoxaparin under the brand name "Lovenox."

Defendant-counterplaintiff Amphastar wishes to market generic enoxaparin. Seeking to do so, Amphastar in 2003 filed an application with the Food and Drug Administration ("FDA"). In the application, Amphastar certified that Aventis' patent was invalid, unenforceable, or would not be infringed. *21 C.F.R. § 314.94(a)(12)(i)(A)(4)*.

Aventis then sued Amphastar for patent infringement in August 2003. Amphastar counterclaimed for federal antitrust and state unfair competition violations. Both sides amended their pleadings several times between 2003 and 2004. Extensive discovery continued for years.

The case was transferred to this Court in June 2006. Due to this case's peculiar procedural history, Amphastar's inequitable conduct defense to patent infringement was tried first. The counterclaims **[*9]** were stayed. *See Aventis, 475 F. Supp. 2d at 972, 974-75*.

Aventis' patent was found unenforceable for inequitable conduct, with this Court's finding entered in February 2007. *Aventis, 475 F. Supp. 2d 970*, *aff'd* *525 F.3d 1334 (Fed. Cir. 2008)*, *reh'g and reh'g en banc denied* (Sept. 25, 2008), *petition for cert. filed* (U.S. Jan. 23, 2009) (No. 08-937) [cert. denied, *556 U.S. 1208, 129 S. Ct. 2053, 173 L. Ed. 2d 1133 (2009)*]. In finding inequitable conduct, this Court concluded that Aventis and its single proffered witness [1] "intended to deceive" the patent office and that "[n]egligence played no role." *Id. at 994*.

After the Federal Circuit affirmed the inequitable conduct ruling, this Court granted Amphastar's request to lift the stay on its counterclaims. Amphastar filed another Amended Answer and Second Amended Counterclaims ("SAC"). Aventis now moves to dismiss the SAC.

For the following reasons, the Court GRANTS Aventis' motion to dismiss because the allegations that survive *Noerr-Pennington* immunity fail to allege antitrust injury, a necessary element. Because no federal issue survives, the state claims **[*10]** will not be addressed at this time. In light of these rulings, Amphastar's application for additional discovery is DENIED.

I.

---

[1] Others involved in the events surrounding the inequitable conduct stated in depositions that they had no recollection of any relevant facts. *Id. at 988 n.17*.

BACKGROUND

A. The Drug Approval Process

A manufacturer seeking approval of a new drug must file a New Drug Application ("NDA") with the FDA. An NDA includes detailed safety and efficacy data, as well as a listing of the components and composition of the drug, "a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug," samples of the drug, and proposed labeling. *21 U.S.C § 355(b)(1)*.

In addition, the NDA must include the patent numbers and the expiration dates of any patents which claim the drug and methods of using the drug, but not methods of manufacturing the drug. *Id.* After approval, these patents are listed in a publication commonly known as the "Orange Book." Drugs with NDA approval are known as "brand-name" drugs.

The "Hatch-Waxman Act" aims to speed generic approval. *21 U.S.C. § 355*. Under the Act, a generic drug manufacturer may file an Abbreviated New Drug Application ("ANDA") so it can market a generic version of a previously approved brand-name drug. The ANDA must include **[*11]** data showing that the active ingredient or ingredients of the generic drug are the "same" as that of the brand-name drug, that the generic drug is bioequivalent to the brand-name drug, and that the proposed labeling of the generic drug is the same as the brand-name drug. *Id. § 355(j)(2)(A)(ii)*. The ANDA applicant is not required to duplicate the clinical trials that were required for approval of the brand-name drug.

In addition, the ANDA applicant must certify for each relevant Orange Book-listed patent:

> (I) that such patent information has not been filed,
> (II) that such patent has expired,
> (III) of the date on which such patent will expire, or
> (IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted[.]

Id. § 355(j)(2)(A)(vii).

FDA regulations interpret patent unenforcability to meet Paragraph IV's invalidity or noninfringement requirement. *See Teva Pharms., USA, Inc. v. United States FDA, 182 F.3d 1003, 1010, 337 U.S. App. D.C. 204 (D.C. Cir. 1999)* (citing 59 Fed. Reg. at 50,353, 59 Fed. Reg. at 50,339); *21 C.F.R. § 314.94(a)(12)(i)(A)(4)*.

An ANDA applicant making a Paragraph IV certification must give the NDA applicant and patent **[*12]** holder notice of the ANDA and the basis of its patent invalidity, unenforceability, or noninfringement position. *21 U.S.C. § 355(j)(2)(B)(iv)*; *21 C.F.R. § 314.94(a)(12)(i)(A)(4)*.

A Paragraph IV certification constitutes a constructive act of infringement, giving the patent holder standing to sue. *35 U.S.C. § 271(e)(2)(A)*. Once Paragraph IV notice is received, the patent holder has forty-five days to file suit. *21 U.S.C. § 355(c)(3)(C)*.

Filing suit prevents the FDA from approving the ANDA for thirty months from the notice date, subject to some exceptions for court action. *Id.* This provision, the "thirty-month stay," is significant to this case and has begun to generate a body of antitrust case law: unlike an ordinary infringement suit, a Paragraph IV suit bars the FDA from approving an ANDA, thereby excluding the would-be entrant from the market.

The first successful ANDA applicant receives a 180-day period of generic marketing exclusivity, beginning on the earlier of the generic manufacturer's first marketing date or the date of a judicial decision of patent invalidity or noninfringement. *Id.* at *§ 355(j)(5)(B)(iv)*.

Any person may try to affect FDA action, including action on an ANDA. The **[*13]** FDA encourages this, maintaining an open invitation to the public to file a "citizen petition." 21 C.F.R. § 10.30(a). A petitioner can urge the FDA to issue, amend, or revoke a regulation or order; or to act or refrain from acting. *Id.* § 10.30(b). The petition is then "docketed," the FDA invites comment on the petition, and the FDA "rule[s]" on each petition. *Id.* § 10.30(c)-(e). The FDA must approve, deny, or provide a tentative response to the petition within 180 days. *Id.* at § 10.30(e). A party may supplement, amend, or withdraw the petition before it has been ruled on by the FDA. *Id.* at § 10.30(g). The FDA's decision is limited by the record generated in the citizen petition process. *Id.* § 10.30(j).

B. The Enoxaparin Applications and Litigation

Enoxaparin is somewhat unusual for a pharmaceutical drug: it is a mixture of complex molecules. The molecules' structure and mixture's composition are not entirely known (i.e., enoxaparin has not been "fully characterized"). *See* *Aventis v. Amphastar, 475 F. Supp. 2d 970 (C.D. Cal. 2007)* (discussing some technical aspects of enoxaparin).

Aventis received FDA approval for its Lovenox NDA. The Orange Book-listed patents material to this motion **[*14]** are 5,389,618 and RE 38,743. The latter is a reissue patent that replaced the original patent after suit was filed. The distinction is immaterial to this motion; "the Lovenox Patent" therefore refers to either patent, as relevant.

Aventis filed a citizen petition on February 19, 2003, before any enoxaparin ANDAs were filed. FDA docket no. 2003P-0064:CP1, *available at* http://www.fda.gov/ohrms/dockets/DOCKETS/03p0064/03p0064.htm. The citizen petition argues that since enoxaparin is not fully characterized, its manufacturing process determines the product. *Id.* at 1-2. Unless and until enoxaparin can be fully characterized, generic entrants should submit to the full NDA process or show that their manufacturing processes are equivalent to Aventis' process. *Id.* Otherwise, an entrant cannot show its enoxaparin is the "same" within the meaning of the statute. *Id.*; 21 U.S.C. § 355(j)(2)(A)(ii)(I). To illustrate, Aventis argues that a particular chemical feature present in a certain proportion is important to enoxaparin's safety and efficacy. *Id.* at 3.

Amphastar filed an ANDA for approval of generic enoxaparin in March 2003. Amphastar made a Paragraph IV certification for the Lovenox patent and **[*15]** notified Aventis on June 19, 2003. As the first ANDA filer to challenge the validity of a patent covering enoxaparin, if successful, Amphastar will enjoy 180 days' exclusivity under 21 U.S.C. § 355(j)(5)(B)(iv).

Aventis filed this lawsuit against Amphastar on August 4, 2003, alleging infringement of the Lovenox patent. The lawsuit triggered the thirty-month stay of Amphastar's ANDA under *id.* § 355(j)(2)(B)(iii). The automatic stay was removed by court judgment before thirty months elapsed. 21 U.S.C. § 355(j)(2)(B)(iii); *Aventis, 390 F. Supp. 2d 936*.

The day after Aventis filed suit, August 5, 2003, the FDA issued a tentative response to Aventis' citizen petition. The response stated, "FDA has been unable to reach a decision on your requests because they raise complex issues requiring extensive review by Agency officials." Letter from Jane A. Axelrad, Assoc. Dir. for Policy, Center for Drug Eval. and Research, Dept. of Heath & Human Services, to Peter O. Safir and Scott L. Cunningham, Covington & Burling (Aug. 5, 2003), *available at* http://www.fda.gov/ohrms/dockets/dailys/03/Aug03/080603/03p-0064-let0001-vol3.pdf.

Amphastar filed a comment on the citizen petition on May 13, 2004, stating **[*16]** that Aventis had changed its manufacturing process seventeen times in eight years, undermining its argument that the manufacturing process must be the same to result in the same active ingredient. Letter from Stephen A. Campbell, Senior VP, Regulatory Affairs, Amphastar Pharm., Inc. to Lester M. Crawford, Acting Commissioner, FDA (June 1, 2004), *available at* http://www.fda.gov/ohrms/dockets/dailys/04/June04/060804/03p-0064-c00002-vol3.pdf. The letter characterized Aventis' citizen petition as an "endless delay tactic[] in order to keep their drug 'Evergreen.'" *Id.* at 2. Amphastar also discussed studies that "answered all of the FDA's questions [about its ANDA] in detail" and asserted that its enoxaparin was equivalent to Aventis' Lovenox.

A series of supplements to the citizen petition by Aventis and comments on the citizen petition from Amphastar and other parties followed.

To date, the FDA has not taken final action on Aventis' citizen petition. Amphastar's ANDA has not been approved.

C. Antitrust and Unfair Competition Allegations

Amphastar alleges that Aventis has engaged in anticompetitive conduct and unfair competition by obtaining and enforcing its patents through fraud. ¶¶ 20-31, **[*17]** 45(a)-(d), 45(f). [2] For example, Amphastar alleges that the Lovenox patent infringement case was "sham litigation for the anticompetitive purpose of delaying or preventing Amphastar's entry into the relevant market." ¶ 45(c).

In addition, Amphastar alleges that Aventis' citizen petition is frivolous. *Id.* Amphastar points to the statement:

> Since the initial development of enoxaparin in 1981, the steps of the manufacturing process have remained unchanged. Clinical supplies used in a few of the initial clinical studies, however, were made from batches where some of the conditions (e.g., time and temperature) were modified.

in footnote 33 of Aventis' citizen petition, claiming it constitutes a materially false representation. Barrett Decl. in Opp'n to Aventis' Mot. to Dismiss, Ex. 1; ¶ 45(e). [3]

Amphastar also alleges that Aventis "has, or has attempted to, control the supply of components or compositions necessary for market approval or the marketing of enoxaparin." ¶ 45(g).

Finally, and only in support of its state claims, Amphastar alleges that Aventis has made false statements about Lovenox's therapeutic levels. ¶ 50.

II.

LEGAL STANDARD

HN1[] A motion to dismiss tests whether the allegations in a complaint, if true, amount to an actionable claim. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. In evaluating a defendant's motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all allegations of material fact **[*19]** in the complaint and read the complaint in the light most favorable to the nonmoving party. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; *Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. However, a court should not accept as true unreasonable inferences; nor should it accept legal conclusions cast in the form of factual allegations. *Sprewell, 266 F.3d at 988*. A court reads the complaint as a whole, together with facts appropriate for judicial notice, rather than isolating allegations and taking them out of context. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007)*.

---

[2] These and all subsequent paragraph citations refer to the SAC.

[3] Amphastar filed the SAC under seal, with this allegation redacted in the public version. Amphastar's ground was that it obtained the information in ¶ 45(e) earlier in this case and that this information was subject to the Court's protective order. Aventis did not seek to keep this allegation confidential—in fact, it was discussed in open **[*18]** court at the hearing—but neither did Aventis oppose Amphastar's motion to file it under seal. *See, e.g.* Hearing Tr. at 46, 1-3 (Jan. 26, 2009) (statement of counsel for Amphastar). *See also* Letter from Stephen A. Campbell, Senior VP, Regulatory Affairs, Amphastar Pharm., Inc. to Lester M. Crawford, Acting Commissioner, FDA (June 1, 2004), *available at* *http://www.fda.gov/ohrms/dockets/dailys/04/June04/060804/03p-0064-c00002-vol3.pdf* (pointing out that publicly available records show Aventis' process has changed at least seventeen times in eight years).

HN2[] The foregoing principles of notice pleading do not eliminate the requirement that a plaintiff plead sufficient factual allegations to demonstrate a plausible claim. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-66, 167 L. Ed. 2d 929 (2007)*. Where a particularly complex claim or set of claims is alleged, the factual burden to overcome a motion to dismiss is more difficult in practice: a court may require more detail to assess the plausibility of complex allegations. *See id.* For example, antitrust allegations must be sufficiently detailed for a court to determine **[*20]** whether they are economically plausible. *Twombly, 127 U.S. at 1955*. Such demands are all the more reasonable when the factual basis underlying the allegations is within the plaintiff's knowledge. *Cf. Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995)* (making a similar observation in the Rule 9(b) context), *cert. denied*, *517 U.S. 1183, 116 S. Ct. 1710, 134 L. Ed. 2d 772 (1996)*. None of this gives courts license to blur the line between a motion to dismiss and summary judgment: "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Twombly, 127 U.S. at 1965*. [4]

III.

DISCUSSION

Amphastar alleges that Aventis has violated Sherman Act *§ 2* by monopolizing the market for enoxaparin products in the United States. ¶ 45; *15 U.S.C. § 2* (hereinafter "*§ 2*").

Amphastar also alleges that Aventis has violated California state law for "common law unfair competition and statutory unfair business practices." *Cal. Bus. & Prof. Code §§ 17200 et seq.* The conduct alleged under state law is the same as that under the federal law, with the addition of allegedly **[*21]** false statements regarding Lovenox's therapeutic levels. ¶ 52.

HN3[] The *§ 2* monopolization offense requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

HN4[] For Amphastar to maintain its private antitrust claims, it must also show injury and causation. Therefore, Amphastar must adequately plead (3) that Aventis' misconduct caused (4) an injury to competition or the competitive process that harmed Amphastar. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 806-07, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)* (discussing antitrust injury and causation in the Hatch-Waxman context); *15 U.S.C. § 15* (creating the private antitrust cause of action). [5]

---

[4] Some SAC allegations trigger *Rule 9(b)*'s heightened standard for pleading fraud. *Rule 9(b)* is discussed below where it applies.

[5] HN5[] The minimum required injury for standing is "*some* damage flowing from the unlawful [antitrust misconduct]; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inv.., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* **[*22]** (emphasis in original). Standing also requires that the antitrust violation be a "material cause" of that damage. *Id.* Material causation and injury in fact are jurisdictional issues; even if they are satisfied at the pleading stage, the requirements must continue to be satisfied at all stages of the case.

Contrary to Aventis' implications, these jurisdictional requirements are not the same as antitrust injury. HN6[] The antitrust injury element (4) of the substantive antitrust offense asks whether the injury in fact is the type the antitrust laws remedy; not whether there has been injury in fact. PHILLIP E. AREEDA ET AL., ***ANTITRUST LAW***, ¶¶ 335b, e-f (3d ed. 2007) (emphasizing that the standing test remains the same at all stages and clarifying that antitrust injury is not the same as standing).

A. The Alleged Courses of Conduct Must Be Analyzed Separately

Amphastar contends that all Aventis' alleged conduct, even if each act is legal on its own, must be reviewed as a single course of conduct. The theory is that the whole is greater than the sum of its parts. However, that cannot be the law in a case where special immunity exempts some conduct from antitrust scrutiny.

HN7[] The Supreme Court recognizes **[*23]** that, at the fact-finding stage, antitrust plaintiffs are entitled to "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. That is, relevant circumstantial evidence should be considered in making a fact determination. *Id. at 697-98*. The same principle applies at the pleading stage: allegations should generally be taken as a whole, together with matters appropriate for judicial notice. *Tellabs, 127 S. Ct. at 2509*.

But antitrust is not devoid of areas where alleged conduct is analyzed discretely as a matter of law. *See, e.g., Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008)* (holding that alleged predatory pricing conduct must meet a price test). *See generally* AREEDA, ***ANTITRUST LAW*** ¶ 310 (discussing when conduct aggregation is appropriate). Some acts must be segregated where the *Noerr-Pennington* doctrine immunizes some conduct from antitrust scrutiny. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

HN8[] *Noerr-Pennington* **[*24]** serves *First Amendment* interests by protecting the petitioning and political activity of market participants. Subject to a limited "sham" exception, speech directed to obtaining government action cannot give rise to an antitrust violation. *Kaiser Found.Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1044-45 (9th Cir. 2009)*, *pet. for reh'g and reh'g en banc filed* (Jan. 28 2009), *resp. to pet. ordered* (Feb. 2, 2009). *Noerr-Pennington* applies equally to federal and state claims. *Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1059 (9th Cir. 1998)*.

HN9[] Pleading a "sham" under *Noerr-Pennington* does not suffice to state a claim. Rather, a plaintiff must survive *Noerr-Pennington* and adequately plead *§ 2*'s elements. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Industries, 508 U.S. 49, 61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* [hereinafter "*Columbia Pictures*"].

HN10[] "Although the *Noerr-Pennington* doctrine applies to activities directed at any branch of government, the scope of the sham exception depends on the type of governmental entity involved." *Kottle, 146 F.3d at 1060*. This is because the petitioning interests in the executive and legislative realm are strongly protected to serve the political process; because government **[*25]** action confounds private causation; and because those realms lack judicially manageable standards. *See id. at 1060-62*. Administrative petitioning poses definitional difficulties: different administrative proceedings receive different levels of protection according to whether they more resemble legislative or judicial proceedings. *Id.*

Noerr-Pennington, and its constitutional underpinnings, would be destroyed if an antitrust plaintiff could subject otherwise protected speech to antitrust scrutiny by alleging additional misconduct. ***HN11***[] *Pennington* itself recognized that objectively legitimate petitioning conduct—even when undertaken in subjective bad faith—"is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *381 U.S. at 670*. However, as discussed more fully below, some petitioning conduct may be aggregated into a "petitioning scheme" to determine whether *Noerr-Pennington* applies to that conduct. *Kaiser, 552 F.3d 1033, at 1046* (citing *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972))*.

The SAC alleges two courses of conduct to which *Noerr-Pennington* applies: patent-enforcement conduct and FDA conduct. Under *Kottle*, **[*26]** different legal standards apply to these courses of conduct. *146 F.3d 1056, 1060-62*. Thus, even if these two courses of conduct could be conceived as a unified "petitioning scheme" within the meaning of *Kaiser* and *California Motor*, the two courses of conduct must be separately evaluated. The conduct, if any, which loses its immunity may then be considered together with the remaining allegations. *Cf.* HERBERT HOVENKAMP ET AL., IP AND ANTITRUST § 11.4f (2009 Supp.) (observing that such an approach properly "avoid[s] the risk of such mixed allegations being used as a subterfuge to avoid the stringent requirements of [petitioning] immunity").

C. Allegations Regarding Aventis' Patent Enforcement Survive *Noerr-Pennington*

The first alleged course of conduct involves patents. Amphastar alleges that Aventis engaged in sham enforcement of the Lovenox patent. [6]

Because this course of conduct involves prosecuting and enforcing a patent, Supreme Court and Federal Circuit law governs. *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)*, *cert. denied 525 U.S. 876, 119 S. Ct. 178, 142 L. Ed. 2d 145 (1998)*.

HN12[] Under the broadest possible range of exceptions, litigation activity constitutes a sham by meeting any of three tests: (a) "the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful"; (b) a party commits "knowing fraud" on a court by making "intentional misrepresentations" severe enough to "deprive the litigation of its legitimacy"; or (c) "the conduct involves a series of lawsuits **[*28]** brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose." *Kaiser, 552 F.3d at 1045* (quoting *Sosa v. DirecTV, Inc., 437 F.3d 923, 938 (9th Cir. 2006))*.

However, ***HN13***[] the Federal Circuit expressly recognizes only two types of sham litigation—types (a) and (b), above. *Id. at 1068* ("Each [t]ype provides its own basis for depriving a patent owner of immunity . . . either or both may be applicable to a particular party's conduct . . . ."). Nevertheless, the Ninth Circuit recently applied its own type (c) law to a patent case. *Kaiser, 552 F.3d at 1046*.

HN14[] The Ninth Circuit reconciles two Supreme Court cases that coexist in some tension by recognizing a third type of sham, type (c), above. The Ninth Circuit has long held that type (b) applies to determine "whether a single action constitutes sham petitioning." *Id.* (quoting *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 810-11 (9th Cir. 1993))*. Type (b) sham litigation is "essentially retrospective." *Id.*

HN15[] Type (c), on the other hand, "is prospective." *Id.* It applies when there is a "series of lawsuits and other legal actions without regard to the merits [because **[*29]** when] dealing with a series of lawsuits, the question is not whether any one of them has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* This amounts to potential liability for a "petitioning scheme."

HN16[] The Supreme Court requires all *Noerr-Pennington* shams to pass both an "objective" and a "subjective" test. *Columbia Pictures, 508 U.S. at 59* ("[N]either *Noerr* immunity nor its sham exception turns on subjective intent alone."). The Ninth Circuit's articulation of type (c) immunity lacks a clearly expressed objective element. *See Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 428-30 (D. Del. 2006)* (discussing this tension between type (c) and subsequent Supreme Court doctrine and ultimately rejecting type (c)).

Therefore, ***HN17***[] a type (c) theory must allege both (1) a subjective policy of starting legal proceedings for the purpose of injuring a market rival; and (2) an objective policy of starting legal proceedings without regard to the merits. Precisely how the objective prong works is unclear, but it appears that **[*30]** the Ninth Circuit favors

[6] Amphastar also alleges that Aventis also fraudulently listed Patent No. 4,692,435 ("the '435 patent") in the Orange Book, but that patent expired in 2001. *See* ¶ 45(b). Because the '435 patent had expired, it was not the subject of a Paragraph IV certification and did not trigger a Hatch-Waxman stay. Further, there is no allegation that this **[*27]** patent was ever asserted against Amphastar. Nor is there any allegation that the patent caused Amphastar any harm not caused by the Lovenox patent. Therefore, the '435 patent is immaterial. *Cf. In re Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002)* (fraudulently listing a patent in the Orange Book and bringing an enforcement action after a Paragraph IV certification regarding that patent may constitute enforcement conduct). *See also* HOVENKAMP, IP & ANTITRUST § 74.e1 (discussing antitrust concerns about Orange Book patent listing).

determining whether a substantial number of the suits lacked objective merit. Kaiser, 552 F.3d at 1046-47 (discussing with approval a district court's dissection of seventeen different lawsuits, noting that the district court viewed only six of the suits "as presenting the closest question" of sham litigation). [7]

This Court assumes that the Federal Circuit would agree with the Ninth Circuit's type (c) sham exemption. Whether the Federal Circuit would agree makes no difference to the resolution of the present motion.

1. Type (a): objectively baseless and subjective abuse of process

Legal standard. ***HN18***[] The first method of alleging sham litigation has two steps. First, the litigation must be alleged to be "objectively baseless." *Columbia Pictures, 508 U.S. at 60 (1993)*. Second, the defendant must subjectively intend to use the judicial "*process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* (emphasis in original).

HN19[] As to the objective test, the "challenged lawsuit's *legal* viability" is assessed first. *Id. at 61* (emphasis in original). Thus, conduct that includes "ignoring the law, filing administrative or legal actions that do not request reasonable extensions or development of the law and mischaracterization of the relevant issues or legal standards" may be stripped of immunity. *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis, 2008 U.S. Dist. LEXIS 81328, at *13-18, 2008 WL 4580016, at *4-5 (S.D.N.Y. Oct. 14, 2008)*. **[*32]** If the lawsuit is legally viable, a court may turn to whether the defendant had factual probable cause to institute the suit. *Columbia Pictures, 508 U.S. at 62*.

Ripeness. As a threshold matter, this issue is not yet ripe. Aventis has pending a petition for certiorari on inequitable conduct. Aventis' legal position could yet be vindicated. Therefore, the *Columbia Pictures* "retrospective" test is not yet fit for judicial application. *Alaska Right to Life Pol. Action Comm. v. Feldman, 504 F.3d 840, 849 (9th Cir. 2007)* (***HN20***[] "Prudential ripeness . . . involves two overarching considerations: the fitness for judicial review and the hardship to the parties of withholding court consideration.") (internal quotations and citation omitted).

Objectively baseless. However, even assuming ripeness, Amphastar cannot meet *Columbia Pictures*' objectively baseless prong. Aventis' legal contentions cannot be seen as objectively baseless. The Court is well aware of this case's long and complicated procedural history, including two Federal Circuit analyses on the merits, with a dissent on this case's most recent Federal Circuit visit. *176 Fed. Appx. 117 (Fed. Cir. 2006)*; *525 F.3d 1334 (Fed. Cir. 2008)*. Even though **[*33]** Aventis' factual position suffered from "a total absence of indicia of credibility," *475 F. Supp. 2d at 993*, Aventis has made credible legal arguments to change the law or to adopt a not-unreasonable legal interpretation that may change the legal implications of the facts. *See, e.g.*, *525 F.3d 1334*; Petition for Certiorari (U.S. 08-937 Jan. 23, 2009) [cert. denied, *556 U.S. 1208, 129 S. Ct. 2053, 173 L. Ed. 2d 1133 (2009)*]. Such arguments further doctrinal development and are unquestionably protected petitioning activity.

The Court takes judicial notice of the foregoing facts. Granting Amphastar all reasonable inferences in its favor, Amphastar cannot plead that Aventis' legal positions were objectively baseless.

2. Type (b): knowing and willful fraud

---

[7] A Court in the Northern District recently observed a similar problem with the type (c) theory. It held that otherwise protected conduct could be included in the antitrust analysis if a court "first find[s] that the other aspects of the scheme independently produce anticompetitive harms." *Hynix Semiconductor, Inc. v. Rambus, Inc., 527 F. Supp. 2d 1084, 1090-91 (N.D. Cal. 2007)*. *Hynix* was decided before *Kaiser*, where the Ninth Circuit's approach is incompatible with the *Hynix* test. Further, the *Hynix* test conflates *Noerr-Pennington* immunity with the substantive *§ 2* element of antitrust injury. Not only is that doctrinally incorrect, it may not be necessary: if, in the but-for world, the patent could not have been enforced, damages flowing from enforcement may be recoverable, even if the substance of the petitioning activity cannot be used to plead or **[*31]** prove an antitrust violation. *Cf.* HOVENKAMP, IP AND ANTITRUST § 11.4f (approving *Hynix*'s damages outcome but not the doctrine).

Legal standard. **HN21**[] In the patent context, the second method of alleging sham litigation comes from *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. The thrust of a *Walker Process* theory is that the obtaining, maintaining, and enforcing a patent are all premised on a knowing and willful fraud. *Kaiser, 552 F.3d at 1047*; *Nobelpharma, 141 F.3d at 1071*.

HN22[] *Walker Process* requires "the knowing assertion of a patent procured by fraud on the PTO." *Nobelpharma, 141 F.3d at 1071*. Further, **[*34]** the patent must have been enforced with awareness that the patent was fraudulently obtained. *Id. at 1069*. In contrast to the *Columbia Pictures* test, which protects litigants' legal and factual positions, *Walker Process* looks only to whether there was an actual fraud in patent procurement and whether the defendant knew of the fraud when asserting the patent. *Nobelpharma, 141 F.3d at 1070-71*.

HN23[] The Federal Circuit has repeatedly emphasized that *Walker Process*, unlike inequitable conduct, requires all elements of traditional fraud, including actual reliance, causation, and damages. *Nobelpharma, 141 F.3d at 1070-71*; *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1358-59* (discussing cases), *rev'd on other grounds*, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. One implication of the traditional fraud requirement is that a mere technical violation in the patent office does not satisfy *Walker Process. Nobelpharma, 141 F.3d at 1069-71*. Another implication is that *Rule 9(b)*'s heightened pleading requirements apply to the circumstances constituting fraud. *Unitherm, 375 F.3d at 1358*.

Therefore, **HN24**[] *Walker Process* requires (1) fraud in patent procurement and (2) fraudulent enforcement of the patent, including **[*35]** awareness of its fraudulent procurement.

Fraud in patent procurement. The SAC contains plausible and reasonably specific allegations of all patent-procurement fraud elements with respect to the Lovenox patent. ¶¶ 20-31. While the SAC only uses the magic words "[b]ut for" to allege reliance and causation as to one act, ¶ 24, the allegations, fairly read, state that the patent office relied on Aventis' factual representations and duty of candor and that this reliance caused the Lovenox patent to issue and thereby harmed Amphastar. ¶ 31.

Fraud in patent enforcement. Amphastar adequately alleges that Aventis was aware of the Lovenox patent's fraudulent underpinnings when Aventis engaged in enforcement conduct against Amphastar. ¶¶ 45(a)-(d), (f). This caused Amphastar damage by forcing it to defend the alleged sham. [8]

However, this alleged fraud only removes *Noerr-Pennington* immunity. "[T]he other elements necessary to a *§ 2* case" must also be present. *Walker Process, 382 U.S. at 174*. **HN25**[] One indispensable element is antitrust injury. *Brunswick, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701*. **[*36]** Whether injury-in-fact from this *Walker Process* fraud amounts to antitrust injury is addressed below in Section III.F.

Amphastar's *Walker Process* allegations survive *Noerr-Pennington* at the pleading stage.

3. Type (c): fraudulent course of conduct

Assuming without deciding that the Federal Circuit would adopt the Ninth Circuit's type (c) theory, the SAC fails both prongs: (1) the subjective policy of instituting lawsuits, (2) a substantial number of which suits lack objective merit.

Aventis is on record in this case explaining that it instituted an array of patent enforcement actions to preserve its rights under the Hatch-Waxman Act. This Court presided over most of Aventis' actions and, indeed, stayed those actions pending the outcome of this litigation. Aventis consented to the stay, stating that it filed the series of suits to preserve its rights rather than to harm all potential generic competitors with frivolous litigation. *See, e.g., Aventis Pharma S.A. v. Sandoz Inc.*, CV 07-3658-MRP (PLAx), Notice of Amended Complaint at 2 (Aug. 29, 2007)

---

[8] For purposes of this motion, the Court assumes that Amphastar's attorney fee award did not negate all damages flowing from Aventis' patent enforcement conduct.

(discussing some background) & Ex. C (letter of June 6, 2007 from Aventis to potential generic entrant explaining Aventis' intentions with regard **[*37]** to the suit).

The volume of Aventis' suits in the Hatch-Waxman context matters little, if at all. *Kaiser, 552 F.3d at 1046-47* (finding at summary judgment that no reasonable jury could find a pattern within the meaning of the type (c) exception where a drug company instituted seventeen infringement suits to protect its rights under Hatch-Waxman). Moreover, for the same reasons explained above in dismissing Amphastar's type (a) theory, Aventis' legal position must be viewed as objectively tenable in all these suits.

The Court takes judicial notice of the foregoing facts. Granting Amphastar all reasonable inferences in its favor, Aventis' legal position was not objectively baseless. Further, it is merely conceivable that Aventis instituted a series of patent suits without regard to the merits and for the purpose of injuring competitors. It is much more plausible that Aventis' several lawsuits were undertaken to preserve its rights under the Hatch-Waxman Act and not as a policy of instituting patent suits without regard to the merits. *Twombly, 127 S. Ct. at 1974*.

D. Allegations Regarding Aventis' FDA Conduct Do Not Survive *Noerr-Pennington*

Legal standard. Aventis' conduct in the FDA is not "unique **[*38]** to patent law" and therefore is not subject to the Federal Circuit's exclusive jurisdiction. *Nobelpharma, 141 F.3d at 1068*. Accordingly, Ninth Circuit law applies.

The FDA citizen petition process is an administrative proceeding that the Ninth Circuit has not yet addressed. ***HN26***[] To determine how *Noerr-Pennington* applies to such a proceeding, the Court must first characterize the proceeding. *Kottle, 146 F.3d at 1062-63*.

HN27[] If petitioning in an administrative proceeding bears the "indicia of a true adjudicatory proceeding," then *Noerr-Pennington* rules developed for the judicial branch will apply. *Id. at 1062*. This is because "[o]nly where administrative officials must follow rules is it meaningful to ask whether a petition before an agency was 'objectively baseless,' or whether there has been a pattern of petitioning without regard to the 'merits' of the petitions." *Id. at 1061-62*. Adjudicatory indicia include "public hearings . . . written and oral statements . . . representation by counsel . . . and question[ing] witnesses." *Id.*

On the other hand, ***HN28***[] where administrative petitioning more closely resembles petitioning in the legislative realm, few or no exceptions may apply. This is because legislative **[*39]** lobbying is the quintessential political realm in which petitioning rights enjoy their greatest protection; where legislative action supersedes private action and thereby makes determining causation impossible; and where it is inappropriate for the judiciary to intrude, even assuming it could divine manageable standards. *Id. at 1060-62*.

The FDA's citizen petition process contains some adjudicatory indicia. The FDA maintains an open invitation to the public to petition. *21 C.F.R. § 10.30(a)*. The petition is then "docketed," the FDA invites comment on the petition, and the FDA "rule[s]" on each petition. *Id. § 10.30(c)-(e)*. Importantly, the FDA's decision is limited by the record generated in the citizen petition process. *Id. § 10.30(j)*.

On the other hand, the citizen petition process resembles lobbying to some extent. A petitioner can urge the FDA to exercise its administrative discretion by issuing, amending, or revoking a regulation or order; or by taking or refraining from an action. *Id. § 10.30(b)*.

When a citizen petition challenges a drug approval, the process will closely resemble an adjudicatory proceeding. Because the petition record is the sole basis on which the FDA may act on **[*40]** the petition, an applicant (or potential applicant) will need to respond to generate the appropriate record. *Id. § 10.30*.

HN29[] To the extent a drug is challenged on a statute binding upon the FDA and not admitting of administrative discretion, *Noerr-Pennington* rules developed for the judiciary apply. And to the extent an application is challenged based on specific factual allegations, *Noerr-Pennington* rules developed for the judiciary apply.

But ***HN30***[] to the extent a citizen petition urges the FDA to exercise administrative discretion, the process more closely resembles traditional legislative or executive lobbying. In this context, courts must exercise great caution, if not abstain from interfering with the process entirely.

Allegations. The SAC alleges: "Aventis filed a frivolous citizen petition that falsely represented that Aventis had not changed its manufacturing process since 1981. This false representation was highly material to the representations Aventis made to the FDA in its citizen petition." ¶ 45(e). *See also* ¶ 27 (discussing the alleged falsity in more detail).

The Court takes notice of the citizen petition. FDA docket no. 2003P-0064:CP1, *available at* *http://www.fda.gov/ohrms/dockets/DOCKETS/03p0064/03p0064.htm*. **[*41]** The petition's legal basis is the statutory requirement that an ANDA applicant demonstrate that the proposed generic has the "same" active ingredient as the approved drug. *See id.* at 1-2. The petition makes factual arguments why generic enoxaparin products should not be determined to be the "same" in ways that Aventis contends are relevant. *Id.*

1. Type (a): objectively baseless and subjective abuse of process

HN31[] A type (a) theory—using the *Columbia Pictures* test—is designed for in-court litigation. Its inquiry into the legal and factual bases of an action translates only roughly to the administrative context. It can only apply to the extent the petition makes arguments on the law.

HN32[] *Columbia Pictures* requires that the alleged conduct be "objectively baseless." *508 U.S. at 60 (1993)* Second, the defendant must subjectively intend to use the petitioning "*process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.*

Ripeness. A type (a) theory cannot be sustained at this time. Whether Aventis' interpretation of the statutory "sameness" requirement is objectively baseless is a matter of administrative discretion, subject to a separate body of law for judicial review. Unless **[*42]** and until the FDA acts on the petition, this dispute is not ripe.

If the FDA denies a citizen petition, then a *Columbia Pictures* theory may lie. This was the position of a court in the Southern District of New York when it evaluated Aventis' alleged conduct in a citizen petition unrelated to the petition here at issue. *Louisiana Wholesale, 2008 U.S. Dist. LEXIS 3611, at *13-17, 2008 WL 169362, at *5 (S.D.N.Y. Jan. 18, 2008)*. The FDA rejected that citizen petition, expressly stating the reasons why the petition was "unfounded" on both the law and the facts. *Id. at n.6*. Relying on the FDA's statement of reasons for rejecting that petition, together with additional allegations as to why Aventis "had no reasonable chance of success," the *Louisiana Wholesale* Court refused to dismiss the claim against Aventis. *Id.*

On the other hand, if the FDA acts favorably on Aventis' petition, and that action is caused by Aventis' petition, and a court determines that Aventis' and the FDA's position violated the applicable legal standard for reviewing administrative action, then a *Columbia Pictures* theory may be available. These events would be the necessary predicates for the Court to determine whether **[*43]** Aventis' position, and the FDA's decision in reliance on it, were objectively baseless. *Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)*. This is an extremely heavy burden.

2. Type (b): knowing and willful fraud

Legal standard. ***HN33***[] Pleading a type (b) theory outside the patent context requires a plaintiff to allege that the defendant "so misrepresented the truth . . . that the entire . . . proceeding was deprived of its legitimacy." *Kottle, 146 F.3d at 1063*.

HN34[] A type (b) theory requires fraud. The Ninth Circuit therefore applies *Rule 9(b)*'s heightened pleading standard. *Kottle, 146 F.3d at 1063*. *Rule 9(b)* applies to "all circumstances constituting fraud." Which elements of fraud are subject to *Rule 9(b)* is somewhat unsettled, but falsity, materiality, and reliance are subject to *Rule 9(b)*, at least where plaintiffs "can reasonably be expected to have access" to the underlying facts. Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995), *cert. denied*, *517 U.S. 1183, 116 S. Ct. 1710, 134 L. Ed. 2d 772 (1996)*. The Court therefore subjects these elements to Rule 9(b) and assumes, but does not hold, that ordinary Rule 8(a) notice pleading applies to the other elements.

HN35[] *Kottle's* demanding fraud requirements—the **[*44]** fraud must be so great that the entire proceeding is "deprived of its legitimacy"—recognizes that ***antitrust law*** does not give courts *carte blanche* to regulate the regulators. *See* Verizon Commc'ns, Inc. v. Law Offices of Curvis V. Trinko, LLP, 540 U.S. 398, 405-07, 124 S. Ct. 872, 157 L. Ed. 2d 823 (cautioning against antitrust intervention in regulatory schemes). Almost always, the agency's expertise puts it in a better position than a court to determine whether a petitioner is making fraudulent arguments.

In this case, however, it is not implausible under Twombly that Amphastar is in a better position than the FDA to recognize the fraud. This is because Amphastar had access to voluminous discovery documents during litigation of the patent claims in this case. Further, it is not implausible that this Court's protective order prevents Amphastar from disclosing to the FDA facts that would enable the FDA to detect Aventis' alleged fraud. *Accord* AREEDA, ***ANTITRUST LAW*** ¶ 205c2 (observing *Noerr-Pennington* should not apply where facts undermining false information are "peculiarly within the control of the antitrust defendant").

Falsity. The only falsity allegations go to whether Aventis has changed its manufacturing process since **[*45]** 1981. ¶¶ 27, 45(e). Given Amphastar's unique position—its discovery with respect to the patent infringement claims in this case—some degree of falsity is plausible under *Twombly.*

However, Amphastar has not met the Rule 9(b) standard for alleging why the falsity is severe enough to deprive the citizen petition proceeding of its legitimacy. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th Cir. 2003) ("The plaintiff must set forth what is false or misleading about a statement, and why it is false.") (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (emphasis added). Amphastar is in a position to explain how its discovered documents undermine Aventis' allegedly false representation and why it is plausible that the FDA cannot detect the alleged false representation itself, thereby undermining the citizen petition process. This is especially true in light of the fact that Amphastar has already pointed out to the FDA, in the citizen petition proceeding, Aventis' frequent process changes. Letter from Stephen A. Campbell, Senior VP, Regulatory Affairs, Amphastar Pharm., Inc. to Lester M. Crawford, Acting Commissioner, FDA (June 1, 2004), *available at* http://www.fda.gov/ohrms/dockets/dailys/04/June04/060804/03p-0064-c00002-vol3.pdf **[*46]** (pointing out that publicly available records show Aventis' process has changed at least seventeen times in eight years).

Materiality. Amphastar alleges that Aventis' representation to the FDA "was highly material" to the citizen petition. ¶ 45(e). The Court has already taken notice of the citizen petition. The central argument in the petition is that, for complex products such as enoxaparin, the manufacturing process determines the product.

However, the materiality allegations do not satisfy Rule 9(b). Notwithstanding the conclusory assertion of high materiality, the face of the citizen petition is ambiguous as to whether Aventis' process representation is material to the process-determines-the-product argument. FDA Docket No. 2003P-0064:CP1, at 11 n.33. It appears likely that the representation about Aventis' own process— stated in a footnote—is immaterial to its broader process-determines-the-product argument. The SAC does not remedy the ambiguity by alleging how or why Aventis' process representation is material to the argument.

Reliance. Even assuming materiality as to the process-determines-the-product argument, the petition contains an argument about characterizing enoxaparin products **[*47]** that may not rely on the alleged representation: Aventis appears to contend that it has discovered structural features unique to Lovenox. However, such a determination is more appropriate at the fact-finding stage. The Court further notes a potential ripeness problem: if the alleged misrepresentation is material as to a product-determines-the-process argument, but immaterial to a characterization argument, the type (b) theory may not become ripe until after the FDA acts and explains the arguments it relied on. Nevertheless, the Court assumes that the applicable reliance pleading standard has been met.

Causation & damages. Contrary to Aventis' position, lack of FDA approval does not bar causation or damages per se. There are two types of possible damages flowing from the alleged fraud. First, exclusion from the market is potentially cognizable. *Andrx, 256 F.3d at 806-08*; *Louisiana Wholesale, 2008 U.S. Dist. LEXIS 3611, at *17-20, 2008 WL 169362, at *6*; *Amgen, Inc. v. Hoffmann-La Roche Ltd., 480 F. Supp. 2d 462, 467-68 (D. Mass. 2007)*. Second, expenses related to defending a type (b) sham flow from the fraud.

For its market exclusion theory, Amphastar must plead that it intends to enter **[*48]** the market, that it is prepared to enter the market, and that it would have entered the market by now but for Aventis' conduct. The D.C. Circuit addressed a similar complaint in *Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 807, 347 U.S. App. D.C. 178 (D.C. Cir. 2001)*. ***HN36***[] The *Andrx* Court held that a company lacking FDA approval can still allege causation if it can allege the "intent and capacity to enter the market" but for the defendant's antitrust violation. *Id.* Without this causation test, Hatch-Waxman's automatic stay would always bar causation, even if the FDA or patent enforcement conduct was plainly anticompetitive. *See* *21 U.S.C. § 355(c)(3)(C)*; HOVENKAMP, IP AND ANTITRUST § 7.4e1.

Aventis mischaracterizes the D.C. Circuit's holding as turning only on the fact that the *Andrx* District Court was not informed that the FDA had approved the plaintiff's application. This is incorrect: *Andrx* used this fact to illustrate why dismissal with prejudice was improper—the *Andrx* plaintiff was plainly able to allege facts that would meet the causation standard. *Id. at 808* ("And even before the FDA approved [plaintiff's] ANDA, [plaintiff] could have alleged its intent and preparedness to enter the market . **[*49]** . . ."). The market exclusion test is intent and preparedness to enter the market, but for the defendant's misconduct.

But Amphastar has not pled intent and preparedness but for Aventis' conduct. Amphastar must allege that (1) that the citizen petition is a material cause of delay to FDA approval, *Zenith 395 U.S. at 114 n.9*; (2) that Amphastar intends to enter the market with reasonable speed upon FDA approval; and (3) that Amphastar is prepared to enter the market with reasonable speed upon FDA approval. The factual allegations that would support causation are within Amphastar's knowledge. Such facts may include whether the FDA has expressed other concerns with regard to Amphastar's application, whether Amphastar has a good faith basis to believe the FDA will not grant approval before the citizen petition has been disposed, whether Amphastar has completed all other FDA-required steps thus far to the FDA's satisfaction, and whether Amphastar has the manufacturing capacity and suppliers available to enter the market with reasonable speed upon approval. *See* *Andrx, 256 F.3d at 807* (discussing indicia of preparedness).

Further, one SAC allegation undermines Amphastar's preparedness: Amphastar **[*50]** alleges that it is having difficulty obtaining "the supply of components or compositions necessary for market approval or marketing of enoxaparin." ¶ 45(g). The Court turns to another problem with this allegation in Section III.E *infra.*

On the damages flowing from Aventis' enforcement conduct, the SAC adequately pleads that Aventis' citizen petition conduct caused Amphastar to expend resources defending Aventis' allegation. ¶ 47. This states damages for a type (b) fraud, but the other elements have not been pled. Whether these damages, without more, could constitute antitrust injury is discussed in the substantive antitrust analysis below in Section III.F.

3. Type (c): fraudulent course of conduct

A type (c) theory to deprive Aventis' FDA conduct of *Noerr-Pennington* immunity requires (1) a subjective policy of making representations regarding enoxaparin before the FDA, (2) a substantial number of which lack objective merit.

Amphastar alleges a single citizen petition with a single alleged misrepresentation. ¶¶ 27, 45(e). This is not a fraudulent course of conduct.

As the foregoing discussion should make clear, it is not impossible to allege a *Noerr-Pennington* exception in the citizen petition **[*51]** process, but it is extraordinarily difficult. Amphastar has not satisfied the requirements.

E. The Vague Allegation Regarding Market Foreclosure Does Not Suffice

Noerr-Pennington does not facially apply to one antitrust allegation in the SAC: "On information and belief, Aventis has, or has attempted to, control the supply of components or compositions necessary for market approval or the marketing of enoxaparin." ¶ 45(g).

This vague allegation does not give Aventis adequate notice of anything. It also fails the *Twombly* plausibility test as a matter of law. It is always possible that one competitor attempts to exclude (or does exclude) another from a market; and that exclusion may, in some circumstances, amount to an antitrust violation. But such a bare and conclusory allegation of exclusion is not enough to cross "the line from the conceivable to plausible." *Twombly, 127 S. Ct. at 1974*. Amphastar must plead the facts, if any, that give rise to its inference that Aventis is engaging in illegal exclusion. Facts about Amphastar's difficulty obtaining supplies, and the factual foundation for the inference that exclusionary conduct by Aventis caused the difficulty, are within Amphastar's knowledge. **[*52]** *Concha, 62 F.3d at 1503*. [9]

F. The SAC Does Not State a Claim

The only allegations that survive *Noerr-Pennington* and *Twombly* are those related to Aventis' patent conduct. ¶¶ 20-31, 45(a)-(d), (f). These allegations fail on antitrust injury.

Ninth Circuit law governs *§ 2*'s substantive elements. *Nobelpharma, 141 F.3d at 1068*. Again, monopolization requires (1) monopoly power in the relevant market and (2) willful acquisition or maintenance of that power (3) by misconduct that (4) caused injury to competition or the competitive process, thereby harming the plaintiff. *Supra* Section III.A.

Monopoly power in the relevant market. Amphastar alleges that Aventis has monopoly power in a plausible market. The alleged market is that for enoxaparin products in the United States. ¶ 45. Aventis plausibly has monopoly power in this market because it has the only enoxaparin product approved for marketing in the United States. ¶¶ 45(a)-(d).

Anticompetitive misconduct. Amphastar adequately alleges that Aventis' patent-related conduct was fraudulent **[*53]** and thereby escapes *Noerr-Pennington* immunity under *Walker Process. Supra* Section III.B.2. This fraud suffices for *§ 2*'s conduct element under *Walker Process. Nobelpharma, 141 F.3d at 1071*.

Antitrust injury & causation. ***HN37***[] "Only an actual competitor or one ready to be a competitor can suffer antitrust injury." *Bourns, Inc. v. Raychem Corp., 331 F.3d 704, 711 (9th Cir. 2003)*. Patent defense expenses alone may constitute antitrust injury if the defendant is an actual competitor or ready to be a competitor. *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 988-89 (9th Cir. 1979)* (holding that patent litigation expenses may be an antitrust injury where both parties were competitors in the relevant market when enforcement began). *Accord* *Indium Corp. of America v. Semi-Alloys, Inc., 781 F.2d 879, 882 (Fed. Cir. 1985)* (holding that there can be no antitrust injury unless plaintiff was prepared to enter the market); *Amgen, 480 F. Supp. 2d at 468* (holding that *Walker Process* litigation expenses in a Hatch-Waxman suit can be an antitrust injury after concluding intent and preparedness was adequately pled); *Brotech Corp. v. White Eagle Int'l Techs. Group, Inc., 2004 U.S. Dist. LEXIS 11552, at *14-17, 2004 WL 1427136, at *6-7 (E.D. Pa. June 21, 2004)* **[*54]** (holding that litigation expenses alone are not an antitrust injury). [10]

---

[9] Even giving Amphastar the benefit of inferences from its *Walker Process* claim, the SAC still has not made this non-*Walker Process* conduct any more than conceivable.

[10] To the extent *Bristol-Myers Squibb Co. v. Ben Venue Lab., 90 F. Supp. 2d 540, 544-46 (D.N.J. 2000)*, may suggest that Hatch-Waxman requires a different approach, it is disapproved in light of the 2003 decision in *Bourns* and the 2001 in decision in

HN38[] In the Hatch-Waxman context, a company is "ready to be a competitor" if it meets the *Andrx* intent and preparedness test. *256 F.3d at 806-08*.

Again, only the *Walker Process* allegations survive *Noerr-Pennington.* The only damages that are cognizable are those flowing from *Walker Process* enforcement. ¶ 47. Therefore, lack of FDA approval is a causation **[*55]** bar that Amphastar cannot surpass unless it pleads a *Noerr-Pennington* exception to the Aventis' FDA-related conduct and alleges market exclusion injury under the *Andrx* intent-and-preparedness test. Amphastar has not done so; it therefore cannot claim to have suffered antitrust injury as a matter of law. *Supra* Section III.G.3.

G. The Court Declines to Address the State Law Claims at this Time

Because the SAC states no federal claim, the Court declines to address its state claims at this time. *See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*.

The Court does observe that the SAC does not provide adequate notice of which common law business tort Amphastar proposes—"common law unfair competition" is not enough. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 192-93, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (discussing the amorphous scope of California common law unfair competition and some theories it may encompass). Nor is it clear whether Aventis' alleged false statements about Lovenox's therapeutic levels were made to the FDA—and therefore would be subject to *Noerr-Pennington*—or if they were made to the prescribing and consuming public. *See* ¶ 50.

IV.

CONCLUSION

The SAC is DISMISSED **[*56]** WITHOUT PREJUDICE. Because Amphastar does not state a claim, Amphastar's application for discovery is DENIED.

The Court will set a status conference to discuss whether Amphastar may replead.

IT IS SO ORDERED.

DATED: February 17, 2009

/s/ Mariana R. Pfaelzer

Hon. Mariana R. Pfaelzer

United States District Judge

End of Document

Andrx. However, the better reading of *Bristol-Myers* is that the plaintiff there had adequately shown on summary judgment that the Hatch-Waxman automatic thirty-month stay may have been a material cause of the approval delay and that, in light of the automatic stay, requiring further indicia of preparedness was unreasonable. *Id. at 546* (rejecting the proposed legal standard that a company subject to the Hatch-Waxman stay must be "fully prepared to enter the market" and emphasizing the automatic nature of the stay (emphasis added)).

Christy Sports, LLC v. Deer Valley Resort Co.

United States Court of Appeals for the Tenth Circuit

February 18, 2009, Filed

No. 07-4198

Reporter
555 F.3d 1188 *; 2009 U.S. App. LEXIS 3033 **; 2009-1 Trade Cas. (CCH) P76,499

CHRISTY SPORTS, LLC, a Colorado Limited Liability Company, Plaintiff-Appellant, v. DEER VALLEY RESORT COMPANY, LTD., a Utah Limited Partnership, Defendant-Appellee.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. NO. 06-CV-964-DAK).

Core Terms

ski, rental, resort, restrictive covenant, mid-mountain, competitors, relevant market, anticompetitive, monopolize, anti trust law, antitrust, effects, output, skiers, third party, village, prices, anticompetitive conduct, rental business, allegations, destination, ski resort, food, ancillary, Sports, argues, rent, consumers, ticket, ancillary services

LexisNexis® Headnotes

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

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

An appellate court reviews the grant of a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss de novo. In doing so, the appellate court asks whether there is plausibility in the complaint. The complaint "does not need detailed factual allegations, but the factual allegations must be enough to raise a right to relief above the speculative level. When the United States Supreme Court emphasized the need for plausibility in the complaint rather than wholly conclusory statements, it warned particularly of the high costs and frequent abuses associated with antitrust discovery. The concept of plausibility at the dismissal stage refers not to whether the allegations are likely to be true; the court must assume them to be true. The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law.

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

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

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

HN2[] **Actual Monopolization, Claims**

The offense of monopoly under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power. Similarly, an attempt claim must show: (1) that the defendant has engaged in predatory or anticompetitive conduct; with (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power, with the third element requiring consideration of the relevant market and the defendant's ability to lessen or destroy competition in that market. Under both types of *§ 2* claims a plaintiff must therefore plead both power in a relevant market and anticompetitive conduct. To define one small component of the overall product as the relevant product market is simply implausible.

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

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

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

HN3[] **Actual Monopolization, Claims**

Even if a firm has monopoly power in a relevant market, a plaintiff must also show the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

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

HN4[] **Actual Monopolization, Claims**

The United States Supreme Court has recognized the economic value of allowing businesses to decide with whom they will deal, as it recently re-emphasized: As a general matter, the Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. In rare circumstances a refusal to cooperate with competitors might constitute a *15 U.S.C.S. § 2* violation, but such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm, should be few.

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

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN5[] **Attempts to Monopolize, Sherman Act**

Restrictive covenants limiting immediate competition may promote competition in a broader market. When a landowner divides his property and sells part to a third party while retaining the rest, attachment of a restrictive covenant to one of the two parcels can promote competition by enabling the owner of the other parcel to start a business without potentially crippling competition on its doorstep. It does not matter, legally or economically, whether the business will be started by the purchaser, or the original property owner. Just as a property owner who operates a business on his land has no obligation to sell part of his property to a person who intends to open a competing facility, he generally has no obligation, if he sells part of the property, to allow a competing facility to be opened there. ***Antitrust law*** is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.

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

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

HN6[] **Actual Monopolization, Claims**

In the context of a claim for violation of *15 U.S.C.S. § 2*, courts cannot infer the absence of anticompetitive behavior simply by comparing the level of raw output before and after the alleged violation; the courts must still consider the underlying behavior.

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

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

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

HN7[] **Actual Monopolization, Claims**

The proposition that an allegation of actual anticompetitive effects obviates any need to allege a relevant market because such effects are direct evidence of monopoly power is more commonly associated with claims under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, which inquire into whether a defendant acts to restrain trade rather than to monopolize a market. A *§ 1* claim and a claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act are different inquiries. The former prohibits restraints of trade that are accomplished through concerted action, while the latter prohibits unilateral conduct but only when it rises to the more severe offense of threatening a monopoly. Because the Sherman Act does not prohibit unreasonable restraints of trade as such, but only restraints effected by a contract, combination, or conspiracy, it leaves untouched a single firm's anticompetitive conduct that may be indistinguishable in economic effect from the conduct of two firms subject to *§ 1* liability.

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

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

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

HN8[] **Actual Monopolization, Claims**

A resort operator's ability to reserve to itself the operation of ancillary businesses within the resort is not dependent on the quantity of output being as high or the price being as low as they would be if there were competition from third parties within the resort. It depends, instead, on either the proposition that a market that involves only one component of an interrelated package of services is not a relevant market for purposes of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, or that it is not anticompetitive conduct for a resort owner to refuse to invite competitors to supply ancillary services within its resort.

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

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

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

HN9[] **Actual Monopolization, Claims**

The concepts of the naked/ancillary restraint distinction apply only in the context of restraint of trade claims under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*; they do not apply to monopoly claims under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act.

Counsel: Thomas P. McMahon, Jones & Keller, P.C., Denver, Colorado (Steven G. Loosle, Kruse Landa Maycock & Ricks, LLC, Salt Lake City, Utah, with him on the briefs), for Plaintiff-Appellant.

Gordon Strachan, Strachan, Strachan, & Simon, P.C., Park City, Utah (Kevin J. Simon, with him on the brief), for Defendant-Appellee.

Judges: Before McCONNELL, EBEL, and GORSUCH, Circuit Judges.

Opinion by: McCONNELL

Opinion

[*1190] McCONNELL, Circuit Judge.

When the Deer Valley Resort Company ("DVRC") was developing its world-renowned ski resort in the Wasatch Mountains, it sold parcels of land within the resort village to third parties, while reserving the right of approval over the conduct of certain ancillary businesses on the property, including ski rentals. For about fifteen years, DVRC granted permission to Cole Sports and plaintiff-appellant Christy Sports to rent skis in competition with its own ski rental outlet. More recently, however, DVRC revoked that permission, presumably in order to gain more business for its own newly-opened mid-mountain ski rental store. The question is whether this revocation violated the antitrust laws. We conclude **[**2]** that it did not.

I. Background

Deer Valley is one of three resorts in the vicinity of Park City, Utah. Many--indeed, "the vast majority," according to the Complaint, P 25--of Deer Valley's patrons are destination skiers who fly into Salt Lake City and then take a forty-five minute bus or shuttle ride to the resort. The resort itself is divided into two areas: the base area, located at the bottom of the mountain, and the ritzier mid-mountain village, located halfway up the slope. DVRC has always been the sole provider of ski rentals at the base area, but at the mid-mountain village, Christy and Cole Sports have operated rental facilities; DVRC itself opened a mid-mountain ski rental facility in 2005.

Originally, DVRC owned all the property at the mid-mountain village, but over the years it has sold parcels to third parties. In 1990, DVRC sold one such parcel to S.Y. and Betty Kimball, subject to a restrictive covenant that prohibited use of the property for either ski rental or real estate sales office purposes without DVRC's express written consent. The Kimballs built a commercial building and leased space in it to Christy's corporate predecessor, Bulrich Corporation. The lease expressly **[**3]** prohibited both the rental of skis and the operation of a real estate office. The next year, though, DVRC gave Bulrich permission to rent skis in return for 15% of the rental revenue. When Bulrich **[*1191]** merged with another company in 1994 and formed Christy Sports, LLC, Christy continued to operate the rental business. According to the complaint, Christy stopped paying DVRC 15% of its rental revenue in 1995, though the reason for this change is unknown. Christy rented skis at the Deer Valley mid-mountain village with no objection from DVRC until 2005. During that time, DVRC was the sole purveyor of rental skis at the base area but did not have a ski rental operation at mid-mountain.

DVRC opened a mid-mountain ski rental outlet in 2005. In August of that year, the resort notified Christy that, beginning the following year's ski season, the restrictive covenant would be enforced and Christy would no longer be allowed to rent skis. Christy believes that DVRC issued the same message to Cole's, leaving DVRC as the only rental ski provider at Deer Valley, with the exception of a small operation at the Stein Eriksen Lodge, which serves its own lodgers. This leaves that majority of skiers who fly **[**4]** into Salt Lake City and then shuttle to Deer Valley with few choices: they can carry unwieldy ski equipment onto the plane, [1] take a shuttle into Park City and hunt for cheaper ski rentals in town, or rent from the more conveniently located DVRC location. Christy predicts, not improbably, that most consumers will choose the third option.

Christy argues that DVRC's decision to begin enforcing its restrictive covenant is an attempt to monopolize the market of ski rentals available to destination skiers in Deer Valley, or, alternatively, to the destination skiers in the mid-mountain **[**5]** village itself. It alleges that by eliminating its competitors, DVRC will be able to increase prices and reduce output, thus harming consumers. The complaint states that the number of skis available for rental mid-mountain will decline by 620 pairs, and the price will increase by at least twenty-two to thirtytwo percent.

The district court dismissed Christy's antitrust complaints. In this appeal, Christy challenges only the dismissal of its claims under *§ 2 of the Sherman Act*.

II. Analysis

HN1[] We review the grant of a *Rule 12(b)(6)* motion to dismiss de novo. *Teigen v. Renfrow, 511 F.3d 1072, 1078 (10th Cir. 2007)*. In doing so, we ask whether there is "plausibility in [the] complaint." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1970, 167 L. Ed. 2d 929 (2007)*. The complaint "does not need detailed factual allegations," *id. at 1964*, but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id. at 1965*. When, in *Twombly*, the Supreme Court emphasized the need for plausibility in the complaint rather than "wholly conclusory statement[s]," *id. at 1966-67*, it warned particularly of the high costs and frequent abuses associated with antitrust discovery. **[**6]** *Id. at 1959* ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") (internal citations omitted). The concept of "plausibility" at the dismissal stage refers not to whether **[*1192]** the allegations are likely to be true; the court must assume them to be true. The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law. *Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)*.

Christy has alleged that DVRC violated *§ 2 of the Sherman Act* by either actual or attempted monopolization. ***HN2***[] "The offense of monopoly under *§ 2 of the Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Similarly, an attempt claim must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power," with the third element **[**7]** requiring "consider[ation] [of] the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Under both types of *§ 2* claims Christy must therefore plead both power in a relevant market and anticompetitive conduct. The relevant market, according to Christy's complaint, is the market for ski rentals to destination skiers in Deer Valley in general or, even

---

[1] We decline Christy's request to take judicial notice of newspaper stories reporting that airlines have made it more difficult and costly for passengers to transport their skis. Whether or not such materials would be admissible in district court, this is an appeal of an order dismissing the complaint at the pleading stage. The question before this court is whether the complaint states a claim upon which relief may be granted. For that purpose, we assume that the factual allegations of the complaint are true, and are not concerned with evidence that the parties might bring supporting or challenging those allegations.

more narrowly, the market for ski rentals in the mid-mountain village. Compl. P 61. The alleged anticompetitive conduct is the enforcement of the restrictive covenant.

A great many pages in the briefs are devoted to whether the defined market set forth in the complaint--destination skiers at Deer Valley, or alternatively at Deer Valley's mid-mountain village--is too small to constitute a market for antitrust purposes, in light of the proximity of a number of ski rental outlets in Park City, just down the road. For purposes of analyzing the complaint, however, we find it not implausible that destination skiers who arrive at the resort by bus or shuttle will find it sufficiently inconvenient to travel into town to rent skis that a successful **[**8]** monopolist over ski rental at Deer Valley could charge supracompetitive prices. The question, we believe, is not whether DVRC might be able to raise prices and reduce output by becoming the only purveyor of rental skis at the resort, but whether such a market is legally cognizable under the antitrust laws and whether the decision of a resort owner to reserve to itself the right to provide ancillary services counts as anticompetitive conduct.

The defendant argues that these issues must be analyzed primarily from the temporal perspective of DVRC's decision to impose a restrictive covenant on the sale of the property to the Kimballs. It points out that DVRC had the right not to sell the property at issue at all; it could have operated its own ski rental facilities at mid-mountain as it did at the base, without allowing competitors to enter the business. None of this would have violated the antitrust laws. Such an arrangement would not have diminished competition; on the contrary, by creating a resort and providing all the services ancillary to it, DVRC increased competition in the ski industry as a whole. The defendant argues that the analysis is the same when it allows an outside ski **[**9]** rental provider to operate for a period of time, and later changes its mind. If it is permissible for a resort owner to impose a covenant on land sales restricting potential competition in the provision of ancillary services, defendants argue, it must be permissible to exercise those rights under the covenant at a later date.

The plaintiff argues, on the contrary, that the temporal focus should be on DVRC's decision to withdraw its consent **[*1193]** to the operation of Cole and Christy's ski rental facilities. It argues that this decision diminished competition in the ski rental business for destination skiers at Deer Valley (or, alternatively, at mid-mountain), and will result in lowered output and higher prices for ski rentals, as compared to the situation before DVRC withdrew its consent.

We begin our analysis with DVRC's original decision to impose the restrictive covenant.

A. Imposition of the Restrictive Covenant

We agree with the defendant that the creator of a resort has no obligation under the antitrust laws to allow competitive suppliers of ancillary services on its property. A theme park, for example, does not have to permit third parties to open restaurants, hotels, gift shops, or other **[**10]** facilities within the park; it can reserve to itself the right to conduct such businesses and receive revenues from them. Accordingly, if it sells land within the resort to third parties, the antitrust laws do not bar the resort owner from imposing a covenant against use of the property for competitive businesses. This is so even if food, rooms, gifts, or other ancillary goods and services would be cheaper and more plentiful if the resort owner allowed competition in these businesses.

This conclusion can be reached either by reference to the proper definition of a market or by reference to the absence of anticompetitive conduct. Some courts, faced with cases of this sort, have found the market definition implausible. The Seventh Circuit took this approach in *Elliott v. United Center, 126 F.3d 1003 (7th Cir. 1997)*, when a peanut vendor challenged a sports arena's decision to ban outside food and thereby monopolize the market for food concessions within the arena. The court rejected that market definition as implausible, saying:

> The logic of [the] argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because **[**11]** the restaurant would be "monopolizing" the sale of wine within its interior. Movie theaters, which traditionally (and notoriously) earn a substantial portion of their revenue from the sale of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food.

Id. at 1005. Other courts agree. Hospitals alleged to have monopolized the market for medical services within that single hospital, *Collins v. Associated Pathologist, Ltd.*, 844, F.2d 473, 480 n.5 (7th Cir. 1988); Ginzburg v. Memorial Healthcare Systems, Inc., 993 F.Supp. 998, 1013 (S.D. Tex. 1997), and a cemetery alleged to have monopolized the market for tombstones within that cemetery, Monument Builders of N.A. v. Michigan Cemetery Ass'n, 524 F.3d 726, 733-37 (6th Cir. 2008), were all declared too narrow to constitute a relevant market. Perhaps even closer to this case is Hack v. President & Fellows of Yale College, 237 F.3d 81, 85 (2d Cir. 2000), in which Yale University was alleged to have monopolized the market for on-campus housing within its sprawling complex of facilities. The Second Circuit rejected the idea that it is impermissible for an institution to monopolize one particular **[**12]** product within an establishment that provides a variety of interrelated services, the most important one of which is education. The alleged market was too narrow.

Although discussion of sports arenas and universities seems to suggest that Christy's shortcomings lie with its alleged geographic market, the actual problem lies with its product market. In these cases the two are difficult to disentangle because **[*1194]** the product (rental skis, as here, or housing, as in *Hack*) is intimately related to the location. Consumers do not travel to Deer Valley for rental skis, just as they do not attend Yale to live in an Eero Saarinen-designed dormitory. The true product in these cases is the overall experience. Deer Valley offers a cluster of products that combine to create a destination ski experience; rental skis are only one small component. *Cf.* United States v. Phillipsburg Nat. Bank & Trust Co., 399 U.S. 350, 361, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970) ("[T]he cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved."); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963) (defining the relevant market under the Clayton Act merger analysis **[**13]** as "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking'"). The complaint alleges nothing to suggest that destination skiers are choosing their ski resort based on the price of rental skis, separate and apart from the cluster of services associated with the destination-ski experience. To define one small component of the overall product as the relevant product market is simply implausible. [2]

Alternatively, one could say that the monopolization claim would fail because the alleged conduct is not anticompetitive. ***HN3***[] Even if a firm has monopoly power in a relevant market, a plaintiff must also show "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Grinnell Corp., 384 U.S. at 570-71. **[**14]** Deer Valley is not required to invite competitors onto its property to rent skis to its patrons, even if a failure to do so would mean it is the sole supplier of rental skis at the ski area.

HN4[] The Supreme Court has recognized the economic value of allowing businesses to decide with whom they will deal, as it recently re-emphasized: "[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (quoting United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)). In *Trinko*, the Court acknowledged that in rare circumstances a refusal to cooperate with competitors might constitute a § 2 violation, but that "such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," *id*., should be few.

Having invested time and money in developing a premier ski resort that attracts skiers from across the nation, DVRC could recoup its investment **[**15]** in a number of ways. It could increase the price of lift tickets, raise room rates, serve only high-priced food, or, as it seems to have chosen, delve more deeply into the rental ski market. *See* Elliott, 126 F.3d at 1005 ("[The United Center] can charge very high ticket prices, and allow unlimited numbers of food concessions in and around the stadium, or it can charge somewhat lower ticket prices **[*1195]** and restrict the

---

[2] We should not be misread as suggesting the implausibility of a rental ski product market within a reasonably well-defined geographic area. We simply hold implausible Christy's attempt to suggest a product market exists in rental skis for destination skiers, disaggregated from the full destination ski experience.

number of concessions (thereby earning some of its profits from the food sales)."). This does not mean consumers have no protection. The ski resort industry is competitive (and Christy does not allege otherwise). Families contemplating ski vacations have many options, and they presumably compare quality and price. If they are rational, the price they are concerned about is the sum of all of their prospective vacation costs, including not just lift ticket prices and resort lodging, but air fare, food and drink, apres-ski entertainment, ski rentals, and the like. A resort that facilitates lower ski rental prices by allowing competition is able to price other aspects of the ski vacation experience more aggressively. The competitive discipline comes not from introducing competition **[**16]** with respect to each component of the experience, but from competition with other ski resorts with respect to the entire package. Christy has not alleged, and it would not likely be plausible to allege, that DVRC's decision to foreclose competition in the ski rental business at the mid-mountain village will have any effect on the market for ski resort vacations as a whole.

Indeed, allowing resorts to decide for themselves what blend of vertical integration and third party competition will produce the highest return may well increase competition in the ski resort business as a whole, and thus benefit consumers. This flexibility about business strategies induces entrants into the ski resort business by allowing them to reserve the benefits of their investments to themselves. Disneyland may have made a business miscalculation in locating where third parties could conveniently supply hotels, restaurants, and other services to its guests. *See* *Elliott, 126 F.3d at 1005* (citing Jim Molnar, *A Tale of 2 Disneys: Out of a Single Mouse Different Playgrounds Grew*, Seattle Times, May 19, 1991, at L1). The antitrust laws do not make such miscalculations legally obligatory.

The idea that ***HN5***[ ] restrictive **[**17]** covenants limiting immediate competition may promote competition in a broader market finds support in this court's decision in *Drury Inn--Colorado Springs v. Olive Co., 878 F.2d 340 (10th Cir. 1989)*, a case on which the district court below heavily relied. In *Drury Inn*, a motel chain purchasing a tract of land insisted that the seller attach a restrictive covenant to a neighboring lot that would prevent a competing motel from operating next door. The court held that the restrictive covenant was not a per se violation of *§ 1 of the Sherman Act*, concluding that the arrangement was one that "merely regulates and perhaps thereby promotes competition." *Id. at 342*. To be sure, in an immediate sense the restrictive covenant barred competition against the motel chain, but in a broader sense it facilitated the entry of a new market participant, to the benefit of consumers and competition overall. Without the covenant, Drury Inn might not have entered the market. This case is similar, in that DRVC insisted on attaching a restrictive covenant to its sale of land to the Kimballs to protect its future ability to profitably operate a ski rental business. Because both the land deal and the potential **[**18]** opening of a ski rental business would expand the market, the arrangement "merely regulates and perhaps thereby promotes competition." *Id*.

Drury Inn of course has differences from this case. As Christy points out, *Drury Inn* was a *§ 1* case; the antitrust issue was raised as an affirmative defense to a breach of contract action rather than as a freestanding antitrust claim; the restrictive covenant was more limited in time; and the restriction operated to the benefit of the buyer rather than the seller. But despite these surface differences, **[*1196]** the underlying economic logic of *Drury Inn* is equally applicable here: that when a landowner divides his property and sells part to a third party while retaining the rest, attachment of a restrictive covenant to one of the two parcels can promote competition by enabling the owner of the other parcel to start a business without potentially crippling competition on its doorstep. It does not matter, legally or economically, whether the business will be started by the purchaser (as in *Drury Inn*), or the original property owner (as in our case). Just as a property owner who operates a business on his land has no obligation to sell part of his property **[**19]** to a person who intends to open a competing facility, he generally has no obligation, if he sells part of the property, to allow a competing facility to be opened there. *See* *Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985)* (Easterbrook, J.) ("***Antitrust law*** is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

Either line of reasoning--whether based on market definition or lack of anticompetitive conduct--leads to the same conclusion. Indeed, they are two sides of the same coin: having created a resort destination, antitrust will not force a resort developer to share its internal profit-making opportunities with competitors. The relevant market requirement reaches this result by finding implausible a market definition that singles out a small component of the cluster of services that constitutes the actual product; the anticompetitive conduct requirement reaches it by saying that it is not anticompetitive to refuse to grant access to competitors.

B. Revocation of Consent to Operate a Ski Rental Facility

The plaintiff does not seriously argue that it was impermissible **[**20]** for DVRC to impose the restrictive covenant back in 1990, or that it would have been impermissible for DVRC to use its ownership of the land to bar competition in the ski rental business from the beginning. Rather, the plaintiff argues primarily that, having allowed third parties to engage in the ski rental business for almost fifteen years, DVRC violated *§ 2 of the Sherman Act* when it revoked that permission and took over the ski rental business for itself.

We do not see the logic in this argument. If ***antitrust law*** permits a resort operator to organize its business in either of two ways, by providing ancillary services itself or by allowing third parties to provide the service on a competitive basis, we do not see why an initial decision to adopt one business model would lock the resort into that approach and preclude adoption of the other at a later time. Conceivably, such a change might lead to a claim under contract law or as a business tort. We would not even preclude the theoretical possibility that such a change could give rise to an antitrust claim, for example, if by first inviting an investment and then disallowing the use of the investment the resort imposed costs on a competitor **[**21]** that had the effect of injuring competition in a relevant market. But there are no such allegations here. Indeed, Christy knew from the beginning that it could operate a ski rental business only by permission of DVRC, on a year-to-year basis. It cannot claim unfair surprise.

The closest case in support of the plaintiff's position is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. In *Aspen Skiing*, two companies had successfully cooperated to offer skiers joint passes to both companies' mountains, until the larger of those companies decided to end the relationship. *Id. at 587-95*. Indeed, it not only stopped offering **[*1197]** the joint pass, but, when its former partner tried to recreate the multi-mountain pass by giving its customers vouchers equal to a price of a full day's lift ticket, it also refused to honor those vouchers. *Id. at 593-94*. The Court held that termination of the relationship was anticompetitive. The case could be interpreted as holding that even if a firm has the right to refuse to do business with a competitor, it may not necessarily have the right to do so after establishing a business relationship. The Court has since said, however, that "*Aspen Skiing* **[**22]** is at or near the outer boundary of *§ 2* liability," *Trinko, 540 U.S. at 409*, and noted that the key fact in *Aspen Skiing* was that the defendant terminated a profitable relationship without any economic justification, showing "a willingness to forsake short-term profits to achieve an anticompetitive end," *id*., especially when it refused to renew the joint ticket "*even if compensated at retail price*." *Id*. The critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal.

Here, in contrast, we have no indication that DVRC is terminating a profitable business relationship. There is no allegation that DVRC was motivated by anything other than a desire to make more money for itself. For all that appears from the complaint, DVRC expects to increase (not forsake) short-term profits by operating its own ski rental facility at the mid-mountain village. The Sherman Act does not force DVRC to assist a competitor in eating away its own customer base, especially when that competitor is offering DVRC nothing in return. Moreover, by using the restrictive covenant DVRC had explicitly informed its competitors from the beginning that the relationship could change at any time. **[**23]** Unlike the competitor in *Aspen Skiing*, Christy should have been aware that the relationship was temporary and subject to DVRC's business judgment. DVRC's behavior does not reach the "outer boundary of § 2 liability," *id*., at which *Aspen Skiing* lies.

At oral argument Christy argued that our opinion in *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999)* requires us to view any decrease in competition as an antitrust violation, even when that decrease represents simply a return to a formerly valid level of competition. In that case, a group of archery manufacturers boycotted a trade show sponsored by a trade show promoter in order to run that promoter out of business and begin promoting shows itself. *Id. at 748*. The boycott organizers argued that "[their] alleged activities were not anticompetitive because [they] actually increased the output of exhibition space, albeit briefly, and because the output of exhibition space merely returned to the pre-boycott level after the [competitor] failed." *Id. at 755*. We rejected that argument, saying that "the bare fact that the output of exhibition space before and after the alleged boycott stayed the same says nothing about **[**24]** whether the process in between was anticompetitive, which it allegedly was." *Id*.

Full Draw indicates only that ***HN6***[] we cannot infer the absence of anticompetitive behavior simply by comparing the level of raw output before and after the alleged violation; we must still consider the underlying behavior. It does *not* suggest that any decrease in the number of competitors or total output will automatically violate the antitrust laws. The defendants in *Full Draw* did not experiment with a new business plan and then return to their earlier status; they actively changed that earlier status by driving a pre-existing competitor out of the market. Rather than inviting a competitor into its market and then rescinding the invitation, the *Full Draw* defendants actively invaded another market **[*1198]** through anticompetitive behavior and substantially changed what that market looked like. Whereas DVRC returned to a position it had a right to from the beginning, the *Full Draw* defendants created a position they never had a right to in the first place.

DVRC should not be forever locked into a business decision made in 1990, especially when it took an affirmative step to preserve its future flexibility by bargaining **[**25]** for a restrictive covenant. This is so even if Christy is correct that by enforcing the restrictive covenant DVRC could increase the price and decrease the output of ski rentals at Deer Valley. It had the right to do so from the beginning, and the fact that it chose to do otherwise for some time does not eliminate that right. The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path.

C. Whether Definition of a Relevant Market Is Required

The plaintiff also argues that, having pled actual anticompetitive effects stemming from DVRC's enforcement of the restrictive covenant, it was not required to plead a relevant market. It reasons that an allegation of actual anticompetitive effects obviates any need to allege a relevant market because such effects are direct evidence that DVRC has monopoly power. ***HN7***[] This proposition is more commonly associated with § 1 claims, which inquire into whether a defendant acts to restrain trade rather than to monopolize a market. *See F.T.C. v. Ind. Fed. of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("Since the purpose of the inquiries into market definition **[**26]** and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotations omitted); *Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998)*. A § 1 claim and a § 2 claim are different inquiries, though. The former prohibits "restraints of trade" that are accomplished through concerted action, while the latter prohibits unilateral conduct but only when it rises to the more severe offense of threatening a monopoly. "Because the Sherman Act does not prohibit unreasonable restraints of trade as such--but only restraints effected by a contract, combination, or conspiracy--it leaves untouched a single firm's anticompetitive conduct . . . that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. *See also Anserphone, Inc. v. Bell Atlantic Corp., 955 F.Supp. 418, 428 (W.D. Pa. 1996)* (relying on this distinction to reject argument that anticompetitive **[**27]** effects are sufficient to state a claim under § 2).

Nonetheless, at least one circuit has applied the plaintiff's logic to the § 2 context. *Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1018 (6th Cir. 1999)* ("[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."). This circuit has neither accepted nor rejected the theory. In two cases, *Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558, 1569 n.15 (10th Cir. 1991)*, and *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 968 n.24 (10th Cir. 1990)*, this court discussed the possibility that proof of anticompetitive effects rendered definition of a relevant market unnecessary in a § 2 case, but in both cases found it unnecessary to reach the issue **[*1199]** either because the plaintiffs had failed to prove detrimental effects, *Tarabishi, 951 F.2d at 1569 n.15*, or because the plaintiffs had proved power in a relevant market, *Reazin, 899 F.2d at 968 n.24*. We are in a similar position.

Although Christy insists that it has shown **[**28]** anticompetitive effects by its allegations of a decline in quantity and increase in price of rental skis at the mid-mountain village, this is just a repackaging of the argument rejected above. ***HN8***[] A resort operator's ability to reserve to itself the operation of ancillary businesses within the resort is not dependent on the quantity of output being as high or the price being as low as they would be if there were competition from third parties within the resort. It depends, instead, on either the proposition that a market that involves only one component of an interrelated package of services is not a relevant market for purposes of the Sherman Act or that it is not anticompetitive conduct for a resort owner to refuse to invite competitors to supply ancillary services within its resort. The fact (even if it is a fact, as the complaint alleges) that fewer skis will be available for rental and that prices for rental skis will be higher, does not refute either of these legal propositions.

The plaintiff also devotes much of its briefing to the argument that the restrictive covenant is a "naked" rather than "ancillary" restraint, making it per se illegal regardless of market power. This was the **[**29]** principal point at issue in *Drury Inn, 878 F.2d at 343*, where we found a restrictive covenant ancillary rather than naked. Christy acknowledges, however, that the naked/ancillary restraint distinction pertains only to its § 1 claim, the appeal of which Christy decided to withdraw subsequent to briefing. Aplt. R. Br. 14 ***HN9***[] ("Those concepts apply *only* in the context of Section 1 restraint of trade claims; they do *not* apply to Section 2 monopoly claims."). Thus, now that the § 1 claim is no longer at issue and only § 2 claims remain, we need not address whether the restrictive covenant is a "naked restraint."

III. Conclusion

Because Christy Sports has failed to plead a plausible claim for either attempted or actual monopolization under *§ 2 of the Sherman Act*, we **AFFIRM** the district court's dismissal for failure to state a claim.

End of Document

[Delano Farms Co. v. Cal. Table Grape Comm'n]()

United States District Court for the Eastern District of California

February 18, 2009, Decided; February 20, 2009, Filed

1:07-cv-1610 OWW SMS

Reporter

623 F. Supp. 2d 1144 *; 2009 U.S. Dist. LEXIS 13081 **; 2009-1 Trade Cas. (CCH) P76,522

DELANO FARMS COMPANY, FOUR STAR FRUIT, INC., and GERAWAN FARMING, INC., Plaintiffs, v. THE CALIFORNIA TABLE GRAPE COMMISSION, Defendant.

Subsequent History: Reconsideration denied by, Claim dismissed by, Motion denied by *Delano Farms Co. v. Cal. Table Grape Comm'n, 2009 U.S. Dist. LEXIS 100093 (E.D. Cal., Oct. 27, 2009)*

Prior History: *Cal. Table Grape Comm'n v. RB Sandrini, Inc., 2007 U.S. Dist. LEXIS 48362 (E.D. Cal., June 27, 2007)*

Core Terms

patent, growers, licensee, license, invalidity, royalties, rights, grape, joined, patent misuse, inequitable conduct, sovereign immunity, license agreement, relevant market, antitrust, nurseries, infringement, indispensable party, shippers, motion to dismiss, exclusive license, agency's action, immunity, Farms, waiver of sovereign immunity, substantial rights, unenforceable, allegations, reproduced, parties

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN1[] **Adjudicative Facts, Facts Generally Known**

See *Fed. R. Evid. 201(b)*.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN2[] **Adjudicative Facts, Judicial Records**

Materials from a proceeding in another tribunal are appropriate for judicial notice.

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

HN3[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails to state a claim upon which relief can be granted.

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

HN4[] Motions to Dismiss, Failure to State Claim

Motions to dismiss under *Fed. R. Civ. P. 12(b)(6)* are disfavored and rarely granted.

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

HN5[] Motions to Dismiss, Failure to State Claim

In deciding whether to grant a motion to dismiss for failure to state a claim, the court accepts all factual allegations of the complaint as true and draws all reasonable inferences in the light most favorable to the nonmoving party. The court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

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

HN6[] Motions to Dismiss, Failure to State Claim

The question before the court on a motion to dismiss for failure to state a claim is not whether the plaintiff will ultimately prevail; rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle him to relief.

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

HN7[] Motions to Dismiss, Failure to State Claim

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Patent Law > Statutory Bars > Public Use Bar > Elements

HN8[] Public Use Bar, Elements

See *35 U.S.C.S. § 120(b)*.

Governments > Local Governments > Claims By & Against

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

Governments > Federal Government > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN9[] Local Governments, Claims By & Against

Where sovereign immunity is asserted, and the sovereign's claims are not frivolous, dismissal must be ordered where there is a potential for injury to the absent sovereign's interests.

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

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

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

HN10[] Compulsory Joinder, Indispensable Parties

See *Fed. R. Civ. P. 19*.

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

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

HN11[] Compulsory Joinder, Indispensable Parties

The application of *Fed. R. Civ. P. 19* involves three successive inquiries. First, the court must determine whether a nonparty should be joined under *Rule 19(a)*. The term "necessary" is used to describe those persons to be joined if feasible. The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. Second, if an absentee is a necessary party under *Rule 19(a)*, the court is to determine whether it is feasible to order that the absentee be joined. Finally, and thirdly, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an indispensable party such that the action must be dismissed. In the final analysis, *Rule 19* uses the word "indispensable" only in a conclusory sense, that is, a person is regarded as indispensable when he cannot be made a party and, upon consideration of the factors in *Rule 19(b)*, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

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

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

HN12[] Compulsory Joinder, Indispensable Parties

The terms "necessary" and "indispensable" are terms of art in *Fed. R. Civ. P. 19* jurisprudence: "Necessary" refers to a party who should be joined if feasible. "Indispensable" refers to a party whose participation is so important to the resolution of the case that, if the joinder of the party is not feasible, the suit must be dismissed.

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

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN13[] Compulsory Joinder, Indispensable Parties

The patent owner is an indispensable party in a case challenging the validity of the patent.

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

Patent Law > Remedies > Declaratory Judgments

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN14[] Compulsory Joinder, Indispensable Parties

The general rule in patent infringement suits, which applies in declaratory relief actions seeking invalidity of a patent, is that the patent owner is to be joined when fewer than all substantial rights have been transferred in an exclusive license to the licensee.

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN15[] Ownership, Federal Government Inventions

See *35 U.S.C.S. § 207(a)(2)*.

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

Civil Procedure > Parties > Joinder of Parties > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN16[] Ownership, Federal Government Inventions

In conjunction with *35 U.S.C.S. § 207(a)(2)*, federal regulations provide, pursuant to *37 C.F.R. § 404.5*, licenses may contain provisions permitting the right to enforce the patent by the licensee, without joining the United States: Licenses shall contain such terms and conditions as the federal agency determines are appropriate for the protection of the interests of the federal government and the public and are not in conflict with law or this part. The following terms and conditions apply to any license: Any patent license may grant the licensee the right of enforcement of the licensed patent without joining the federal agency as a party as determined appropriate in the public interest. *37 C.F.R. § 404.5(b)(2)*.

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

HN17[] Compulsory Joinder, Necessary Parties

When it has been determined that an absent party to the suit is "necessary" under *Fed. R. Civ. P. 19(a)*, the inquiry is whether that party can be joined in the action.

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

HN18[] Administrative Law, Sovereign Immunity

Absent a waiver, sovereign immunity shields the federal government and its agencies from suit.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Federal Government > Claims By & Against

HN19[] Subject Matter Jurisdiction, Jurisdiction Over Actions

The United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Federal Government > Claims By & Against

HN20[] Subject Matter Jurisdiction, Jurisdiction Over Actions

The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.

Governments > Federal Government > Claims By & Against

HN21[] Federal Government, Claims By & Against

Absent a waiver, sovereign immunity bars any proceeding against property in which the United States has an interest.

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

Governments > Federal Government > Claims By & Against

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

HN22[] Compulsory Joinder, Indispensable Parties

If the United States is immune from suit and no waiver is available, the United States cannot be joined under *Fed. R. Civ. P. 19(a)*, and is an indispensable party under *Rule 19(b)*.

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

HN23[] **Administrative Law, Sovereign Immunity**

A waiver of sovereign immunity must be unequivocally expressed. The Government's consent to be sued must be construed strictly, in favor of the sovereign.

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

Governments > Legislation > Interpretation

HN24[] **Administrative Law, Sovereign Immunity**

Whether sovereign immunity has been waived depends on the language of a federal statute.

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

HN25[] **Administrative Law, Sovereign Immunity**

Any suit against a federal agency is a suit against the United States for the purposes of sovereign immunity.

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

Governments > Federal Government > Claims By & Against

Patent Law > Remedies > Declaratory Judgments

HN26[] **Ownership, Federal Government Inventions**

A declaratory judgment seeking invalidity of a U.S.-owned patent squarely implicates sovereign immunity.

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

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

HN27[] **Ownership, Federal Government Inventions**

Property owners are generally necessary parties to actions that could affect their property interests adversely. The United States, as a patent owner, is no exception.

Business & Corporate Compliance > ... > Patent Law > Infringement Actions > Corporate & Government Infringers

Governments > Federal Government > Claims By & Against

Patent Law > ... > Damages > Patentholder Losses > Compensation From United States

HN28[] Infringement Actions, Corporate & Government Infringers

Under the only patent-related waiver of sovereign immunity, *28 U.S.C.S. § 1498* permits private parties to bring patent infringement suits in United States Federal Claims Court to seek money damages only. *28 U.S.C.S. § 1498*.

Business & Corporate Compliance > ... > Patent Law > Infringement Actions > Corporate & Government Infringers

Governments > Federal Government > Claims By & Against

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Declaratory Judgments

Governments > Courts > Courts of Claims

HN29[] Infringement Actions, Corporate & Government Infringers

A suit under *28 U.S.C.S. § 1498* must be brought in U.S. Court of Federal Claims against the United States, and by its plain terms *28 U.S.C.S. § 1498* does not cover declaratory judgments seeking to invalidate a patent.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Federal Government > Claims By & Against

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Scope of Declaratory Judgments

HN30[] Subject Matter Jurisdiction, Jurisdiction Over Actions

The federal statute covering declaratory relief actions, the Declaratory Judgment Act, *28 U.S.C.S. § 2201*, standing alone, does not waive sovereign immunity. The act does not of itself create jurisdiction; it merely adds an additional remedy where the district court already has jurisdiction to entertain the suit.

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

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

HN31[] Compulsory Joinder, Indispensable Parties

If a necessary party cannot be joined, a court must consider whether the party is indispensable. *Fed. R. Civ. P. 19(b)*.

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

HN32[] Compulsory Joinder, Indispensable Parties

A party is indispensable if in equity and good conscience, the court should not allow the action to proceed in its absence.

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

Governments > Federal Government > Claims By & Against

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

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

HN33[] **Compulsory Joinder, Indispensable Parties**

Fed. R. Civ. P. 19(b) sets out four factors to determine whether a case must be dismissed. However, where the absent party cannot be joined in light of sovereign immunity, there may be very little need for balancing because immunity itself may be viewed as the compelling factor. The four factors are: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum.

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

HN34[] **Compulsory Joinder, Indispensable Parties**

The first *Fed. R. Civ. P. 19(b)* factor directs the court to consider, in determining whether the action may proceed, the prejudice to absent entities and present parties in the event judgment is rendered without joinder.

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

HN35[] **Compulsory Joinder, Indispensable Parties**

Under *Fed. R. Civ. P. 19(b)*, "adequacy" refers not to satisfaction of the plaintiffs' claims, but to the public stake in settling disputes by wholes, whenever possible.

Patent Law > Infringement Actions > Defenses > General Overview

HN36[] **Infringement Actions, Defenses**

See *35 U.S.C.S. § 282*.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN37[] **Inequitable Conduct, Elements**

A claim for inequitable conduct requires proof that the defendant, one, affirmatively failed to disclose material information, or submitted false material information, and two, did so with an intent to deceive.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN38[] Inequitable Conduct, Elements

To be guilty of inequitable conduct, one must have intended to act inequitably.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN39[] Inequitable Conduct, Burdens of Proof

Materiality and intent to deceive are distinct factual inquiries concerning inequitable conduct, and each must be shown by clear and convincing evidence.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN40[] Pleadings, Heightened Pleading Requirements

Inequitable conduct must be pled with particularity.

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN41[] Defenses, Inequitable Conduct

Inequitable conduct encompasses deception, fraud, or failure to disclose material information.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Failure to Fulfill Duties

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

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

HN42[] Inequitable Conduct, Failure to Fulfill Duties

Inequitable conduct is a breach of the patentee's duties to the United States Patent and Trademark Office of candor, good faith, and honesty, may be stricken pursuant to *Fed. R. Civ. P. 12(f)* for failure to plead with particularity.

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

HN43[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.

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

HN44[] **Heightened Pleading Requirements, Fraud Claims**

The U.S. Court of Appeals for the Ninth Circuit interprets *Fed. R. Civ. P. 9(b)* to mean that the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.

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

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

HN45[] **Sherman Act, Scope**

A claim for the enforcement of a patent procured by fraud on the United States Patent and Trademark Office may be violative of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, provided the other elements necessary to a *§ 2* case are present. Antitrust liability may arise when a patent has been procured by knowing and willful fraud and the patentee gaining market power in the relevant market through the use of its fraudulently obtained patent to restrain competition.

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

HN46[] **Scope, Monopolization Offenses**

See *15 U.S.C.S. § 2*.

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

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

HN47[] **Attempts to Monopolize, Elements**

In a Walker Process fraud case, the antitrust claimant must show: (1) that the asserted patent was obtained by knowingly and willfully misrepresenting the facts to the United States Patent and Trademark Office; (2) that the party enforcing the patent was aware of the fraud when bringing suit; (3) independent and clear evidence of deceptive intent; (4) a clear showing of reliance, i.e., that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Courts > Courts of Claims

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

HN48[] **Antitrust & Trade Law, Exemptions & Immunities**

Whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of U.S. Court of Appeals for the Federal Circuit law.

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

Governments > Courts > Courts of Claims

HN49[] **Inequitable Conduct, Anticompetitive Conduct**

When the courts consider a patentee's behavior under U.S. Court of Appeals for the Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit.

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN50[] **Inequitable Conduct, Elements**

Fraud in the procurement of a patent requires proof of the elements of common law fraud: (1) that a false representation of a material fact was made; (2) with the intent to deceive; (3) which induced the deceived party to act in justifiable reliance on the misrepresentation; and (4) which caused injury that would not otherwise have occurred.

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

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN51[] **Inequitable Conduct, Anticompetitive Conduct**

To establish fraud for purposes of antitrust violation, the defendant must make a greater showing of scienter and materiality than when seeking unenforceability based on conduct before the U.S. Patent and Trademark Office.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

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

HN52[] **Antitrust & Trade Law, Exemptions & Immunities**

The enforcement of a patent procured by fraud on the U.S. Patent and Trademark Office may be violative of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*. Obtaining a patent by knowing and willfully misrepresenting facts to the Patent Office is sufficient to strip the patentee of its exemption from the antitrust laws. This conclusion applies with equal force to an assignee who maintains and enforces the patent with knowledge of the patent's infirmity.

Antitrust & Trade Law > Sherman Act > Claims

HN53[] **Sherman Act, Claims**

The gravamen of a 15 U.S.C.S. § 2 claim is the deliberate use of market power by a competitor to control price or exclude competition.

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

HN54[] **Actual Monopolization, Monopoly Power**

Monopoly power is defined as the power to control prices or exclude competition. The existence of such power ordinarily may be inferred from the predominant share of the market.

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

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN55[] **Regulated Practices, Monopolies & Monopolization**

To determine if a monopoly exists, it is first necessary to determine the market, both in terms of geography and product, that is being monopolized, that is the "relevant market." The definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility. A submarket exists if it is sufficiently insulated from the larger market so that supply and demand are inelastic with the larger market.

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

HN56[] **Market Definition, Relevant Market**

The relevant market is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.

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

HN57[] **Market Definition, Relevant Market**

The term "relevant market" encompasses notions of geography as well as product use, quality, and description.

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

HN58[] **Relevant Market, Geographic Market Definition**

The geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply.

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

HN59[] Relevant Market, Product Market Definition

The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN60[] Regulated Practices, Market Definition

The proper market definition in any particular case can be determined only after a factual inquiry into the commercial realities faced by consumers. The purpose of market definitions is not to frustrate antitrust plaintiffs by requiring the proof of bright lines which do not exist, but is to help identify monopoly power, that is, the power to control prices or exclude competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

HN61[] Regulated Practices, Market Definition

Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market. To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes--analysis of the interchangeability of use or the cross-elasticity of demand and it must be plausible. Dismissals in such cases on the pleadings typically occur in matters involving (1) a failure to attempt to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes; or (2) a failure to attempt a plausible explanation as to why a market should be limited in a particular way. A complaint may be dismissed under *Rule 12(b)(6)* if the complaint's "relevant market" definition is facially unsustainable.

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

HN62[] Relevant Market, Product Market Definition

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

HN63[] **Relevant Market, Product Market Definition**

In some instances one brand of a product can constitute a separate market.

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

HN64[] **Relevant Market, Product Market Definition**

The market must include all economic substitutes; it is legally permissible to premise antitrust allegations on a submarket. That is, an antitrust claim may, under certain circumstances, allege restraints of trade within or monopolization of a small part of the general market of substitutable products. In order to establish the existence of a legally cognizable submarket, a plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct from the general product market.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN65[] **Inequitable Conduct, Anticompetitive Conduct**

The concept of patent misuse arose to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy. The policy purpose was to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN66[] **Inequitable Conduct, Anticompetitive Conduct**

Patent misuse is viewed as a broader wrong than antitrust violation because of the economic power that may be derived from the patentee's right to exclude. Thus misuse may arise when the conditions of antitrust violation are not met.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN67[] **Inequitable Conduct, Anticompetitive Conduct**

A court's inquiry into a misuse claim is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect. Since patent misuse arises in equity, if found to be patent misuse, the patent is rendered unenforceable. And it remains unenforceable until the misuse ends; the patent, however, is not invalidated.

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

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN68[] Per Se Rule Tests, Manifestly Anticompetitive Effects

When a practice alleged to constitute patent misuse is neither per se patent misuse (e.g. tying arrangements or post-expiration royalties) nor specifically excluded from a misuse analysis by the Patent Misuse Reform Act, *35 U.S.C.S. § 271(d)*, a court must determine if that practice is reasonably within the patent grant, i.e., that it relates to subject matter within the scope of the patent claims. If so, the practice does not have the effect of broadening the scope of the patent claims and thus cannot constitute patent misuse. If, on the other hand, the practice has the effect of extending the patentee's statutory rights and does so with an anticompetitive effect, that practice must then be analyzed in accordance with the rule of reason. Under the rule of reason, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN69[] Inequitable Conduct, Anticompetitive Conduct

License agreements entered into after a patent application has been filed but before the patent issues are not necessarily unenforceable. The key inquiry to patent misuse is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect. Pre-issuance, there is no patent right to impermissibly broaden.

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

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN70[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A patent holder may lawfully restrict a licensee's right to use or sell a patented invention, so long as the restriction is reasonably within the patent grant, but not if the patentee has ventured beyond the patent grant and into behavior having an anticompetitive effect not justifiable under the rule of reason.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN71[] Defenses, Misuse

In the cases in which the restriction is reasonably within the patent grant, the patent misuse defense can never succeed.

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

HN72[] Trade Practices & Unfair Competition, State Regulation

The purpose of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.

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

HN73[] Trade Practices & Unfair Competition, State Regulation

The Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, defines "unfair competition" to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the false advertising law, *Cal. Bus. & Prof. Code § 17500 et seq.* *Cal. Bus. & Prof. Code § 17200*.

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

HN74[] Trade Practices & Unfair Competition, State Regulation

The scope of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, has been viewed by California Courts as quite broad.

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

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

HN75[] State Regulation, Claims

Because the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition. Such a claim can cover anticompetitive business practices and injuries to consumers. It can encompass violations of other laws, treating them as unlawful practices, that are independently actionable under the unfair competition law, but a practice can be deemed unfair even if not specifically proscribed by some other law.

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

HN76[] State Regulation, Claims

To state an Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, claim under the "unlawful" prong, the plaintiffs are required to allege a violation of another law. The "unlawful" practices prohibited by *§ 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.

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

HN77[] **Trade Practices & Unfair Competition, State Regulation**

An unfair act under *Cal. Bus. & Prof. Code § 17200* is defined as one that offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. "Unfair" simply means any practice whose harm to the victim outweighs its benefits.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN78[] **Defenses, Demurrers & Objections, Motions to Strike**

Fed. R. Civ. P. 12(f) provides that redundant, immaterial, impertinent, or scandalous matters may be stricken from any pleading. *Fed. R. Civ. P. 12(f)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN79[] **Defenses, Demurrers & Objections, Motions to Strike**

A motion to strike is limited to pleadings. However, a motion to strike materials that are not part of the pleadings may be regarded as an invitation by the movant to consider whether the proffered material may properly be relied upon.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN80[] **Defenses, Demurrers & Objections, Motions to Strike**

A motion to strike is sometimes used to call to courts' attention questions about the admissibility of proffered material in ruling on motions.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN81[] **Defenses, Demurrers & Objections, Motions to Strike**

Motions to strike are disfavored and infrequently granted. Such motions should be granted only where it can be shown that none of the evidence in support of an allegation is admissible.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN82[] **Defenses, Demurrers & Objections, Motions to Strike**

See *Fed. R. Civ. P. 12(f)*.

Counsel: [1]** For Delano Farms Company, Plaintiff: Brian C Leighton, LEAD ATTORNEY, Law Offices of Brian C. Leighton, Clovis, CA; Lawrence Milton Hadley, LEAD ATTORNEY, Omer Salik, Hennigan Bennett & Dorman, Los Angeles, CA; Ralph B. Wegis, LEAD ATTORNEY, The Law Offices of Ralph B. Wegis, P.C., Bakersfield, CA.

For Four Star Fruit, Inc., Gerawan Farming Inc, Plaintiffs: Brian C Leighton, LEAD ATTORNEY, Law Offices of Brian C. Leighton, Clovis, CA; Lawrence Milton Hadley, Omer Salik, LEAD ATTORNEYS, Hennigan Bennett & Dorman, Los Angeles, CA; Ralph B. Wegis, LEAD ATTORNEY, The Law Offices of Ralph B. Wegis, P.C., Bakersfield, CA.

For The California Table Grape Commission, Defendant: Brian Matthew Boynton, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Randolph D. Moss, PHV, LEAD ATTORNEY, Leon B Greenfield, PHV, Wilmer Cutler Pickering Hale & Dorr LLP (DC), Washington, DC.

Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

Opinion by: Oliver W. Wanger

Opinion

[*1148] MEMORANDUM DECISION AND ORDER [GRANTING IN PART AND DENYING IN PART] DEFENDANT'S MOTION TO DISMISS AND [DENYING] DEFENDANT'S MOTION TO STRIKE (Doc. 19)

I. INTRODUCTION

Defendant, The California Table Grape Commission ("Commission"), moves to dismiss **[*1149]** **[**2]** Plaintiffs' Delano Farms Company ("Delano"), Four Star Fruit, Inc. ("Four Star"), and Gerawan Farming, Inc. ("Gerawan"), entire complaint pursuant to *Federal Rule of Civil Procedure 19(a)*, claiming the United States is a necessary party, and moves to dismiss pursuant to *Federal Rule of Civil Procedure 19(b)*, claiming the government is an indispensable party and immune from this suit. Defendant additionally moves to dismiss Plaintiffs' remaining claims for (1) Inequitable Conduct, (2) Sherman and Clayton Anti-Trust violations, (3) Patent Misuse, (4) Unfair Competition, (5) Unjust Enrichment and (6) Constructive Trust. Defendant moves to strike certain portions of Plaintiffs' complaint pursuant to *Federal Rule of Civil Procedure 12(f)*. (Doc. 20, Motion to Dismiss, Filed December 14, 2007). Plaintiffs oppose the motion. (Doc. 24, Opposition, filed January 9, 2008.) Defendant filed a notice of supplemental authority on June 17, 2008, (Doc. 39). This matter was heard on May 19, 2008.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on November 5, 2007. (Doc. 1, Complaint). The Commission filed its Motion to Dismiss on December 14, 2007, (Doc. 20), which Plaintiffs opposed on January **[**3]** 9, 2008. (Doc. 24, Opposition). On January 21, 2008, Defendant filed a reply to Plaintiffs' Opposition. (Doc. 26, Reply).

III. FACTUAL BACKGROUND

A. Parties

Plaintiff Delano is a corporation duly organized and existing under the laws of the State of Washington, with its principal place of business at Hoquiam, Washington. Plaintiff Four Star is a corporation duly organized and existing under the laws of the State of California, with its principal place of business at Delano, California. Plaintiff Gerawan is a corporation duly organized and existing under the laws of the State of California, with its principal place of business at Sanger, California. Plaintiffs are engaged in the business, *inter alia,* of growing, harvesting and selling table grapes.

Defendant is a corporation of the State of California, established by the 1967 Ketchum Act. *Cal. Food & Agric. Code §§ 65550-65551*. Defendant's principal place of business is at Fresno, California. The stated purpose of the Commission is to expand and maintain the market for California table grapes for the benefit of the State of California as well as the State's over five hundred California table grape growers. The Commission is funded primarily **[**4]** by assessments levied on each shipment of California table grapes and paid by the State's table grape shippers. No general revenues of the State fund the Commission. (Doc. 1, Complaint, PP 4-9).

B. USDA Research Program

California table grape growers and shippers have funded a research program under the U.S. Department of Agriculture ("USDA") to develop new table grape varieties. Growers and shippers fund the USDA research program through the Commission by an assessment on each box of table grapes shipped in California. Prior to 2002, the USDA provided the new varieties under development to area growers for evaluation of growing potential and commercial marketability. Once new varieties appeared commercially viable, the USDA "released" the variety, and distributed plant material of the variety to area growers free-of-charge. The USDA did not charge California growers for the new varieties since California growers and shippers already paid for a large portion of the development. (Complaint, P 10). Accordingly, when a variety under development appeared commercially successful, it **[*1150]** was not uncommon for many growers to have reproduced and commercially sold the variety prior to an official **[**5]** "release" by the USDA. (Complaint, P 43).

C. Commission Patents Grape Varieties

In the late 1990s, the Commission developed a scheme by which it and a few select nurseries could profit from the new varieties that the USDA distributed for free. At the urging of the Commission, the USDA agreed to begin patenting new table grape varieties. California shippers already funded much of the development, but the USDA agreed to give the Commission an exclusive license to all new patented varieties, and to allow the Commission to charge royalties when growers wished to obtain the new varieties. The USDA also agreed to give the Commission exclusive enforcement powers over its new patent rights. (Complaint, P 21).

Under the Commission's "patent and licensing" scheme, the Commission hand-selected three nurseries to exclusively sell all new patented table grape varieties ("Licensed Nurseries"). Unlike the prior free distribution, the nurseries would be allowed to sell new varieties to growers. (Complaint, P 13). The Licensed Nurseries are responsible for paying the royalty, but the Licensed Nurseries are allowed to pass the royalty amount on to the purchasing growers, which they do and have done. The **[**6]** Commission pays a portion of the royalty to the USDA. (Complaint, P 28).

When a grower seeks to obtain a new variety from a nursery, it is required to enter a "Domestic Grower License Agreement" or "License Agreement" with the Commission. Under the terms of the License Agreement, the grower cannot propagate the variety beyond the plant purchased. If the Commission believes the grower has violated the License Agreement, it can void the License Agreement and order that all purchased plants be destroyed. (Complaint, P 13).

The first three varieties that the Commission identified to the USDA for patenting had been under development for years. At least one of the varieties had been distributed to growers for wide-scale commercial evaluation and sale. (Complaint, P 14). Recognizing that at least one of the new varieties identified for patenting (and perhaps all three) had been previously in public use and/or sold commercially, the Commission created a so-called "amnesty program" designed to hide the fact that valid patents could not be obtained, and to extort funds from growers already in possession of the varieties. Under the amnesty program, the Commission widely disseminated notices to **[**7]** growers and shippers stating that they were in violation of the law if they possessed the varieties intended for patenting. The notices also offered confidential "settlements" to any growers who, within a narrow window, agreed to license the varieties, pay a "penalty" to the Commission, and accept the Commission's license restrictions on further propagation. (Complaint, P 15).

In May 2004, the commission sent a notice to all California table grape growers and shippers stating that the USDA had applied for a patent on the Sweet Scarlet variety. Although no enforceable patent had yet issued, the Commission offered "amnesty" for any grower who had previously reproduced Sweet Scarlet. Under its so-called "amnesty" program, a grower with Sweet Scarlet could keep the vines reproduced, so long as the grower (i) admitted to possession prior to July 2004, (ii) paid $ 2 per vine reproduced, (iii) paid $ 2 per box of Sweet Scarlet grapes previously shipped, and (iv) agreed to no further propagation of the Sweet Scarlet variety from the plants possessed. (Complaint, P 60).

[*1151] In July 2004, the Commission sent another notice to all California table grape growers and shippers extending the "amnesty" **[**8]** time period for one month, and extending the "amnesty" to include Autumn King and Scarlet Royal varieties. (Complaint P 61). In both notices, the Commission threatened to sue growers who did not come forward, and to seek money damages and injunctions. Yet, at the time of the second notice, the USDA patent application on Sweet Scarlet not only remained un-issued, but had been rejected by the USPTO. Moreover, the USDA had not even applied for a patent on either Autumn King or Scarlet Royal. The USDA had no patent rights, and the Commission lacked any enforcement rights. (Complaint, P 62). On information and belief, at the time the Commission sent the "amnesty" notices in May and June, 2004, the USDA, and Dr. Ramming knew of the public use and sale with respect to the Sweet Scarlet that occurred prior to February 20, 2002 - more than one year prior to the filing of the '512 Application on the Sweet Scarlet variety. (Complaint, P 63). On information and belief, the Commission, the USDA, and Dr. Ramming learned (prior to the July 25, 2005, issue date for Sweet Scarlet) that at least some of the 17 growers who agreed to the Commission's "amnesty" program for that variety had possessed and **[**9]** reproduced Sweet Scarlet prior to February 2002. On information and belief, the Commission, the USDA, and Dr. Ramming knew that such information was material to the patentability of the Sweet Scarlet variety. (Complaint, P 64). Seventeen growers confirmed possession of the varieties and agreed to pay the penalties demanded by the Commission, confirming its expectation that varieties identified for patenting were in public use. (Complaint, P 17).

D. <u>Patents in Prior Use</u>

The USDA and inventor of the new varieties breached their duty of candor to the United States Patent & Trademark Office ("USPTO") by not reporting these prior public uses and sales when applying for patents on the new varieties. Under Patent Law, public use or sale of an invention more than one year prior to filing a patent application bars patentability. Based on these facts, none of the patents on the new varieties are valid. The USDA and inventor committed inequitable conduct before the USPTO. The Commission demanded licenses and accepted royalties on knowingly invalid patents.

Plaintiffs seek to hold the patents invalid so the varieties can be freely distributed, to obtain the return of royalty payments illegally collected **[**10]** from growers and shippers, and to stop the Commission from engaging in further illegal activities through the use of patents. (Complaint, P 17).

E. <u>Patents</u>

1. <u>Sweet Scarlet</u>

On February 20, 2003, the USDA filed patent application No. 371,512 (the "'512 Application") on a grapevine denominated "Sweet Scarlet." On July 26, 2005, the '512 Application issued as U.S. Patent No. PP 15,891, entitled "Grapevine Denominated Sweet Scarlet" (the "'891 patent"). (Complaint, P 18). The United States of America, as represented by the Secretary of Agriculture, is the owner by assignment of the '891 patent. (Complaint, P 19). On information and belief, the Commission is the exclusive licensee of the '891 patent pursuant to a license agreement entered into between the United States Government, as represented by the United States Department of Agriculture, Agricultural Research Services, and the Commission. The exclusive license includes the right to **[*1152]** license the '891 patent and to enforce the '891 patent against alleged infringers. (Complaint, P 20).

2. <u>Autumn King</u>

On September 28, 2004, the USDA filed patent application No. 953,387 (the "'387 Application") on a grapevine denominated "Autumn King." On February **[**11]** 21, 2006, the '387 Application issued as U.S. Patent No. PP 16,284, entitled "Grapevine Denominated Autumn King" (the "Autumn King or '284 patent"). The United States of America, as represented by the Secretary of Agriculture, is the owner by assignment of the '284 patent. (Complaint, PP 21, 22). On information and belief, the Commission is the exclusive licensee of the '284 patent pursuant to a license agreement entered into between the United States Government, as represented by the United States Department of Agriculture, Agricultural Research Services, and the Commission. The exclusive license includes the right to license the '284 patent and to enforce the '284 patent against alleged infringers. (Complaint, P 23).

3. <u>Scarlet Royal</u>

On September 28, 2004, the USDA filed patent application No. 953,124 (the "'124 Application") on a grapevine denominated "Scarlet Royal." On January 31, 2006, the '124 Application issued as U.S. Patent No. PP 16,229, entitled "Grapevine Denominated Scarlet Royal" (the "Scarlet Royal or '229 patent"). The United States of America, as represented by the Secretary of Agriculture, is the owner by assignment of the '229 patent. (Complaint, PP 24, 25). On information **[**12]** and belief, the Commission is the exclusive licensee of the '229 patent pursuant to a License Agreement entered into between the United States Government, as represented by the United States Department of Agriculture, Agricultural Research Services, and the Commission. The exclusive license includes the right to license the '229 patent and to enforce the '229 patent against alleged infringers. (Complaint, P 26).

E. <u>Plaintiffs' License Agreements</u>

Plaintiffs are in possession of the Autumn King, Sweet Scarlet and Scarlet Royal varieties, which they purchased through Licensed Nurseries. Plaintiffs paid the royalties imposed by the Commission on each purchased plant. (Complaint, P 30). Plaintiffs have entered into a License Agreement with the Commission for each of the Patented Varieties. In consideration for this limited, nonexclusive license, Plaintiffs have paid a license fee to a Licensed Nursery. Under the terms of this agreement, Plaintiffs have a limited, nonexclusive license of the Patented Varieties, to grow the variety and sell the fruit produced. Plaintiffs cannot propagate the grapevines or distribute the vines to third parties. Further, Plaintiffs are obligated to destroy all **[**13]** Patented Varieties' plant material upon termination of the agreement. (Complaint, PP 31-33).

F. <u>Commission's Patent and Licensing Program</u>

The Commission requires that California grape shippers pay an assessment of approximately $ 0.13 per box of table grapes. The Commission operates at an annual surplus from these assessments, but does not return any of the assessment money back to the California growers or shippers. (Complaint, P 34). Dr. Ramming, the co-inventor of the patented Autumn King, Sweet Scarlet and Scarlet Royal varieties, is a researcher at the Agriculture Research Center ("ARC") of the USDA located in Fresno, California. For at least 20 years, Dr. Ramming has operated a research program at the ARC relating to the development of new table grape varieties. Since the early 1980s, the Commission has **[*1153]** funded a portion of Dr. Ramming's grapevine breeding program with funds collected through the shipper assessments. In many years, the Commission's funding has amounted to over one-third of the total table grape research budget at the ARC, excluding employee salaries. (Complaint, P 35). Prior to 2003, the USDA had never sought patent protection for any new table grape variety developed **[**14]** at the ARC.

The USDA agreed that the Commission could serve as the exclusive licensee for patented varieties in the collection of royalties and enforcement against infringers. (Complaint, P 37). In exchange for seeking patent protection, and providing an exclusive license to the Commission, the Commission and the USDA agreed that revenues from the patent licensing program would be shared between the USDA and the Commission. However, the USDA indicated that it was not interested in profiting from the patenting program. Additionally, Dr. Ramming received no extra compensation from the patenting of varieties he developed. (Complaint, P 39).

In accordance with the agreement between the Commission and the USDA, the Commission charges nurseries that distribute patented varieties a $ 5,000 participation fee per patented variety and an additional $ 1 per production unit royalty. These costs are then passed on by the nurseries to the California grape growers, who purchase the patented plant material from the nurseries, including Plaintiffs who purchased the Patented Varieties. (Complaint, P 40). The California grape growers who bear the ultimate costs of the royalty fees imposed by the Commission **[**15]** are the same California grape growers who bear the cost of the per box assessment charged by the Commission, which funds much of Dr. Ramming's breeding program. Thus, California table grape growers essentially pay for the development of patented varieties, then pay again to obtain the varieties. (Complaint, P 41).

The Commission's Research Committee and Board oversee and administer the patent and licensing program. Specifically, the Board sets the royalty rates on patented plants, determines penalties for infringement, and establishes enforcement policy. The Research Committee oversees Dr. Ramming's breeding program and makes recommendations regarding which new varieties should be patented and released. To date, the USDA has only patented new varieties that the Commission has recommended for patenting, and has only applied for patents once receiving a recommendation from the Commission to do so. (Complaint, P 42).

1. Prior Uses and Sales of Patented Varieties

Development of the Patented Varieties began in about 1993. Prior to 2003, Dr. Ramming had reproduced each of the Patented Varieties, Sweet Scarlet, Autumn King, and Scarlet Royal, produced fruit from each of the Patented Varieties, **[**16]** and had evaluated the potential commercialization of each Patented Variety. (Complaint, P 46).

Dr. Ramming did not keep the development of the Patented Varieties secret. To the contrary, Dr. Ramming discussed each of the Patented Varieties with the Commission over many years, including between 2001 and 2003. Dr. Ramming discussed the Patented Varieties during public meetings of the Commission's Research Committee. Additionally, prior to 2003, Dr. Ramming displayed fruit from the Patented Varieties at Commission meetings, which area growers and shippers attended. Attendees were allowed to take samples of fruit from the three varieties. (Complaint, P 47).

[*1154] By 2001, the Commission's Research Committee was actively evaluating the Sweet Scarlet, Autumn King, and Scarlet Royal varieties (among others) for USDA release. The Commission recommended that Sweet Scarlet should be released in 2002. The Commission also recommended that the USDA seek patent protection on Sweet Scarlet as the first variety for patenting under the Commission's new patent and licensing program. After receiving the Commission's recommendation, the USDA proceeded with the release of Sweet Scarlet and filed a patent application **[**17]** on the Sweet Scarlet variety in February 2003. (Complaint, P 48). Although the Commission recommended proceeding with the release of Sweet Scarlet, the Commission decided to delay any release and patenting of Autumn King and Scarlet Royal. Instead, the Commission recommended that Autumn King and Sweet Scarlet undergo further evaluation prior to release. Eventually, the Commission recommended release of Autumn King and Scarlet Royal approximately two years later, in 2004. At that time, the Commission further recommended that the USDA seek patent protection for Autumn King and Scarlet Royal. (Complaint, P 49).

Despite waiting for the Commission's recommendations on releasing new varieties to seek patent protection, Dr. Ramming could have filed patent applications much earlier. All three Patented Varieties had been reproduced and undergone several growing cycles well before the Commission recommended release in 2002 for Sweet Scarlet, and 2004 for Autumn King and Scarlet Royal. By 2001-2002 (if not before), all three varieties had been developed to a point at which they were ready for patenting. The Commission's recommendations regarding continued evaluation of the Autumn King and Sweet **[**18]** Scarlet varieties prior to release did not prevent the USDA from seeking patent protection on these varieties long before receiving a recommendation regarding releases. (Complaint, P 50).

Although the USDA delayed the decision to apply for patents on Autumn King and Scarlet Royal, it made little effort to prevent these varieties from entering the public domain. The USDA did not conceal the varieties. To the contrary, prior to seeking patent protection, the USDA displayed and discussed the varieties at public meetings. Moreover, the USDA kept its fully developed Autumn King and Scarlet Royal plants at unsecured facilities at California State University at Fresno ("Fresno State"), which could be accessed through the Fresno State grounds. The USDA never made efforts to secure plant materials sent to other facilities for testing. (Complaint, P 51). [1]

While delaying the decision to seek patent protection, and failing to implement security measures at its facilities, the USDA knew that public use had been made of new varieties more than one year before applying for a patent would bar later filing for patent protection. Indeed, the Commission and Dr. Ramming discussed the fact that public uses and sales of new varieties prior to seeking patent protection could jeopardize the Commission's patenting program.

---

[1] The USDA considered placing a fence around its facilities adjacent to the Fresno State campus, but declined to do so. Although the USDA purportedly told employees that they were not to take or distribute plant materials from new varieties, the USDA made no efforts to examine materials removed from the USDA facility to ensure that persons entering **[**19]** the facility did not remove plant material for these varieties. (Complaint, P 51).

(Complaint, P 52). All three Patented Varieties entered the public domain more than one year before the USDA sought patent protection **[*1155]** on each respective variety. (Complaint, P 53).

The Sweet Scarlet variety and its fruit was publicly used, distributed, offered for sale and sold by growers and shippers prior to February 20, 2002 - more than one year prior to the filing of the '512 Application on the Sweet Scarlet variety. Specifically, approximately nine growers received Sweet Scarlet from Dr. Ramming for trials in 1999 and 2000. At least three of these growers sold fruit produced into commercial markets before 2002. (Complaint, P 54). Additionally, **[**20]** at least 17 other growers, who were not part of trials, received and reproduced the Sweet Scarlet variety. On information and belief, these reproductions took place prior to 2002. Neither the USDA, nor Dr. Ramming oversaw or controlled the reproductions created by these 17 growers. (Complaint, P 55).

In early 2002, more than two years before filing the patent applications for Autumn King and Scarlet Royal, a grower in Delano, California (J&J Farms, owned by Jim and Jack Ludy) obtained "sticks" of several new varieties, including Autumn King and Scarlet Royal. Jim and Jack Ludy provided some of the plant material for the new varieties (including Autumn King and Scarlet Royal) to their cousin (Lawrence Ludy) who owned and operated an adjacent farm ("Ludy Farms"). With these sticks, the Ludys reproduced Autumn King and Scarlet Royal grapevines on their farms in 2002. Lawrence Ludy reproduced additional Autumn King on his farm in mid-2003. In total, J&J Farms and Ludy Farms reproduced more than five hundred Autumn King and Scarlet Royal plants before September 2003. (Complaint, P 57). J&J Farms and Ludy Farms received the Autumn King and Scarlet Royal plant material without any written **[**21]** or verbal agreement or restrictions on disclosure or use. Neither the USDA, nor Dr. Ramming oversaw or controlled the reproductions that occurred on the Ludy Farms. Although Ludy Farms was privately owned, it placed no special restrictions such as fences or gates limiting public access to its fields and the location of the Autumn King and Scarlet Royal plants. Nor did Ludy Farms place any confidentiality restrictions on employees who viewed the reproduced new varieties. Finally, prior to September 2003, both J&J Farms and Ludy Farms showed the reproduced varieties to members of the public, including neighboring farmers, without any confidentiality restrictions. (Complaint, P 57). The USDA and Dr. Ramming did not disclose to the USPTO the information regarding all the growers who possessed and reproduced Sweet Scarlet prior to February 20, 2002, which the Commission learned through its "amnesty" program. (Complaint, P 65).

On information and belief, both the USDA and the Commission knew, before the respective patents issued on the Patented Varieties, that (i) Sweet Scarlet had been in the public domain since before February 2002, and (ii) either knew or suspected that Autumn King and/or **[**22]** Scarlet Royal had been in the public domain since before September 2003. (Complaint, P 58). Because the known public use and sale of the Patented Varieties, more than one year before the patent application filing would prevent issuance of valid patents, the Commission (with the USDA's knowledge and approval), created a scheme to prevent challenges to patentability based on these prior uses and sales. (Complaint, P 59).

IV. REQUEST FOR JUDICIAL NOTICE

Defendant Commission requests judicial notice pursuant to *Federal Rule of Evidence Rule 201*, of Defendant Party-United States of America's memorandum of **[*1156]** points and authorities filed in the District Court case of *Nutrition 21 v. Thorne Research, Inc., 130 F.R.D. 671 (D.Wash. 1990)* and Appellee Party-United States of America's brief filed in Federal District appeal case of *Nutrition 21 v. United States, 930 F.2d 862 (Fed. Cir. 1991)*. (Doc. 27, Commission Request for Judicial Notice, filed January 21, 2007, Exhibit 1 and Exhibit 2). Plaintiffs provide no objection to this request. ***HN1***[] "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial **[**23]** court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*; *see Biggs v. Terhune, 334 F.3d 910, 916, n.3 (9th Cir. 2003)* (***HN2***[] "Materials from a proceeding in another tribunal are appropriate for judicial notice.")

Defendant's request for judicial notice is GRANTED as to the documents and their existence, but not as to any disputed contents of those papers.

V. LEGAL STANDARD

HN3[] Fed. R. Civ. P. 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails "to state a claim upon which relief can be granted." However, HN4[] motions to dismiss under Fed. R. Civ. P. 12(b)(6) are disfavored and rarely granted. Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997). HN5[] In deciding whether to grant a motion to dismiss, the Court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences" in the light most favorable to the nonmoving party. TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999); *see also,* Rodriguez v. Panayiotou, 314 F.3d 979, 983 (9th Cir. 2002). A court is not "required to accept as true allegations that are merely conclusory, unwarranted **[**24]** deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*.

HN6[] The question before the court is not whether the plaintiff will ultimately prevail; rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle him to relief. *See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). HN7[] "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v. CNN, Inc., 284 F.3d 977, 980 (9th Cir. 2002) (citations omitted).

VI. ANALYSIS

A. Joinder of Parties

Defendant argues that the United States is not a named defendant and is a necessary and indispensable party to certain claims under Federal Rule of Civil Procedure 19. Further, because the United States is not subject to suit under the doctrine of sovereign immunity, Plaintiffs cannot join the United States to this action, and this action must be dismissed under Rule 19(b).

Plaintiffs' first three causes of action seek a declaration of the invalidity of the three U.S.-owned patents under 35 U.S.C. § 102(b) ('891 Patent, '284 Patent and **[**25]** '229 Patent). Defendant seeks to dismiss these causes of action. Defendant's argument that the United States is a necessary and indispensable party is based on the fact that the patents sought to be invalidated are owned by the U.S., a sovereign entity, and Plaintiffs have failed to identify a waiver of sovereign immunity. Plaintiffs allege in the Complaint that the USDA and Dr. Ramming, of the USDA, knowingly did not disclose to the USPTO that the Patented Varieties had been in the public **[*1157]** domain more than one year before the patent application filing dates in violation of the Patent Act. And they allegedly knew that this information would prevent issuance of valid patents. (Doc. 1, Complaint, PP 53, 58-9). Plaintiffs' Complaint is brought against the Commission only. Section 120 of the Patent Act states:

> HN8[] A person shall be entitled to a patent *unless*- (b) *the invention was* patented or described in a printed publication in this or a foreign country or *in public use* or on sale in this country, *more than one year prior to the date of the application* for patent in the United States…

35 U.S.C. § 120(b) (emphasis added).

Defendant also seeks to dismiss Plaintiffs' fourth and sixth claims on **[**26]** the same basis as the first three claims, the U.S. is a necessary and indispensable party and is a sovereign entity immune from this suit. Plaintiffs' fourth claim seeks a declaration that the U.S.-owned patents are unenforceable, in part, due to alleged "inequitable conduct" by the USDA. This directly implicates the interests of the United States, the patent owner, as it would render the patents useless if they are found unenforceable. Claim six is a patent misuse claim, in which Plaintiffs seek a declaration that the patent is also unenforceable due to the Commission's misuse of the patents. Defendant argues this makes the United States a necessary and indispensable party to claims one through four and six.

HN9[] "[W]here sovereign immunity is asserted, and the sovereign's claims are not frivolous, dismissal must be ordered where there is a potential for injury to the absent sovereign's interests." Republic of Philippines v. Pimentel, 553 U.S. 851, 128 S.Ct. 2180, 2182-83, 171 L. Ed. 2d 131 (2008). Rule 19 governs the circumstances under which persons must be joined as parties to a lawsuit. Rule 19 provides in relevant part:

> (a) Persons Required to Be Joined if Feasible.

(1) Required Party. ***HN10***[] A person who is subject to service **[**27]** of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
(A) in that person's absence, the court cannot accord complete relief among existing parties; or
(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
(i) as a practical matter impair or impede the person's ability to protect the interest; or
(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest . . . .

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
(2) The extent to which any prejudice could be lessened or avoided by:
(A) protective provisions in the judgment;
(B) shaping the relief; or
(C) other measures;

(3) whether a judgment **[**28]** rendered in the person's absence would be adequate; and

[*1158] (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19.

HN11[] The "[a]pplication of *Rule 19* involves three successive inquiries." *Wilbur v. Locke, 423 F.3d 1101, 1111 (9th Cir. 2005)*. "First, the court must determine whether a nonparty should be joined under *Rule 19(a)*." The term "necessary" is used to describe those persons to be joined if feasible. *Id. at 1112*. "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992)*.

Second, "[i]f an absentee is a necessary party under *Rule 19(a)*," the court is to determine "whether it is feasible to order that the absentee be joined." *Wilbur, 423 F.3d at 1112*. "Finally, [and thirdly,] if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an 'indispensable party' such that the action must be dismissed." *Id.; Shermoen, 982 F.2d at 1317* (a court must determine whether the absent party is "indispensable" so that in 'equity **[**29]** and good conscience" the suit should be dismissed). In the final analysis, "[r]ule 19 uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in *Rule 19(b)*], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." *Wilbur, 423 F.3d at 1112*. [2]

1. United States is a Necessary Party Under *Rule 19(a)*.

The United States has an "interest relating to the subject of the action" - which is the validity and enforceability of the three patents it owns and the royalties under those patents that it receives. *Fed. R. Civ. P. 19(a)(1)(B)(I)*. Disposition of the claims without the participation of the **[**30]** United States will "as a practical matter impair or impede" the United States' "ability to protect [its] interests." *Id.*

---

[2] ***HN12***[] The terms "necessary" and "indispensable" are terms of art in Rule 19 jurisprudence: "Necessary" refers to a party who should be "[j]oined if [f]easible." *Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 867 n.5 (9th Cir. 2004)*. "'Indispensable' refers to a party whose participation is so important to the resolution of the case that, if the joinder of the party is not feasible, the suit must be dismissed." *Id.*

a. Joinder Voluntarily or Involuntarily of Patent Owner.

The U.S. has retained substantive rights in a patent that is the subject of the exclusive license and therefore is an indispensable party. *Waterman v. Mackenzie, 138 U.S. 252, 255, 11 S. Ct. 334, 34 L. Ed. 923, 1891 Dec. Comm'r Pat. 320 (1890)*. The Ninth Circuit case *Massa v. Jiffy Products Co., 240 F.2d 702 (9th Cir. 1957)*, holds that ***HN13***[] the patent owner is an indispensable party in a case challenging the validity of the patent. "When ownership of the patent and the trademark in *Massa* appeared from his deposition, an involuntary joinder of *Massa* as a party defendant under *Rule 19, Fed. R. Civ. P.* became proper. Massa, appearing as the registered owner of the patent and trade mark, became an indispensable party in the declaratory judgment action, *in order that the alleged infringer might have tried in the one action, as to all parties, the invalidity of the patent and the alleged improper recordation of the trade mark." Id. at 705* (emphasis added). The one exception to this rule, is when a licensee is transferred all "substantial rights" in the patent from the patent owner. **[**31]** This exception **[*1159]** is not here applicable to the License Agreements between the Commission and the United States.

In the Federal Circuit case describing the "rule of reciprocity," *Enzo APA & Son, Inc. v. Geapag A.G., 134 F.3d 1090 (Fed.Cir. 1998)*, the court held that where the non-exclusive licensee did not hold an exclusive license with all "substantial rights," *i.e.,* the right to bring an enforcement action without joining the patent owner, there can no declaratory judgment brought against the licensee, without joining the patent owner. "We have accorded standing, in certain limited circumstances, where all substantial rights under the patent have been transferred in the form of an exclusive license, rendering the licensee the virtual assignee." *Id. at 1093-94*, *citing* *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A., 944 F.2d 870 (Fed.Cir. 1991)*.

HN14[] The general rule in patent infringement suits, which applies in declaratory relief actions seeking invalidity of a patent, is that the patent owner is to be joined when fewer than all substantial rights have been transferred in an exclusive license to the licensee. *Intellectual Property Development, Inc. v. TCI Cablevision of Cal., 248 F.3d 1333 (Fed.Cir. 2001)*. **[**32]** "As a general rule, in accordance with *Independent Wireless,* this court adheres to the principle that a patent owner should be joined, either voluntarily or involuntarily, in any patent infringement suit brought by an exclusive licensee having fewer than all substantial patent rights." *Id. at 1347*; [3] *see also* *Independent Wireless Tel. Co. v. Radio Corp. of Am., 269 U.S. 459, 468, 46 S. Ct. 166, 70 L. Ed. 357, 1926 Dec. Comm'r Pat. 294 (1926)* (patent owner is an indispensable party in infringement suit brought by a licensee); *see also* *Tol-O-Matic, Inc. v. Proma Produkt-Und Marketing Gesellschaft, m.b.H., 690 F.Supp. 798 (D.Minn. 1987)*.

There are two reasons in infringement actions for requiring joinder of the patent owner when fewer than all "substantial rights" have been transferred, in a suit for declaratory relief to invalidate a patent. First, there is the possibility that the alleged infringer would be subject to multiple **[**33]** actions. *Schwarz Pharma, Inc. v. Paddock Laboratories, Inc., 504 F.3d 1371, 1374 (Fed. Cir. 2007)*. Second, to ensure that the rights of the patent owner are protected in a suit brought by the licensee. *Id.* Although Plaintiffs' action is not an infringement action, the second reason applies where patent invalidation is sought. The United States and the USDA both have an interest in whether the Patents in suit are invalidated. If the patent is declared invalid, the United States loses the ownership and value of its patents and any royalty derived from the patents. [4] Second, the patent owner is at risk that a licensee did not diligently defend the patent in pending litigation. The patent owner may have a different perspective because the licensee's interests are limited.

---

[3] "As a prudential principle, an exclusive licensee having fewer than all substantial patent rights possesses standing under the Patent Act as long as it sues in the name of, and jointly with, the patent owner and meets the Lujan requirements. *Id.; citing* *Prima Tek II L.L.C. v. A-Roo Co., 222 F.3d 1372 (Fed.Cir. 2000)*.

[4] Patents have long been considered a species of property. *See* *Brown v. Duchesne, 60 U.S. 183, 197, 15 L. Ed. 595 (1856)* ("For, by the laws of the United States, the rights of a party under a patent are his private property"); *cf.,* *Consolidated Fruit-Jar Co. v. Wright, 94 U.S. 92, 96, 24 L.Ed. 68 (1876)*; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 642, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)*.

Here, the USDA did not transfer all **[**34]** "substantial rights" as required under case law, specifically the right of assignment **[*1160]** and the ability to bring enforcement actions. The Commission ostensibly is unauthorized to defend the declaratory suit seeking to invalidate the U.S.-owned patents, without the joinder of the United States. "[A] patent should not be placed at risk of invalidation by the licensee without the participation of the patentee," *Schwarz Pharma, Inc., 504 F.3d at 1374*, especially here where fewer than all "substantial rights" have been transferred from patent owner to licensee. In *Intellectual Property Development Inc. v. TCI Cablevision of California, 248 F.3d 1333, 1347 (Fed. Cir. 2001)*, the court gave dispositive weight to the licensee's ability to only bring enforcement actions in limited circumstances, and only with consent of the patent owner. The Court also noted the licensee had no assignment rights. As a result, no "substantial rights" existed with the exclusive licensee. "In light of CPL's [patent holder] right to permit infringement in certain cases, the requirement that CPL [patent holder] consent to certain actions and be consulted in others, and the limits in IPD's right to assign its interests **[**35]** in the '202 patent, we find that the CPL IPD agreement at issue transfers fewer than all substantial rights in the '202 patent from CPL [patent holder] to IPD." *Id. at 1345*; *see also* *Vaupel Textilmaschinen KG v. Meccanica Euro Italia, 944 F.2d 870, 875 (Fed.Cir. 1991)* (The court noted the importance of having the right to sue for infringement in determining whether joinder of patent owner is required.)

In *Abbott Laboratories v. Diamedix Corp., 47 F.3d 1128 (Fed. Cir. 1995)*, the exclusive licensee did not have "substantial rights" because it lacked full enforcement rights, and possessed no assignment rights: 1) the exclusive licensee, while possessing the right of first refusal to sue alleged infringers of the patent, could not "indulge" or permit an infringement, which the court noted normally accompanies a complete conveyance of the right to sue; 2) the exclusive licensee was prevented from assigning its rights under the license to any other party other than a successor in business; and 3) the patent owner retained the right to participate in a suit brought by the exclusive licensee.

Here, the License Agreements specify that the Commission, as licensee, cannot file an infringement suit **[**36]** without first obtaining authorization from USDA, the patent holder:

> In the event of [] infringement, the parties hereto shall confer and shall use best efforts to reach mutual agreement upon the best course of action.

See Ex. 1 (Sweet Scarlet License Agreement) § 8.1; Ex. 2 (Autumn King License Agreement) § 8.1; & Ex. 3 (Scarlet Royal License Agreement) § 8.1.5.

The License Agreements further provide:

> USDA may grant the right of enforcement to THE COMMISSION, pursuant to Title 35, *Section 207(a)(2)* and Title 35, Chapter 29, of the U.S. Code.

Id. at § 8.2 (emphasis added).

> The granting of the right of enforcement to THE COMMISSION shall be given thorough consideration on a *case by case basis.*

Id. (emphasis added).

The agreements reserve the right in the United States, to forego enforcement against infringers: The United States may "elect[] not to enforce the Licensed Patents or other intellectual property rights for the Licensed Variety against infringers." *Id.* There is no indication here that the Commission sought or received authorization from the USDA to defend this declaratory judgment suit against the USDA's patents. Last, the license agreements do not provide for assignment rights in **[**37]** the Commission:

> **[*1161]** This Agreement shall not be transferred or assigned by THE COMMISSION to any party other than to a successor or assignee of the entire business interest of THE COMMISSION relating to the Licensed Variety, but in no event shall THE COMMISSION assign or transfer this Agreement to a party not a citizen, resident, or entity of the United States of America. THE COMMISSION shall notify USDA in writing prior to any transfer or assignment.

(EL § 12.1).

While Section *35 U.S.C. § 207(a)(2)* provides federal agencies, such as the USDA, the ability to grant exclusive licenses, the USDA did not do so here:

> (a) ***HN15***[] Each Federal agency is authorized to-
>
> > (2) grant nonexclusive, exclusive, or partially exclusive licenses under federally owned inventions, royalty-free or for royalties or other consideration, and on such terms and conditions, *including the grant to the licensee of the right of enforcement* pursuant to the provisions of chapter 29 of this title as determined appropriate in the public interest.

35 U.S.C. § 207(a)(2) (emphasis added). And ***HN16***[] in conjunction with *35 U.S.C. § 207(a)(2)*, Federal Regulations provide, pursuant to *37 C.F.R. § 404.5*, licenses may contain provisions permitting **[**38]** the right to enforce the patent by the licensee, without joining the United States:

> (b) Licenses shall contain such terms and conditions as the Federal agency determines are appropriate for the protection of the interests of the Federal Government and the public and are not in conflict with law or this part. The following terms and conditions apply to any license:
>
> > (2) Any patent license may grant the licensee the right of enforcement of the licensed patent without joining the Federal agency as a party as determined appropriate in the public interest.

37 C.F.R. § 404.5(b)(2).

Plaintiffs cite to various portions of the License Agreements to demonstrate the rights transferred to the Commission are "substantial rights" to the Patented Varieties. [5] But none of these rights include the "right of enforcement" or the "right of assignment," two determinative rights defining "substantial rights" under present case law: [6]

> . The Commission has an "exclusive license" to "make, use, offer for sale, propagate, maintain, sell and otherwise exploit" the patented varieties. (EL §2.1)
>
> . The Commission has the exclusive right to sublicense the patented varieties. (EL §2.2)
>
> . The exclusive license has no expiration **[**39]** date. (EL §7.1)
>
> **[*1162]** . The Commission is entitled to "use all commercially reasonable efforts to protect USDA's property rights in the Licensed Variety" and the USDA is required to confer with and reach mutual agreement with the Commission regarding infringement of the patents. (EL §8.1) [7]

Under the sublicense agreements, Plaintiffs cite the following: [8]

> . right to terminate the sub-license. (DGL §8.2)
>
> . Right to force grower to destroy all wood of the Patented Variety. (DGL §8.4)

---

[5] Plaintiffs cite *Speedplay, Inc. v. Bebop, Inc., 211 F.3d 1245 (Fed.Cir. 2000)*, which states "the proper focus is on the 'substance of what was granted.'" *Id. at 1250*. In *Speedplay,* the licensor retained the right to bring infringement actions. Specifically, if the licensee did not halt an infringement on the patent, it had the right to bring an infringement action. This right was found "illusory" by the court because the licensee could grant a royalty-free sublicense to an alleged infringer under the license agreement, thereby making the licensor's right to sue nugatory. Here, the USDA does not have such an "illusory" right.

[6] "EL" refers to the exclusive licenses for the Patented Varieties, attached as Exhibits 1-3 to the Commission's Motion to Dismiss. "DGL" refers to the Domestic Grower License Agreements for the Patented Varieties, attached as Exhibits 1-3 to Plaintiffs' Opposition.

[7] Plaintiffs' also **[**40]** cite sections: EL §1.1; EL §1.2; EL §1.3; EL §2.2.

[8] Plaintiffs also cite sections DGL §5.1 and DGL §8.4.

Plaintiffs cite *Dow Chemical Co. v. Exxon Corp., 139 F.3d 1470 (Fed.Cir. 1998)*. But the *Dow Chemical* court, in affirming the district court's decision that joinder of the patent owner was not required, noted first that the patent owner was a wholly-owned subsidiary of the licensee defendant, and was thus not required because its interests were adequately protected, and second, because the licensee had been granted the right to sue for infringement and defend the patent owner in litigation:

> [J]oinder was not required because, "as a practical matter, "Exxon [Corp.] has both the duty and the capability of protecting ECPI's interests." [citation] Although ECPI remains the owner of the '783 patent, it has granted certain significant rights in the patent to Exxon Chemical Company ("ECC"), an unincorporated division of Exxon Corp. These rights include the right to sue for infringement of the patent, **[**41]** the right to defend ECPI in litigation concerning the patent, and the right to sublicense the patent without notifying ECPI.

Id. at 1479 (citation omitted). The facts differ here.

Plaintiffs also cite Eastern District of Pennsylvania, *Pennsalt Chemicals Corp. v. Dravo Corp., 240 F. Supp. 837 (E.D. Pa. 1965)*. The Court held in a declaratory suit seeking to invalidate a patent, that the patent owner was not an indispensable party even though the licensee did not have specific right to sue infringers. The court permitted the suit to proceed against a licensee who had no enforcement rights. [9] The Court noted that intervention was an option if further protection was sought by the patent owner. Despite this holding, the overall weight of the cases heavily favors evaluating license agreements on whether substantial rights are granted to the licensee. Here, the USDA did not provide the Commission, as the licensee, with the right of enforcement, nor the right of assignment, "substantial rights" in licensing the Patented Varieties.

Plaintiffs argue that Defendant overlooks case law where courts have applied a different standard in determining necessary and indispensable defendants in actions for declaratory judgment seeking invalidity. They argue that courts have allowed declaratory judgment actions for invalidity to proceed against exclusive licensees without joining the patent owner. Plaintiffs cite *A.L. Smith Iron Co. v. Dickson, 141 F.2d 3, 6-7 (2d Cir. 1944)* and *Capri Jewelry Inc. v. Hattie Carnegie Jewelry Enterprises, Ltd., 539 F.2d 846, 847 (2d Cir. 1976)* (Friendly, J.).

Capri Jewelry, however, is not applicable, as it was a case of shared counsel, and the facts here are not similar. Counsel in **[*1163]** *Capri Jewelry* represented both the patent owner and the licensee and a 19(b) dismissal was reversed because the patent owner's interest was determined to be adequately protected. "Counsel representing [the licensee], Hattie Carnegie in this suit are *acting both for it [licensee] and for [the patent owner,] James* in the infringement suit [brought against another jewelry distributor]." *Id. at 853* (emphasis added); *see also* *Parkson Corp. v. Andritz Sprout-Bauer, Inc., 866 F.Supp. 773, 775 (S.D.N.Y. 1994)* **[**43]** (highlighting *shared counsel* as critical fact in *Capri Jewelry*). The United States is not represented by the Commission's counsel.

A.L. Smith Iron Co. v. Dickson, 141 F.2d 3, 6-7 (2d Cir. 1944) ("Dickson"), Plaintiffs' second cite, a Second Circuit decision, does not comport with the more general and recent case law in this area. *Dickson* first noted the patent owner has an interest in deciding the forum and was a factor to be weighed:

> [I]ts only interest in the dismissal of the complaint is the interest of every patent owner in the choice of the forum in which, and the time at which, he will assert his rights. That too is an interest proper to be weighed against the plaintiff's interest in settling its present controversy with [licensee] Dickson… Indeed, the owner may have granted a number of licenses, and it would be exceedingly oppressive to subject him to the will of all his licensees.

Id. at 6. But due to the unique facts of the case, the court held that the patent owner did not need to be joined to proceed with the case:

[9] "The fact that the agreement does not specifically authorize defendant to sue alleged infringers does not preclude a finding that defendant is the substantial owner **[**42]** of the patent for purposes of this declaratory judgment action." *Id. at 839*.

> The Court however, found that the patent owner had "plainly" used the licensee to enforce its right, and though it may not have surrendered its choice of forum, it **[**44]** had permitted the licensee to license, thus the court found it clearly had dwindled its right to choose a forum.

Id. (emphasis added).

Case law after *Dickson,* recognizes that it is an outlier case with its unique set of facts: "Recent case law has tended to articulate the implicit denominator in the *Dickson* case. The emphasis today is upon the ability to bring suit to protect the patent against infringement; and, as a manifestation of that power, to be free to select the forum in which the question of infringement should be tried. Instead of predicating the right to sue upon the semantic categorization of litigants as 'licensees' or 'assignees,' the more recent cases have tended to place reliance upon the right to bring suit in affirmance of the patent. Then, assuming that right exists in the licensee, the licensee may be sued to test the validity of the licensed patent without the licensor-patentees being joined as a party defendant." *Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258, 263-264 (S.D.N.Y. 1955)*; *see also* *Alamo Refining Co. v. Shell Development Co., 99 F.Supp. 790, 800 (D.Del. 1951)*; *Messerschmitt-Boelkow-Blohm v. Hughes Aircraft Co., 483 F.Supp. 49, 52 (S.D.N.Y. 1979)*; **[**45]** *Alamo Refining Co. v. Shell Dev. Co., 99 F.Supp. 790, 800 (D. Del. 1951)*. "The rationale of the general rule is that, whether the exclusive license is considered an assignment of all the patentee's rights or not, the owner suffers no prejudice from a judgment of invalidity in his absence if by agreement he has entrusted the licensee with the right to protect his interests by suing for infringement." *Messerschmitt-Boelkow-Blohm, 483 F.Supp. at 52*. "A patent owner has a property right which ought not to be adjudicated in his absence. This is a salutary principle which the courts have long recognized." *Technical Tape Corp. v. Minnesota Min. & Mfg. Co., 135 F.Supp. 505, 508 (S.D.N.Y. 1955)*.

[*1164] Because the United States, as patent owner, owns and controls enforcement of the patents and assignability rights of the patents, and insufficient enforcement rights, without consent, were transferred to the Commission, the United States is a necessary party to this action under *Rule 19*.

2. Sovereign Immunity: Joinder Not Possible.

HN17[] When it has been determined that an absent party to the suit is "necessary" under *Rule 19(a)*, the inquiry is whether that party, the United States, can be joined in the action. **[**46]** *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002)* ("Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party.") Here, unless it is clearly shown that the United States has waived its sovereign immunity, it cannot be joined.

HN18[] "Absent a waiver, sovereign immunity shields the Federal government and its agencies from suit." *F.D.I.C. v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)*. "It is axiomatic that ***HN19***[] the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)*. "It long has been established, of course, that ***HN20***[] the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)* (internal quotation marks omitted, omission in original). ***HN21***[] Absent a waiver, sovereign immunity bars any proceeding against property in which the United States has an interest. *See* *United States v. Alabama, 313 U.S. 274, 282, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941)*. **[**47]** ***HN22***[] If the United States is immune from suit and no waiver is available, the United States cannot be joined under *Rule 19(a)*, and is an indispensable party under *Rule 19(b)*. *See e.g.,* *Dawavendewa, 276 F.3d at 1161* (because tribe enjoys tribal sovereign immunity, it cannot be joined).

HN23[] A waiver of sovereign immunity must be unequivocally expressed. *Department of Army v. Blue Fox, Inc., 525 U.S. 255, 256, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999)*. The Government's consent to be sued must be construed strictly, in favor of the sovereign. *Id.* ***HN24***[] Whether sovereign immunity has been waived depends on the language of a federal statute. *Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993)* ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'"); *United States v. Turkette, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*

("In determining the scope of a statute, we look first to its language.") This suit is against a United States' agency, USDA. ***HN25***[] Any suit against a federal agency is a suit against the United States for the purposes of sovereign immunity. *United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)*.

HN26[] A declaratory judgment seeking invalidity of a U.S.-owned patent squarely **[**48]** implicates sovereign immunity. Further, ***HN27***[] property owners are generally necessary parties to actions that could affect their property interests adversely. [10] The United **[*1165]** States, as owner of the Patented Varieties, is no exception. In *Tegic Communications Corp. v. Board of Regents of the University of Texas System, 458 F.3d 1335 (Fed. Cir. 2006)*, *Eleventh Amendment* immunity barred a suit against a state University. Plaintiffs sought a declaratory judgment to invalidate the University-owned patent. As a result, the patent owner, the University, was dismissed. *Id. at 1345*; *see also* *Xechem Intern., Inc. v. University of Tex. M.D. Anderson Cancer Center, 382 F.3d 1324 (Fed. Cir. 2004)* (parties and court accepted that absent waiver or abrogation, state sovereign immunity precluded litigation against the state university in a suit seeking to correct inventorship of patents owned by the university).

Plaintiffs argue that Defendant's *Eleventh Amendment* state sovereignty cases are not applicable here, because they concern state immunity. However, the state immunity cases demonstrate **[**49]** the importance of adhering to an entity's sovereign immunity, and absent a waiver of sovereign immunity, suits to invalidate a patent, owned by a sovereign, federal or state, are barred. If there is uncertainty, case law concludes that sovereign immunity applies. If ambiguity about waiver of sovereign immunity remains, that ambiguity must be interpreted to preserve sovereign immunity of the United States. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*.

HN28[] Under the only patent-related waiver of sovereign immunity, *28 U.S.C. § 1498* permits private parties to bring patent infringement suits in United States Federal Claims Court to seek money damages only. *28 U.S.C. § 1498*. "In waiving its own immunity from patent infringement actions in *28 U.S.C. § 1498(a) (1994)* ed. and Supp. III)," the United States did not consent to treble damages nor injunctive relief, and permitted reasonable attorney's fees in a narrow class of specified instances. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 648, n.11, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)*. ***HN29***[] This suit must be brought in **[**50]** Federal Claims Court against the United States and by its plain terms *28 U.S.C. § 1498* does not cover declaratory judgments seeking to invalidate a patent. Further, ***HN30***[] the federal statute covering declaratory relief actions, the Declaratory Judgment Act, *28 U.S.C. §2201*, standing alone, does not waive sovereign immunity. *Wyoming v. United States, 279 F.3d 1214, 1225 (10th Cir. 2002)* (the declaratory judgment statute, *28 U.S.C. §2201*, itself does not confer jurisdiction on a federal court where none otherwise exists). "It is well settled, however, that said Act [Declaratory Act] does not of itself create jurisdiction; it merely adds an additional remedy where the district court already has jurisdiction to entertain the suit." *Wells v. United States, 280 F.2d 275, 277 (9th Cir. 1960)*.

There are limited waivers of sovereign immunity enacted by Congress for suits involving property interests of the United States, but such statutes do not address a waiver for patent-property interests of the U.S. [11] Generally property owners are necessary parties to actions that could adversely **[*1166]** affect their property interests and the

---

[10] *McShan v. Sherrill, 283 F.2d 462, 463 (9th Cir. 1960)*; *Stewart v. United States, 242 F.3d 49, 51 (5th Cir. 1957)*.

[11] For example, actions brought under the Quiet Title Act, *28 U.S.C. § 2409a*, waiving immunity for actions brought against the United States involving "real property" in which the United States claims an interest, and *Section 2410, Title 28*, waiving immunity for certain actions involving "real or personal property on which the United States has or claims a mortgage or other lien." *28 U.S.C. § 2410*. The Tucker Act, *28 U.S.C. § 1491*, permits monetary suits brought against the United States based on an alleged violation of a constitutional provision, statute, or regulation, if brought in the Federal Claims Court. *28 U.S.C. § 1498(a)*. It authorizes suits against the United States for patent infringement by the United States, but limits the patent owner's recovery to monetary damages in the Federal Claims Court. *35 U.S.C. § 282* provides affirmative defenses that can be asserted by the federal government in suits brought under *28 U.S.C. § 1498*.

United States is no exception, as a patent owner. [12] The United States cannot **[**51]** be joined absent a clear waiver of sovereign immunity. Plaintiffs have not shown such a waiver exists. The United States cannot be joined.

Plaintiffs argue *§ 702* of the Administrative Procedure Act ("APA"), Title 5 United States Code, eliminates in almost every circumstance, the defense of sovereign immunity to actions seeking non-monetary relief against unlawful action by government agencies and officials. *Section 702* of the APA states:

> A person *suffering legal wrong because of agency action,* or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action is a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee *thereof acted or failed to act in an official capacity or under color of legal authority* shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any **[**53]** mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

5 U.S.C. § 702 (emphasis added).

The one limitation to this waiver of sovereign immunity for non-monetary actions against the United States is if "any other statute that grants consent to suit expressly or *impliedly* forbids the relief which is sought." *5 U.S.C. § 702(2)* (emphasis added). Defendant refers to the text of *§ 702* to argue that it forecloses Plaintiffs' argument concerning the APA as a waiver of sovereign immunity because Plaintiffs are not seeking a review of agency "action" or "inaction," as the suit is brought against the Commission only, the state agency and seeks, based on the actions of the Commission, a declaration of invalidity of the U.S.-owned patents.

In addition, Defendant for the first time in its Reply, discusses the split in the Ninth Circuit on whether final agency action is required to seek review under *§ 702* of the APA. Plaintiffs were not afforded an opportunity to respond. However, in the later case, *Gallo Cattle Co. v. U.S. Dept. of Agriculture, 159 F.3d 1194 (9th Cir. 1998)*, the Court **[**54]** held that review of agency action under the APA, only is available if it constitutes "final agency action" for which there is no other adequate remedy in a court or agency action that is made reviewable by statute. *5 U.S.C. § 704*. However, in an earlier Ninth Circuit Court decision, *The Presbyterian Church (U.S.A.) v. U.S., 870 F.2d 518 (9th Cir. 1989)*, which involved an injunctive suit brought against the Immigration and Naturalization Service ("INS"), for violation of *First* and *Fourteenth Amendment* rights, the court did not limit *§ 702*'s sovereign immunity waiver to "agency action" as is technically defined in *§ 551(13)* of the APA: "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial **[*1167]** thereof, or failure to act." *5 U.S.C. § 551(13)*.

> Nothing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of "agency action"…Moreover, nothing in the legislative history of the 1978 amendment of *§ 702* suggests that Congress intended to limit the waiver of sovereign immunity to the specific forms of "agency action" enumerated **[**55]** in *§ 551(13)*. On the contrary, Congress stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." H.Rep. No. 1656, 94th Cong., 2d Sess. 9, reprinted in 1976 U.S.Code Cong. & Admin.News 6121, 6129 (emphasis supplied). Congress singled out types of government conduct similar to the alleged INS conduct in this case-"tax investigations" and "control of subversive activities"-as appropriate for judicial review under the amended version of *§ 702*….This

[12] *See* *McShan v. Sherrill, 283 F.2d 462, 463 (9th Cir. 1960)* (Any order that would affect title to property requires **[**52]** all parties interested in the title and that will be directly affected by the judgment, be before the court); *Stewart v. United States, 242 F.3d 49, 51 (5th Cir. 1957)*.

> waiver was clearly intended to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of "agency action" contained in § 551(13).

870 F.2d at 525. A later Ninth Circuit decision, Gros Ventre Tribe v. United States, 469 F.3d 801, 808-809 (9th Cir. 2006) recognized the split, but provided no further guidance. "The parties go to great pains to argue the issue whether the APA's waiver of sovereign immunity under 5 U.S.C. § 702 for non-monetary actions against the government is conditioned upon the parties challenging a 'final agency action' as set forth in 5 U.S.C. § 704. **[**56]** We now recognize that there is a conflict in our caselaw regarding this issue; however, we need not resolve it as we affirm the district court on its alternative." Id. at 808. While the *Gros Ventre Tribe* court did not provide any further guidance, it discussed the issue of § 702's waiver of sovereign immunity, at length:

> Under *The Presbyterian Church,* § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. *See* Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471, 510 n.4, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (Souter, J., dissenting) ("[The waiver of sovereign immunity found in 5 U.S.C. § 702] is not restricted by the requirement of final agency action that applies to suits under the [APA]." (citing The Presbyterian Church, 870 F.2d at 523-26)). But that is directly contrary to the holding in *Gallo Cattle* where we stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement… Nevertheless, we need not make a sua sponte en banc call to resolve this conflict…

469 F.3d at 809. Plaintiffs **[**57]** have cited no case where the APA § 702 was invoked as an asserted waiver of sovereign immunity for purposes of bringing a patent invalidity case against the United States. However, if Plaintiff can amend the Complaint to adequately state a § 702 APA claim against the United States, it may.

3. United States is an Indispensable Party and the Disputed Claims Must be Dismissed.

HN31[] If a necessary party cannot be joined, a court must consider whether the party is indispensable. *See* Fed. R. Civ. P. 19(b). ***HN32***[] "A party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 276 F.3d 1150, 1161 (9th Cir. 2002), *quoting* Fed. R. Civ. P. 19(b).

[*1168] ***HN33***[] Rule 19(b) sets out four factors to determine whether a case must be dismissed. However, where the absent party cannot be joined in light of sovereign immunity, "there may be very little need for balancing . . . because immunity itself may be viewed as the compelling factor." Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996). [13]

The four factors are:

> (1) prejudice to any party or to the absent party;
> (2) whether relief can be shaped to lessen prejudice;
>
> (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and
>
> (4) whether there exists an alternative forum.

Id. at 1310-11.

---

[13] In regard to challenges to real property interests, i.e., interests in federal land, implicating sovereign **[**58]** immunity, the Supreme Court and Appeals Courts have consistently held that the United States is an indispensable party. *See e.g.* United States v. Alabama, 313 U.S. 274, 282-83, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941) (invalidating tax sale of federal land. "A proceeding against property in which the United States has an interest in a suit against the United States."); Stewart v. U.S., 242 F.2d 49, 51 (1957) (affirming dismissal of quiet title action against United States); Lambert v. R.F.C., 71 F.Supp. 509, 513 (E.D.N.Y. 1947) (dismissing suit to cancel lease and force sale of government land).

The first factor weighs in favor of dismissal. ***HN34***[] "The first factor directs the court to consider, in determining whether the action may proceed, the prejudice to absent entities and present parties in the event judgment is rendered without joinder." *Republic of Philippines, 128 S.Ct. at 2182*. Plaintiffs seek to invalidate and declare unenforceable patents **[**59]** owned by the United States. The validity of the USDA's patent has been challenged. If invalidated, the USDA's assets, the Patents, would be destroyed, Patented Varieties would be freely marketed, and the USDA would lose royalties. The patents would be declared invalid under claims one through three of the Complaint and unenforceable under claim four for inequitable conduct and claim six for patent misuse.

Plaintiffs, however, argue that the Commission can and will adequately protect the USDA's interest in preserving the validity of the patents-in-suit. The Commission conceived of the patenting programs that resulted in the Patented Varieties and lobbied for its acceptance by the USDA. There is a Memorandum of Understanding between the Commission and the USDA that recognizes that their interests in the patenting program are aligned. The Commission has aggressively enforced and litigated the patents-in-suit in the past. If its interests are prejudiced, Plaintiffs argue the United States could intervene.

Plaintiffs cite *Dainippon Screen Mfg. Co., Ltd. v. CFMT, 142 F.3d 1266 (Fed. Cir. 1998)*, to support their argument that in an action challenging the validity of a patent, the action can **[**60]** proceed without the patent owner. Here, however, unlike in *Dainippon,* there is no unity of ownership or interest between the patent owner and licensee. The facts of *Dainippon* are instructive. The patent owner in the suit was not an indispensable party because the suit was brought by a competitor against the parent company, who held an exclusive license from its wholly-owned subsidiary. *Dainippon* found no indispensability in part because the patent holder was the parent company's holding company for patents and held an identity of interest and ownership with the subsidiary. *Id. at 1273*. As to the first 19(b) factor, there was an adequacy of protection of the subsidiary's interests, the patent owner, by the parent company, the licensee. Further, the patent owner could intervene at any time. *Id. at 1272*.

[*1169] The second factor, whether prejudice can be lessened by shaping the relief provided, also weighs in favor of dismissal. No declaratory, injunctive or compensatory relief would be granted under the Complaint if the patent's validity were not challenged. "Any measures to lessen these prejudices would necessarily dilute the efficacy of the judgment sought." *Messerschmitt-Boelkow-Blohm GmgH v. Hughes Aircraft, 483 F.Supp. 49, 53 (S.D.N.Y. 1979)*. **[**61]** Although the Complaint is brought against the Commission alone, granting declaratory relief requires finding that the Commission had no authority to enforce an invalid patent, that the patent is invalid and unenforceable, a patent which is owned by the USDA, a branch of the United States. Here, any judgment cannot be tailored to eliminate the prejudice to the United States. A finding for Plaintiffs would declare invalid patents owned by the United States, abrogating the United States' interest in the patents, not only depriving the United States of royalties under the patents, but ending the United States' ability to license the patents. In a Western District of Pennsylvania case, *Suprex Corp. v. Lee Scientific, Inc., 660 F.Supp. 89 (W.D. Pa. 1987)*, the court addressed similar facts relating to a university, stated:

> Because the university [patent owner] is a necessary party, we must consider whether the action can proceed in its absence. First, a judgment of patent invalidity in the university's absence would be prejudicial. Such a judgment would devalue the university's asset, reduce royalties now accruing and severely restrict or even destroy the university's ability to develop and **[**62]** market the chromatography technology. Second, the prejudice to the absent patent owner cannot be lessened through the "shaping of relief" because no declaratory, injunctive or compensatory relief would be granted under the existing complaint if the patent's validity were not questioned…such relief requires a finding that Lee Scientific has no authority to enforce an invalid patent owned by the university.

Id. at 93.

The third factor, adequacy of remedy, also favors dismissal. ***HN35***[] "'[A]dequcy' refers not to satisfaction of [Plaintiffs'] claims, but to the 'public stake in settling disputes by wholes, whenever possible.'" *Republic of Philippines, 128 S.Ct. at 2183*, *citing* *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)*. As in *Republic of Phillippines,* "[g]oing forward with the action in the absence of" the United States, "would not further this public interest because they could not be bound by a judgment to which they were not parties." *Id.* The Court held the University had not waived its *Eleventh Amendment* immunity.

The fourth factor is whether there is an available alternative forum. First is the Court of Federal Claims, expressly authorized by statute. Plaintiffs **[**63]** have an opportunity to raise the defense of patent invalidity and unenforceability in an action brought against them for patent infringement brought by the United States or the Commission. *See 35 U.S.C. § 282*. [14]

[*1170] However, to require Plaintiffs to violate the license and wait to see whether the patent owner sues for infringement creates an unfavorable situation as damages could be exacerbated. Where "no alternative forum exists, the district court should be 'extra cautious' before dismissing an action." *Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996)*. But just as the courts have held in actions involving tribal immunity and state immunity, sovereign immunity **[**64]** of the United States can justify dismissal for inability to join an indispensable party, despite the fact that no alternative forum is available. "If the necessary party is immune from suit, there may be very little need for balancing *Rule 19(b)* factors because immunity itself may be viewed as the compelling factor." *Id. at 1311* (internal citations and quotations omitted). The latest Supreme Court case, *Republic of Philippines v. Pimentel, 553 U.S. 851, 128 S.Ct. 2180, 171 L. Ed. 2d 131 (2008)*, to address *Rule 19*, held as to immunity barring an action from proceeding without the sovereign party:

> The analysis of the joinder issue in those cases was somewhat perfunctory, but the holdings were clear: A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

128 S.Ct. at 2190-91. In this context, dismissal is appropriate even if Plaintiffs have no alternative forum for their claim. *See Dawavendewa, 276 F.3d at 1162*.

Because the proceedings in this case threaten both **[**65]** the property and sovereign immunity of the United States, the United States' failure to waive its immunity from suit strongly supports dismissing this litigation in its absence.

Defendant also seeks to dismiss claims four and six, for inequitable conduct and patent misuse on the same grounds that the United States is a necessary and indispensable party. Plaintiffs' fourth claim alleges inequitable conduct against Defendant Commission. In the fourth claim for inequitable conduct, Plaintiffs allege actions by the USDA and Mr. Ramming, and actions of the patent prosecuting attorneys ("Margaret A. Conner, John D. Fado, and/or Lesley Shaw, who prosecuted the application Sweet Scarlet variety") amount to inequitable conduct. (Doc. 1, Complaint PP 90, 91). The United States was not a named Defendant in this claim, although its rights will clearly be implicated if there is a finding in Plaintiffs' favor. Claim six is a patent misuse claim, seeking a judgment that the patents are unenforceable. Again, the United States is not a named party, although this claim, if decided for Plaintiffs, will adversely effect the rights of the United States. Because Plaintiffs are seeking a judgment that the **[**66]** '284, '891 and '229 patents are unenforceable for misuse, the United States is a necessary party and indispensable party under *Rule 19* to this claim. (Complaint, P 109).

---

[14] ***HN36***[] The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

> (1) Noninfringement, absence of liability for infringement or unenforceability,
>
> (2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability.
>
> (3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of *sections 112* or *251* of this title,
>
> (4) Any other fact or act made a defense by this title.

35 U.S.C. § 282.

Defendant's motion to dismiss pursuant to *Rule 19(b)* is GRANTED WITHOUT LEAVE TO AMEND, except if Plaintiffs amend to name the united States and consent to transfer of the case to the Federal Court of Claims.

B. INEQUITABLE CONDUCT.

Defendant seeks, separately from its Rule 19 motion, to dismiss Plaintiffs' fourth claim for inequitable conduct on other grounds. Defendant's motion to dismiss on Rule 19 grounds has been granted **[*1171]** with conditional leave to amend. The other grounds on which Defendant argues for dismissal of the fourth claim are briefly addressed here. Defendant moves to dismiss Plaintiffs' fourth claim for inequitable conduct, which seeks a judgment that the '891 Patent for Sweet Scarlet is unenforceable. Defendant argues that Plaintiffs fail to allege an intent by USDA, and by Dr. Ramming, to deceive the PTO. Defendant also claims that Plaintiffs fail to allege their claim with the specificity required under *Rule 9(b)*. Plaintiffs rejoin that although the Complaint does not allege the specific words "fraudulent **[**67]** intent," all the allegations pled by Plaintiffs regarding inequitable conduct are more than sufficient to state such a claim and comply with *Rule 9(b)*.

HN37[] A claim for inequitable conduct requires proof that Defendant, one, affirmatively failed to disclose material information, or submitted false material information, and two, did so with an intent to deceive. ***HN38***[] "To be guilty of inequitable conduct, one must have intended to act inequitably." *FMC Corp. v. Manitowoc Co., Inc., 835 F.2d 1411, 1415 (Fed. Cir. 1987)*. ***HN39***[] "Materiality and intent to deceive are distinct factual inquiries, and each must be shown by clear and convincing evidence." *Life Technologies, Inc. v. Clontech Laboratories, 224 F.3d 1320, 1324 (Fed. Cir. 2000)*. ***HN40***[] Inequitable conduct must be pled with particularity. *See* *Central Admixture Pharmacy Servs., v. Advanced Cardiac Solutions, 482 F.3d 1347, 1356 (Fed. Cir. 2007)* (inequitable conduct must be pled with particularity). ***HN41***[] "Inequitable conduct encompasses deception, fraud, or failure to disclose material information." *Chiron Corp. v. Abbott Laboratories, 156 F.R.D. 219 (N.D. Cal. 1994)*; *Multimedia Patent Trust v. Microsoft Corp., 525 F.Supp.2d 1200 (S.D. Cal. 2007)*. (***HN42***[] Inequitable **[**68]** conduct is a breach of the patentee's duties to the PTO of candor, good faith, and honesty, may be stricken pursuant to *Rule 12(f)* for failure to plead with particularity).

The Ninth Circuit has described the requirements of sufficiently pleading the facts to meet the requirements of *Rule 9(b)*:

> We have held that ***HN43***[] *Rule 9(b)* "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 611 (9th Cir. 1977)*; *see also* *Walling v. Beverly Enterprises, 476 F.2d 393, 397 (9th Cir. 1973)*.
>
> ***HN44***[] We have interpreted *Rule 9(b)* to mean that the pleader must state the *time, place, and specific content of the false representations* as well as the *identities of the parties* to the misrepresentation.

Schreiber Distributing Co. v. Serv-Well Furniture, 806 F.2d 1393, 1400-01 (9th Cir. 1986) (RICO suit) (emphasis added).

Plaintiffs in their Complaint allege that the '891 patent for Sweet Scarlet is unenforceable because of the inequitable conduct by the USDA and Dr. Ramming, co-inventor of Sweet Scarlet, who "knew of prior possession and reproduction under the Commission's 'amnesty program' **[**69]** and the group of individuals who "prosecuted the application on the Sweet Scarlet Variety before the USPTO, [who] knew of the prior possession and reproduction of the Sweet Scarlet variety by growers who admitted to such possession and reproduction under the Commission's 'amnesty program.'" (Doc. 1, Complaint, P 90, IV. Claim, Inequitable Conduct). Plaintiffs allege in their Complaint, that prior to the issuance of the '891 patent, neither the USDA, nor Dr. Ramming, nor Ms. Conner, Mr. Fado and/or Mr. Shaw notified the USPTO of the prior possession and reproduction by the growers and this breached the duty of candor owed to the USPTO. **[*1172]** The "breach of the duty of candor constitutes inequitable conduct." (*Id.* at PP 91-92).

Plaintiffs state:

> Specifically, approximately nine growers received Sweet Scarlet from Dr. Ramming for trials in 1999 and 2000. At least three of these growers sold fruit produced into commercial markets before 2002. Additionally, at least 17 other growers, who were not part of trials, received and reproduced the Sweet Scarlet variety. On information and belief, these reproductions took place prior to 2002. Neither the USDA nor Dr. Ramming oversaw or controlled the reproductions **[**70]** created by these 17 growers.

(Doc. 1, Complaint, PP 54-55). The totality of these assertions provide sufficient specificity for Plaintiffs have sufficiently pled a claim for inequitable conduct. This Rule 9(b) motion to dismiss is DENIED.

C. ANTI-TRUST

Defendant moves to dismiss Plaintiffs' fifth claim for antitrust violations, specifically, Plaintiffs' claim under *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Defendant argues that Plaintiffs' anti-trust claim fails on three bases: (1) Plaintiffs have failed to allege a cognizable relevant market that the Commission could have monopolized; (2) Plaintiffs have failed to allege that the Commission even participates in the alleged market for the Patented Varieties; (3) and last, Defendant argues that Plaintiffs are indirect purchasers and therefore lack standing to seek damages under the anti-trust laws. Plaintiffs rejoin that they have identified a relevant market, "the worldwide market," for table grapes of these varieties; they have also alleged active participation by the Commission in the worldwide market; and they have standing to seek damages.

"Fraud in the procurement of intellectual property rights can, upon a proper showing, give **[**71]** rise to antitrust liability." 4 J. von Kalinowski, Antitrust Laws and Trade Regulation § 73.03 (2007). The seminal Supreme Court case on this claim is *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp. 5, 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. *Walker* established that ***HN45***[] a claim for "the enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present." *Id. at 174*. Antitrust liability may arise when a patent has been procured by knowing and willful fraud and the patentee gaining market power in the relevant market through the use of its fraudulently obtained patent to restrain competition. *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1367 (Fed. Cir. 1998)*.

Section 2 of the Sherman Act provides:

> ***HN46***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ."

15 U.S.C. § 2.

HN47[] In a Walker Process fraud, the antitrust claimant must show:

> (1) that the asserted patent was obtained by knowingly and willfully misrepresenting the facts **[**72]** to the PTO;
> (2) that the party enforcing the patent was aware of the fraud when bringing suit;
> (3) independent and clear evidence of deceptive intent;
>
> (4) a clear showing of reliance, *i.e.,* that the patent would not have issued but **[*1173]** for the misrepresentation or omission; and
>
> (5) the necessary additional elements of an underlying violation of the antitrust laws.

In re Netflix Antitrust Litigation, 506 F.Supp.2d 308, 314 (N.D. Cal. 2007), *citing* *Nobelpharma, Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068-71 (Fed. Cir. 1998)*. [15]

---

[15] The law of the circuit in which the district court sits governs the ***antitrust law*** issues. ***HN48***[] "[W]hether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." *Nobelpharma, 141 F.3d at 1068*. ***HN49***[] "When…the courts consider a patentee's behavior

Plaintiffs' *§ 2* claim rests on allegations that Defendant **[**73]** illegally monopolized interstate and foreign commerce in bad faith by enforcing alleged patent rights, as the exclusive licensee of the patents and collecting royalty fees on the Patented Varieties under its "amnesty" program, prior to issuance of a valid U.S. patent. It then enforced patent rights and collected royalties on the Sweet Scarlet variety knowing that the patent could not be enforced due to prior public use.

In *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, the Court clarified that "knowing and willful" fraud must be shown, and is a predicate to a potential antitrust violation. ***HN50***[] "Fraud in the procurement of a patent requires proof of the elements of common law fraud: (1) that a false representation of a material fact was made, (2) with the intent to deceive, (3) which induced the deceived party to act in justifiable reliance on the misrepresentation, and (4) which caused injury that would not otherwise have occurred." *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)*. ***HN51***[] "To establish fraud for purposes of antitrust violation, the defendant 'must make a greater showing of scienter and materiality' than when seeking **[**74]** unenforceability based on conduct before the Patent Office." *Id. (Bard).*

1. Indirect Purchasers.

Defendant argues that Plaintiffs cannot sue for anti-trust damages as indirect purchasers under the *Illinois Brick* doctrine, which denies standing to indirect purchasers affected by allegedly anti-competitive activity - that is, plaintiffs purchasing products indirectly or through intermediaries. *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Defendant contends that Plaintiffs cannot seek damages by claiming that the prices of the grape vines they bought from the nurseries were inflated because of the royalties the Commission impermissibly charged the nurseries.

Defendant cites a Fourth Circuit case decision in *Kloth v. Microsoft Corp., 444 F.3d 312 (4th Cir. 2006)*. In *Kloth,* the Court dismissed a monopolization claim against manufacturers brought by purchasers of computers with pre-installed software. The purchasers bought the computers from and paid intermediaries and retailers, not the manufacturer. The Court held that Plaintiffs who purchased Microsoft licenses from intermediaries and retailers when they purchased their pre-installed software computers fit the *Illinois Brick* paradigm. **[**75]** They were indirect purchasers prohibited from asserting a claim against the manufacturer. *Id. at 323*.

[*1174] Plaintiff's antitrust claim is not however solely premised on inflated prices by indirect purchasers. Rather, Plaintiffs' antitrust claim is more broadly based on the enforcement of a patent, knowingly procured through fraud, by an exclusive licensee. Plaintiffs allege that the Commission's threat of enforcement and enforcement of a fraudulently obtained patent caused Plaintiffs to obtain a license it would not have otherwise been required to obtain. Under that license, Plaintiffs must comply with a number of anticompetitive clauses. (Doc. 24, Opposition, p. 23:22-24 - 24:1-4). Plaintiffs state that "[b]ecause [it's] antitrust claim is not based on an inflated price paid by an indirect purchaser, *Illinois Brick* is wholly inapplicable." (*Id.* at p. 24:10-12).

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, the Supreme Court held that ***HN52***[] "the enforcement of a patent procured by fraud on the Patent Office may be violative of *§2* of the Sherman Act…" *Id. at 174*. As the Supreme Court explained, obtaining a patent "by knowing and willfully misrepresenting **[**76]** facts to the Patent Office…would be sufficient to strip [the patentee] of its exemption from the antitrust laws." *Id. at 177*. "This conclusion applies with equal force to an assignee who maintains and enforces the patent with knowledge of the patent's infirmity." *Id. at 177 n.5*.

Defendant also argues that Plaintiffs have not alleged that they have suffered compensable damages from having been unable to propagate their own vines or distribute vines to other distributors. However, Plaintiffs' Complaint makes a general allegation in paragraph 101 of their anti-trust claim that "[t]he existence and misuse of the patents on the Patented Varieties has deprived Plaintiffs of revenues and profits that it would have otherwise enjoyed absent the Commission's anticompetitive activities and patent misuse." (Complaint, P 101). Although Plaintiffs do

---

under Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit."

not specify what is the basis for such lost revenues and profits, they are alleging a basic *Walker Process* claim, but must add these necessary facts.

1. Active Participation.

Defendant also contends that the Commission does not participate in the market, because the Commission's only involvement is the hand-selecting three nurseries to exclusively sell **[**77]** all new patented table grape varieties. Plaintiffs do not allege that the Commission itself sells the Patented Varieties, rather the three nurseries are marketers and their firms are not named parties in this litigation.

Plaintiffs claim the Commission has been an active participant with direct and significant anti-competitive activities in the relevant market, sufficient to uphold an antitrust claim for:

(1) the Commission was the party that collected on-going royalties for each sale of the Patented Varieties;
(2) the Commission threatened enforcement of the patents for the Patented Varieties;
(3) the Commission threatened and sought removal of plant material for the Patented Varieties from growers' land, including growers who have licensed the Patented Varieties;
(4) the Commission required growers to pay for and obtain new licenses in order to expand existing crops of the Patents Varieties;
(5) the Commission granted "amnesty" to growers in exchange for royalty fees for the Patented Varieties under the threat of enforcement of fraudulently procured patent(s); and

[*1175] (6) the Commission granted licenses to a limited number of nurseries to distribute the plant material for the Patented Varieties **[**78]** to the exclusion of other nurseries and on terms dictated by the Commission.

(Doc. 24, Opposition, p. 23).

HN53[] "The gravamen of a *section 2* claim is the deliberate use of market power by a competitor to control price or exclude competition." *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755, 758 (9th Cir. 1986)*. If the Commission does not compete in the relevant market, then it cannot be liable for monopolizing a business in which it does not compete. *Id. at 759*. In *Mercy-Peninsula,* an ambulance company sued San Mateo County for a monopolization claim, claiming the county wrongfully excluded it from a health care provision market by refusing to grant it a contract to provide such services. *Id.* In its decision, the Ninth Circuit noted that the County, during the brief period prior to the enactment of the EMS Act, which provided it state immunity under antitrust laws, the County was not a competitor in the health care provision market, the relevant market. *Id.* The Court provided no discussion, nor cited to relevant law on the issue. But it is clear from case law that Plaintiffs must allege that Defendant has monopoly power in the relevant market, that is, the power to control **[**79]** prices and exclude competition. *U.S. v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Here, the Commission sub-licenses the patented grape stock to the nurseries and the nurseries sell grape stock to Plaintiffs, with restrictions, imposed and monitored by the Commission, on use, re-sale ability and propagation. The Commission sets the prices. It is the primary party enforcing the licenses. The nurseries do not have the power to lessen or destroy competition, they only sell the Patented Varieties based on the restrictions placed by the Commission and the USDA. The Commission remains the primary actor dictating terms of marketing and use for the varieties in-suit.

3. Relevant Market.

HN54[] Monopoly power is defined as "'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market." *Id. at 571*. ***HN55***[] To determine if a monopoly exists, it is first necessary to determine the market, both in terms of geography and product, that is being monopolized, that is the "relevant market." *Thurman Industries, Inc. v. Pay 'n Pak Stores, 875 F.2d 1369, 1373 (9th Cir. 1989)*. "[T]he definition of the relevant market is a factual inquiry **[**80]** for the jury, and the court may not weigh evidence or judge witness credibility." *Rebel Oil, 51 F.3d at 1435*. "A submarket exists if it is sufficiently insulated from the larger market so that supply and demand are inelastic with the larger market." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)*.

Defendant cites *Tanaka v. University of Southern California, 252 F.3d 1059 (9th Cir. 2001)* and *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc., 300 F.3d 620 (5th Cir. 2002)*. In *Tanaka,* a college soccer player seeking to play for a college program in Los Angeles made a conclusory allegation that the "UCLA women's soccer program" constituted its own relevant product market. *Tanaka, 252 F.3d at 1063*. The court rejected such a limited definition of the relevant market and held that women's college soccer programs "compete in the recruiting of student-athletes and, hence, are interchangeable with each other for antitrust purposes." *Id. at 1064*. In *Apani,* the Court stated: "where the plaintiff fails to define its proposed relevant **[*1176]** market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant **[**81]** market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted." *Apani, 300 F.3d at 628*. Defendant argues that just as in *Tanaka* and *Apani,* the instant Complaint should be dismissed because it fails to allege any facts even remotely suggesting that the Patented Varieties are not interchangeable with a host of other varieties.

HN56[] "The relevant market is 'the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.' Sullivan, Antitrust 41 (1977)." *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274, 280 (1st Cir. 1982)*. ***HN57***[] "[T]he term 'relevant market' encompasses notions of geography as well as product use, quality, and description. ***HN58***[] The geographic market extends to the 'area of effective competition'…where buyers can turn for alternative sources of supply.' ***HN59***[] The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity **[**82]** of demand." *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*, *quoting* *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)*.

The Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, stated: ***HN60***[] "The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *504 U.S. at 482*. "The purpose of market definitions is not to frustrate anti-trust plaintiffs by requiring the proof of bright lines which do not exist, but is to help identify monopoly power, that is, 'the power to control prices or exclude competition.'" *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274, 280 (1st Cir. 1982)*, *quoting* *United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

Motions to dismiss are not the place to delve into a factual inquiry on whether, in the market, local, regional, national, or international, for table grapes, if other varieties of table grapes are effective substitutes. As the Second Circuit court case discussed, *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*, ***HN61***[] "[b]ecause market definition **[**83]** is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." "To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a 'rational relation to the methodology courts prescribe to define a market for antitrust purposes--analysis of the interchangeability of use or the cross-elasticity of demand… and it must be 'plausible.'" *Id. at 200* (citations omitted). The court further explained: dismissals in such cases on the pleadings typically occur in matters involving (1) a failure to attempt to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) a failure to attempt a plausible explanation as to why a market should be limited in a particular way. *Id.* (citations omitted). "[A] complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*.

Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 ***[*1177]*** *(1962)* set forth the standards for defining relevant product markets and submarkets and demonstrates **[**84]** the fact-intensive considerations:

> ***HN62***[] The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust

> purposes. *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593-595, 77 S. Ct. 872, 877, 1 L. Ed. 2d 1057*. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325.

"This Court's prior cases support the proposition that ***HN63***[] in some instances one brand of a product can constitute a separate market." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Plaintiffs' Complaint alleges that the Commission conspires to "monopolize the world-wide market for the four Patented Varieties of table grapes…" (Complaint, P 102). **[**85]** Plaintiffs' claim the geographic market is the "world-wide market" and the relevant product market is each Patented Variety, the existence of the plant patents limits the myriad of other varieties of table grapes from being substitutes for the Patented Varieties in the world-wide market. This does not follow logically or legally without further definition and description of the table grape market, such as unique characteristics that set the three varieties apart in sub-markets.

If there are effective substitutes, they must be considered part of the relevant market. Plaintiffs do not allege in the Complaint that no other substitutes for each Patented Variety exist, but state for the first time in their opposition papers, that there are submarkets and that each Patented Variety, Sweet Scarlet, Autumn King and Scarlet Royal, are inherently unique as each grapevine and fruit must derive from the single parent plant. Although dubious, it is not impossible that each Patented Variety constitutes a relevant market. *See* *Walker, 382 U.S. at 177-178* ("To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2* of the Sherman Act, it would then be necessary to appraise **[**86]** the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device-knee-action swing diffusers - used in sewage treatment systems, does not comprise a relevant market. There may be effective substitutes for the device, which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker.")

HN64[] The market must include all economic substitutes, "…it is legally permissible to premise antitrust allegations on a submarket. That is, an antitrust claim may, under certain circumstances, allege restraints of trade within or monopolization of a small part of the general market of substitutable products. In order to establish the existence of a legally cognizable submarket, the plaintiff must be able to show (but need not necessarily establish in the complaint) that the alleged submarket is economically distinct from the general product market." *Newcal Industries, Inc. **[*1178]** v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*.

Because Plaintiffs allege for the first time **[**87]** in their Opposition to these Motions that each Patented Variety is a distinct product market within the table grape market, and do not allege that the Commission holds market power in each Patented Variety market or the scope of that market, they are GRANTED LEAVE TO AMEND to allege the relevant market.

D. Patent Misuse.

Defendant seeks, on separate grounds from its Rule 19 motion, to dismiss Plaintiffs' sixth claim for patent misuse. Defendant's motion to dismiss on Rule 19 grounds has been granted. Nonetheless, the other grounds Defendant advances for dismissal of the sixth claim are briefly addressed. ***HN65***[] "The concept of patent misuse arose to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy. The policy purpose was to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right." *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 705 (Fed. Cir. 1992)*. ***HN66***[] "Patent misuse is viewed as a broader wrong than antitrust violation because of the economic power that may be derived from the patentee's right to **[**88]** exclude. Thus misuse may arise when the conditions of antitrust violation are not met." *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998)*.

HN67[] A court's inquiry into a misuse claim is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect. *Id.* Since patent misuse arises in equity, if found to be patent misuse, the patent is rendered unenforceable. And remains unenforceable until the misuse ends, the patent however is not invalidated. *Id.*

HN68[] "When a practice alleged to constitute patent misuse is neither per se patent misuse [e.g. tying arrangements or post-expiration royalties] nor specifically excluded from a misuse analysis by § 271(d) [Patent Misuse Reform Act, 35 U.S.C. § 271(d)], a court must determine if that practice is 'reasonably within the patent grant, *i.e.,* that it relates to subject matter within the scope of the patent claims.' [citation.] If so, the practice does not have the effect of broadening the scope of the patent claims and thus cannot constitute patent misuse. [citation.] If, on the other hand, the practice has the effect of extending **[**89]** the patentee's statutory rights and does so with an anti-competitive effect, that practice must then be analyzed in accordance with the 'rule of reason.' [citation]. Under the rule of reason, 'the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.'" Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997) (citations omitted).

Defendant claims that two of Plaintiffs' theories do not constitute patent misuse: collecting royalties before a patent issues, and imposing post-sale restrictions on propagation of new vines and distributions to third parties. Plaintiffs' third theory also fails because Plaintiffs have failed to identify a cognizable market required for this type of patent misuse claim. This last argument has already been addressed for the anti-trust claim and need not be repeated.

Plaintiffs' complaint alleges the following three theories of patent misuse:

> **[*1179]** (i) enforcing alleged patent rights and collecting **[**90]** royalty fees on the Patented Varieties under its "amnesty" program prior to issuance of a valid United States patent,
> (ii) enforcing patent rights (including demanding the removal of Patented Varieties) and collecting royalties on the Sweet Scarlet variety while knowing that the patent on Sweet Scarlet could not be enforced due to prior public use and inequitable conduct, and
> (iii) imposing on growers a Domestic Growers' License Agreement, which purport to extend the Commission's rights to Patented Varieties even after sale despite the exhaustion of those rights upon sale of the patented plant.

(Complaint, P 106).

As to the first theory, there is no viable claim for the "amnesty program" as the Commission could not have misused patents that did not exist and at most were inventions in the pre-issuance stage. HN69[] License agreements entered into after a patent application has been filed but before the patent issues are not necessarily unenforceable. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 264-65, 99 S. Ct. 1096, 59 L. Ed. 2d 296 (1979). The "key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive **[**91]** effect." C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed.Cir. 1998). Pre-issuance, there is no patent right to impermissibly broaden. The doctrine of patent misuse could not be brought into play in *Aronson,* which concerned a license agreement entered into before issuance of the patent, but after patent application submitted. 440 U.S. at 264- 65; *see also* Technology Licensing Corp. v. Gennum Corp., No. 01- 04204, 2007 U.S. Dist. LEXIS 35521, 2007 WL 1319528, at *23 (N.D. Cal. May 4, 2007) ("As to Gennum's argument that TLC's interactions with Ross Video constituted misuse of the '250 patent, it is a peculiar notion that a party could "misuse" a patent that is not in existence. While it has been called patent misuse where a patentee seeks to collect royalties after the expiration of the patent term, it appears that in such cases the patentee and licensor have typically entered into the royalty agreement at a time when the patent is in force. Again, to the extent a party demands royalties or demands that another cease using a product where no patent has yet issued, the other party is not put to the type of choice that patent misuse doctrine normally guards against. The other party is free to ignore the **[**92]** demands.") [16]

The motion to dismiss the pre-issuance claim of misuse is GRANTED WITHOUT LEAVE TO AMEND.

Defendant also seeks to dismiss Plaintiffs' claim about the restrictions imposed through the License Agreements prohibiting the propagation of the grapevines or distribution of the vines to third parties (Plaintiffs' third theory - extending "the Commission's rights to Patented Varieties even after sale despite the exhaustion of those rights upon sale of the patented varieties.") (Complaint, P 27). Plaintiffs appear to concede in their Opposition that they cannot assert a patent misuse claim on the basis that the Commission has allegedly attempted to extend patent rights by **[*1180]** prohibiting "growers who purchased the Patented Varieties from propagating the grapevines or distributing the vines to third parties." **[**93]** (*Id.*) "Second, the Commission contends that its restrictions on propagation of new vines and distribution to third parties do not constitute misuse. While this may be true, the Commissions licensing agreements do not simply limit growers from distributing new vines." (Opposition, p. 26); [17] *see* *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 (Fed. Cir. 1992)* (***HN70***[] a patent holder may lawfully restrict a licensee's right to use or sell a patented invention, so long as the restriction is "reasonably within the patent grant," but not if "the patentee has ventured beyond the patent grant and into behavior having an anticompetitive effect not justifiable under the rule of reason."); *Monsanto Co. v. McFarling, 363 F.3d 1336, 1341 (Fed.Cir. 2004)* (***HN71***[] "In the cases in which the restriction is reasonably within the patent grant, the patent misuse defense can never succeed."); *B. Braun Med. v. Abbott Labs., 124 F.3d 1419, 1426 (Fed.Cir. 1997)* ("[E]xpress conditions accompanying the … license of a patented product are generally upheld.") Here, it is not misuse of a plant patent to prevent the plant's disclosure to prevent its reproduction.

Defendant's motion to dismiss Plaintiffs' sixth claim as to theories one and portions of three is GRANTED WITHOUT LEAVE TO AMEND.

E. Unfair Competition.

Defendant moves to dismiss Plaintiffs' seventh claim for unfair competition under *California Business and Professional Code § 17200* and California Common Law. Defendant contends that Plaintiffs have not alleged unlawful conduct because Plaintiffs' only allegation of violation of another law is *Section 2* of the Sherman Act. Absent a *Section 2* violation, Defendant argues Plaintiffs fail to state a claim under the "unlawful" prong of *§ 17200*.

HN72[] The purpose of the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]" *Kasky v. Nike, Inc., 27 Cal.4th 939, 949, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)*. **[**95]** ***HN73***[] It "defines 'unfair competition' to mean and include 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (*§ 17500 et seq.*)].' (*§ 17200*.)." *Id. at 949*. ***HN74***[] The scope of the UCL has been viewed by California Courts as "quite broad." *McKell v. Washington Mut., Inc., 142 Cal.App.4th 1457, 1471, 49 Cal.Rptr.3d 227 (2006)*. ***HN75***[] "Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." *Id.* Such a claim can cover anticompetitive business practices and injuries to consumers. It can encompass violations of other laws, treating them as unlawful practices, that are independently actionable under

---

[16] Plaintiffs cite several cases which do not support a patent misuse claim pre-issuance patent, including a Texas Court of Appeals case, *Reich v. Reed Tool Co., 582 S.W.2d 549 (Tex.App. 1970)*, which is not applicable in the Ninth Circuit. And none of these cases addresses whether collecting royalties per-issuance of patent on its own constitutes a "rule of reason" patent misuse claim.

[17] Plaintiffs also argue in response to Defendant's motion **[**94]** to dismiss its' sixth claim that the Commission restricts third party distribution that extends into foreign territories and cite *Extractol Process v. Hiram Walker & Sons, 153 F.2d 264 (7th Cir. 1946)*. *Extractol* is an older Seventh Circuit decision that does not address patent misuse. Neither party fully briefed this issue, which cannot be resolved as the arguments are unclear.

the unfair competition law, but a practice can be deemed unfair even if not specifically proscribed by some other law. *Cel-Tech Communications, Inc. v. Los Angeles, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)*.

[*1181] The seventh claim states: "The Commission has unlawfully and unfairly exploited the '284, '891 and '229 patents in a manner that violates antitrust laws and in a manner that attempts to extend these **[**96]** patents beyond their lawful scope. Such acts constitute unfair trade practices and unfair competition under *California Business and Professions Code §17200, et seq.*, and under the common law of the State of California, entitling Plaintiffs to relief." (Complaint, P 111).

HN76[] To state an UCL claim under the "unlawful" prong, Plaintiffs are required to allege a violation of another law. "The 'unlawful' practices prohibited by *section 17200* are any practices forbidden by law, be it civil or *839 criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal.App.4th 832, 839, 33 Cal.Rptr.2d 438 (1994)*. Defendant moves to dismiss this portion of the Unfair Competition claim.

Plaintiffs argue that they have stated a cognizable antitrust claim for relief under *Walker Process,* including the allegation of a relevant market. Defendant contends that Plaintiffs have failed to state a claim under the "unfair" prong, because the anticompetitive acts Plaintiffs allege for an unfair practice claim are based primarily on the same conduct as their antitrust claim. Plaintiffs rejoin that their allegations of the Commission's unfair actions go beyond antitrust **[**97]** complaints and that California's unfair competition law is "broad" and "sweeping" and may include a vast range of unfair conduct. ***HN77***[] An unfair act under *§ 17200* is defined as one that "offends an established public policy or…is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1259 (C.D. Cal. 2003)*; *quoting* *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1170, 121 Cal. Rptr. 2d 79 (2002)*. "'Unfair' simply means any practice whose harm to the victim outweighs its benefits." *Saunders v. Superior Court, 27 Cal.App.4th 832, 839, 33 Cal.Rptr.2d 438 (1994)*.

Plaintiffs argue they have satisfied the "broad and sweeping" "unfair" competition claim requirement because they have alleged that the Commission has engaged in a broad range of unlawful and unfair activities, including the enforcement of a patent known to be fraudulently procured, improperly seeking to extend the scope of the patent monopoly, and collecting patent royalties from growers who paid for the research and development of the patented varieties through assessment fees.

Defendant disputes Plaintiffs' contention that they alleged the Commission was **[**98]** "collecting royalties from grower" who already paid assessments. Defendant asserts that the theory is not alleged in Plaintiffs' Complaint. Plaintiffs' Complaint provides adequate notice to Defendant by the allegations:

> For years, California table grape growers and shippers have funded a research program under the U.S. Department of Agriculture ("USDA") to develop new table grape varieties. Growers and shippers fund the USDA research program through the Commission by an assessment on each box of table grapes shipped in California. Prior to 2002, the USDA provided the new varieties under development to area growers for evaluation of growing potential and commercial marketability. Once new varieties appeared commercially viable, the USDA "released" the variety, and distributed plant material of the variety to area growers free-of-charge. The USDA did not charge California growers for the new varieties since California growers **[*1182]** and shippers already paid for a large portion of the development.
>
> In the late 1990s, the Commission developed a scheme by which it and a few select nurseries could profit from the new varieties that the USDA distributed for free. At the urging of the Commission, the **[**99]** USDA agreed to begin patenting new table grape varieties. Although California shippers already funded much of the development, the USDA agreed to give the Commission an exclusive license to all new patented varieties, and to allow the Commission to charge royalties when growers wished to obtain the new varieties. The USDA also agreed to give the Commission exclusive enforcement powers over its new patent rights.

(Complaint, PP 10-11). This alleged "double payment scheme" is entirely premised on the patent laws and the monopoly effect resulting from a valid patent. This claim is entirely derivative of the patent claim, which cannot proceed in this Court.

Defendant's motion to dismiss Plaintiffs' seventh claim is DENIED.

F. Unjust Enrichment and Constructive Trust

Defendant moves to dismiss Plaintiffs' eighth and ninth causes of action for unjust enrichment and constructive trust, respectively. These claims are dependent upon Plaintiffs' substantive claims seeking monetary relief, the antitrust claims and unfair competition claims. Defendant's motion to dismiss the eighth and ninth causes of action is based on the argument that they have proved that the substantive claims must be dismissed, **[**100]** therefore the unjust enrichment and constructive trust claims must also be dismissed as well. Plaintiffs' substantive claim for unfair competition has not been dismissed.

Defendant's motion to dismiss Plaintiffs' eighth and ninth causes of action is DENIED.

G. Motion to Strike.

Defendant moves to strike certain portions of the Complaint. ***HN78***[] *Rule 12(f)* provides that "redundant, immaterial, impertinent, or scandalous matters" may be "stricken from any pleading." *Fed. R. Civ. P. 12(f)* (emphasis added). ***HN79***[] A motion to strike is limited to pleadings. *See* *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)*. However, a "motion to strike" materials that are not part of the pleadings may be regarded as an "invitation" by the movant "to consider whether [proffered material] may properly be relied upon." *United States v. Crisp, 190 F.R.D. 546, 551 (E.D. Cal. 1999)*; *quoting* *Monroe v. Board of Educ., 65 F.R.D. 641, 645 (D. Con. 1975)*. ***HN80***[] A motion to strike has sometimes been used to call to courts' attention questions about the admissibility of proffered material in ruling on motions. *Id.*

Defendant moves to strike allegations in Plaintiffs' antitrust claim regarding the Commission's "amnesty" **[**101]** program because Plaintiffs have not alleged they participated in the program nor that they suffered any injury in fact as a result of the amnesty program. Plaintiffs rejoin that these allegations are highly relevant to their claim and not stated simply for antitrust damages suffered by Plaintiffs. The allegations regarding the "amnesty" program are that 17 growers were in possession of Sweet Scarlet prior to February 2002 and show: (1) the Commission's knowledge that the patent on Sweet Scarlet was fraudulently procured; (2) the Commission's attempts to avoid invalidity challenges to the Sweet Scarlet Patent, knowing it was fraudulently procured; (3) the Commission's threat of enforcement and **[*1183]** enforcement of patents known to be fraudulently procured; and (4) the Commission's attempt to extend the scope of its patents beyond their legal bounds.

HN81[] Motions to strike are however disfavored and infrequently granted. *See* *Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 947 (C.D. Cal. 1990)*, *abrogated on other grounds by* *Stanton Road Ass'n v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993)*. Such motions should be granted only where it can be shown that none of the evidence in **[**102]** support of an allegation is admissible. *See id.*

Defendant's motion to strike the "amnesty program" allegations is DENIED.

Defendant also moves to strike portions of Plaintiffs' prayer for relief sections. Plaintiffs respond that striking certain prayers for relief is not the proper subject of a motion to strike and cite to a Massachusetts District Court case, *Massachusetts v. Russell Stover Candies, Inc., 541 F.Supp. 143, 145 (D. Ma. 1982)* which denied a motion to strike prayers for relief, finding it did not fall within any of the categories referred to in *Rule 12(f)*. *Rule 12(f)* states ***HN82***[] "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. There does not appear to be any Ninth Circuit law addressing the striking of the prayer for relief sections. However, the prayer for relief section is not a substantive part of the pleading and is irrelevant if not supported by evidence. The relief provided for the various claims will be determined if any entitlement to remedies is proved.

Defendant's request to strike various portions of the prayer for relief sections is DENIED.

VI. CONCLUSION

For all the **[**103]** reasons stated above:

1. Defendant's motion to dismiss Plaintiffs' declaratory relief claims pursuant to *Rule 19* is GRANTED WITH LEAVE TO AMEND to transfer the case to the Federal Court of Claims;

2. Defendant's motion to dismiss Plaintiffs' inequitable conduct claim is DENIED;

3. Defendant's motion to dismiss Plaintiffs' antitrust claim is GRANTED WITH LEAVE TO AMEND;

4. Defendant's motion to dismiss all Plaintiffs' patent misuse claims is GRANTED WITHOUT LEAVE TO AMEND;

5. Defendant's motion to dismiss Plaintiffs' unfair competition claim is DENIED;

6. Defendant's motion to dismiss Plaintiffs' claims for constructive trust and disgorgement is DENIED; and

7. Defendant's motion to strike is DENIED.

IT IS SO ORDERED.

Dated: February 18, 2009

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

Emerson Elec. Co. v. Le Carbone Lorraine, S.A.

United States District Court for the District of New Jersey

February 18, 2009, Decided; February 18, 2009, Filed

Civil Action No. 05-6042 (JBS)

Reporter

2009 U.S. Dist. LEXIS 13113 *; 2009 WL 435191

EMERSON ELECTRIC COMPANY, et al., Plaintiffs, v. LE CARBONE LORRAINE, S.A., et al., Defendants.

Prior History: *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 2009 U.S. Dist. LEXIS 8831 (D.N.J., Feb. 4, 2009)*

Core Terms

questions, discovery, conspiracy, carbon

Counsel: **[*1]** For **EMERSON ELECTRIC COMPANY, VALEO, S.A., VALEO, INCORPORATED, VIACOM, INCORPORATED, ELECTROLUX HOME CARE PRODUCTS, INCORPORATED, ROCKWELL AUTOMATION, INCORPORATED, DELPHI CORPORATION, ROBERT BOSCH GMBH, ROBERT BOSCH CORPORATION, A.O. SMITH CORPORATION, VISTEON CORPORATION, BALDOR ELECTRIC COMPANY, FASCO INDUSTRIES, INCORPORATED, SIEMENS TRANSPORTATION SYSTEMS, INCORPORATED, Plaintiffs: DANIEL A. SASSE,** *LEAD ATTORNEY,* CROWELL & MORING, IRVINE, CA; **JEROME A. MURPHY, KENT A. GARDINER, MATTHEW J. MCBURNEY,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, CROWELL & MORING, LLP, WASHINGTON, DC; **JOEL H. SERLIN, RONALD L. CORNELL, JR.,** *LEAD ATTORNEYS,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SEYBURN, KAHN, SOUTHFIELD, MI.

For **MORGAN CRUCIBLE COMPANY, PLC, MORGANITE INDUSTRIES, INCORPORATED, MORGANITE, INCORPORATED, MORGAN ADVANCED MATERIALS AND TECHNOLOGIES, INCORPORATED, MORGANITE ELECTRICAL CARBON LTD, Defendants: ROBERT M. OSGOOD,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SULLIVAN & CROMWELL, NEW YORK, NY.

For **LE CARBONE LORRAINE, S.A., Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* **JAMES RICHARD COSTELLO, II,** SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ.

For **CARBONE [*2] LORRAINE NORTH AMERICA CORPORATION, Defendant: HARRIS NEAL FELDMAN, JAMES RICHARD COSTELLO, II,** *LEAD ATTORNEYS,* SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ; **MARY ELLEN HENNESSY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KATTEN, MUCHIN & ROSEMAN, LLP, CHICAGO, IL.

For **CARBONE OF AMERICA INDSTRIES CORPORATION, Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* **JAMES RICHARD COSTELLO, II,** SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ; **MARY ELLEN HENNESSY,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, KATTEN, MUCHIN & ROSEMAN, LLP, CHICAGO, IL.

For **SCHUNK GMBH, SCHUNK KOHLENSTOFF-TECHNIK GMBH, Defendants: MATTHEW M. NEUMEIER,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, JENNER & BLOCK LLP, CHICAGO, IL.

For **SCHUNK OF NORTH AMERICA, INCORPORATED, SCHUNK GRAPHITE TECHNOLOGY, L.L.C., Defendants: MATTHEW M. NEUMEIER,** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, JENNER & BLOCK LLP, CHICAGO, IL; **JOSEPH A. MARTIN, KERRI E. CHEWNING,** ARCHER & GREINER, PC, HADDONFIELD, NJ.

For **HOFFMANN CARBON, INCORPORATED, Defendant: JOSEPH A. MARTIN, KERRI E. CHEWNING,** ARCHER & GREINER, PC, HADDONFIELD, NJ.

For **SGL CARBON AG, SGL CARBON, LLC, Defendants: JEROME S. FORTINSKY, [*3]** *LEAD ATTORNEY,* COUNSEL NOT ADMITTED TO USDC-NJ BAR, SHEARMAN & STERLING LLP, NEW YORK, NY.

For **EMILIO DIBARNARDO, Defendant: HARRIS NEAL FELDMAN,** *LEAD ATTORNEY,* SCHNADER, HARRISON, SEGAL & LEWIS, LLP, CHERRY HILL, NJ.

For **SCHUNK OF NORTH AMERICA, INC., Schunk Graphite Technology, LLC, Defendants: KERRI E. CHEWNING,** *LEAD ATTORNEY,* ARCHER & GREINER, PC, HADDONFIELD, NJ.

Judges: HON. JEROME B. SIMANDLE, United States District Judge.

Opinion by: JEROME B. SIMANDLE

Opinion

MEMORANDUM OPINION

SIMANDLE, DISTRICT JUDGE:

This matter comes before the Court on three motions for issuance of request for international judicial assistance pursuant to *Rule 28(b), Fed. R. Civ. P.*, and *28 U.S.C. § 1781*, filed by Plaintiffs [Docket Items 140, 141 and 146]. THIS COURT FINDS AS FOLLOWS:

1. Plaintiffs seek to depose three non-party witnesses -- Robin D. Emerson, Richard Fourcault, and Jacques Marquand -- all of whom reside abroad and all of whom, Plaintiffs allege, were involved in an international conspiracy to fix the price of electrical carbon product in the United States. Both Mr. Fourcault and Mr. Marquand were employed by Defendant Le Carbone Lorraine, S.A. ("LCL") -- Mr. Fourcault as Vice President of LCL's Consumer Division and Mr. **[*4]** Marquand as President of that division. Mr. Emerson was employed by a subsidiary of The Morgan Crucible Company, PLC, which is a former defendant in this matter. The facts are well-known to all parties and the Court will not reiterate them here.

2. Defendants do not oppose Plaintiffs' motions in their entirety, but instead ask the Court to limit the questions that may be asked in the following ways:

. Questions relating to the European Commission's investigation should be stricken from the request
. Questions for examination relating to Defendants' activities in Europe should be stricken
. Questions for examination relating to the isostatic graphite industry should be stricken from the request
. Questions relating to Mr. Emerson's communications with and documents he produced to the U.S. Department of Justice relating to his obstruction of justice guilty plea should be stricken from the request
. The request should be limited to cover the defined relevant period of October 1988 to September 2001
. The request should be amended to make clear that Defendants will be entitled to attend any examination proceedings and question the witness

3. The scope of proper discovery is governed by *Rule 26(b)(1), Fed. R. Civ. P.*:

> Parties **[*5]** may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by *Rule 26(b)(2)(C)*.

4. *Rule 26(b)(2)(C)* incorporates the rule of proportionality. Thus, *Rule 26(b)(2)(C)* requires the Court to limit the extent of the discovery when, inter alia, "the burden or expense of the proposed discovery outweighs its likely benefit" or the information can be obtained from another, less burdensome, source.

5. The Court rejects Defendants' request to strike questions related to the European Commission investigation and the witnesses' conduct in Europe. In previous discovery disputes, Defendants have similarly argued that Plaintiffs are not entitled **[*6]** to information about the European conspiracy to fix the price of electrical carbon products, given this Court's decision that it lacks subject matter jurisdiction over claims of conspiracy to purchase these products abroad. *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., 500 F.Supp.2d 437 (D.N.J. 2007)* ("Emerson I"). Plaintiffs maintain, however, that efforts to fix prices in the United States occurred, and may have been based, in Europe. In particular, Plaintiffs accuse LCL, a French business, of orchestrating a conspiracy targeted, at least in part, in the United States. Further, the European Commission, though it ultimately found insufficient evidence that the European cartel extended beyond Europe and the Middle East, was investigating the "same conspiracy" at issue here. *Emerson Elec. Co. v. Le Carbone Lorraine, S.A., No. 05-6042, 2008 U.S. Dist. LEXIS 72705, 2008 WL 4126602, at *8 (D.N.J. Aug. 27, 2008)* ("Emerson II"). Finally, the Court has reviewed the proposed questions for each of the three motions and does not find undue emphasis placed on European activity and does not find the burden of answering those questions that do pertain to European activities outweigh their relevance. Therefore, these questions **[*7]** will be permitted.

6. The Court likewise will not strike questions relating to the isostatic graphite industry. Defendants LCL and its North American subsidiaries pled guilty to a price-fixing conspiracy in the isostatic graphite industry. The Court has previously found that information about this conspiracy is relevant because "[s]imilar cartel activities undertaken in a similar marketplace may be probative of the motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake" of Defendants. *Emerson II, 2008 U.S. Dist. LEXIS 72705, [WL] at *6*. Furthermore, the Court finds that the few, relatively narrow, proposed questions on the isostatic graphite industry are focused on its connection to electrical carbon products and are not unduly burdensome, and should be permitted.

7. The Court further will not strike questions related to Mr. Emerson's guilty plea for obstruction of justice. Plaintiffs maintain, and Defendants do not contest, that Mr. Emerson pled guilty to obstructing the Department of Justice investigation into price-fixing in the electrical carbon products industry. It makes little difference that Mr. Emerson was convicted of obstruction of justice, not violating ***antitrust law***. The **[*8]** Court, therefore, finds this subject highly relevant and questioning on the subject would not be unduly burdensome and will be allowed.

8. The Court does accept Defendants' request that these probing questions be limited to the defined "relevant period" of October 1988 to September 2001. Plaintiffs have offered no defense for inquiring beyond this period - already a lengthy one. Information beyond this period has limited relevance and creates the risk of a truly limitless inquiry. The Court finds the period to be a reasonable, and necessary, limit tailored to the relevant time period.

9. The Court also orders Plaintiffs to permit Defendants to attend any examination proceedings. To the extent that the judiciary of the United Kingdom permit counsel for both parties to question the witnesses, Defendants are permitted to question the witnesses within the scope of Plaintiffs' examination. To the extent that the French judiciary will provide an official inquisitor, Defendants' questions are included with the proposed questions to be attached to the Court's request for international assistance. The Court has reviewed all proposed questions from both Plaintiffs and Defendants and concludes **[*9]** that all questions are proper for the purpose of these depositions.

10. An accompanying Order will be entered.

February 18, 2009

Date

/s/ Jerome B. Simandle

JEROME B. SIMANDLE

United States District Judge

Pac. Bell Tel. Co. v. linkLine Communs., Inc.

Supreme Court of the United States

December 8, 2008, Argued; February 25, 2009, Decided

No. 07-512

Reporter

555 U.S. 438 *; 129 S. Ct. 1109 **; 172 L. Ed. 2d 836 ***; 2009 U.S. LEXIS 1635 ****; 77 U.S.L.W. 4130; 2009-1 Trade Cas. (CCH) P76,500; 21 Fla. L. Weekly Fed. S 654; 47 Comm. Reg. (P & F) 472

PACIFIC BELL TELEPHONE COMPANY, dba AT&T CALIFORNIA, et al., Petitioners v. LINKLINE COMMUNICATIONS, INC., ET AL.

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Linkline Communs., Inc. v. Cal., Inc., 503 F.3d 876, 2007 U.S. App. LEXIS 21719 (9th Cir. Cal., 2007)

Disposition: Reversed and remanded.

Core Terms

prices, squeeze, price-squeeze, antitrust, wholesale, predatory, retail, retail price, Sherman Act, rivals, wholesale price, firms, competitors, anti trust law, plaintiffs', monopolist, monopoly, upstream, transport, inputs, amici, antitrust liability, no duty, monopolize, customers, regulated, margins, courts, amended complaint, leave to amend

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN1[] **Sherman Act, Claims**

A price-squeeze claim may not be brought under *§ 2* of the Sherman Act when a defendant is under no antitrust obligation to sell the inputs to a plaintiff in the first place.

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

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

HN2[] Regulated Practices, Monopolies & Monopolization

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. Ch. 647, 26 Stat. 209, 15 U.S.C.S. § 2. Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] Sherman Act, Claims

If a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] Sherman Act, Claims

Cutting prices in order to increase business often is the very essence of competition. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly because they chill the very conduct the antitrust laws are designed to protect. To avoid chilling aggressive price competition, the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low are carefully limited. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.

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

HN5[] Anticompetitive & Predatory Practices, Predatory Pricing

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN6[] Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes

An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not forbid lawfully obtained monopolies from charging monopoly prices. Similarly, the Sherman Act does not forbid--indeed, it encourages--aggressive price competition at the retail level, as long as the prices being charged are not predatory. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price.

Lawyers' Edition Display

Decision

[*836]** Internet service providers' (ISPs') claim that digital subscriber line (DSL) providers "squeezed" ISPs' profit margins held not cognizable under *15 U.S.C.S. § 2*, as (1) DSL providers lacked antitrust obligation to sell wholesale service to ISPs; and (2) there was no showing of retail predatory pricing.

Summary

Procedural posture: Respondent Internet service providers (ISPs) brought an action against petitioner providers of digital subscriber line (DSL) service for connecting to the Internet, alleging that the providers "squeezed" the ISPs' profit margins in setting retail prices. Upon the grant of a writ of certiorari, the providers appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit which held that the claim was cognizable under *15 U.S.C.S. § 2*.

Overview: The providers participated in both the wholesale and retail markets for DSL service and, while the providers were otherwise not required to deal with the ISPs, federal approval of a prior merger required the providers to provide wholesale DSL service to the ISPs at a price no greater than retail. The ISPs contended that the providers raised wholesale prices while cutting retail prices, resulting in the ISPs being forced to pay the higher wholesale price while cutting their own retail prices to compete with the providers. The U.S. Supreme Court held that the ISPs' price-squeeze claim could not brought under *§ 2* since the providers were under no antitrust obligation to sell wholesale DSL service to the ISPs and there was no showing of predatory retail pricing. The providers' duty to sell to the ISPs arose from federal regulations rather than antitrust obligations under *§ 2*, there was no allegation that the providers' retail price was below cost, and, in the absence of a duty to deal at the wholesale level and no predatory pricing at the retail level, the providers **[***837]** were not required to set both wholesale and retail prices in a manner which preserved the ISPs' profit margins.

Outcome: The judgment which held that the ISPs' price-squeeze claim was cognizable under *§ 2* was reversed and the case was remanded for further proceedings. 5-4 Decision; 1 concurrence in the judgment.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > PRICE SQUEEZE > Headnote:
LEdHN[1][] [1]

A price-squeeze claim may not be brought under *§ 2* of the Sherman Act when a defendant is under no antitrust obligation to sell the inputs to a plaintiff in the first place. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > SHERMAN ACT -- MONOPOLIZATION > Headnote:
LEdHN[2][] [2]

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 2. Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > REFUSAL TO DEAL > Headnote:
LEdHN[3][] [3]

If a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41.5 > PREDATORY PRICING -- SHERMAN ACT > Headnote:
LEdHN[4][] [4]

Cutting prices in order to increase business often is the very essence of competition. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly because they chill the very conduct the antitrust laws are designed to protect. To avoid chilling aggressive price competition, the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low are carefully limited. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.) **[***838]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > PRICE CUTTING > Headnote:
LEdHN[5][] [5]

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41.5 > WHOLESALE PRICES -- PREDATORY PRICES > Headnote:
LEdHN[6][] [6]

An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not forbid lawfully obtained monopolies from charging monopoly prices. Similarly, the Sherman Act does not forbid--indeed, it encourages--aggressive price competition at the retail level, as long as the prices being charged are not predatory. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

Syllabus

[*438] **[***839]** **[**1112]** Petitioners (hereinafter AT&T) own infrastructure and facilities needed to provide "DSL" service, a method of connecting to the Internet at high speeds over telephone lines. As a condition for a recent merger, the Federal Communications Commission requires AT&T to provide wholesale DSL transport service to independent firms at a price no greater than the retail price of AT&T's DSL service. The plaintiffs in this case, respondents here, are independent Internet service providers that compete with AT&T in the retail DSL market in California. The plaintiffs do not own all the facilities needed to supply DSL service, and must lease wholesale DSL transport service from AT&T. They filed suit under *§ 2* of the Sherman Act, asserting that AT&T unlawfully "squeezed" their profit margins by setting a high price for the wholesale DSL transport service it sells and a low price for its own retail DSL service. This maneuver allegedly placed the plaintiffs at a competitive disadvantage, allowing AT&T to maintain monopoly power in the DSL market. AT&T moved for judgment on the pleadings, **[****2]** arguing that the plaintiffs' claims were foreclosed by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*, in which this Court held that a firm with no antitrust duty to deal with its rivals has no obligation to provide those rivals with a "sufficient" level of service. The District Court found that AT&T had no antitrust duty to deal with the plaintiffs, but nonetheless denied the motion, holding that *Trinko* did not address price-squeeze claims. The court certified its order for interlocutory appeal on the question whether *Trinko* bars price-squeeze claims when the parties are required to deal by federal communications law, but not ***antitrust law***. The Ninth Circuit affirmed, holding that *Trinko* did not address the viability of price-squeeze claims, and thus the plaintiffs' complaint stated a potentially valid *§ 2* claim.

Held:

1. The case is not moot. The plaintiffs now agree that their claims must meet the *Brooke Group* test for predatory pricing, apparently apart from their price-squeeze theory. That test established two requirements for predatory pricing: below-cost retail pricing and a "'dangerous **[*439]** probability'" that the defendant will recoup any lost **[****3]** profits, see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Despite the plaintiffs' new position, the parties continue to seek different relief: AT&T seeks reversal of the decision below and dismissal of the complaint, while the plaintiffs seek leave to amend their complaint to allege a *Brooke Group* claim. It is also not clear that the plaintiffs have unequivocally abandoned their price-squeeze **[***840]** claims. Prudential concerns favor answering the question presented; absent a decision on the merits, the Circuit conflict that this Court **[**1113]** granted certiorari to resolve would persist. Pp. 5-7.

2. A price-squeeze claim may not be brought under *§ 2* when the defendant has no antitrust duty to deal with the plaintiff at wholesale. Pp. 7-17.

(a) Businesses are generally free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460* But in rare circumstances, a dominant firm may incur antitrust liability for purely unilateral conduct, such as charging "predatory" prices. *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. There are also limited circumstances in which a firm's unilateral **[****4]** refusal to deal with its rivals can give rise to antitrust liability. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467*. Here, plaintiffs do not allege predatory pricing, and the District Court concluded that there was no antitrust duty to deal. Plaintiffs challenge a different type of unilateral conduct in which a firm "squeezes" its competitors' profit margins. This requires the defendant to operate in both the wholesale ("upstream") and retail ("downstream") markets. By raising the wholesale price of inputs while cutting its own retail prices, the defendant can raise competitors' costs while putting downward pressure on their revenues. Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between wholesale and retail prices. Pp. 7-9.

(b) Where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals' profit margins. Pp. 9-12.

(i) Any challenge to AT&T's *wholesale* prices is foreclosed by a straightforward application of *Trinko.* The claim in *Trinko* addressed the quality of Verizon's support **[****5]** services, while the claims in this case challenge AT&T's pricing structure. But for antitrust purposes, there is no meaningful distinction between price and nonprice components of a transaction. The nub of the complaint in both cases is identical--the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing **[*440]** effectively in the retail market. But a firm with no antitrust duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors. See *Trinko, supra, at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Had AT&T simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Thus, it was not required to offer this service at the wholesale prices the plaintiffs would have preferred. Pp. 9-10.

(ii) The other component of a price-squeeze claim is the assertion that the defendant's *retail* prices are "too low." Here too plaintiffs' claims find no support in existing antitrust doctrine. "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538*. **[****6]** To avoid chilling aggressive price competition, the Court has carefully limited the **[***841]** circumstances under which plaintiffs can state a Sherman Act claim by alleging that the defendant's prices are too low. See *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. The complaint at issue here has no allegation that AT&T's conduct met either *Brooke Group* requirement. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the **[**1114]** precise harm the Court sought to avoid in *Brooke Group*: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability. See *509 U.S., at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Pp. 11-12.

(c) Institutional concerns also counsel against recognizing such claims. This Court has repeatedly emphasized the importance of clear rules in ***antitrust law***. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. Courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze. Moreover, firms seeking to avoid price-squeeze liability will have no safe harbor for their pricing **[****7]** practices. The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between wholesale and retail prices; this test is nearly impossible for courts to apply without conducting complex proceedings like rate-setting agencies. Some *amici* argue that a price squeeze should be presumed if the defendant's wholesale price exceeds its retail price. But if both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price is greater than or equal to its retail price. Pp. 12-15.

(d) The District Court on remand should consider whether an amended complaint filed by the plaintiffs states a claim upon which relief may be granted under the pleading standard articulated in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; whether plaintiffs should be **[*441]** given leave to amend their complaint to bring a *Brooke Group* claim; and such other matters properly before it. Pp. 15-17.

503 F.3d 876, reversed and remanded.

Counsel: Aaron Panner argued the cause for petitioners. **Deanne E. Maynard** argued the cause for the United States, as amicus curiae, by special leave of court. **Maxwell M. Blecher** argued the cause for respondents. **Richard M. Brunell** argued the cause for the American Antitrust Institute, as amicus curiae, by special leave of court.

Judges: Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., **[****8]** joined. Breyer, J., filed an opinion concurring in the judgment, in which Stevens, Souter, and Ginsburg, JJ., joined *post*, p.___.

Opinion by: ROBERTS

Opinion

[*442] Chief Justice **Roberts** delivered the opinion of the Court.

The plaintiffs in this case, respondents here, allege that a competitor subjected them to a "price squeeze" in violation of *§ 2* of the Sherman Act. They assert that such a claim can arise when a vertically integrated firm sells inputs at wholesale and also sells finished goods or services at retail. If that firm has power in the wholesale market, it can simultaneously raise the wholesale price of inputs and cut the retail price of the finished good. This will have the effect of "squeezing" the profit margins of any competitors in the retail market. Those firms will have to pay more for the inputs they need; at the same time, they will have to cut their retail **[***842]** prices to match the other firm's prices. The question before us is whether such ***HN1***[] ***LEdHN[1]***[] [1] a **[**1115]** price-squeeze claim may be brought under *§ 2* of the Sherman Act when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place. We hold that no such claim may be brought.

I

This case involves the market for digital subscriber line **[****9]** (DSL) service, which is a method of connecting to the Internet at high speeds over telephone lines. AT&T[1] owns much of the infrastructure and facilities needed to provide DSL service in California. In particular, AT&T controls most of what is known as the "last mile"--the lines that connect homes and businesses to the telephone network. Competing DSL providers must generally obtain access to AT&T's facilities in order to serve their customers.

Until recently, the Federal Communications Commission (FCC) required incumbent phone companies such as AT&T **[*443]** to sell transmission service to independent DSL providers, under the theory that this would spur competition. See *In re Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14868 (2005)*. In 2005, the FCC largely abandoned this forced-sharing requirement in light of the emergence of a competitive market beyond DSL for high-speed Internet service; DSL now **[****10]** faces robust competition from cable companies and wireless and satellite services. *Id., at 14879-14887*. As a condition for a recent merger, however, AT&T remains bound by the mandatory interconnection requirements, and is obligated to provide wholesale "DSL transport" service to independent firms at a price no greater than the retail price of AT&T's DSL service. *In re AT&T Inc., 22 FCC Rcd. 5662, 5814 (2007)*.

The plaintiffs are four independent Internet service providers (ISPs) that compete with AT&T in the retail DSL market. Plaintiffs do not own all the facilities needed to supply their customers with this service. They instead lease DSL transport service from AT&T pursuant to the merger conditions described above. AT&T thus participates in the DSL market at both the wholesale and retail levels; it provides plaintiffs and other independent ISPs with wholesale DSL transport service, and it also sells DSL service directly to consumers at retail.

In July 2003, the plaintiffs brought suit in District Court, alleging that AT&T violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*, by monopolizing the DSL market in California. The complaint alleges that AT&T refused to deal **[****11]** with the plaintiffs, denied the plaintiffs access to essential facilities, and engaged in a "price squeeze." App. 18-19. Specifically, plaintiffs contend that AT&T squeezed their profit margins by setting a high wholesale price for DSL transport and a low retail price for DSL Internet service. This maneuver allegedly "exclude[d] and

---

[1] Petitioners consist of several corporate entities and subsidiaries, and their names and corporate structures have changed frequently over the course of this litigation. For simplicity, we will refer to all the petitioners as "AT&T."

unreasonably impede[d] competition," **[*444]** thus allowing AT&T to "preserve and maintain its monopoly control of DSL access to the Internet." *Ibid.*

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* ***[***843]*** *540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, we held that a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a "sufficient" level of service. Shortly after we issued that decision, AT&T moved for judgment on the pleadings, arguing **[**1116]** that plaintiffs' claims in this case were foreclosed by *Trinko.* The District Court held that AT&T had no antitrust duty to deal with plaintiffs, App. to Pet. for Cert. 77a-85a, but it denied the motion to dismiss with respect to the price-squeeze claims, *id.*, at 86a-90a. The court acknowledged that AT&T's argument "has a certain logic to it," but held that *Trinko* "simply **[****12]** does not involve price-squeeze claims." App. to Pet. for Cert. 86a. The District Court also noted that price-squeeze claims have been recognized by several Circuits and "are cognizable under existing antitrust standards." *Id.*, at 89a, and n 27.

At the District Court's request, plaintiffs then filed an amended complaint providing greater detail about their price-squeeze claims. AT&T again moved to dismiss, arguing that price-squeeze claims could only proceed if they met the two established requirements for predatory pricing: below-cost retail pricing and a "'dangerous probability'" that the defendant will recoup any lost profits. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. The District Court did not reach the issue whether *all* price-squeeze claims must meet the *Brooke Group* requirements, because it concluded that the amended complaint, "generously construed," satisfied those criteria. App. to Pet. for Cert. 46a-49a, 56a. The court also certified its earlier order for interlocutory appeal on the question whether "*Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communications laws." *Id.*, at 56a-57a.

[*445] On interlocutory **[****13]** appeal, the Court of Appeals for the Ninth Circuit affirmed the District Court's denial of AT&T's motion for judgment on the pleadings on the price-squeeze claims. *linkLine Communications, Inc. v. SBC California, Inc., 503 F.3d 876 (2007)*. The court emphasized that "*Trinko* did not involve a price squeezing theory." *Id., at 883*. Because "a price squeeze theory formed part of the fabric of traditional* ***antitrust law*** prior to *Trinko*," the Court of Appeals concluded that "those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko.*" *Ibid.* Based on the record before it, the court held that plaintiffs' original complaint stated a potentially valid claim under *§ 2* of the Sherman Act.

Judge Gould dissented, noting that "the notion of a 'price squeeze' is itself in a squeeze between two recent Supreme Court precedents." *Id., at 886*. A price-squeeze claim involves allegations of both a high wholesale price and a low retail price, so Judge Gould analyzed each component separately. He concluded that "*Trinko* insulates from antitrust review the setting of the upstream price." *Id., at 886-887*. With respect to the downstream price, he argued that "the retail side of a price squeeze cannot be considered to create an **[****14]** antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*, which set unmistakable limits on what can be considered to be predatory within the meaning of the antitrust laws." *Id., at 887* (citing *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*). Judge Gould concluded that the plaintiffs' complaint did not **[***844]** satisfy these requirements because it contained no allegations that the retail price was set below cost and that those losses could later be recouped. *503 F.3d, at 887*. Judge Gould would have allowed the plaintiffs to amend their complaint if they could, in good faith, raise predatory pricing claims meeting the *Brooke Group* requirements. *503 F.3d, at 887*.

We granted certiorari, *554 U.S. 916, 128 S. Ct. 2957, 171 L. Ed. 2d 883 (2008)*, to resolve a conflict over whether a plaintiff can bring price-squeeze **[*446]** claims under *§ 2* of the Sherman Act when the defendant **[**1117]** has no antitrust duty to deal with the plaintiff. See *Covad Communs. Co. v. Bell Atl. Corp., 398 F.3d 666, 673-674, 365 U.S. App. D.C. 78 (CADC 2005)* (holding that *Trinko* bars such claims). We reverse.

II

This case has assumed an unusual posture. The plaintiffs now assert that they agree with Judge Gould's dissenting position that price-squeeze claims must meet the *Brooke Group* **[****15]** requirements for predatory pricing. They ask us to vacate the decision below in their favor and remand with instructions that they be given leave to amend their complaint to allege a *Brooke Group* claim. In other words, plaintiffs are no longer pleased with their initial theory of the case, and ask for a mulligan to try again under a different theory. Some *amici* argue that the case is moot in light of this confession of error. They contend that "[w]ith both petitioners and respondents now aligned on [the same] side of the question presented, *no party* with a concrete stake in this case's outcome is advocating for the contrary position." Brief for COMPTEL 6.

We do not think this case is moot. First, the parties continue to seek different relief. AT&T asks us to reverse the judgment of the Court of Appeals and remand with instructions to dismiss the complaint at issue. The plaintiffs ask that we vacate the judgment and remand with instructions that they be given leave to amend their complaint. The parties thus continue to be adverse not only in the litigation as a whole, but in the specific proceedings before this Court.

Second, it is not clear that the plaintiffs have unequivocally abandoned **[****16]** their price-squeeze claims. In their brief and at oral argument, the plaintiffs continue to refer to their "pricing squeeze claim." See Brief for Respondents 13. They appear to acknowledge that those claims must meet the *Brooke Group* requirements, but it is not clear whether they believe the necessary showing can be made in at least partial **[*447]** reliance on the sort of pricesqueeze theory accepted by the Court of Appeals. At one point, for example, the plaintiffs suggest that "the DSL transport price" may be pertinent to their claims going forward under the theory of Judge Gould's dissent; that opinion, however, concluded that *Trinko* "in essence takes the issu[e] of wholesale pricing out of the case." *503 F.3d at 886*. Given this ambiguity, the case before us remains a live dispute appropriate for decision. Cf. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (a party's voluntary conduct renders a case moot only if it is "'absolutely clear'" the party will take that course of action).

Amici also argue that we should dismiss the writ of certiorari because of the "lack of adversarial presentation" by an interested party. Brief for **[***845]** COMPTEL 7. To **[****17]** the contrary, prudential concerns favor our answering the question presented. Plaintiffs defended the Court of Appeals' decision at the certiorari stage, and the parties have invested a substantial amount of time, effort, and resources in briefing and arguing the merits of this case. In the absence of a decision from this Court on the merits, the Court of Appeals' decision would presumably remain binding precedent in the Ninth Circuit, and the Circuit conflict we granted certiorari to resolve would persist. Two *amici* have submitted briefs defending the Court of Appeals' decision on the merits, and we granted the motion of one of those *amici* to participate in oral argument. *555 U.S. 1029, 129 S. Ct. 617, 172 L. Ed. 2d 454 (2008)*. We think it appropriate to proceed to address the question presented.

[1118]** III

A

HN2[] ***LEdHN[2]***[] [2] *Section 2* of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Ch. 647, 26 Stat. 209, *15 U.S.C. § 2*. Simply possessing **[*448]** monopoly power and charging monopoly prices does not violate *§ 2*; rather, the statute targets "the willful acquisition or maintenance of that power **[****18]** as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. But there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct. For example, we have ruled that firms may not charge "predatory" prices--below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses. *Brooke Group, 509 U.S., at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Here, however, the complaint at issue does not contain allegations meeting those requirements. App. 10-24.

There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Here, however, the District Court held that AT&T had no such antitrust duty to deal with its competitors, App. to Pet. for **[****19]** Cert. 84a-85a, and this holding was not challenged on appeal.[2]

[*449] The challenge here focuses on retail prices--where there is no predatory pricing--and the terms of dealing--where there is no duty to **[***846]** deal. Plaintiffs' price-squeeze claims challenge a different type of unilateral conduct in which a firm "squeezes" the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze its downstream competitors **[****20]** by raising the wholesale price of inputs while cutting its own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price). Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between the wholesale price and the retail price. In this case, we consider whether a plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale.

[1119]** B

1. A straightforward application of our recent decision in *Trinko* forecloses any challenge to AT&T's *wholesale* prices. In *Trinko*, Verizon was required by statute to lease its network elements to competing firms at wholesale rates. *540 U.S., at 402-403, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The plaintiff--a customer of one of Verizon's rivals--asserted that Verizon denied its competitors access to interconnection support services, making it difficult for those competitors to fill their customers' orders. *Id., at 404-405, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The complaint alleged that this conduct in the upstream market violated *§ 2* of the Sherman Act by impeding the ability **[****21]** of independent carriers to compete in the downstream market for local telephone service. *Ibid.*

We held that the plaintiff's claims were not actionable under *§ 2*. Given that Verizon had no antitrust duty to deal with its rivals at all, we concluded that "Verizon's alleged **[*450]** insufficient assistance in the provision of service to rivals" did not violate the Sherman Act. *Id., at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. *Trinko* thus makes clear that ***HN3***[] ***LEdHN[3]***[] [3] if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

In this case, as in *Trinko*, the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act. See *supra, at 448, 172 L. Ed. 2d, at 845-846*. There is no meaningful distinction between the "insufficient assistance" claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case. The *Trinko* plaintiff challenged the quality of Verizon's interconnection service, while this case involves a challenge to AT&T's pricing structure. But for antitrust purposes, there is no reason to distinguish between price and nonprice components of **[****22]** a transaction. See, *e.g.*, *American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)* ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa"). The nub of the complaint in both *Trinko* and this case is identical--the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in **[***847]** the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.

---

[2] The Court of Appeals assumed that any duty to deal arose only from FCC regulations, *503 F.3d 876, 878-879, n 6*(CA9 2007), and the question on which we granted certiorari made the same assumption. Even aside from the District Court's reasoning, App. to Pet. for Cert. 77a-85a, it seems quite unlikely that AT&T would have an antitrust duty to deal with the plaintiffs. Such a duty requires a showing of monopoly power, but--as the FCC has recognized, *In re Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14879-14887* --the market for high-speed Internet service is now quite competitive; DSL providers face stiff competition from cable companies and wireless and satellite providers.

The District Court and the Court of Appeals did not regard *Trinko* as controlling because that case did not directly address price-squeeze claims. *503 F.3d at 883*; App. to Pet. for Cert. 86a; see also Brief for COMPTEL as *Amicus Curiae* 27-30. This is technically true, but the reasoning of *Trinko* applies with equal force to price-squeeze claims. AT&T could have squeezed its competitors' profits just as effectively by providing poor-quality interconnection service to the plaintiffs, as Verizon allegedly did in *Trinko.* But a firm with no duty to deal in the wholesale market has no **[*451]** obligation to deal under terms and conditions **[****23]** favorable to its competitors. If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred.

2. The other component of a price-squeeze claim is the assertion that the defendant's *retail* prices are "too low." **[**1120]** Here too plaintiffs' claims find no support in our existing antitrust doctrine.

HN4[] ***LEdHN[4]***[] [4] "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Ibid.*; see also *Brooke Group, 509 U.S., at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168*; *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 121-122, n 17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low. Specifically, to prevail on a predatory **[****24]** pricing claim, a plaintiff must demonstrate that: (1) "the prices complained of are below an appropriate measure of its rival's costs"; and (2) there is a "dangerous probability" that the defendant will be able to recoup its "investment" in below-cost prices. *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

In the complaint at issue in this interlocutory appeal, App. 10-24, there is no allegation that AT&T's conduct met either of the *Brooke Group* requirements. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm we sought to avoid **[*452]** in *Brooke Group*: Firms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability. See *509 U.S., at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (***HN5***[] ***LEdHN[5]***[] [5] "As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability **[****25]** of a judicial tribunal to control without **[***848]** courting intolerable risks of chilling legitimate price cutting").

3. Plaintiffs' price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.[3]

C

---

[3] Like the Court of Appeals, *503 F.3d at 880*, *amici* argue that price-squeeze claims have been recognized by Courts of Appeals for many years, beginning with Judge Hand's opinion in *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945)* (*Alcoa*). In that case, the Government alleged that Alcoa was using its monopoly power in the upstream aluminum ingot market to squeeze the profits of downstream aluminum sheet fabricators. The court concluded: "That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must **[****26]** be regarded as higher than a 'fair price.'" *Id., at 438*. Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.

1. Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance **[**1121]** of clear rules in ***antitrust law***. Courts are ill suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Trinko, 540 U.S., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. "'No court should impose a duty to deal that it cannot **[*453]** explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'" *Id., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823* (quoting Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841, 853 (1989)); see also *Concord v. Boston Edison Co., 915 F.2d 17, 25 (CA1 1990)* (Breyer, C. J.) ("[A]ntitrust courts normally avoid direct price administration, relying on rules and remedies . . . that are easier to administer").

It is difficult enough for courts **[****27]** to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level. See *Brooke Group, supra, at 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (predation claims "requir[e] an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will"); *Trinko, supra, at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.

Perhaps most troubling, firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices. See *Concord, supra, at 22* (antitrust rules "must be clear enough for lawyers to explain them to clients"). At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost. *Brooke Group, supra, at 223, 113* ***[***849]*** *S. Ct. 2578, 125 L. Ed. 2d 168*. No such guidance is available for price-squeeze **[****28]** claims. See, *e.g.*, 3B P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 767c, p 138 (3d ed. 2008) ("[A]ntitrust faces a severe problem not only in recognizing any *§ 2* [price-squeeze] offense, but also in formulating a suitable remedy").

[*454] The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between the wholesale price and the retail price. See *Concord, supra, at 23-25*; *Alcoa, 148 F.2d 416, 437-438 (CA2 1945)*. One of our colleagues has highlighted the flaws of this test in Socratic fashion:

> "[H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . **[****29]** . And how should the court respond when costs or demands change over time, as they inevitably will?" *Concord, supra, at 25*.

Some *amici* respond to these concerns by proposing a "transfer price test" for identifying an unlawful price squeeze: A price squeeze should be presumed if the upstream monopolist could **[**1122]** not have made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates. Brief for American Antitrust Institute (AAI) 30; Brief for COMPTEL 16-19; see *Ray v. Indiana & Mich. Elec. Co., 606 F. Supp. 757, 776-777 (ND Ill. 1984)*. Whether or not that test is administrable, it lacks any grounding in our antitrust jurisprudence. ***HN6***[] ***LEdHN[6]***[] [6] An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not prohibit lawfully obtained monopolies from charging monopoly prices. *Trinko, supra, at 407, 124 S. Ct. 872, 157 L. Ed. 2d 823* ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it **[*455]** is an important element of the free-market system"). Similarly, the Sherman Act does not forbid--indeed, it *encourages*--aggressive price competition at the retail level, as long as the prices **[****30]** being charged are not predatory. *Brooke Group, 509 U.S., at 223-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price.

2. *Amici* assert that there are circumstances in which price squeezes may harm competition. For example, they assert that price squeezes may raise entry barriers that fortify the upstream monopolist's position; they also contend that price squeezes may impair nonprice competition and innovation in the downstream market by driving independent firms out of business. See Brief for AAI 11-15; *Concord, supra, at 23-24*.

The problem, however, is that *amici* have not identified any independent **[***850]** competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level. See 3A P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 767c, p 126 (2d ed. 2002) ("[I]t is difficult to see any *competitive* significance [of a price squeeze] apart from the consequences of vertical integration itself"). **[****31]** To the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law. We do not need to endorse a new theory of liability to prevent such harm.

IV

Lastly, as mentioned above, plaintiffs have asked us for leave to amend their complaint to bring a *Brooke Group* predatory pricing claim. We need not decide whether leave to amend should be granted. Our grant of certiorari was limited to the question whether price-squeeze claims are cognizable in the absence of an antitrust duty to deal. The **[*456]** Court of Appeals addressed only AT&T's motion for judgment on the pleadings on the plaintiffs' *original* complaint.[4] For the reasons stated, **[**1123]** we hold that the price-squeeze claims set forth in that complaint are not cognizable under the Sherman Act.

Plaintiffs have also filed an amended complaint, and the District Court concluded that this complaint, generously construed, could be read as alleging conduct that met the *Brooke Group* requirements for predatory pricing. App. to Pet. for Cert. 47a-52a, 56a. That order, however, applied the "no set of facts" pleading standard that we have since rejected as too lenient. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. It is for the District Court on remand to consider whether the amended complaint states a claim upon which relief may be granted in light of the new pleading standard **[****33]** we articulated in *Twombly*, whether plaintiffs should be given leave to amend their complaint to bring a claim under *Brooke Group*, and such other matters properly before it. Even if the amended complaint is further amended to add a *Brooke Group* claim, it may not survive a motion to dismiss. For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of **[*457]** business by pricing them out of the market. Nevertheless, such questions are for the District Court to decide in the first instance. We do not address these issues here, as they are outside the scope of the question presented and were not addressed by the Court of Appeals in the decision below. See *Cutter v. Wilkinson, 544 U.S. 709, 718, n 7, 125 S. Ct. 2113, 161 L. Ed. 2d* ***[***851]*** *1020 (2005)* ("[W]e are a court of review, not of first view").

* * *

Trinko holds that a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals. *540 U.S., at 409-410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. *Brooke Group* holds that low prices are only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be **[****34]** able to recoup the profits it loses from the low prices. *509 U.S., at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. In this case, plaintiffs have not stated a duty-to-deal claim under *Trinko* and have not stated a predatory pricing claim under *Brooke Group.* They have nonetheless tried to join a wholesale

---

[4] We note a procedural irregularity with this case: Normally, an amended complaint supersedes the original complaint. See 6 C. Wright & A. Miller, Federal Practice & Procedure § 1476, pp 556-557 (2d ed. 1990). Here, the District Court addressed the amended complaint in its 2005 order, App. to Pet. for Cert. 36a-52a, but the court only certified its 2004 order--addressing the *original* complaint--for interlocutory appeal, **[****32]** *id.*, at 56a-57a. Both parties, as well as the Solicitor General, have expressed confusion about whether the amended complaint and the 2005 order are properly before this Court. See Brief for Petitioners 9, n 6 (noting "some ambiguity" about which order was certified); Brief for United States as *Amicus Curiae* 17 ("[I]t is unclear whether the 2005 Order and the amended complaint are properly at issue in this interlocutory appeal"); Brief for Respondents 8-10. The Court of Appeals majority did not address any of the District Court's holdings from the 2005 order, so we decline to consider those issues at this time.

claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by this Court. We decline the invitation to recognize such claims. Two wrong claims do not make one that is right.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: BREYER

Concur

Justice **Breyer** with whom Justice **Stevens** Justice **Souter** and Justice **Ginsburg** join, concurring in the judgment.

I would accept respondents' concession that the Ninth Circuit majority's "price squeeze" holding is wrong, I would vacate the Circuit's decision, and I would remand the case in order to allow the District Court to determine whether respondents may proceed with their "predatory pricing" claim **[*458]** as set forth in Judge Gould's dissenting Ninth Circuit opinion. *linkline Communs., Inc. v. SBC Cal, Inc., 503 F.3d 876, 887 (2007)*.

[1124]** A **[****35]** "price squeeze" claim finds its natural home in a Sherman Act *§ 2* monopolization case where the Government as plaintiff seeks to show that a defendant's monopoly power rests, not upon "skill, foresight and industry," *United States v. Aluminum Co. of America, 148 F.2d 416, 430 (CA2 1945)* *(Alcoa)*, but upon exclusionary conduct, *United States v. Grinnell Corp., 384 U.S. 563, 576, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. As this Court pointed out in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, the "'means of illicit exclusion, like the means of legitimate competition, are myriad.'" *Id., at 414, 124 S. Ct. 872, 157 L. Ed. 2d 823* (quoting *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (CADC 2001)* (en banc) *(per curiam)*). They may involve a "course of dealing" that, even if profitable, indicates a "willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, supra, at 409, 124 S. Ct. 872, 157 L. Ed. 2d 823*. See, *e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; Complaint in *United States* v. *International Business Machines Corp.*, Civil Action No. 69 Civ. 200 (SDNY, filed Jan. 17, 1969), P 20(c), reprinted in F. Fisher, J. McGowan, & J. Greenwood, **[***852]** Folded, Spindled, and Mutilated: Economic **[****36]** Analysis and *U. S.* v. *IBM*, App. 357 (1983). And, as Judge Hand wrote many years ago, a "price squeeze" may fall within that latter category. *Alcoa, supra, at 437-438*. As a matter of logic, it may be that a particular price squeeze can only be exclusionary if a refusal by the monopolist to sell to the "squeezed customer" would also be exclusionary. But a court, faced with a price squeeze rather than a refusal to deal, is unlikely to find the latter (hypothetical) question any easier to answer than the former.

I would try neither to answer these hypothetical questions here nor to foreshadow their answer. We have before us a regulated firm. During the time covered by the complaint, **[*459]** petitioners were required to provide wholesale digital subscriber line (DSL) transport service as a common carrier, charging "just and reasonable" rates that were not "unreasonabl[y] discriminat[ory]." *47 U.S.C. §§ 201(b)*, *202(a) (2000 ed.)*. And, in my view, a purchaser from a regulated firm (which, if a natural monopolist, is lawfully such) cannot win an antitrust case simply by showing that it is "squeezed" between the regulated firm's wholesale price (to the plaintiff) and its retail price (to customers for whose **[****37]** business both firms compete). When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits. See *Concord v. Boston Edison Co., 915 F.2d 17, 26-29 (CA1 1990)*. Cf. 3 P. Areeda & D. Turner, ***Antitrust Law*** PP 834-836, pp 344-355 (1978) (whether a particular course of conduct counts as "exclusionary" for antitrust purposes depends upon a host of factors, including, for example, the market position of the defendant, the nature of the market, and the nature of the defendant's conduct).

Unlike *Concord,* the regulators here controlled prices only at the wholesale level. See *915 F.2d at 29*. But respondents do not claim that that regulatory fact makes any difference; and rightly so, for as far as I can tell, respondents could have gone to the regulators and asked for petitioners' wholesale prices to be lowered in light of the alleged price squeeze. Cf. *FPC v. Conway Corp., 426 U.S. 271, 279, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*; 3 Areeda & Turner, *supra*, P 726e, at 219-220.

Respondents now seek to show only that the defendant engaged in predatory pricing, within the terms of this Court's decision **[**1125]** in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. **[****38]** The District Court can determine whether there is anything in the procedural history of this case that bars respondents from asserting their predatory pricing claim. And if not, it can decide the merits of that claim. As I said, I would remand the case so that it can do so.

References

15 U.S.C.S. § 2

1 Antitrust Laws and Trade Regulation § 2.03 (Matthew Bender 2d ed.)

2 Antitrust Laws and Trade Regulation § 27.04 (Matthew Bender 2d ed.)

1 Antitrust Laws and Trade Regulation: Desk Edition § 3.02 (Matthew Bender)

2 Federal ***Antitrust Law*** § 14.18 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 36.7, 41.5

L Ed Index, Internet; Wholesale and Wholesalers

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. §§ 1 et seq.*). *64 L. Ed. 2d 997*.

Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.)

United States District Court for the District of Nevada

February 26, 2009, Decided; February 26, 2009, Filed

MDL 1566; 2:03-CV-01431-PMP-PAL BASE FILE; 2:07-CV-01019-PMP-PAL

Reporter
605 F. Supp. 2d 1118 *; 2009 U.S. Dist. LEXIS 54527 **; 177 Oil & Gas Rep. 804

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION; ARANDELL CORP., et al., Plaintiffs, v. XCEL ENERGY, INC., et al., Defendants.

Subsequent History: Claim dismissed by *Arandell Corp. v. XCel. Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 2009 U.S. Dist. LEXIS 66875 (D. Nev., Feb. 26, 2009)*

Reconsideration granted by, in part, Reconsideration denied by, in part *Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 2010 U.S. Dist. LEXIS 104116 (D. Nev., June 4, 2010)*

Prior History: *Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 619 F. Supp. 2d 1062, 2008 U.S. Dist. LEXIS 18873 (D. Nev., Feb. 18, 2008)*

Core Terms

subsidiary, personal jurisdiction, natural gas, contacts, trading, Energy, conspiracy, limits, parent company, conspiracy theory, co-conspirator, conspirator, marketing, purposes, alter ego, reporting, sales, forum state, allegations, oversight, prices, no evidence, antitrust, injustice, due process, purposefully, day-to-day, principles, venue, lack of personal jurisdiction

Counsel: **[**1]** For Fairhaven Power Co. (2:03-cv-01431-PMP-PAL), (Plaintiff): Bruce Alverson, LEAD ATTORNEY, Alverson Taylor Mortensen & Sanders, Las Vegas, NV; William Timothy Needham, LEAD ATTORNEY, Janssen, Malloy, Needham, Morrison, Reinholtsen & Crowley, L, Eureka, CA.

For Cross Oil Refining & Marketing, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiff): Jennifer Gille Bacon, LEAD ATTORNEY, Polsinelli Shughart, Kansas City, MO.

For Sinclair Oil Corporation, Safety-Kleen Systems, Inc., Sargento Foods, Inc., Arandell Corp., BBD Acquisition Co., Breckenridge Brewery of Colorado, LLC, Ladish Co., Inc., Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Philip M. Ballif, LEAD ATTORNEY, Durham Jones & Pinegar, Salt Lake City, UT.

For Cross Oil Refining & Marketing, Inc., Topeka Unified School District 501, Arandell Corp. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Gregory M. Bentz, LEAD ATTORNEY, Polsinelli Shughart, Kansas City, MO.

For Coral Energy Resources, LP (2:03-cv-01431-PMP-PAL), (Defendant): Kristen Bird, Roxanna Manuel, Marshall M Searcy, LEAD ATTORNEYS, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; James Richard Eiszner, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Kansas City, MO; **[**2]** Joshua D. Lichtman, LEAD ATTORNEY, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Bruce A. Schultz, LEAD ATTORNEY, Madison, WI; Lori Renee Schultz, LEAD ATTORNEY, Shook Hardy & Bacon, Kansas City, MO.

For BBD Acquisition Co. (2:03-cv-01431-PMP-PAL), (Plaintiff): Philip Wayne Bledsoe, LEAD ATTORNEY, Shughart Thomson * Kilroy, PC, Denver, CO.

For Texas-Ohio Energy, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiff): Michael J. Boni, LEAD ATTORNEY, Boni & Zack LLC, Bala Cynwyd, PA.

For Heartland Regional Medical Center (2:03-cv-01431-PMP-PAL), (Plaintiff): R. Dan Boulware, LEAD ATTORNEY, Shughart Thompson & Kilroy, PC, St. Joseph, MO.

For Xcel Energy Inc. (2:03-cv-01431-PMP-PAL), (Defendant): David Len Bryant, LEAD ATTORNEY, Bryant Law Firm, Tulsa, OK.

For Reliant Resources, Inc (2:03-cv-01431-PMP-PAL), (Defendant): Jefferson Gregory Copeland, LEAD ATTORNEY, Houston, TX; Isaac Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, KS.

For Sinclair Oil Corporation (2:03-cv-01431-PMP-PAL), (Plaintiff): Matthew Corcoran, LEAD ATTORNEY, Goldstein & Associates, Washington, DC; Melvin Goldstein, LEAD ATTORNEY, Goldstein & Associates, PC, Washington, DC.

For CMS Field Services (2:03-cv-01431-PMP-PAL), (Defendant): **[**3]** Robert E. Craddock, Jr., LEAD ATTORNEY, Wyatt, Tarrant & Combs, LLP, Memphis, TN; Steven A Ellis, LEAD ATTORNEY, Sidley Austin LLP, Los Angeles, CA.

For Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc., Williams Power (2:03-cv-01431-PMP-PAL), (Defendants): Sarah Jane Gillett, Graydon Dean Luthey, Jr., LEAD ATTORNEYS, Heather L. Cupp, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, OK; Brandon B Rule, Hall Estill, Tulsa, OK.

For Missouri Public Service Commission (2:03-cv-01431-PMP-PAL), (Plaintiff): Cathy J. Dean, Douglas Kramer, LEAD ATTORNEYS, Polsinelli Shalton Flanigan Suelthaus, Kansas City, MO; S. Jay Dobbs, LEAD ATTORNEY, Polsinelli Shalton Flanigan, St. Louis, MO; Matthew C. Hans, LEAD ATTORNEY, Polsinelli Shalton Flanigan Suelthaus, St. Louis, MO.

For Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiff): Isaac Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, KS.

For San Diego Gas & Electric, Sempra Energy, Sempra Energy Trading Corp., Southern California Gas Company, Sempra Energy Corp. (2:03-cv-01431-PMP-PAL), (Defendants): Jennifer Dorsey, LEAD ATTORNEY, PRO HAC VICE, Kemp, Jones & Coulthard, **[**4]** LLP, Las Vegas, NV.

For Texas-Ohio Energy, Inc., Utility Savings & Refund Services, LLP, Abelman Art Glass, Fairhaven Power Co. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Marc H. Edelson, LEAD ATTORNEY, Hoffman & Edelson, LLC, Doylestown, PA.

For OneOK Energy Services Company, L.P., Oneok, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Gregory T. Everts, LEAD ATTORNEY, Quarles & Brady LLP, Madison, WI.

For Merrick's Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., Arandell Corp., Ladish Co., Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): William E Fischer, Kohner, Mann & Kailas, Milwaukee, WI.

For Kansas Gas Marketing Company, Oneok Energy Marketing & Trading Company, LP, Oneok, Inc., OneOK Energy Services Company, L.P., Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Energy Services Company, Williams Merchant Services Company, Inc., Williams Power (2:03-cv-01431-PMP-PAL), (Defendants): Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK.

For OneOK Energy Services Company, L.P., Kansas Gas Marketing Company, Oneok Energy Marketing & Trading Company, LP, Oneok, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Amelia A Fogleman, LEAD ATTORNEY, John Henry Rule, Gable & Gotwals, **[**5]** Tulsa, OK.

For Reliant Energy Services (2:03-cv-01431-PMP-PAL), (Defendant): W. James Foland, LEAD ATTORNEY, Foland, Wickens, Eisfelder, Roper & Hofer, P.C., Kansas City, MO.

For The McGraw-Hill Companies, Inc. (2:03-cv-01431-PMP-PAL), (Objector): Carolyn K. Foley, Davis Wright Tremaine, LLP, New York, NY.

For Multiut Corporation (2:03-cv-01431-PMP-PAL), (Plaintiff): Paul T Fox, Paul Alexis Del Aguila, Jeffrey S. Torosian, LEAD ATTORNEYS, Howard K Jeruchimowitz, Greenberg Traurig, LLP, Chicago, IL; Ira P Gould, LEAD ATTORNEY, Greenberg Trauring, LLP, Chicago, IL; Alan J. Mandel, LEAD ATTORNEY, ALAN J. MANDEL, LTD., Skokie, IL.

For Merrick's Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., Arandell Corp., Ladish Co., Inc., NewPage Wisconsin System Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Robert L Gegios, LEAD ATTORNEY, Kohner, Mann & Kailas, Milwaukee, WI.

For Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Stacey R. Gilman, Thomas P. Schult, LEAD ATTORNEYS, Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP, Kansas City, MO.

For CMS Field Services, CMS Marketing, Service & Trading **[**6]** Company, CMS Energy, CMS Marketing Services & Trading Company (2:03-cv-01431-PMP-PAL), (Defendants): Michelle B Goodman, LEAD ATTORNEY, Sidley Austin LLP, Los Angeles, CA.

For Dynegy Inc., Dynegy Inc. Holding Company, Dynegy Marketing & Trade, West Coast Power LLC (2:03-cv-01431-PMP-PAL), (Defendants): John M. Grenfell, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For CMS Energy, CMS Marketing Services & Trading Company, CMS Energy Resources, CMS Field Services, CMS Marketing, Service & Trading Company, Cantera Natural Gas, Inc., Cantera Resources, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Mark E Haddad, LEAD ATTORNEY, Sidley Austin LLP, Los Angeles, CA.

For Dynegy Inc., Dynegy Marketing & Trade (2:03-cv-01431-PMP-PAL), (Defendants): William M. Hannay, Barry S. Hyman, Samantha C. Norris, LEAD ATTORNEYS, Schiff Hardin LLP, Chicago, IL.

For Breckenridge Brewery of Colorado, LLC, Heartland Regional Medical Center, Learjet, Inc., Arandell Corp. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Kathleen A. Hardee, Russell S. Jones, Jr., Dennis D. Palmer, LEAD ATTORNEYS, Polsinelli Shughart, P.C., Kansas City, MO.

For Reliant Energy Services (2:03-cv-01431-PMP-PAL), (Defendant): **[**7]** Christopher J. Healey, LEAD ATTORNEY, Luce, Forward, Hamilton & Scripps LLP, San Diego, CA.

For Cross Oil Refining & Marketing, Inc., Learjet, Inc., Topeka Unified School District 501 (2:03-cv-01431-PMP-PAL), (Plaintiffs): Von S. Heinz, LEAD ATTORNEY, Lewis & Roca, LLP, Las Vegas, NV; Gregory L. Musil, LEAD ATTORNEY, Shughart Thompson & Kilroy, Overland Park, KS.

For Ever-Bloom, Inc., Utility Savings & Refund Services, LLP, Maximum Nursery, Inc., Texas-Ohio Energy, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Theresa J. Henson, LEAD ATTORNEY, Boni & Zack LLC, Bala Cynwyd, PA.

For Texas-Ohio Energy, Inc., Utility Savings & Refund Services, LLP (2:03-cv-01431-PMP-PAL), (Plaintiffs): Jerold B Hoffman, LEAD ATTORNEY, Hoffman & Edelson, LLC, Doylestown, PA.

For Reliant Energy Services, Reliant Resources, Inc (2:03-cv-01431-PMP-PAL), (Defendants): Terry Houlihan, LEAD ATTORNEY, Bingham McCutchen LLP, San Francisco, CA; Mark R Robeck, Amy E. Tabor, LEAD ATTORNEY, Baker Botts, L.L.P, Houston, TX; Jeffrey D Wexler, LEAD ATTORNEY, Luce Forward Hamilton & Scripps, San Diego, CA.

For OneOK Energy Services Company, L.P., Kansas Gas Marketing Company, Oneok Energy Marketing & Trading Company, LP, Oneok, **[**8]** Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Oliver S Howard, LEAD ATTORNEY, Gable & Gotwals, Tulsa, OK.

For Sempra Energy, Sempra Energy Trading Corp. (2:03-cv-01431-PMP-PAL), (Defendants): Peter F. Jazayeri, Alan Z. Yudkowsky, LEAD ATTORNEYS, Stroock & Stroock & Lavan LLP, Los Angeles, CA.

For Duke Energy Corporation, Duke Energy Trading & Marketing, LLC, Duke Energy, Duke Energy & Marketing, LLC (2:03-cv-01431-PMP-PAL), (Defendants): Lisa M Kaas, LEAD ATTORNEY, Dickstein Shapiro LLP, Washington, DC.

For Duke Energy Trading & Marketing, LLC (2:03-cv-01431-PMP-PAL), (Defendant): Peter J Kadzik, Dickstein Shapiro LLP, Washington, DC.

For Dynegy Inc., Dynegy Inc. Holding Company, Dynegy Marketing & Trade, West Coast Power LLC, Dynegy Holding Co., Inc., Dynegy GP Inc DMT Holding, LP, Dynegy GP Inc., Dynegy Illinois Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Michael J. Kass, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Duke Energy Corporation, Duke Energy Trading & Marketing, LLC, Encana Corporation, Duke Energy, Duke Energy & Marketing, LLC (2:03-cv-01431-PMP-PAL), (Defendants): Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA.

For Abelman **[**9]** Art Glass Company, et al, Auila, Inc., BBD Acquisition Co., Breckenridge Brewery of Colorado, LLC, Cross Oil Refining & Marketing, Inc., Ever-Bloom, Inc., Heartland Regional Medical Center, Learjet, Inc., Maximum Nursery, Inc., Merrick's Inc., Missouri Public Service Commission, Prime Tanning Corporation, Safety-Kleen Systems, Inc., Sargento Foods, Inc., Topeka Unified School District 501, Arandell Corp., Coachella Valley Taxi Owners Association, Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Aquila Merchant Services, Inc. (2:03-cv-01431-PMP-PAL), (Defendant): Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA.

For Duke Energy Corporation, Duke Energy Trading & Marketing, LLC, Duke Energy, Duke Energy & Marketing, LLC, CMS Field Services, CMS Marketing Services & Trading Company, Coral Energy Resources, LP, Dynegy GP Inc DMT Holding, LP, Dynegy GP Inc., Dynegy Marketing & Trade, El Paso Corporation, El Paso Marketing, LP, El Paso Merchant Energy-Gas LP, Kansas Gas Marketing Company, Northern **[**10]** States Power Company, OneOK Energy Services Company, L.P., Oneok, Inc., Reliant Energy Services, Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc., Williams Power, Xcel Energy Inc., e prime Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Joel B. Kleinman, LEAD ATTORNEY, Dickstein Shapiro LLP, Washington, DC.

For CMS Energy Resource Management Company (2:03-cv-01431-PMP-PAL), (Defendant): Sherry A. Knutson, LEAD ATTORNEY, Sidley Austin, Chicago, IL; James Pecht, Sidley Austin LLP, Los Angeles, CA.

For Abelman Art Glass, Abelman Art Glass Company, et al, Auila, Inc., BBD Acquisition Co., Breckenridge Brewery of Colorado, LLC, Cross Oil Refining & Marketing, Inc., Ever-Bloom, Inc., Heartland Regional Medical Center, Learjet, Inc., Maximum Nursery, Inc., Merrick's Inc., Missouri Public Service Commission, Prime Tanning Corporation, Safety-Kleen Systems, Inc., Sargento Foods, Inc., Topeka Unified School District 501, Arandell Corp., Coachella Valley Taxi Owners Association, Abelman Art Glass Company, et al, Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San **[**11]** Francisco, CA.

For Aquila Merchant Services, Inc., Aquila, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Khai LeQuang, William Molinski, LEAD ATTORNEYS, Orrick, Herrington & Sutcliffe, LLP, Los Angeles, CA; Charles A. Moore, LEAD ATTORNEY, Dewey & LeBoeuf LLP, Houston, TX.

For Fairhaven Power Co., Fairhaven Power Company (2:03-cv-01431-PMP-PAL), (Plaintiffs): Michael P. Lehmann, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll P.L.L.C., San Francisco, CA; Kathleen S. Rogers, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, San Francisco, CA.

For Sempra Energy, San Diego Gas & Electric, Southern California Gas Company, Sempra Energy Corp. (2:03-cv-01431-PMP-PAL), (Defendants): Richard P. Levy, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA.

For Aquila Merchant Services, Inc., Aquila, Inc., El Paso Corporation (2:03-cv-01431-PMP-PAL), (Defendants): Martin M. Loring, LEAD ATTORNEY, Blackwell, Sanders, Peper, Martin, Kansas City, MO.

For Cross Oil Refining & Marketing, Inc., Learjet, Inc., Topeka Unified School District 501, Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Gary D. McCallister, LEAD ATTORNEY, Gary D. McCallister & Associates, Ltd, Chicago, IL; Eric I. Unrein, **[**12]** LEAD ATTORNEY, Davis, Unrein, Biggs & Head, L.L.P., Topeka, KS.

For Xcel Energy Inc., e prime Inc., Northern States Power Company (2:03-cv-01431-PMP-PAL), (Defendants): Michael John Miguel, Morgan, Lewis & Bockius LLP, Los Angeles, CA.

For Auila, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiff): Charles A. Moore, LEAD ATTORNEY, Dewey & LeBoeuf LLP, Houston, TX.

For El Paso Corporation, El Paso Merchant Energy Company, El Paso Merchant Energy LP (2:03-cv-01431-PMP-PAL), (Defendants): Paul Howard Morris, LEAD ATTORNEY, Martin Tate Morrow & Marston, Memphis, TN.

For Sempra Energy Trading Corp. (2:03-cv-01431-PMP-PAL), (Defendant): Brian J. Nese, LEAD ATTORNEY, Stroock & Stroock & Lavan LLP, Los Angeles, CA.

For El Paso Corporation, El Paso Marketing, LP (2:03-cv-01431-PMP-PAL), (Defendants): Paul R. Norman, LEAD ATTORNEY, Boardman, Suhr, Curry & Field LLP, Madison, WI; Phillip Russell Perdew, LEAD ATTORNEY, Locke Lord Bissell & Liddell LLP, Chicago, IL.

For Kansas Gas Marketing Company, Oneok Energy Marketing & Trading Company, LP, Oneok, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Mason G Patterson, Gable & Gotwals, Tulsa, OK.

For Merrick's Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., Arandell **[**13]** Corp. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Alexander T. Pendelton, LEAD ATTORNEY, Kohner, Mann & Kailas, S.C., Milwaukee, WI.

For Ladish Co., Inc. (2:03-cv-01431-PMP-PAL), (Plaintiff): Alexander T. Pendelton, LEAD ATTORNEY, Kohner, Mann & Kailas, Milwaukee, WI.

For Duke Energy Corporation, Duke Energy Trading & Marketing, LLC (2:03-cv-01431-PMP-PAL), (Defendants): Adam Proujansky, LEAD ATTORNEY, Disckstein Shapiro LLP, Washington, DC.

For OneOK Energy Services Company, L.P. (2:03-cv-01431-PMP-PAL), (Defendant): Thomas F Reese, LEAD ATTORNEY, Brown, Drew & Massey, LLP, Casper, WY.

For CMS Field Services, CMS Marketing, Service & Trading Company, (2:03-cv-01431-PMP-PAL), (Defendants): Glen G Reid, Jr., LEAD ATTORNEY, Wyatt, Tarrant & Combs, LLP, Memphis, TN.

For Fairhaven Power Co., Abelman Art Glass (2:03-cv-01431-PMP-PAL), (Plaintiffs): Nathan Reinmiller, LEAD ATTORNEY, Alverson Taylor Mortensen, et al, Las Vegas, NV.

For Ever-Bloom, Inc., Maximum Nursery, Inc., Texas-Ohio Energy, Inc., Utility Savings & Refund Services, LLP (2:03-cv-01431-PMP-PAL), (Plaintiffs): Kate Reznick, LEAD ATTORNEY, Boni & Zack LLC, Bala Cynwyd, PA.

For OneOK Energy Services Company, L.P., Oneok Energy Marketing **[**14]** & Trading Company, LP, Oneok, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI.

For OneOK Energy Services Company, L.P., Oneok, Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Scott R. Rowland, LEAD ATTORNEY, GableGotwals, Tulsa, OK.

For Utility Savings & Refund Services, LLP, Abelman Art Glass, Abelman Art Glass Company, et al, Ever-Bloom, Inc., Fairhaven Power Co., Fairhaven Power Company, Texas-Ohio Energy, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Joshua D Snyder, Boni & Zack LLC, Bala Cynwyd, PA.

For Xcel Energy Inc., e prime Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Jodi K Stanfield, LEAD ATTORNEY, los angeles, CA.

For Texas-Ohio Energy, Inc., Utility Savings & Refund Services, LLP, Ever-Bloom, Inc., Maximum Nursery, Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): Dennis J. Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Dynegy Inc., Dynegy Inc. Holding Company, Dynegy Marketing & Trade, West Coast Power LLC, Dynegy GP Inc DMT Holding, LP, Dynegy Holding Co., Inc., Dynegy Power Marketing, Inc., Dynegy GP Inc., Duke Energy Trading & Marketing, **[**15]** LLC, Dynegy Illinois Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA.

For Sempra Energy Corp., Sempra Energy Trading Corp. (2:03-cv-01431-PMP-PAL), (Defendants): William R. Urga, LEAD ATTORNEY, Jolley Urga Wirth Woodbury & Standish, Las Vegas, NV.

For Cross Oil Refining & Marketing, Inc., Learjet, Inc., Topeka Unified School District 501, Heartland Regional Medical Center, Prime Tanning Corporation, Merrick's Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., Arandell Corp., BBD Acquisition Co., Breckenridge Brewery of Colorado, LLC, Ladish Co., Inc. (2:03-cv-01431-PMP-PAL), (Plaintiffs): R. Lawrence Ward, LEAD ATTORNEY, Shughart Thomson & Kilroy, PC, Kansas City, MO.

For El Paso Corporation, El Paso Marketing, LP, CMS Field Services, Coral Energy Resources, LP, Duke Energy Trading & Marketing, LLC, Dynegy GP Inc DMT Holding, LP, Dynegy Marketing & Trade, Kansas Gas Marketing Company, Northern States Power Company, OneOK Energy Services Company, L.P., Oneok, Inc., Reliant Energy Services, Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc., **[**16]** Xcel Energy Inc., e prime Inc. (2:03-cv-01431-PMP-PAL), (Defendants): Stacy Williams, LEAD ATTORNEY, Locke Lord Bissell & Liddell LLP, Houston, Tx.

For Duke Energy Trading & Marketing, LLC, Duke Energy Corporation (2:03-cv-01431-PMP-PAL), (Defendants): Jerome T. Wolf, LEAD ATTORNEY, Sonnenschein Nath & Rosenthal LLP, Kansas City, MO.

For Arandell Corp., Merrick's Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc. (2:07-cv-01019-PMP-PAL), Plaintiffs: Alexander T. Pendelton, LEAD ATTORNEY, Kohner, Mann & Kailas, S.C., Milwaukee, WI; Alexander T. Pendelton, LEAD ATTORNEY, Robert L Gegios, William E Fischer, Kohner, Mann & Kailas, Milwaukee, WI; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Gregory M. Bentz, Jennifer Gille Bacon, LEAD ATTORNEYS, Polsinelli Shughart, Kansas City, MO; R. Lawrence Ward, LEAD ATTORNEY, Shughart Thomson & Kilroy, PC, Kansas City, MO; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Ladish Company, Inc. (2:07-cv-01019-PMP-PAL), Plaintiff: Alexander T. Pendelton, Robert L Gegios, LEAD ATTORNEYS, William E Fischer, Kohner, Mann & Kailas, Milwaukee, WI.

For Xcel Energy Inc., E Prime Inc (2:07-cv-01019-PMP-PAL), Defendants: Michael **[**17]** John Miguel, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, Los Angeles, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Northern States Power Company (2:07-cv-01019-PMP-PAL), Defendant: Michael John Miguel, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, Los Angeles, CA; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA.

For CMS Field Services (2:07-cv-01019-PMP-PAL), Defendant: Mark E Haddad, LEAD ATTORNEY, Michelle B Goodman, Sidley Austin LLP, Los Angeles, CA.

For Centerpoint Energy Inc. (2:07-cv-01019-PMP-PAL), Defendant: Orrin L Harrison, III, LEAD ATTORNEY, Akin Gump Strauss Hauer & Feld LLP, Dallas, TX; Reginald D. Steer, LEAD ATTORNEY, Akin Gump Strauss Hauer & Feld LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Meg Vergeront, Stafford Rosenbaum LLP, Madison, WI; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For CMS Energy (2:07-cv-01019-PMP-PAL), Defendant: Mark E Haddad, Michelle B Goodman, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA.

For CMS Marketing Services & Trading Company (2:07-cv-01019-PMP-PAL), **[**18]** Defendant: Mark E Haddad, Michelle B Goodman, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Coral Energy Resources, LP (2:07-cv-01019-PMP-PAL), Defendant: A. William Urquhart, Kristen Bird, Marshall M Searcy, Roxanne Manuel, LEAD ATTORNEYS, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; Bruce A. Schultz, LEAD ATTORNEY, Madison, WI; Joshua D. Lichtman, LEAD ATTORNEY, Fulbright &

Jaworski, L.L.P., Los Angeles, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Duke Energy Corporation (2:07-cv-01019-PMP-PAL), Defendant: Joel B. Kleinman, LEAD ATTORNEY, Dickstein Shapiro LLP, Washington, DC.

For Duke Energy Trading & Marketing, LLC (2:07-cv-01019-PMP-PAL), Defendant: Clifford Joe Cavitt, LEAD ATTORNEY, Hurley, Burish & Stanton, S.C., Madison, WI; Joel B. Kleinman, LEAD ATTORNEY, Lisa M Kaas, Dickstein Shapiro LLP, Washington, DC; Marie A. Stanton, Madison, WI.

For Dynegy Inc., Dynegy GP Inc DMT Holding, LP (2:07-cv-01019-PMP-PAL), Defendants: Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; Michael J. Kass, **[**19]** LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Dynegy Marketing & Trade (2:07-cv-01019-PMP-PAL), Defendant: Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; Michael J. Kass, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For El Paso Corporation (2:07-cv-01019-PMP-PAL), Defendant: Diane E. Pritchard, LEAD ATTORNEY, Morrison & Foerster, San Francisco, CA; Paul R. Norman, LEAD ATTORNEY, Boardman, Suhr, Curry & Field LLP, Madison, WI; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, DC; Stacy Williams, Locke Lord Bissell & Liddell LLP, Houston, Tx.

For El Paso Marketing, LP (2:07-cv-01019-PMP-PAL), Defendant: Diane E. Pritchard, LEAD ATTORNEY, Morrison & Foerster, San Francisco, CA; Paul R. Norman, LEAD ATTORNEY, Boardman, Suhr, Curry & Field LLP, Madison, WI; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; **[**20]** Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For El Paso Merchant Energy LP (2:07-cv-01019-PMP-PAL), Defendant: Diane E. Pritchard, LEAD ATTORNEY, Morrison & Foerster, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For OneOK Energy Services Company, L.P. (2:07-cv-01019-PMP-PAL), Defendant: Amelia A Fogleman, Oliver S Howard, LEAD ATTORNEYS, Gable & Gotwals, Tulsa, OK; James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Scott R. Rowland, LEAD ATTORNEY, GableGotwals, Tulsa, OK; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Oneok Energy Marketing & Trading Company, LP (2:07-cv-01019-PMP-PAL), Defendant: James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Oliver S Howard, LEAD ATTORNEY, Amelia A Fogleman, Gable & Gotwals, Tulsa, OK; Joel **[**21]** B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Oneok, Inc. (2:07-cv-01019-PMP-PAL), Defendant: Amelia A Fogleman, Oliver S Howard, LEAD ATTORNEYS, Gable & Gotwals, Tulsa, OK; James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Scott R. Rowland, LEAD ATTORNEY, GableGotwals, Tulsa, OK; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Reliant Resources, Inc (2:07-cv-01019-PMP-PAL), Defendant: Amy E. Tabor, LEAD ATTORNEY, Mark R Robeck, Baker Botts, LLP, Houston, TX; D. Neal Tomlinson, Snell & Wilmer L.L.P., Las Vegas, NV; Jefferson Gregory Copeland, Houston, TX.

For Reliant Energy Services, Inc. (2:07-cv-01019-PMP-PAL), Defendant: Amy E. Tabor, Mark R Robeck, LEAD ATTORNEYS, Baker Botts, LLP, Houston, TX; Jefferson Gregory Copeland, LEAD ATTORNEY, Houston, TX; D.

Neal Tomlinson, Snell & Wilmer L.L.P., Las Vegas, NV; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, **[**22]** DC.

For Williams Companies, Inc., Williams Power Company, Inc., Williams Merchant Services Company, Inc. (2:07-cv-01019-PMP-PAL), Defendants: Mark H. Hamer, LEAD ATTORNEY, Piper Rudnick Gray Cary, San Diego, CA; Sarah Jane Gillett, LEAD ATTORNEY, Graydon Dean Luthey, Jr., Heather L. Cupp, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, OK; Brandon B Rule, Hall Estill, Tulsa, OK; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joshua D. Lichtman, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Noah A. Katsell, San Diego, CA; Robert B. Wolinsky, Hogan & Hartson, Washington, DC.

For Williams Energy Marketing & Trading Company (2:07-cv-01019-PMP-PAL), Defendant: Mark H. Hamer, LEAD ATTORNEY, Piper Rudnick Gray Cary, San Diego, CA; Sarah Jane Gillett, LEAD ATTORNEY, Graydon Dean Luthey, Jr., Heather L. Cupp, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, OK; Brandon B Rule, Hall Estill, Tulsa, OK; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

Judges: PHILIP M. PRO, United States District Judge.

Opinion by: PHILIP M. PRO

Opinion

[*1125] *ORDER RE: DEFENDANT'S MOTION TO DISMISS (Doc. # 869)*

Presently before this Court is Defendant Reliant Energy, Inc.'s Motion to Dismiss for Lack of Personal **[**23]** Jurisdiction (Doc. # 869), [1] filed on March 3, 2008. Plaintiffs filed an Opposition (Doc. # 1103) and supporting declaration (Doc. # 1104) on June **[*1126]** 4, 2008. Defendant Reliant Energy, Inc. filed a Reply (Doc. # 1185) on June 24, 2008.

I. BACKGROUND

A. Procedural Background

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed this action in the Circuit Court, Dane County, Wisconsin. (Notice of Removal [Doc. # 2 in 2:07-CV-01019-PMP-PAL], Compl.) Defendants removed the case to the United States District Court for the District of Wisconsin. (*Id.*) The Judicial Panel on Multidistrict Litigation entered a Transfer Order pursuant to *28 U.S.C. § 1407* centralizing the foregoing action in this Court for coordinated or consolidated pretrial proceedings.

Plaintiffs Arandell Corporation, Merrick's, Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., and Ladish Co., Inc. are Wisconsin corporations. (Corrected Second Am. Compl. [Doc. # 190 in 2:07-CV-01019-PMP-PAL] [2] at 5-6.) According to the Corrected Second Amended Complaint **[**24]** ("SAC"), Defendants are natural gas companies that buy, sell, transport, and store natural gas, including their own and their affiliates' production, in the United States and in the State of Wisconsin. (*Id.* at 6-51.) In this litigation, Plaintiffs allege Defendants conspired to engage in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for

---

[1] Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

[2] Plaintiffs' Second Amended Complaint is located at docket number 847 in the base file. Plaintiffs filed the Corrected Second Amended Complaint only in the individual case file.

consumers. (*Id.*) Specifically, Plaintiffs allege Defendants, directly and through their affiliates, conspired to manipulate the natural gas market by knowingly delivering false reports concerning trade information to trade indices and engaging in wash trades, in violation of Wisconsin Statutes chapter 133. (*Id.*)

The SAC asserts two causes of action. Count one arises under *Wisconsin Statutes § 133.14*, which voids contracts to which an antitrust conspirator is a party and allows recovery of payments made pursuant to such a contract. (*Id.* at 54-56.) Count two seeks trebled actual damages under *Wisconsin Statutes § 133.18* **[**25]** for Defendants' alleged antitrust violations. (*Id.* at 56-57.)

The SAC's allegations are directed generally at two types of Defendants: the natural gas companies that actually engaged in natural gas sales and the related reporting of allegedly manipulated gas prices to the trade indices, and those companies' parent corporations. The SAC does not allege the parent company Defendants themselves engaged in natural gas trading and price reporting. Rather, the SAC alleges these Defendants are the parent companies of subsidiaries which engage in such activity generally, and which also made natural gas sales in Wisconsin during the relevant time period.

Plaintiffs seek to establish personal jurisdiction over the parent company Defendants based on their out-of-forum activities directed at Wisconsin along with their subsidiaries' and affiliates' contacts within Wisconsin. According to the SAC, the parent company Defendants dominated and controlled their respective subsidiaries and the parent company Defendants "entered into a combination and conspiracy . . . which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market **[**26]** prices of natural gas." (*Id.* at 6-7, 9, 14-15, 18-19, 23, 26-27, 30-31, 35-36.) Plaintiffs allege the parent **[*1127]** company Defendants intended their actions to have a direct, substantial, and foreseeable effect on commerce in the State of Wisconsin. (*Id.* at 7, 10, 15, 19, 23-24, 27, 31, 36.) According to the SAC, the parent company Defendants "made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates . . . in the United States and in Wisconsin." (*Id.* at 8, 10, 15, 19, 24, 27-28, 32, 36.)

Defendant Reliant Energy, Inc. ("REI") now moves to dismiss, arguing this Court lacks personal jurisdiction over REI. According to REI, it conducts no business in Wisconsin and has no other contacts supporting general or specific jurisdiction. REI also argues it cannot be subject to jurisdiction in Wisconsin based on its subsidiary's contacts with the forum because its subsidiary is not its agent or alter ego, and Wisconsin would not support **[**27]** the conspiracy theory of jurisdiction. REI thus argues personal jurisdiction does not exist under the Wisconsin long-arm statute, and even if it did, exercising personal jurisdiction in this case would violate constitutional due process requirements.

Plaintiffs respond that REI's subsidiary has submitted to jurisdiction in Wisconsin and REI is subject to personal jurisdiction based on agency and alter ego principles based on its subsidiary's contacts. Additionally, Plaintiffs argue that because Wisconsin's antitrust statutes contemplate imposing liability on an antitrust conspirator who performs acts outside of Wisconsin that have an impact in Wisconsin, the Court has personal jurisdiction over REI under Wisconsin's long-arm statute.

B. Facts Related to Personal Jurisdiction

Defendant REI is a Delaware corporation with its principal place of business in Texas. (Def. Reliant Energy, Inc.'s Mot. to Dismiss for Lack of Pers. Juris. (Doc. # 869), Ex. A ["Jines Decl."] at 2.) REI as it currently exists came into being in response to changes in Texas regulatory laws. (*Id.*) The company formerly known as Reliant Energy, Incorporated divided itself into CenterPoint Energy, Inc. ("CenterPoint") **[**28]** and Reliant Resources, Inc. ("RRI"). (*Id.*) After CenterPoint divested itself of its RRI stock, the two companies became separate entities and RRI changed its name to REI, the Defendant in this action. (*Id.* at 2-3.) Under the Master Separation Agreement resulting in RRI's existence as a separate entity, RRI agreed that it would indemnify, defend, and hold harmless Reliant Energy, Incorporated, and in certain cases, that it would cause its subsidiaries to do so as well, for liabilities arising out of RRI and its subsidiaries' business operations, including business operations that pre-dated the agreement. (App. of Docs. Filed Under Seal ["Sealed App."] (Doc. # 1126), Ex. E at REILJ012883, Ex. F at REILJ009719.)

REI is a holding company that does not itself buy, sell, or transport natural gas, nor does it report natural gas prices to any price reporting firms or price index publishers. (Jines Decl. at 3-4; Joint Supplemental Mem. of Defs. CMS Energy Corp., Duke Energy Carolinas, LLC, and Reliant Energy, Inc. in Supp. of Mots. to Dismiss for Lack of Pers. Juris. (Doc. # 963), Reliant Energy, Inc.'s App. in Supp. of Its Mots. to Dismiss for Lack of Pers. Juris. ["REI App."], Ex. B at 2.) **[**29]** REI does not have any offices, employees, property, bank accounts, phone listings, or mailing addresses in Wisconsin. (Jines Decl. at 3; REI App., Ex. C at 2, Ex. D at 2, Ex. E at **[*1128]** 2.) REI does not pay taxes in Wisconsin and has never sold or traded natural gas in Wisconsin. (Jines Decl. at 3; REI App., Ex. B at 2, Ex. F at 2.) REI has not itself conducted any business in Wisconsin. (Jines Decl. at 3.) Other than advertising in publications available nationwide, REI has not directed advertising specifically towards Wisconsin. (REI App., Ex. G at 2.)

REI has a wholly owned subsidiary, Reliant Energy Services, Inc. ("RES"). (Jines Decl. at 3.) RES sold millions of dollars worth of natural gas to the Wisconsin Public Service Corporation and Integrys Energy Services, Inc., Wisconsin corporations, and had a natural gas supply agreement with the Wisconsin Electric Power Company ("WEPCO") and Wisconsin Gas, LLC, during the 2000 to 2002 time period. (Decl. of Andy Hess (Doc. # 1089); Revised Decl. of Kristie J. Wiegand, Revised Decl. of Julie Baumgart (Doc. # 1131); Notice of Filing of Docs. Under Seal (Doc. # 1180); Notice of Filing of Docs. Under Seal (Doc. # 1184); Decl. of Timothy J. McCollow **[**30]** (Doc. # 993); Decl. of William E. Fischer (Doc. # 1097), Second Decl. of James H. Voss.) State of Wisconsin billing records show RES also sold thousands of dollars of natural gas from July 2001 to June 2002 to the State of Wisconsin. (Decl. of William E. Fischer (Doc. # 1104) ["Fischer Decl."], Ex. B, Jines Ex. 16.) Plaintiff Ladish Co., Inc. ("Ladish") purchased over $ 19 million in natural gas from RES between January 2000 and August 2002. (*Id.,* Jines Ex. 11.)

According to Ladish's accounting manager, RES marketed itself under the name "Reliant Energy" in making these sales. (*Id.*) Timothy J. McCollow ("McCollow"), a former WEPCO employee, likewise avers that Reliant-related companies sold gas to WEPCO using a common logo. (Decl. of Timothy J. McCollow at 4.) McCollow avers that several Reliant marketing employees traveled to Wisconsin and personally met with WEPCO employees, including McCollow. (*Id.*) McCollow also states that he and his coworkers spoke with Reliant marketing personnel on a nearly daily basis when WEPCO actively was seeking to purchase natural gas. (*Id.*)

REI and RES share physical offices in Texas. (Sealed App., Ex. D at 163-64.) REI and its subsidiaries, including **[**31]** RES, share some common officers and directors. (Sealed App., Ex. B.) For example, Michael Jines ("Jines") was an officer for REI, RES, and several other REI subsidiaries, including some for which he could not recall the subsidiary's name. (Sealed App., Ex. D at 15-19, 107-110.) At his deposition, Jines stated his duties and responsibilities as an officer and director of those subsidiaries would be "no different" than his duties and responsibilities as REI's general counsel. (*Id.* at 119-20.) As RES's one hundred percent owner, REI nominates and elects the directors for RES. (*Id.* at 88-89.)

At the present time, REI and RES have no employees of their own. (*Id.* at 248, 288-89.) Rather, Reliant Energy Corporate Services ("RECS"), an REI subsidiary, acts as the payroll entity for REI and all of its subsidiaries. (*Id.* at 9-10.) RECS employs personnel who provide services to REI and RES. (*Id.* at 10.) For example, lawyers employed by RECS provide legal services to REI and all of its subsidiaries. (*Id.* at 111-13.) RECS also provides accounting, finance, legal, human resources, and facilities management services to REI and its subsidiaries. (*Id.* at 20.) As part of these services, RECS prepares **[**32]** separate financial documents, including tax filings, for RES. (*Id.* at 56-57, 267.)

In terms of financial dealings between REI and its subsidiaries, the subsidiaries are funded by borrowing from or receiving equity capital infusions from REI. (*Id.* at 239-40.) In turn, REI receives either loan **[*1129]** repayments or dividends when money is transferred from the subsidiaries to REI. (*Id.* at 291-92.) In some circumstances, REI provides guarantees to third parties in transactions involving REI subsidiaries. (*Id.* at 204-05.) REI agreed to be RES's guarantor in an agreement in 2001 with a Wisconsin company. (Fischer Decl., Jines Ex. 17.) In setting forth its financial guarantee policy, REI (then RRI) described RES as a "business unit." (Sealed App., Ex. H at REILJ010083.)

Although describing itself as a holding company, REI does not passively hold stock in its subsidiaries and leave them to operate on their own. Rather, REI establishes overall policies and guidelines for its subsidiaries, establishes a capital structure, and issues consolidated financial reports. (Sealed App., Ex. D at 131.) Among the guidelines REI requires its subsidiaries to follow is a policy for best principles and practices. (Sealed **[**33]** App., Ex. I at REILJ012703.) This policy requires compliance with applicable laws and regulations, and requires that all transactions be for a bona fide business purpose and be reported accurately. (*Id.*) The best practices policy prohibits wash sales and fictitious transactions. (*Id.* at REILJ012704.) This policy applied to RES during the relevant period. (Sealed App., Ex. N at 93.)

Additionally, REI sets certain risk control limits on its subsidiaries. For example, REI set limits on RES's value at risk ("VAR"). (Sealed App., Ex. F at REILJ009749.) REI's board of directors sets the overall limit on VAR. (*Id.*) The Audit Committee of REI's board meets at least three times a year to approve the risk control organization structure, approve the overall risk control policy, monitor compliance with trading limits, and review risk control issues. (*Id.* at REILJ009752.)

REI also has a Risk Oversight Committee consisting of REI and subsidiary officers which allocates VAR to various business segments, including RES. (Sealed App., Ex. M at 17, Ex. F at REILJ009752.) The Risk Oversight Committee meets at least monthly to monitor compliance, review daily position reports for trading and marketing activity, **[**34]** recommend to REI's board of directors adjustments to trading limits, approve new trading activity, monitor information systems related to risk management, and place guidelines and limits on hedging activity. (Sealed App., Ex. F at REILJ009752-53.) Management for each business segment then allocates risk limits among individual traders within the limits set by the Risk Oversight Committee. (*Id.* at REILJ009754.) RES allocates VAR to its "head book traders" who in turn authorize other traders to execute trades. (Sealed App., Ex. M at 17.) Thus, the VAR limit set by REI was "an overall limit." (Sealed App., Ex. N at 155.) RES would engage in multiple transactions in one day, and the limit set by REI was evaluated against the net result of a set of RES's transactions or activities. (*Id.*)

REI oversight of its subsidiaries includes daily reporting of mark-to-market valuation, [3] VAR, and "other risk measurement metrics." (Sealed App., Ex. L.) RES's VAR is reported daily to REI's Risk Oversight Committee. (Sealed App., Ex. M at 17.) Additionally, violations of any risk limits are reported to the business segment management as well as to the appropriate committees. (Sealed App., Ex. F at REILJ009754.) **[**35]** While the reports from the subsidiary to the various committees **[*1130]** may occur daily, communications from REI down to the subsidiaries occurs "only to the extent that the activity ended up in a violation." (Sealed App., Ex. N at 156.) For example, if RES exceeded its VAR limit, an REI officer may inform RES management and inquire as to what RES management intended to do to correct the situation. (*Id.*) However, "in terms of the day-to-day buying and selling of gas or power, [REI officers have] limited or no interaction." (*Id.*)

In November 2003, the Commodity Futures Trading Commission ("CFTC") entered into a settlement with RES regarding the CFTC's allegations that RES violated the Commodities Exchange Act. (Fischer Decl., Ex. B, Jines Ex. 4.) According to the settlement, the CFTC found RES's Houston offices made false price reports regarding natural gas transactions from 1999 through May 2002. (*Id.* at 4-5.) Additionally, the CFTC found RES engaged in wash trades in 2000. (*Id.* at 6-7.) As part of the settlement, RES and REI agreed to entry of the order finding violations, as well **[**36]** as requiring RES to cease and desist from its misconduct, imposing an $ 18 million civil penalty on RES, and requiring RES and REI to undertake certain activities. (*Id.* at 7-9.) Specifically, REI agreed to cooperate with the CFTC in the future, including preserving and producing records regarding the reporting of price or trade volumes in natural gas transactions and producing RES and REI employees to provide assistance in any trial, proceeding, or investigation related to the CFTC's investigation. (*Id.* at 8-9.) Additionally, REI agreed not to make any public

[3] "Mark-to-market" means the value of a contract relative to current market prices. (Sealed App., Ex. N at 128.)

statements denying the CFTC's findings in the order. (*Id.* at 9.) Jines represented both RES and REI relating to the CFTC's investigation and the terms of the CFTC's order. (Sealed App., Ex. D at 41-44.)

The parties now dispute the significance of these contacts under the Wisconsin long-arm statute. The parties also dispute whether this Court's exercise of personal jurisdiction over REI would violate constitutional due process requirements.

II. PERSONAL JURISDICTION

"When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant." **[**37]** *Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006)*. To meet this burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1) permitted under the applicable state's long-arm statute and (2) that the exercise of jurisdiction does not violate federal due process. *Id.* The Court must analyze whether personal jurisdiction exists over each defendant separately. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003)*.

Where the issue is before the Court on a motion to dismiss based on affidavits and discovery materials without an evidentiary hearing, the plaintiff must make "a prima facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid dismissal." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119 (9th Cir. 2002)*. The Court accepts as true any uncontroverted allegations in the complaint and resolves any conflicts between the facts contained in the parties' evidence in the plaintiff's favor. *Id.* However, for personal jurisdiction purposes, a court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992)* **[**38]** (quotation omitted).

[*1131] In diversity cases such as this, "a federal court applies the personal jurisdiction rules of the forum state provided the exercise of jurisdiction comports with due process." *Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986)*. However, "federal law is controlling on the issue of due process under the United States Constitution." *Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977)*; *see also* *Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002)*. Therefore, the Court will apply law from the United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is appropriate under the *Due Process Clause*. *See* *In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174, 265 U.S. App. D.C. 39 (D.C. Cir. 1987)* (concluding that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit"); *Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993)* (holding that "a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit").

To satisfy federal due process **[**39]** standards, a nonresident defendant must have "minimum contacts" with the forum state so that the assertion of jurisdiction does not offend traditional notions of fair play and substantial justice. *Pebble Beach Co., 453 F.3d at 1155* (citing *Int'l Shoe Co. v. Washington, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945))*. A federal district court may exercise either general or specific personal jurisdiction. *See* *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*.

To establish general personal jurisdiction, the plaintiff must demonstrate the defendant has sufficient contacts to "constitute the kind of continuous and systematic general business contacts that 'approximate physical presence.'" *Glencore Grain, 284 F.3d at 1124* (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)*, *modified,* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006))*. Courts consider such factors as whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there. *Bancroft, 223 F.3d at 1086*. "[A] defendant **[**40]** whose contacts are substantial, continuous, and systematic is subject to a court's general jurisdiction even if the suit concerns matters not arising out of his contacts with the forum." *Glencore Grain, 284 F.3d at 1123* (citing *Helicopteros, 466 U.S. at 415 n.9*).

A nonresident defendant's contacts with the forum state may permit the exercise of specific jurisdiction if: (1) the defendant has performed some act or transaction within the forum or purposefully availed himself of the privileges of conducting activities within the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction over the defendant is reasonable. *Pebble Beach Co., 453 F.3d at 1155-56*. "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995)*.

Under the first prong of the "minimum contacts test," the plaintiff must establish either that the defendant "(1) purposefully availed himself of the privilege of conducting his activities in the forum, or (2) purposefully directed his activities toward **[**41]** the forum." *Pebble Beach Co., 453 F.3d at 1155*. "Evidence of availment is typically action taking place in the forum that invokes the benefits and protections **[*1132]** of the laws in the forum." *Id.* Evidence of direction usually consists of conduct taking place outside the forum that the defendant directs at the forum. *Id. at 1155-56*.

The purposeful direction aspect of the first prong is satisfied when a foreign act is both aimed at and has effect in the forum. *Id.* In other words, the defendant "must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Id.* To satisfy the third element of this test, the plaintiff must establish the defendant's conduct was "expressly aimed" at the forum; a "mere foreseeable effect" in the forum state is insufficient. *Id.* The "express aiming" requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct "individually targeting a known forum resident." *Bancroft, 223 F.3d at 1087*.

The second prong of the specific jurisdiction test requiring that the contacts constituting purposeful **[**42]** availment or purposeful direction give rise to the current action is measured in terms of "but for" causation. *Id. at 1088*. "If the plaintiff establishes both prongs one and two, the defendant must come forward with a 'compelling case' that the exercise of jurisdiction would not be reasonable." *Boschetto v. Hansing, 539 F.3d 1011, 1016 (9th Cir. 2008)* (quotation omitted).

No evidence in the record demonstrates REI itself had any contacts with Wisconsin other than acting as a guarantor on a single contract between RES and a Wisconsin entity. A single contact does not support general jurisdiction. Plaintiffs' claims do not arise out of that contract and thus specific jurisdiction also does not exist based on this single contact. Consequently, REI is subject to personal jurisdiction in Wisconsin only if the forum acts of its subsidiary, RES, are attributable to it through principles of alter ego, agency, or a conspiracy theory of personal jurisdiction. [4]

A. Alter Ego

A "parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary **[**43]** to the parent for jurisdictional purposes." *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1134*. However, a subsidiary's contacts may be imputed to its parent for personal jurisdiction purposes where the subsidiary is the parent's alter ego. *Id.*

To demonstrate a parent and its subsidiary are alter egos, the plaintiff must establish a prima facie case that the two companies share "such unity of interest and ownership" that the companies' separateness no longer exists and "failure to disregard [their separate identities] would result in fraud or injustice." *Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)* (quotation omitted). To demonstrate a unity of interest warranting disregard of corporate separateness, the plaintiff must show the parent controls its subsidiary to such a degree as to render the subsidiary a "mere instrumentality" of its parent. *Id.* (quotation omitted). Typically, this would involve showing the parent

[4] The Court will assume that if RES's forum-related acts are attributable to REI, the Wisconsin long-arm statute is satisfied.

controls the subsidiary's internal affairs or daily operations. *Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980)*. [5]

[*1133] A parent corporation may be involved directly in certain aspects of its wholly owned subsidiary's affairs without subjecting itself to alter ego status. For example, a parent may provide financing to its subsidiary so long as it maintains corporate formalities and properly documents loans and capital contributions to its subsidiaries, and it may act as its subsidiary's guarantor. *Doe, 248 F.3d at 927-28*. Additionally, a parent may refer to its subsidiaries as divisions of the parent in annual reports. *Id. at 928*. Further, a parent may review and approve major decisions, place its own directors on the **[**45]** subsidiary's board, and share offices and staff with its wholly owned subsidiary without being considered its alter ego. *Id.; Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135*.

In sum, a parent may involve itself directly in its subsidiary's activities without becoming an alter ego "so long as that involvement is consistent with the parent's investor status." *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135* (quotation omitted). Activities consistent with investor status include "'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures[.]'" *Doe, 248 F.3d at 926* (quoting *United States v. Bestfoods, 524 U.S. 51, 72, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998))*.

In addition to showing lack of corporate separateness, the plaintiff also must show that failure to disregard the corporate form would promote fraud or injustice. The fraud or injustice must relate to the forming of the corporation or abuse of the corporate form, not a fraud or injustice generally. *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 n.12 (9th Cir. 1984)*. For example, undercapitalization **[**46]** at the subsidiary's inception may be evidence of the parent's fraudulent intent. *Id.* However, a corporation that once was capitalized adequately but "subsequently fell upon bad financial times" does not support a finding of fraud or injustice. *Id. at 525*. Further, evidence that the corporation existed as an ongoing enterprise engaged in legitimate business suggests no fraudulent intent or injustice to support piercing the corporate veil. *Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1113 (9th Cir. 1979)*. An inability to collect on a judgment "does not, by itself, constitute an inequitable result." *Id.*

Plaintiffs have failed to establish a prima facie case of personal jurisdiction based on RES being REI's alter ego. REI provided financing to RES and in return received loan repayments and/or dividends, but no evidence in the record suggests REI failed to maintain corporate formalities or to properly document these loans and capital contributions. Rather, the evidence indicates RECS prepared separate books and records for RES and REI.

REI's conduct in acting as a guarantor for RES also does not support an alter ego finding, and the evidence presented on this point suggests the opposite. **[**47]** REI had in place specific policies regarding when it would consider acting as its subsidiary's guarantor, suggesting that the two corporations and their counterparties viewed the two as separate entities not liable for the **[*1134]** other's obligations except where they contractually agreed to such an arrangement. Further, REI's reference to RES as a "business unit" in a report does not suggest RES was REI's mere instrumentality. Nor does the fact that the two companies shared office space and staff.

REI's oversight of RES is consistent with the parent's investor status. As one hundred percent owner of RES's shares, REI was entitled to nominate and elect RES's board of directors. Additionally, REI is entitled as an investor to monitor RES's performance. Consequently, the daily reporting of information from RES to REI is consistent with REI's investor oversight role. Although REI received daily reporting from RES, no evidence suggests REI gave daily control commands to RES. Rather, the record demonstrates that, consistent with its investor status, REI set general

---

[5] Wisconsin utilizes similar principles. In Wisconsin, the party attempting to pierce the corporate veil must show **[**44]** the subsidiary corporation "has no separate existence of its own and is the mere instrumentality of the shareholder and the corporate form is used to evade an obligation, to gain an unjust advantage or to commit an injustice." *Wiebke v. Richardson & Sons, Inc., 83 Wis. 2d 359, 265 N.W.2d 571, 573 (Wis. 1978)*. To the extent Wisconsin would look to the law of the state of incorporation to determine alter ego status, Delaware has similar requirements. *See* *Maloney-Refaie v. Bridge at Sch., Inc., 958 A.2d 871, 881 (Del. Ch. 2008)*; *In re Sunstates Corp. Shareholder Litig., 788 A.2d 530, 534 (Del. Ch. 2001)*.

policies and guidelines regarding best policies and practices, as well as certain overall limits, such as the limit on VAR. However, **[**48]** when it came to RES's day-to-day conduct of its business within these guidelines, REI had little to no role. For example, with respect to natural gas trading, while REI set overall limits on certain metrics, REI had no role in making the day-to-day decisions of who RES was to trade with, when, for what amount of natural gas, and at what price. Only when RES exceeded REI's overall limits would REI become involved by inquiring of its subsidiary what it intended to do to correct any violations. Plaintiffs also present no evidence REI had any role in RES's price reporting to indices.

Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have not established a fraud or injustice would result if the Court failed to pierce the corporate veil. Plaintiffs contend it would be unjust to permit REI to reap the benefits of RES's alleged unlawful behavior by enjoying profits from RES's trading activities while escaping liability for RES's alleged misconduct. However, the alleged illegal price manipulation cannot itself constitute the fraud or injustice necessary to pierce the corporate veil. Rather, REI must have had some fraudulent intent at RES's inception or some later **[**49]** abuse of the corporate form such that failing to treat the entities as one would be inequitable. Plaintiffs present no evidence RES was undercapitalized at its inception. Further, the fact that RES operated as a legitimate business for years suggests a lack of fraudulent intent or perpetration of a fraud through use of the corporate structure on the parent's part.

Plaintiffs' fear that they may not be able to collect on a judgment in this action against RES does not constitute fraud or injustice to support piercing the corporate veil. The Court therefore finds Plaintiffs have not met their burden of establishing RES is REI's alter ego, and the Court will not attribute RES's contacts with Wisconsin to REI for purposes of determining personal jurisdiction based on alter ego principles.

B. Agency

A subsidiary's contacts also may be imputed to its parent for personal jurisdiction purposes where the subsidiary is the parent's general agent in the forum. *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1134*. A subsidiary is its parent's agent for purposes of attributing its forum-related contacts to the parent if the subsidiary "performs services that are 'sufficiently important to the foreign **[**50]** corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'" *Doe, 248 F.3d at 928* (quoting *Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994))*. The ultimate inquiry is whether **[*1135]** the subsidiary's presence in the forum "substitutes" for its parent's presence. *Id. at 928-29* (quotation omitted).

Where the parent is merely a holding company, the subsidiary's forum-related contacts are not done as the parent's agent because the holding company "could simply hold another type of subsidiary" as an investment and thus the subsidiary conducts business not as the parent's agent but as its investment. *Id. at 929*. "Where, on the other hand, the subsidiaries are created by the parent, for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries." *Id.* (quotation omitted). The inquiry as to whether a subsidiary is its parent's general agent in the forum is "a pragmatic one." *Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992)*.

For example, where a Japanese parent company **[**51]** was engaged in the manufacture of watches, its subsidiaries that acted as its sole sales agents in America were "almost by definition . . . doing for their parent what their parent would otherwise have to do on its own." *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981)*. The *Bulova* court thus attributed the subsidiaries' contacts to the parent company. *Id.; see also* *Chan, 39 F.3d at 1405-06* (remanding to the district court for additional findings of fact regarding agency where the German parent corporation owned and operated cruise ships and its local subsidiary marketed cruises and chartered cruise ships and sold the cruise ticket to the plaintiffs out of which the claims arose); *Modesto City Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001)* (holding subsidiary was parent's agent for personal jurisdiction purposes where subsidiary acted as sole conduit for marketing and selling parent's products in the United States).

In contrast, where the parent company owned a subsidiary mining company's stock but did not itself engage in the business of gold mining, imputing the subsidiary's forum contacts to the parent was not appropriate. **[**52]** Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000). As the *Sonora Diamond* court explained, had the parent company owned "the rights to the gold and used Sonora Mining as the operating and marketing entity," then perhaps general jurisdiction over the parent company would be appropriate because under those circumstances the parent company "could not reap the benefits of its rights unless it or someone else removed and sold the ore." *Id.* But where the parent simply held the mining company as an investment, the subsidiary's forum-related contacts could not be imputed to the parent company. *Id.*

Likewise, in *Doe,* the Ninth Circuit concluded a foreign company's subsidiaries were not its general agents in California because the plaintiffs presented no evidence that in the absence of the California subsidiaries' involvement in petrochemical and chemical operations, the parent would have conducted and controlled those operations. Doe, 248 F.3d at 929. The Court reached this conclusion even though the parent company issued consolidated reporting, referred to a subsidiary in an annual report as its "US unit," and stated that use of the subsidiary "would enable **[**53]** it to expand its marketing network and produce higher value-added specialty products in the United States." *Id.*

Plaintiffs have failed to establish a prima facie case that RES was REI's general agent in Wisconsin. REI's business is not purely as a holding company in the sense that it does not passively hold stock **[*1136]** in companies from an unrelated range of businesses. REI (then RRI) has described itself as a "provider of electricity and energy services with a focus on the competitive segments of the electric power industry in the United States and Europe." (Sealed App., Ex. K at REILJ009826.) REI describes its business as acquiring, developing, and operating electric power generation facilities; trading and marketing power, natural gas, and other energy-related commodities; and providing retail electric services in Texas. (*Id.*) REI has asserted in public filings that its--

> trading, marketing, and risk management skills complement [its] generation positions. The combination provides greater scale and skill associated with the management of our fuel and power positions, sophisticated commercial insights and an understanding of the key regions in which we participate, and a wider range of ways **[**54]** in which we participate in the market and are able to meet customer needs.

(*Id.*)

In practice, REI itself does not perform these activities, but, as Jines stated in his deposition, REI "holds the shares of the different subsidiaries that are actually engaged in the different business operations of [REI]." (Sealed App., Ex. D at 129-30.) Among those business operations was REI's "wholesale" group, which included a variety of subsidiaries involved in wholesale-related activities, including RES's natural gas-related activities. (*Id.* at 285-86.)

Although REI identifies natural gas trading and marketing as one of its business lines, Plaintiffs have not established that RES's sales of natural gas in Wisconsin were sufficiently important to REI that if RES did not make the sales in Wisconsin, REI would have done so itself. As the California Court of Appeal found in evaluating this same question involving a similar lawsuit against REI and RES in California, "[t]his portion of the energy business appears to be sufficiently fragmentary so that [REI] could have operated without the assistance of RES." Reliant Energy, Inc. v. Superior Court, No. D049988, 2007 Cal. App. Unpub. LEXIS 10019, 2007 WL 4329488, at *18 (Cal. Ct. App. 2007) **[**55]** (unpublished). Further, the fact that REI subsequently ceased "proprietary trading activities" due to a significant trading loss arising from "the extreme volatility in natural gas prices" suggests that RES's trading activities were not sufficiently important to REI that it would perform the activities itself if RES did not do so on its behalf. (Sealed App., Ex. G.)

Moreover, Plaintiffs have presented no evidence that RES's natural gas sales in Wisconsin in particular were sufficiently important to REI's business that REI would have performed the sales in Wisconsin itself absent its subsidiary's representation in the forum. *See* Modesto City Schs., 157 F. Supp. 2d at 1135 (noting twenty percent of parent's products were sold through subsidiary which acted as parent's "sole conduit for marketing and selling its products in the United States"); Bulova Watch Co., Inc., 508 F. Supp. at 1344 (noting that sixty percent of parent's products were sold as exports and the United States was the parent company's largest export market through its

New York subsidiaries' sales in the United States). Consequently, Plaintiffs have not shown that RES's Wisconsin natural gas sales played a significant **[**56]** role in REI's "'organizational life'" such that it acted as a substitute for REI in the forum. *Bulova Watch Co., Inc., 508 F. Supp. at 1344*.

The Court acknowledges that the California Court of Appeal upheld a state trial court's ruling that RES was REI's agent **[*1137]** in California for natural gas trading activity during the relevant time period. *Reliant Energy, Inc., 2007 Cal. App. Unpub. LEXIS 10019, 2007 WL 4329488, at *17*. Although arising out of the same factual background and involving the same parent and subsidiary, the ruling is distinguishable on several grounds. The evidence presented to the California state court indicated REI had many more significant contacts with California than the single contact REI had with Wisconsin as reflected in the evidence before this Court. According to the evidence in *Reliant,* REI owned another subsidiary that had purchased natural-gas-fueled power plants located in California. *2007 Cal. App. Unpub. LEXIS 10019, [WL] at *2*. Additionally, REI obtained a certificate of qualification to do business and designated an agent for service of process in California, acted as guarantor on seven agreements between RES and California utilities, engaged in a marketing campaign in the state, subleased a small office in Sacramento which **[**57]** was used by a lobbyist, and employed an individual who allegedly engaged in illegal churning and wash trades in California. *2007 Cal. App. Unpub. LEXIS 10019, [WL] at *3-4*.

In accord with this Court's ruling, the California Court of Appeal specifically rejected RES was REI's agent under the same test the Ninth Circuit employs to determine whether a subsidiary is its parent's agent for personal jurisdiction purposes. *Compare* *2007 Cal. App. Unpub. LEXIS 10019, [WL] at *17-18*, *with* *Doe, 248 F.3d at 928*. The California Court of Appeal referred to this test as the "representative services doctrine." *Reliant Energy, Inc., 2007 Cal. App. Unpub. LEXIS 10019, 2007 WL 4329488, at *17-18*. While finding RES was not REI's agent under the representative services doctrine, the *Reliant* court concluded RES was REI's agent in California under general agency principles based on REI's control over RES. *2007 Cal. App. Unpub. LEXIS 10019, [WL] at *15-17*. Although not calling it the "representative services doctrine," the Ninth Circuit has set forth that test as the applicable one for due process purposes. The California Court of Appeal's reference to other agency principles goes beyond the applicable agency test for exercising personal jurisdiction consistent with due process as set forth in controlling precedent for this Court.

Moreover, in making **[**58]** its finding under general agency principles, the California Court of Appeal relied on evidence not presented to this Court and not relevant to REI's contacts with Wisconsin. For example, the *Reliant* court considered the fact that RES made a daily report to REI of the California power plant's hedging activities, "regarding the coordination of power generation and supply of natural gas," and RES's trading activities impacted that supply of natural gas. *2007 Cal. App. Unpub. LEXIS 10019, [WL] at *16*. Additionally, evidence in the record permitted an inference that the employee who allegedly engaged in wash trades and churning in California was an REI (then RRI) employee. *Id.*

The California Court of Appeal also found REI's setting and raising of overall limits such as VAR to be significant evidence of REI's daily control of RES. However, as explained above, the evidence before this Court indicates REI sets overall limits but does not involve itself in RES's day-to-day decisions as to what actions to take within those limits. That RES violated those limits and requested a higher limit, to which REI agreed, is not evidence of day-to-day control. It is evidence of a change in the overall limit under which RES was to perform **[**59]** its day-to-day operations.

To the extent the setting and changing of VAR and other limits constitutes day-to-day control, Plaintiffs have not demonstrated that REI's setting or altering of overall limits on any metric constituted day-to-day interference with RES's sales in Wisconsin. Plaintiffs have presented no evidence that REI's oversight impacted RES's daily decisions regarding whether, when, to whom, in what **[*1138]** volume, or at what price RES decided to sell natural gas in Wisconsin. While daily oversight of trading activities may have been significant in the *Reliant* case where an employee of REI or one of its subsidiaries allegedly engaged in illegal trading activity in California, REI's daily oversight mechanisms as presented to this Court do not suggest a significant level of control over RES's Wisconsin sales activity. Because Plaintiffs have not established a prima facie case that RES acted as REI's agent in Wisconsin, the Court will not attribute RES's Wisconsin contacts to REI on this basis. [6]

C. Conspiracy Theory

The conspiracy theory of personal jurisdiction is based on the premise that a conspirator's acts in furtherance **[**61]** of a conspiracy are attributable to the other members of the conspiracy. *Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1392 (7th Cir. 1983)*. Consequently, some courts attribute a conspirator's in-forum acts to his co-conspirators for personal jurisdiction purposes.

The Ninth Circuit has not expressly accepted or rejected the conspiracy theory of personal jurisdiction. In its only published opinion addressing the issue, the Ninth Circuit noted that the two district court opinions upon which the plaintiff relied required the plaintiff either to allege specific overt acts in the forum state that furthered the conspiracy, or to allege substantial acts in furtherance of the conspiracy in the forum and that the co-conspirator knew or should have known his co-conspirator would perform those acts in the forum. *Underwager v. Channel 9 Australia, 69 F.3d 361, 364 (9th Cir. 1995)*. Without expressing any opinion on the validity of the conspiracy theory of personal jurisdiction, the Ninth Circuit concluded the plaintiff alleged no facts suggesting a conspiracy and failed to dispute the defendants' claims that they did not know certain acts would take place in the forum. *Id.* The Court **[**62]** therefore affirmed the district court's dismissal for lack of personal jurisdiction. *Id.*

Since this case, the Ninth Circuit has noted that "a great deal of doubt" surrounds the conspiracy theory's legitimacy. *Chirila v. Conforte, 47 Fed. Appx. 838, 842, 2002 WL 31105149, at *3 (9th Cir. 2002)* (unpublished). Some courts have adopted it. [7] Others have rejected its **[*1139]** application as inconsistent with due process. [8] Still others follow the Ninth Circuit's lead in *Underwager* and decline to address whether the theory comports with due process, but find the plaintiff failed to meet the test even if it applied. *See* *Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1070 (10th Cir. 2007)*; *Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980)*.

---

[6] The result would be the same under general Wisconsin agency law. In Wisconsin, an express agency relationship exists "only if there has been a manifestation by the principal to the agent **[**60]** that the agent may act on his account, and consent by the agent so to act." *Johnson v. Minn. Mut. Life Ins. Co., 151 Wis. 2d 741, 445 N.W.2d 736, 738 (Wis. Ct. App. 1989)* (quotation omitted). Wisconsin also recognizes apparent agency upon a showing of "(1) acts by the agent or principal justifying belief in the agency; (2) knowledge of such acts by the parties sought to be held; and (3) reliance on the apparent agency consistent with ordinary care and practice." *Id. at 739*.

Here, Plaintiffs have presented no evidence of any express manifestation from REI to RES that RES may act as REI's agent in Wisconsin. As to apparent agency, Plaintiffs have presented evidence that REI permitted RES to use the "Reliant" name and logo in marketing natural gas in Wisconsin. However, Plaintiffs have presented no evidence that anyone relied on an apparent agency relationship between REI and RES. Plaintiffs do not identify any evidence in the record supporting such reliance. None of the affiants who purchased natural gas from RES averred that they relied upon RES's status as REI's apparent agent.

[7] *See, e.g., Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031-32, 325 U.S. App. D.C. 117 (D.C. Cir. 1997)* (applying theory but finding no personal jurisdiction); *Textor, 711 F.2d at 1392-93* (applying Illinois long-arm statute); *Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 434 (D. Del. 1999)*; *Santana Prods., Inc. v. Bobrick Washroom Equip., 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998)*; *see also* *Roy v. Brahmbhatt, No. 07-5082 (PGS), 2008 U.S. Dist. LEXIS 97525, 2008 WL 5054096, at *7 (D.N.J. 2008)* **[**63]** (unpublished) (collecting cases).

[8] *See, e.g., Silver Valley Partners, LLC v. De Motte, 400 F. Supp. 2d 1262, 1268 (W.D. Wash. 2005)*; *Karsten Mfg. Corp. v. U.S. Golf Ass'n, 728 F. Supp. 1429, 1434 (D. Ariz. 1990)*; *Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976)*; *Ploense v. Electrolux Home Prods, Inc., 377 Ill. App. 3d 1091, 882 N.E.2d 653, 666-68, 317 Ill. Dec. 773 (Ill. App. Ct. 2007)*; *Mansour v. Super Ct. of Orange County, 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191, 196-98 (Ct. App. 1995)*; *Hewitt v. Hewitt, 78 Wn. App. 447, 896 P.2d 1312, 1315-16 (Wash. Ct. App. 1995)*; *Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995)*; *see also* *Roy, 2008 U.S. Dist. LEXIS 97525, 2008 WL 5054096, at *7* (collecting cases).

Although not in the personal jurisdiction context, the Ninth Circuit has rejected a similar conspiracy theory in the venue context. *Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491 (9th Cir. 1979)* (rejecting conspiracy theory of venue). In *Piedmont,* the Ninth Circuit considered whether venue in an antitrust action could be based "solely on allegations that a defendant was a member of a conspiracy and that a co-conspirator performed acts in the forum district." *Id. at 492*. The plaintiff argued that because a conspirator committed acts in the venue and **[**64]** a conspirator acts as his co-conspirator's agent, a defendant who otherwise had not conducted business in the forum could be said to have an agent and "transacted business" there under the relevant venue statutes. *Id. at 492-93*. Based on United States Supreme Court dictum casting doubt on the conspiracy theory of venue under the Clayton Act, the Ninth Circuit concluded that deeming a conspirator an agent of his co-conspirators would expand the venue statute beyond what Congress contemplated. *Id. at 494-95*.

Piedmont is of limited value to the question in this case, as *Piedmont* was focused on the plaintiff's attempt to expand a specific venue statute contrary to congressional intent. To the extent *Piedmont* cautions against freely attributing one party's acts to another, existing personal jurisdiction law already provides that this Court must examine each defendant's contacts with the forum individually. *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1130*.

It is unclear whether and under what conditions the Ninth Circuit would find it consistent with due process to attribute a conspirator's forum-related contacts to his coconspirators for personal jurisdiction purposes. However, general **[**65]** due process considerations still would apply to outline the contours of a conspiracy theory of personal jurisdiction, if one is to exist at all.

Under these principles, the Court concludes that to the extent a conspiracy theory of personal jurisdiction is viable, it must be limited to the context of specific jurisdiction and cannot support general jurisdiction. To hold otherwise would create satellite litigation regarding conspiracies completely unrelated to the underlying claims simply to establish personal jurisdiction. Such a trial-within-a-trial situation based on an already tenuous basis to attribute a third party's contacts to a defendant to support personal jurisdiction is untenable.

Within the specific jurisdiction analysis, a plaintiff must establish the defendant purposefully availed himself of the forum. An allegation that a particular defendant **[*1140]** caused or contributed to an effect in the forum state, by itself, is insufficient, even if it is foreseeable that the defendant's conduct would have an effect in the forum. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*. The defendant, not his coconspirator, must choose to direct his activities at the forum in causing **[**66]** the effect in the forum. *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."). Consequently, a co-conspirator's activity directed at the forum, even if in furtherance of a conspiracy of which the foreign defendant is a member, cannot constitute purposeful direction at the forum by the foreign defendant. The Court thus concludes that allegations of specific acts committed by a co-conspirator in the forum in furtherance of the conspiracy, alone, are insufficient to establish minimum contacts by a defendant who otherwise has no contacts with the forum.

Additionally, a "forseeable effect" in the forum state is inadequate to show the purposeful direction necessary to establish specific jurisdiction. *Pebble Beach, 453 F.3d at 1155*. Consequently, a defendant's mere awareness or ability to foresee in-forum effects from his out-of-forum conduct is insufficient to establish minimum contacts with the forum. Rather, under established Ninth Circuit law regarding specific jurisdiction, a foreign defendant expressly aims his conduct at the forum when **[**67]** he is alleged to have engaged in wrongful conduct "individually targeting a known forum resident." *Bancroft, 223 F.3d at 1087*. The Court thus concludes that if a conspiracy theory of jurisdiction is viable, a plaintiff must set forth non-conclusory allegations that the defendant was a member of a conspiracy, that the defendant's or his co-conspirator's acts in furtherance of the conspiracy caused harm in the forum, and that the conspiracy individually targeted a known forum resident.

Absent requiring this sort of purposeful direction at the forum, the conspiracy theory of personal jurisdiction "threatens to confuse the standards applicable to personal jurisdiction and those applicable to liability." *Melea, Ltd.,* *511 F.3d at 1070*. Personal jurisdiction is more restrictive than the scope of liability on a particular claim. A state "does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." *Hanson, 357 U.S. at 254*. That a particular court lacks personal jurisdiction over a member of a conspiracy does not immunize the defendant from liability, it merely affects in what forum the plaintiff may seek to enforce **[**68]** that liability. *Ploense, 882 N.E.2d at 668*.

Here, Plaintiffs' SAC does not allege REI purposefully availed itself of Wisconsin by individually targeting known Wisconsin residents. Rather, the SAC alleges a nationwide conspiracy to manipulate natural gas prices resulting in inflated prices generally, including in Wisconsin. The mere likelihood that the price manipulation allegedly occurring in other states foreseeably would affect natural gas prices in Wisconsin does not amount to purposeful direction at Wisconsin. Other conspirators, not REI, chose to sell natural gas at allegedly inflated prices to customers in Wisconsin. The SAC does not allege the conspirators made an agreement specifically regarding Wisconsin or its residents. While other alleged conspirators such as RES may have purposefully directed their conduct at known Wisconsin residents, the **[*1141]** SAC contains no non-conclusory allegations that REI purposefully did so. [9]

Plaintiffs argue that Wisconsin has expanded its antitrust laws to reach conduct which impacts Wisconsin "even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state." *Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 158 (Wis. 2005)*. Plaintiffs thus contend Wisconsin must have meant to acquire personal jurisdiction over foreign antitrust co-conspirators whose out-of-forum acts impact Wisconsin.

This confuses liability with personal jurisdiction. While REI may be liable under Wisconsin ***antitrust law*** for its alleged illegal conduct, that does not automatically equate to Wisconsin having personal jurisdiction over REI. If Wisconsin does not have personal jurisdiction over a particular defendant, it must depend on other states to enforce its antitrust laws. Even if Wisconsin would adopt the conspiracy theory of personal jurisdiction for purposes of its long-arm statute, the exercise of personal jurisdiction by this Court still must comport with due process of law.

Moreover, Plaintiffs have failed to present evidence that REI was a member of any conspiracy directed at known **[**70]** Wisconsin targets. Although Plaintiffs contend they were not permitted to conduct discovery on the conspiracy issue, and thus the Court should not allow REI to argue no evidence of conspiracy exists, REI answered Plaintiffs' discovery on the issue of conspiracy as it relates to REI. REI had no documents related to communications between REI and the other Defendants about natural gas prices and had no documents in which REI directed a subsidiary's communications, price reporting, or trading. (Partial Tr. (Doc. # 1128) at 49-50.) REI objected to the extent that Plaintiffs sought every communication made by its subsidiary, RES, to other alleged co-conspirators. Such communications would not demonstrate REI's participation in a conspiracy, and thus would not demonstrate REI was a member of a conspiracy directed at Wisconsin.

Plaintiffs have not convinced the Court that further discovery would produce a different result. The Court therefore will decline Plaintiffs' request to defer the personal jurisdiction issue to be resolved with the merits. Because Plaintiffs have failed to allege Defendant REI purposefully directed its activities at a known forum resident, and because Plaintiffs have **[**71]** failed to present any evidence of REI's participation in any such conspiracy, the Court will grant Defendant REI's motion to dismiss for lack of personal jurisdiction.

The Court will not attribute RES's contacts with the forum to REI, and REI has no contacts of its own sufficient to support personal jurisdiction. The Court therefore will grant REI's motion to dismiss for lack of personal jurisdiction.

III. CONCLUSION

---

[9] The SAC contains only one allegation regarding any direction towards Wisconsin: "Reliant Energy, Inc., f/k/a Reliant Resources, Inc.'s actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin **[**69]** during the Relevant Time Period." (Corrected Second Am. Compl. at 35-36.)

IT IS THEREFORE ORDERED that Defendant Reliant Energy, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (Doc. # 869) is hereby GRANTED. Defendant Reliant Energy, Inc. is hereby dismissed from this action for lack of personal jurisdiction.

DATED: February 26, 2009

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

Arandell Corp. v. XCel. Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.)

United States District Court for the District of Nevada

February 26, 2009, Decided; February 26, 2009, Filed

MDL 1566 2:03-CV-01431-PMP-PAL BASE FILE; 2:07-CV-01019-PMP-PAL

Reporter
2009 U.S. Dist. LEXIS 66875 *

IN RE: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION; ARANDELL CORP., et al., Plaintiffs, v. XCEL ENERGY, INC., et al., Defendants.

Subsequent History: Motion denied by, Motion granted by *Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 2009 U.S. Dist. LEXIS 75766 (D. Nev., Mar. 9, 2009)*

Prior History: *Arandell Corp. v. Xcel Energy, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 605 F. Supp. 2d 1118, 2009 U.S. Dist. LEXIS 54527 (D. Nev., Feb. 26, 2009)*

Core Terms

subsidiary, Energy, personal jurisdiction, natural gas, contacts, risk management, trading, policies, management committee, parent company, conspiracy theory, conspirator, conspiracy, co-conspirator, alter ego, reporting, purposes, limits, forum state, allegations, antitrust, marketing, Sealed, no evidence, injustice, electricity, monitoring, sales, venue, owns

Counsel: **[*1]** William H. Dull (2:07-cv-00109-RCJ-RJJ), Plaintiff, Pro se, Las Vegas, NV.

Jenny Kim Dull (2:07-cv-00109-RCJ-RJJ), Plaintiff, Pro se, Las Vegas, NV.

For United States of America (2:07-cv-00109-RCJ-RJJ), Commissioner of Internal Revenue Service, Defendants: Steven P. Johnson, LEAD ATTORNEY, United States Department of Justice, Washington, DC.

For A.L. Gilbert Company (2:03-cv-01431-PMP-PAL), Plaintiff: Clinton P. Walker, Roger M. Schrimp, Damrell, Nelson, Schrimp, Pallios, et al, Modesto, CA; Gene J. Stonebarger, Lindsay & Stonebarger, Sacramento, CA; Mark Albright, Albright Stoddard Warnick & Albright, Las Vegas, NV.

For Abelman Art Glass (2:03-cv-01431-PMP-PAL), Plaintiff: Joshua D Snyder, Michael J. Boni, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Bruce Alverson, Alverson Taylor Mortensen & Sanders, Las Vegas, NV; Marc H. Edelson, Hoffman & Edelson, LLC, Doylestown, PA; Nathan Reinmiller, Alverson Taylor Mortensen, et al, Las Vegas, NV.

For Auila, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Charles A. Moore, LEAD ATTORNEY, Dewey & LeBoeuf LLP, Houston, TX; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow **[*2]** & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Mark Albright, Albright Stoddard Warnick & Albright, Las Vegas, NV.

For Mark Benscheidt, Susan Benscheidt, Celina Martinez (2:03-cv-01431-PMP-PAL), Plaintiff: Michael P. Lehmann, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll P.L.L.C., San Francisco, CA; Athena Jiangxioa Hou, Christopher T. Micheletti, Francis O. Scarpulla, Judith A. Shimm, Zelle Hofmann Voelbel Mason & Gette, LLP, San

Francisco, CA; Craig C. Corbitt, Zelle Hofmann Voelbel & Mason, LLP, San Francisco, CA; Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, PC, San Francisco, CA.

For Bing's Stop & Shop, Frank H. Colvett, Jr., Samuel D. Leggett (2:03-cv-01431-PMP-PAL), Plaintiff: Thomas H. Brill, LEAD ATTORNEY, Law Office of Thomas H. Brill, Mission Hills, KS; Alan G. Crone, James J. Webb, Crone & Mason, PLC, Memphis, TN; John S. Wilder, Sr., Wilder & Sanders, Somerville, TN.

For David C. Brown (2:03-cv-01431-PMP-PAL), Plaintiff: A. J. De Bartolomeo, Amelia F. Burroughs, Daniel C. Girard, Gordon M. Fauth, Jr., Girard Gibbs & DeBartolomeo, San Francisco, CA.

For California, People of the State of (2:03-cv-01431-PMP-PAL), **[*3]** Plaintiff: Joseph W. Cotchett, Cotchett Pitre, Simon & McCarthy, Burlingame, CA; Mark Albright, Albright Stoddard Warnick & Albright, Las Vegas, NV.

For Ever-Bloom, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis J. Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Joshua D Snyder, Kate Reznick, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Theresa J. Henson, Boni & Zack LLC, Bala Cynwyd, PA.

For Fairhaven Power Co. (2:03-cv-01431-PMP-PAL), Plaintiff: Bruce Alverson, LEAD ATTORNEY, Alverson Taylor Mortensen & Sanders, Las Vegas, NV; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason, LLP, San Francisco, CA; Francis O. Scarpulla, LEAD ATTORNEY, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Josef D. Cooper, LEAD ATTORNEY, Cooper & Kirkham, PC, San Francisco, CA; Joshua D Snyder, Michael J. Boni, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Kathleen S. Rogers, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, San Francisco, CA; Michael P. Lehmann, LEAD ATTORNEY, Cohen, Milstein, Hausfeld **[*4]** & Toll P.L.L.C., San Francisco, CA; Nathan Reinmiller, LEAD ATTORNEY, Alverson Taylor Mortensen, et al, Las Vegas, NV; William Timothy Needham, LEAD ATTORNEY, Janssen, Malloy, Needham, Morrison, Eureka, CA; Marc H. Edelson, Hoffman & Edelson, LLC, Doylestown, PA.

For H&M Roses (2:03-cv-01431-PMP-PAL), Plaintiff: William Bernstein, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA.

For JP Morgan Trust Company, NA (2:03-cv-01431-PMP-PAL), Plaintiff: Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Eric I. Unrein, LEAD ATTORNEY, Davis, Unrein, Biggs & Head, L.L.P., Topeka, KS; Gary D. McCallister, LEAD ATTORNEY, Gary D. McCallister & Associates, Ltd, Chicago, IL; Isaac Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, KS; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Thomas H. Brill, LEAD ATTORNEY, Law Office of Thomas H. Brill, Mission Hills, KS; Gregory M. Bentz, Jennifer Gille Bacon, Polsinelli Shughart, Kansas City, MO.

For Lois the Pie Queen (2:03-cv-01431-PMP-PAL), Plaintiff: Donald Chidi Amamgbo, Remigius Chibueze, Amambgo & Associates, **[*5]** Oakland, CA; Reginald Von Terrell, The Terrell Law Group, Richmond, CA.

For Los Angeles, City Of (2:03-cv-01431-PMP-PAL), Plaintiff: Don E Lanson, Edwin W. Duncan, Jennifer L. Nassiri, Greenberg & Bass, Encino, CA; Joseph W. Cotchett, Cotchett Pitre, Simon & McCarthy, Burlingame, CA; Kerrin I. Tso, Richard M. Helgeson, Rockard J. Delgadillo, Stanton J. Snyder, Los Angeles City Attorney's Office, Los Angeles, CA; Mark C. Molumphy, Cotchett Pitre, Simon & McCarthy, Burlingame, CA; Steven N. Williams, Cotchett, Pitre & McCarthy, Burlingame, CA.

For Maximum Nursery, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis J. Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Kate Reznick, Theresa J. Henson, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Multiut Corporation (2:03-cv-01431-PMP-PAL), Plaintiff: Alan J. Mandel, LEAD ATTORNEY, ALAN J. MANDEL, LTD., Skokie, IL; Ira P Gould, Jeffrey S. Torosian, Paul Alexis Del Aguila, Paul T Fox, Howard K Jeruchimowitz, Greenberg Traurig, LLP, Chicago, IL; Gregory M. Bentz, Jennifer **[*6]** Gille Bacon, Polsinelli Shughart, Kansas City, MO.

For Oberti Wholesale Foods, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Daniel J. Mulligan, Thomas A. Jenkins, Jenkins & Mulligan, San Francisco, CA.

For Dan L. Older (2:03-cv-01431-PMP-PAL), Plaintiff: Ralph B Kalfayan, Krause & Kalfayan, San Diego, CA.

For Craig Podesta (2:03-cv-01431-PMP-PAL), Plaintiff: William Henry Parish, Parish & Small PLC, Parish & Small A Professional Law Corp., Stockton, CA.

For San Diego, County of, San Francisco, City of, San Francisco, County of, Santa Clara, County of (2:03-cv-01431-PMP-PAL), Plaintiff: Joseph W. Cotchett, Cotchett Pitre, Simon & McCarthy, Burlingame, CA.

For Shanghai 1930 Restaurant Partners, LP (2:03-cv-01431-PMP-PAL), Plaintiff: A. J. De Bartolomeo, Girard Gibbs & DeBartolomeo, San Francisco, CA; Cadio Zirpoli, Geoffrey C. Rushing, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, San Francisco, CA.

For Haleema Silverman, Michael Silverman, Lynette Stevenson, Tom Stevenson, Team Design (2:03-cv-01431-PMP-PAL), Plaintiff: Albro L. Lundy, III, Brad N. Baker, Baker Burton & Lundy, Hermosa Beach, CA; Elizabeth A. Hernandez, Paul A. Traina, Rahul Ravipudi, Walter J. Lack, Engstrom Lipscomb **[*7]** & Lack, Los Angeles, CA.

For Texas-Ohio Energy, Inc., Utility Savings & Refund Services, LLP (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis J. Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA; Jerold B Hoffman, Marc H. Edelson, LEAD ATTORNEYS, Hoffman & Edelson, LLC, Doylestown, PA; Joshua D Snyder, Kate Reznick, Michael J. Boni, Theresa J. Henson, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Allan M Hoffman, Hoffman & Edelson, Doylestown, PA.

For Laurence Uyeda (2:03-cv-01431-PMP-PAL), Plaintiff: Barry R. Himmelstein, William Bernstein, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA; Francis O. Scarpulla, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA.

For Vittice Corporation (2:03-cv-01431-PMP-PAL), Plaintiff: Derek G. Howard, Gilmur R. Murray, Murray & Howard, LLP, Oakland, CA.

Wolfe River Cafe (2:03-cv-01431-PMP-PAL), Plaintiff, Pro se.

For Wolfe River Cafe (2:03-cv-01431-PMP-PAL), Plaintiff: Thomas H. Brill, LEAD ATTORNEY, Law Office of Thomas H. Brill, Mission Hills, KS; Alan G. Crone, James J. Webb, Crone & Mason, PLC, Memphis, TN; John S. Wilder, Sr., Wilder & Sanders, Somerville, TN.

For Learjet, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis **[*8]** D. Palmer, Kathleen A. Hardee, Russell S. Jones, Jr., LEAD ATTORNEYS, Polsinelli Shughart, P.C., Kansas City, MO; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Eric I. Unrein, LEAD ATTORNEY, Davis, Unrein, Biggs & Head, L.L.P., Topeka, KS; Gary D. McCallister, LEAD ATTORNEY, Gary D. McCallister & Associates, Ltd, Chicago, IL; Gregory L. Musil, LEAD ATTORNEY, Shughart Thompson & Kilroy, Overland Park, KS; Jennifer Gille Bacon, LEAD ATTORNEY, Gregory M. Bentz, Polsinelli Shughart, Kansas City, MO; R. Lawrence Ward, LEAD ATTORNEY, Patrick D. Martin, Shughart Thomson & Kilroy, PC, Kansas City, MO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Von S. Heinz, LEAD ATTORNEY, Lewis & Roca, LLP, Las Vegas, NV.

For Cross Oil Refining & Marketing, Inc., Topeka Unified School District 501 (2:03-cv-01431-PMP-PAL), Plaintiff: Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Eric I. Unrein, LEAD ATTORNEY, Davis, Unrein, Biggs & Head, L.L.P., Topeka, KS; Gary D. McCallister, LEAD ATTORNEY, Gary D. McCallister & Associates, Ltd, Chicago, IL; Gregory **[*9]** M. Bentz, Jennifer Gille Bacon, LEAD ATTORNEYS, Polsinelli Shughart, Kansas City, MO; Gregory L. Musil, LEAD ATTORNEY, Shughart Thompson & Kilroy, Overland Park, KS; R. Lawrence Ward, LEAD ATTORNEY, Patrick D. Martin, Shughart Thomson & Kilroy, PC, Kansas City, MO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Von S. Heinz, LEAD ATTORNEY, Lewis & Roca, LLP, Las Vegas, NV.

For Breckenridge Brewery of Colorado, LLC (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis D. Palmer, Kathleen A. Hardee, Russell S. Jones, Jr., LEAD ATTORNEYS, Polsinelli Shughart, P.C., Kansas City, MO; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Jennifer Gille Bacon, LEAD ATTORNEY, Polsinelli Shughart, Kansas City, MO; Philip Wayne Bledsoe, R. Lawrence Ward, LEAD ATTORNEYS, John Preston Baker, Shughart Thomson & Kilroy, PC, Denver, CO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Gregory M. Bentz, Polsinelli Shughart, Kansas City, MO.

For BBD Acquisition Co. (2:03-cv-01431-PMP-PAL), **[*10]** Plaintiff: Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Jennifer Gille Bacon, LEAD ATTORNEY, Gregory M. Bentz, Polsinelli Shughart, Kansas City, MO; Philip Wayne Bledsoe, R. Lawrence Ward, LEAD ATTORNEYS, John Preston Baker, Shughart Thomson & Kilroy, PC, Denver, CO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Abelman Art Glass Company, et al (2:03-cv-01431-PMP-PAL), Plaintiff: Joshua D Snyder, Michael J. Boni, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Coachella Valley Taxi Owners Association (2:03-cv-01431-PMP-PAL), Plaintiff: Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Arandell Corp., Safety-Kleen Systems, Inc., Sargento Foods, Inc., Merrick's Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Alexander T. Pendelton, LEAD ATTORNEY, Kohner, Mann & Kailas, S.C., Milwaukee, **[*11]** WI; Dennis D. Palmer, Kathleen A. Hardee, Russell S. Jones, Jr., LEAD ATTORNEYS, Polsinelli Shughart, P.C., Kansas City, MO; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Gregory M. Bentz, LEAD ATTORNEY, Jennifer Gille Bacon, Polsinelli Shughart, Kansas City, MO; R. Lawrence Ward, LEAD ATTORNEY, Shughart Thomson & Kilroy, PC, Kansas City, MO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Robert L Gegios, William E Fischer, Kohner, Mann & Kailas, Milwaukee, WI.

For Heartland Regional Medical Center, Prime Tanning Corporation (2:03-cv-01431-PMP-PAL), Plaintiff: Dennis D. Palmer, Kathleen A. Hardee, Russell S. Jones, Jr., LEAD ATTORNEYS, Polsinelli Shughart, P.C., Kansas City, MO; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Gregory M. Bentz, Jennifer Gille Bacon, LEAD ATTORNEYS, Polsinelli Shughart, Kansas City, MO; R. Dan Boulware, LEAD ATTORNEY, Shughart Thompson & Kilroy, PC, St. Joseph, MO; R. Lawrence Ward, LEAD ATTORNEY, Shughart Thomson & Kilroy, PC, Kansas City, MO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, **[*12]** LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Missouri Public Service Commission (2:03-cv-01431-PMP-PAL), Plaintiff: Cathy J. Dean, Douglas Kramer, LEAD ATTORNEYS, Polsinelli Shalton Flanigan Suelthaus, Kansas City, MO; Matthew C. Hans, LEAD ATTORNEY, Polsinelli Shalton Flanigan Suelthaus, St. Louis, MO; S. Jay Dobbs, LEAD ATTORNEY, Polsinelli Shalton Flanigan, Suelthaus- St. Louis, St. Louis, MO; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA.

For Fairhaven Power Company (2:03-cv-01431-PMP-PAL), Plaintiff: Craig C. Corbitt, Zelle Hofmann Voelbel & Mason, LLP, San Francisco, CA; Joshua D Snyder, Michael J. Boni, LEAD ATTORNEYS, Boni & Zack LLC, Bala Cynwyd, PA; Kathleen S. Rogers, LEAD ATTORNEY, Glancy Binkow & Goldberg LLP, San Francisco, CA; Michael P. Lehmann, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll P.L.L.C., San Francisco, CA; Henry A. Cirillo, Thomas P. Dove, The Furth Firm LLP, San Francisco, CA.

For Sinclair Oil Corporation, Sinclair Oil Corporation (2:03-cv-01431-PMP-PAL), Plaintiff: Matthew Corcoran, LEAD **[*13]** ATTORNEY, Goldstein & Associates, Washington, DC; Melvin Goldstein, LEAD ATTORNEY, Goldstein & Associates, PC, Washington, DC; Philip M. Ballif, LEAD ATTORNEY, Durham Jones & Pinegar, Salt Lake City, UT; Gregory M. Bentz, Jennifer Gille Bacon, Polsinelli Shughart, Kansas City, MO.

For Ladish Co., Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Alexander T Pendleton, LEAD ATTORNEY, Kohner, Mann & Kailas, Milwaukee, WI; Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Jennifer Gille Bacon, Gregory M. Bentz, LEAD ATTORNEYS, Polsinelli Shughart, Kansas City, MO; R. Lawrence Ward, LEAD ATTORNEY, Shughart Thomson & Kilroy, PC, Kansas City, MO; Robert L Gegios, LEAD ATTORNEY, William E Fischer, Kohner, Mann & Kailas, Milwaukee, WI.

For Reorganized FLI, Inc. (2:03-cv-01431-PMP-PAL), Plaintiff: Donald D. Barry, LEAD ATTORNEY, Barry Law Offices, L.L.C., Topeka, KS; Eric I. Unrein, LEAD ATTORNEY, Davis, Unrein, Biggs & Head, L.L.P., Topeka, KS; Gary D. McCallister, LEAD ATTORNEY, Gary D. McCallister & Associates, Ltd, Chicago, IL; Gregory M. Bentz, Jennifer Gille Bacon, LEAD ATTORNEYS, Polsinelli Shughart, Kansas City, MO; Isaac Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, **[*14]** KS; Susan G. Kupfer, LEAD ATTORNEY, Glancy Binkow & Goldberg, LLP, San Francisco, CA; Sylvie K. Kern, LEAD ATTORNEY, Glancy Binkow & Goldberg, San Francisco, CA; Thomas H. Brill, LEAD ATTORNEY, Law Office of Thomas H. Brill, Mission Hills, KS.

For AEP Energy Services, Inc., American Electric Power Company, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Amy M. Gallegos, Robert B. Wolinsky, LEAD ATTORNEYS, Jonathon Abram, William H. Johnson, Hogan & Hartson, Washington, DC; D. Michael Miller, Jeffrey D. Cross, LEAD ATTORNEYS, American Electric Power, Columbus, OH; James F. Mauze, Timothy Belz, LEAD ATTORNEYS, Ottsen, Mauze & Leggatt, St. Louis, MO; Steven J. Routh, LEAD ATTORNEY, Orrick Herrington & Sutcliffe, Washington, DC; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Aquila, Inc., Aquila Merchant Services, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Charles A. Moore, LEAD ATTORNEY, Dewey & LeBoeuf LLP, Houston, TX; Khai LeQuang, William Molinski, LEAD ATTORNEYS, Orrick, Herrington & Sutcliffe, LLP, Los Angeles, CA; Martin M. Loring, LEAD ATTORNEY, Blackwell, Sanders, Peper, Martin, Kansas City, MO; Jared M. Katz, LeBoeuf Lamb Greene MacRae, LLP, Los Angeles, CA.

For Cantera Gas **[*15]** Company (2:03-cv-01431-PMP-PAL), Defendant: Nitin Reddy, LEAD ATTORNEY, Mark E. Haddad, Michelle B Goodman, Sidley Austin LLP, Los Angeles, CA.

For Cantera Natural Gas, Inc., Cantera Resources, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Mark E. Haddad, LEAD ATTORNEY, Sidley Austin LLP, Los Angeles, CA.

For Centerpoint Energy Inc. (2:03-cv-01431-PMP-PAL), Defendant: Christopher J. Healey, LEAD ATTORNEY, Luce, Forward, Hamilton & Scripps LLP, San Diego, CA; Heather L Peckham, Orrin L Harrison, III, Walter L McInnis, LEAD ATTORNEYS, Karen C Corallo, William D. Taylor, Akin Gump Strauss Hauer & Feld LLP, Dallas, TX; Terry Houlihan, LEAD ATTORNEY, Bingham McCutchen LLP, San Francisco, CA; Brian E. Butler, Stafford Rosenbaum, Madison, WI; Brian I Cheng, Matthew E. Digby, Bingham McCutchen, Los Angeles, CA; Elizabeth S Parker, Las Vegas, NV; Mark A. James, Bullivant Houser Bailey, PC, Las Vegas, NV; Meg Vergeront, Stafford Rosenbaum LLP, Madison, WI; Reginald D. Steer, Akin Gump Strauss Hauer & Feld LLP, San Francisco, CA; Stephen R. Mick, Akin Gump Strauss Hauer & Feld, Dallas, TX.

For CMS Energy Corporation, CMS Marketing, Service & Trading Company, CMS Field Services (2:03-cv-01431-PMP-PAL), **[*16]** Defendant: Glen G Reid, Jr., Robert E. Craddock, Jr., LEAD ATTORNEYS, Glen G Reid, Jr., Wyatt, Tarrant & Combs, LLP, Memphis, TN; Mark E. Haddad, Michelle B Goodman, Nitin Reddy, Steven A Ellis, LEAD ATTORNEYS, Heather R. Skinazi, Sidley Austin LLP, Los Angeles, CA; David Gordon, Sidley Austin LLP, Chicago, IL; Frederic G. Berner, Jr., Washington, DC.

For CMS Energy Resources (2:03-cv-01431-PMP-PAL), Defendant: Mark E. Haddad, LEAD ATTORNEY, Heather R. Skinazi, Sidley Austin LLP, Los Angeles, CA; Frederic G. Berner, Jr., Washington, DC.

For CMS Energy Resources Management Company, CMS Marketing Services & Trading Company (2:03-cv-01431-PMP-PAL), Defendant: Mark E Haddad, Michelle B Goodman, Nitin Reddy, Steven A Ellis, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA; David Gordon, Sidley Austin LLP, Chicago, IL; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Coral Energy Resources, LP (2:03-cv-01431-PMP-PAL), Defendant: Bruce A. Schultz, LEAD ATTORNEY, Madison, WI; James Richard Eiszner, LEAD ATTORNEY, Shook, Hardy & Bacon LLP, Kansas City, MO; Joshua D. Lichtman, LEAD ATTORNEY, Peter H. Mason, Fulbright & Jaworski, L.L.P., Los Angeles, CA; Kristen Bird, Marshall M Searcy, **[*17]** Roxanna Manuel, LEAD ATTORNEYS, A. William Urquhart, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; Lori Renee Schultz, LEAD ATTORNEY, Shook Hardy & Bacon, Kansas City, MO; D. Neal Tomlinson, Snell & Wilmer L.L.P., Las Vegas, NV; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Duke Energy, Duke Energy & Marketing, LLC (2:03-cv-01431-PMP-PAL), Defendant: Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA; Joel B. Kleinman, LEAD ATTORNEY, Lisa M Kaas, Dickstein Shapiro LLP, Washington, DC.

For Duke Energy Corporation (2:03-cv-01431-PMP-PAL), Defendant: Adam Proujansky, LEAD ATTORNEY, Disckstein Shapiro LLP, Washington, DC; Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA; Jerome T. Wolf, LEAD ATTORNEY, Sonnenschein Nath & Rosenthal LLP, Kansas City, MO; Joel B. Kleinman, Lisa M Kaas, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Katrina June Lee, Scott Phillip DeVries, Nossaman, Gunthur, Knoy & Elliott, San Francisco, CA; Leslie H. Spiegel, Dickstein Shapiro Morin & Oshinsky, LLP, Washington, DC; Lisa M.R. Miller, Dickstein, Shapiro, Morin & Oshinsky, Washington, DC.

For Duke Energy Field Services, **[*18]** Inc., Duke Energy North America, LLC (2:03-cv-01431-PMP-PAL), Defendant: Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA; Joel B. Kleinman, LEAD ATTORNEY, Dickstein Shapiro LLP, Washington, DC; Katrina June Lee, Scott Phillip DeVries, Nossaman, Gunthur, Knoy & Elliott, San Francisco, CA; Lisa M.R. Miller, Dickstein, Shapiro, Morin & Oshinsky, Washington, DC.

For Duke Energy Trading & Marketing, LLC (2:03-cv-01431-PMP-PAL), Defendant: Adam Proujansky, LEAD ATTORNEY, Disckstein Shapiro LLP, Washington, DC; Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA; Jerome T. Wolf, LEAD ATTORNEY, Sonnenschein Nath & Rosenthal LLP, Kansas City, MO; Joel B. Kleinman, Lisa M Kaas, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Clifford Joe Cavitt, Hurley, Burish & Stanton, S.C., Madison, WI; Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; Katrina June Lee, Scott Phillip DeVries, Nossaman, Gunthur, Knoy & Elliott, San Francisco, CA; Leslie H. Spiegel, Dickstein Shapiro Morin & Oshinsky, LLP, Washington, DC; Lisa M.R. Miller, Dickstein, Shapiro, Morin & Oshinsky, Washington, DC.

For Dynegy Holding Co., Inc. (2:03-cv-01431-PMP-PAL), **[*19]** Defendant: Michael J. Kass, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA.

For Dynegy Inc. (2:03-cv-01431-PMP-PAL), Defendant: Barry S. Hyman, Samantha C. Norris, William M. Hannay, LEAD ATTORNEYS, Schiff Hardin LLP, Chicago, IL; Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; John M. Grenfell, Michael J. Kass, LEAD ATTORNEYS, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Michael J. Modl, Madison, WI; Steven M. Streck, Axley Brynelson, Madison, WI.

For Dynegy Inc. Holding Company, West Coast Power LLC (2:03-cv-01431-PMP-PAL), Defendant: Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; John M. Grenfell, Michael J. Kass, LEAD ATTORNEYS, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Dynegy Marketing & Trade (2:03-cv-01431-PMP-PAL), Defendant: Barry S. Hyman, Samantha C. Norris, William M. Hannay, LEAD ATTORNEYS, Schiff Hardin LLP, Chicago, IL; Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; John M. Grenfell, Michael J. Kass, LEAD ATTORNEYS, Pillsbury Winthrop Shaw Pittman **[*20]** LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; John S. Golwen, Bass Berry & Sims, PC, Memphis, TN; Michael J. Modl, Madison, WI; Steven M. Streck, Axley Brynelson, Madison, WI.

For Dynegy Power Marketing, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA.

For e prime Inc., Xcel Energy Inc. (2:03-cv-01431-PMP-PAL), Defendant: David Len Bryant, LEAD ATTORNEY, Bryant Law Firm, Tulsa, OK; Jodi K Stanfield, LEAD ATTORNEY, los angeles, CA; David T. Peterson, Joseph Duffy, Morgan Lewis & Bockius, Los Angeles, CA; Franz Hardy, White & Steele, PC, Denver, CO; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; John M Palmeri, Gordon & Rees LLP, Denver, CO; Michael C. Lieb, Michael John Miguel, Morgan, Lewis & Bockius LLP, Los Angeles, CA; Michael J. Modl, Madison, WI; Steven M. Streck, Axley Brynelson, Madison, WI.

For El Paso Corporation (2:03-cv-01431-PMP-PAL), Defendant: Martin M. Loring, LEAD ATTORNEY, Blackwell, Sanders, Peper, Martin, Kansas City, MO; Paul Howard Morris, LEAD ATTORNEY, Shea Sisk Wellford, Martin Tate Morrow & Marston, Memphis, TN; Paul R. Norman, LEAD ATTORNEY, Boardman, **[*21]** Suhr, Curry & Field LLP, Madison, WI; Stacy Williams, LEAD ATTORNEY, Locke Lord Bissell & Liddell LLP, Houston, Tx; Diane E. Pritchard, Stuart Plunkett, Morrison & Foerster, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Steven M. Kaufmann, Morrison & Foerster LLP, Denver, CO.

For El Paso Marketing, LP (2:03-cv-01431-PMP-PAL), Defendant: Paul R. Norman, LEAD ATTORNEY, Boardman, Suhr, Curry & Field LLP, Madison, WI; Diane E. Pritchard, Morrison & Foerster, San Francisco, CA; Donald Schultz, Holland & Hart, Cheyenne, WY; Michael Daniel Smith, Holland & Hart, Cheyenne, Wy; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Linda M. Bullen, Lionel, Sawyer & Collins, Las Vegas, NV; Stacy Williams, LEAD ATTORNEY, Locke Lord Bissell & Liddell LLP, Houston, Tx.

For El Paso Merchant Energy Company (2:03-cv-01431-PMP-PAL), Defendant: Paul Howard Morris, LEAD ATTORNEY, Shea Sisk Wellford, Martin Tate Morrow & Marston, Memphis, TN; Diane E. Pritchard, Stuart Plunkett, Morrison & Foerster, San Francisco, CA.

For El Paso Merchant Energy-Gas LP (2:03-cv-01431-PMP-PAL), Defendant: Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Encana Corporation (2:03-cv-01431-PMP-PAL), **[*22]** Defendant: Bruno William Katz, LEAD ATTORNEY, Shea Stokes & Carter, ALC, San Diego, CA; Diane McGimsey, Sullivan & Cromwell LLP, Los Angeles, CA; Robert A. Sacks, Los Angeles, CA.

For Encana Energy Services, Inc., WD Energy Services, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Diane McGimsey, Sullivan & Cromwell LLP, Los Angeles, CA; Robert A. Sacks, Los Angeles, CA.

For Oneok Energy Marketing & Trading Company, LP (2:03-cv-01431-PMP-PAL), Defendant: James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Oliver S Howard, LEAD ATTORNEY, Amelia A Fogleman, Mason G Patterson, Gable & Gotwals, Tulsa, OK; Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Daniel D. Crabtree, Stinson Morrison Hecker, LLP, Overland Park, KS; David S Steefel, Holme Roberts & Owen LLP, Denver, CO; Jef Feibelman, Burch, Porter & Johnson, PLLC, Memphis, Te.

For Oneok, Inc. (2:03-cv-01431-PMP-PAL), Defendant: James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Oliver S Howard, LEAD ATTORNEY, Amelia A Fogleman, Mason G Patterson, Gable & Gotwals, Tulsa, OK; **[*23]** Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Scott R. Rowland, LEAD ATTORNEY, GableGotwals, Tulsa, OK; Daniel D. Crabtree, Stinson Morrison Hecker, LLP, Overland Park, KS; David S Steefel, Holme Roberts & Owen LLP, Denver, CO; Jef Feibelman, Burch, Porter & Johnson, PLLC, Memphis, Te; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Reliant Energy Services, Reliant Energy, Inc., Reliant Resources, Inc (2:03-cv-01431-PMP-PAL), Defendant: Amy E. Tabor, Mark R Robeck, LEAD ATTORNEYS, Baker Botts, LLP, Houston, TX; Christopher J. Healey, LEAD ATTORNEY, Luce, Forward, Hamilton & Scripps LLP, San Diego, CA; Jefferson Gregory Copeland, LEAD ATTORNEY, Houston, TX; Jeffrey D Wexler, LEAD ATTORNEY, Luce Forward Hamilton & Scripps, San Diego, CA; Terry Houlihan, LEAD ATTORNEY, Bingham McCutchen LLP, San Francisco, CA; W. James Foland, LEAD ATTORNEY, Foland, Wickens, Eisfelder, Roper & Hofer, P.C., Kansas City, MO; Brian I Cheng, Matthew E. Digby, Bingham McCutchen, Los Angeles, CA; D. Neal Tomlinson, Snell & Wilmer L.L.P., Las Vegas, NV; Douglas M. Poland, LaFollette, Godfrey & Kahn, Madison, WI; Elizabeth S Parker, Las Vegas, NV; Jennifer Cotner, Madison, WI; Joel B. Kleinman, Dickstein **[*24]** Shapiro LLP, Washington, DC; Joseph P. Hardy, Gordon & Rees LLP, Las Vegas, NV; Mark A. James, Bullivant Houser Bailey, PC, Las Vegas, NV.

For San Diego Gas & Electric (2:03-cv-01431-PMP-PAL), Southern California Gas Company, Defendants: Jennifer Dorsey, LEAD ATTORNEY, PRO HAC VICE, Kemp, Jones & Coulthard, LLP, Las Vegas, NV; Richard P. Levy, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; J. Randall Jones, Harrison, Kemp & Jones, LLP, Las Vegas, NV.

For Sempra Energy (2:03-cv-01431-PMP-PAL), Defendant: Alan Z. Yudkowsky, Peter F. Jazayeri, LEAD ATTORNEYS, Stroock & Stroock & Lavan LLP, Los Angeles, CA; Jennifer Dorsey, LEAD ATTORNEY, PRO HAC VICE, Kemp, Jones & Coulthard, LLP, Las Vegas, NV; Richard P. Levy, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; J. Randall Jones, Harrison, Kemp & Jones, LLP, Las Vegas, NV.

For Sempra Energy Corp. (2:03-cv-01431-PMP-PAL), Defendant: Jennifer Dorsey, LEAD ATTORNEY, PRO HAC VICE, Kemp, Jones & Coulthard, LLP, Las Vegas, NV; Richard P. Levy, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, Los Angeles, CA; William R. Urga, LEAD ATTORNEY, Jolley Urga Wirth Woodbury & Standish, Las Vegas, NV; J. Randall Jones, Harrison, Kemp **[*25]** & Jones, LLP, Las Vegas, NV.

For Sempra Energy Trading Corp. (2:03-cv-01431-PMP-PAL), Defendant: Alan Z. Yudkowsky, Brian J. Nese, LEAD ATTORNEYS, Stroock & Stroock & Lavan LLP, Los Angeles, CA; Peter F. Jazayeri, LEAD ATTORNEY, Stroock & Stroock & Lavan LLP, Los Angeles, CA; Jennifer Dorsey, LEAD ATTORNEY, PRO HAC VICE, Kemp, Jones & Coulthard, LLP, Las Vegas, NV; William R. Urga, LEAD ATTORNEY, Jolley Urga Wirth Woodbury & Standish, Las Vegas, NV; J. Randall Jones, Harrison, Kemp & Jones, LLP, Las Vegas, NV.

For Williams Companies, Inc., Williams Energy Marketing & Trading Company, Williams Merchant Services Company, Inc., Williams Power (2:03-cv-01431-PMP-PAL), Defendant: Graydon Dean Luthey, Jr., Sarah Jane Gillett, LEAD ATTORNEYS, Heather L. Cupp, Stephanie A. Horton, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, OK; Stacey R. Gilman, Thomas P. Schult, LEAD ATTORNEYS, Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP, Kansas City, MO; Brandon B Rule, Hall Estill, Tulsa, OK; Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Jeffrey M. Shohet, Nancy L. Stagg, Stanley J. Panikowski, DLA Piper Rudnick Gray Cary US LLP, San Diego, CA; Joel B. Kleinman, Dickstein Shapiro **[*26]** LLP, Washington, DC; Mark H. Hamer, Piper Rudnick Gray Cary, San Diego, CA; Noah A. Katsell, San Diego, CA; Stuart G Mondschein, Wheeler, Van Sickle & Anderson, S.C., Madison, WI.

For Williams Energy Services Company (2:03-cv-01431-PMP-PAL), Defendant: Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Jeffrey M. Shohet, Nancy L. Stagg, Stanley J. Panikowski, DLA Piper Rudnick Gray Cary US LLP, San Diego, CA; Mark H. Hamer, Piper Rudnick Gray Cary, San Diego, CA; Noah A. Katsell, San Diego, CA.

For Kathleen M. Zanaboni (2:03-cv-01431-PMP-PAL), Defendant: Brian J. O'Neill, pro hac vice, O'Neill & Sun, Santa Monica, CA; Christopher J. Healey, Luce, Forward, Hamilton & Scripps LLP, San Diego, CA; D. Neal Tomlinson, Snell & Wilmer L.L.P., Las Vegas, NV; Elizabeth S Parker, Las Vegas, NV; Jefferson Gregory Copeland, LEAD ATTORNEY, Houston, TX; Jeffrey D Wexler, Luce Forward Hamilton & Scripps, San Diego, CA; Luan K. Phan, Paz & Phan, Los Angeles, CA; Mark A. James, Bullivant Houser Bailey, PC, Las Vegas, NV; Mark R Robeck, LEAD ATTORNEY, Baker Botts L.L.P, Houston, TX.

For Western Gas Resources, Inc. (2:03-cv-01431-PMP-PAL), Defendant: James E Scarboro, LEAD ATTORNEY, Arnold & Porter LLP, Denver, **[*27]** CO; Jessica Brody, Matthew Douglas, LEAD ATTORNEYS, Arnold & Porter, Denver, CO.

For Kansas Gas Marketing Company (2:03-cv-01431-PMP-PAL), Defendant: Oliver S Howard, LEAD ATTORNEY, Amelia A Fogleman, Mason G Patterson, Gable & Gotwals, Tulsa, OK; Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Jef Feibelman, Burch, Porter & Johnson, PLLC, Memphis, Te; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For OneOK Energy Services Company, L.P. (2:03-cv-01431-PMP-PAL), Defendant: Amelia A Fogleman, Oliver S Howard, LEAD ATTORNEYS, Thomas Kirby, Gable & Gotwals, Tulsa, OK; James W. Richgels, LEAD ATTORNEY, Quarles & Brady, LLP, Madison, WI; Kelly H Twigger, LEAD ATTORNEY, Quarles & Brady LLP, Milwaukee, WI; Scott R. Rowland, LEAD ATTORNEY, GableGotwals, Tulsa, OK; Thomas F Reese, LEAD ATTORNEY, Brown, Drew & Massey, LLP, Casper, WY; Craig A. Fitzgerald, Gable Gotwals, Tulsa, OK; Daniel D. Crabtree, Stinson Morrison Hecker, LLP, Overland Park, KS; David S Steefel, Holme Roberts & Owen LLP, Denver, CO; Jef

Feibelman, Burch, Porter & Johnson, PLLC, Memphis, Te; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC.

For Center Point Energy, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Heather **[*28]** L Peckham, Walter L McInnis, LEAD ATTORNEYS, Akin Gump Strauss Hauer & Feld LLP, Dallas, TX.

For Northern States Power Company (2:03-cv-01431-PMP-PAL), Defendant: Michael John Miguel, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, Los Angeles, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Joseph Duffy, Morgan Lewis & Bockius, Los Angeles, CA; Michael J. Modl, Madison, WI; Steven M. Streck, Axley Brynelson, Madison, WI.

For Cantera Gas Company, CMS Energy (2:03-cv-01431-PMP-PAL), Defendant: Mark E Haddad, Michelle B Goodman, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA; David Gordon, Sidley Austin LLP, Chicago, IL.

For Duke Energy Carolinas, LLC (2:03-cv-01431-PMP-PAL), Defendant: Joel B. Kleinman, Lisa M Kaas, LEAD ATTORNEYS, Dickstein Shapiro LLP, Washington, DC; Clifford Joe Cavitt, Hurley, Burish & Stanton, S.C., Madison, WI; Marie A. Stanton, Madison, WI.

For Dynegy GP Inc DMT Holding, LP (2:03-cv-01431-PMP-PAL), Defendant: Douglas R. Tribble, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; Michael J. Kass, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Michael J. Modl, **[*29]** Madison, WI; Steven M. Streck, Axley Brynelson, Madison, WI.

For El Paso Marketing, LP (2:03-cv-01431-PMP-PAL), Defendant: Paul R. Norman, LEAD ATTORNEY, Boardman, Suhr, Curry & Field LLP, Madison, WI; Diane E. Pritchard, Morrison & Foerster, San Francisco, CA.

For DYNEGY GP INC. (2:03-cv-01431-PMP-PAL), Defendant: Michael J. Kass, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Joel B. Kleinman, Dickstein Shapiro LLP, Washington, DC; Douglas R. Tribble, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA.

For Centerpoint Energy Services, Inc. (2:03-cv-01431-PMP-PAL), Defendant: Heather L Peckham, Walter L McInnis, LEAD ATTORNEYS, Orrin L Harrison, III, Akin Gump Strauss Hauer & Feld LLP, Dallas, TX.

For Michael Beck (2:03-cv-01431-PMP-PAL), Interested Party: Michael J. Beck, Clerk Of The Panel, LEAD ATTORNEY, Washington, DC.

Judges: PHILIP M. PRO, United States District Judge.

Opinion by: PHILIP M. PRO

Opinion

ORDER RE: DEFENDANT'S MOTION TO DISMISS (Doc. # 872)

Presently before this Court is Defendant Duke Energy Carolinas, LLC's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (Doc. # 872), [1] filed on March 3, 2008. [2] Defendant Duke Energy Carolinas, LLC filed an appendix (Doc. # 968) **[*30]** and sealed exhibits (Doc. # 969) [3] in support. Plaintiffs filed an Opposition (Doc. #

[1] Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

[2] Duke Energy Carolinas, LLC subsequently withdrew the attached supporting declaration of Brent C. Bailey (Doc. # 1009).

[3] Duke Energy Carolinas, LLC manually filed the sealed exhibits with the Court but never electronically filed the sealed exhibits after the Court granted the related motion to seal. The Court by this Order directs Duke Energy Carolinas, LLC to electronically file the exhibits under seal so those exhibits are part of the official electronic record of this case.

1096) and supporting declaration (Doc. # 1097) on June 2, 2008. Plaintiffs also filed supporting exhibits (Doc. # 1084, # 1125). Defendant Duke Energy Carolinas, LLC filed a Reply (Doc. # 1176) with supporting exhibits (Doc. # 1179) [4] on June 23, 2008.

I. BACKGROUND

A. Procedural Background

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed this action in the Circuit Court, Dane County, Wisconsin. (Notice of Removal [Doc. # 2 in 2:07-CV-01019-PMP-PAL], Compl.) Defendants removed the case to the United States District Court for the District of Wisconsin. (*Id.*) The Judicial Panel on Multidistrict Litigation entered a Transfer Order pursuant to *28 U.S.C. § 1407* centralizing the foregoing action in this Court for coordinated or consolidated pretrial proceedings.

Plaintiffs Arandell Corporation, Merrick's, Inc., Safety-Kleen Systems, Inc., Sargento Foods, Inc., and Ladish Co., Inc. are Wisconsin corporations. (Corrected Second Am. Compl. [Doc. # 190 in 2:07-CV-01019-PMP-PAL] [5] at 5-6.) According to the Corrected Second Amended Complaint ("SAC"), Defendants are natural gas companies that buy, sell, transport, and store natural gas, including their own and their affiliates' production, in the United States and in the State of Wisconsin. (*Id.* at 6-51.) In this litigation, Plaintiffs allege **[*32]** Defendants conspired to engage in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for consumers. (*Id.*) Specifically, Plaintiffs allege Defendants, directly and through their affiliates, conspired to manipulate the natural gas market by knowingly delivering false reports concerning trade information to trade indices and engaging in wash trades, in violation of Wisconsin Statutes chapter 133. (*Id.*)

The SAC asserts two causes of action. Count one arises under *Wisconsin Statutes § 133.14*, which voids contracts to which an antitrust conspirator is a party and allows recovery of payments made pursuant to such a contract. (*Id.* at 54-56.) Count two seeks trebled actual damages under *Wisconsin Statutes § 133.18* for Defendants' alleged antitrust violations. (*Id.* at 56-57.)

The SAC's allegations are directed generally at two types of Defendants: the natural gas companies that actually engaged in natural gas sales and the related reporting of allegedly manipulated **[*33]** gas prices to the trade indices, and those companies' parent corporations. The SAC does not allege the parent company Defendants themselves engaged in natural gas trading and price reporting. Rather, the SAC alleges these Defendants are the parent companies of subsidiaries which engage in such activity generally, and which also made natural gas sales in Wisconsin during the relevant time period.

Plaintiffs seek to establish personal jurisdiction over the parent company Defendants based on their out-of-forum activities directed at Wisconsin along with their subsidiaries' and affiliates' contacts within Wisconsin. According to the SAC, the parent company Defendants dominated and controlled their respective subsidiaries and the parent company Defendants "entered into a combination and conspiracy . . . which tended to prevent full and free competition in the trading and sale of natural gas, or which tended to advance or control the market prices of natural gas." (*Id.* at 6-7, 9, 14-15, 18-19, 23, 26-27, 30-31, 35-36.) Plaintiffs allege the parent company Defendants intended their actions to have a direct, substantial, and foreseeable effect on commerce in the State of Wisconsin. (*Id.* at 7, 10, 15, 19, 23-24, 27, 31, 36.) **[*34]** According to the SAC, the parent company Defendants "made strategic marketing policies and decisions concerning natural gas and the reporting of natural gas trade information

---

[4] Duke Energy Carolinas, LLC manually filed the sealed exhibits with the Court but never electronically filed the sealed exhibits after the Court granted the related motion to seal. The Court by this Order directs Duke Energy Carolinas, LLC to electronically file the exhibits under seal so those **[*31]** exhibits are part of the official electronic record of this case.

[5] Plaintiffs' Second Amended Complaint is located at docket number 847 in the base file. Plaintiffs filed the Corrected Second Amended Complaint only in the individual case file.

to reporting firms for use in the calculation of natural gas price indices that affected the market prices of natural gas, and those policies and decisions were implemented on an operational level by affiliates . . . in the United States and in Wisconsin." (*Id.* at 8, 10, 15, 19, 24, 27-28, 32, 36.)

Defendant Duke Energy Carolinas, LLC ("DEC") now moves to dismiss, arguing this Court lacks personal jurisdiction over DEC. According to DEC, it conducts no business in Wisconsin and has no other contacts supporting general or specific jurisdiction. DEC also argues it cannot be subject to jurisdiction in Wisconsin based on its subsidiary's contacts with the forum because its subsidiary is not its agent or alter ego, and Wisconsin would not support the conspiracy theory of jurisdiction. DEC thus argues personal jurisdiction does not exist under the Wisconsin long-arm statute, and even if it did, exercising personal jurisdiction in this case would violate constitutional due process requirements.

Plaintiffs respond that **[*35]** DEC's subsidiary has submitted to jurisdiction in Wisconsin and DEC is subject to personal jurisdiction based on agency and alter ego principles based on its subsidiary's contacts. Additionally, Plaintiffs argue that because Wisconsin's antitrust statutes contemplate imposing liability on an antitrust conspirator who performs acts outside of Wisconsin that have an impact in Wisconsin, the Court has personal jurisdiction over DEC under Wisconsin's long-arm statute.

B. Facts Related to Personal Jurisdiction

DEC is a North Carolina limited liability company formerly known as Duke Energy Corporation, a North Carolina corporation. (Renewed Mot. to Dismiss for Lack of Pers. Juris. (Doc. # 872) ["DEC Mot."], Ex. A at 2.) Duke Energy Corporation converted to a limited liability company and renamed itself DEC in April 2006. (*Id.*) DEC primarily engages in the business of generating, transmitting, distributing, and selling electric energy in North and South Carolina. (*Id.* at 3.)

DEC does not maintain offices, conduct business, have employees, own property, or maintain a bank account in Wisconsin. (*Id.*) DEC has not purchased, sold, or transported natural gas in Wisconsin. (DEC Mot., Ex. B at 3.) **[*36]** DEC has not applied for or received a certificate of authority to transact business in Wisconsin and has no registered agent for service of process in Wisconsin. (DEC Mot., Ex. A at 3.)

DEC wholly owns Duke Capital Corporation, which in turn wholly owns Pan Energy Corp. (App. to Pls.' Joint Opp'n to Duke Energy Carolinas, LLC's Mot. to Dismiss for Lack of Pers. Juris. (Doc. # 1084) ["Pls.' App."], Ex. F.) Pan Energy Corp. wholly owns Duke Energy Services, Inc., which wholly owns Duke Energy Natural Gas Corporation. (*Id.*) Duke Energy Natural Gas Corporation wholly owns DETMI Management, Inc. (*Id.*) DETMI Management, Inc. owns a sixty percent interest in Duke Energy Trade and Marketing, LLC ("DETM"), a Defendant in this action and the subsidiary whose contacts with Wisconsin Plaintiffs seek to attribute to DEC. (DEC Mot., Ex. C at 2.) Mobil Natural Gas, Inc. ("MNGI"), an indirect subsidiary of Exxon Mobil Corporation, owns the other forty percent of DETM. (*Id.* at 2-3.)

DETM was created in 1996 as a Delaware limited liability company pursuant to a limited liability company agreement and limited partnership agreement. (Pls.' App., Ex. E at 34-35; App. of Docs. Filed Under Seal (Doc. # 1125) **[*37]** ["Sealed App."], Ex. L at DEMDL000383; Separate Vol. of Evid. in Supp. of the Separate App. of Facts Regarding Duke Energy Carolinas, LCC (Doc. # 968) ["Separate Vol. Evid."], Ex. 7.) The company now known as DETM originally was called PanEnergy Trading and Marketing Services, LLC, and was created by an agreement between PTMSI Management, Inc. and MNGI. (Separate Vol. Evid., Ex. 7 at 1, 6, 7, 10.) PTMSI Management, Inc.'s parent company at the time was PanEnergy Corp. (*Id.* at 7, 10.) PanEnergy Corp. was acquired by Duke Energy Corporation in 1997 and PanEnergy Trading and Marketing Services, LLC was renamed to DETM. (Separate Vol. Evid., Ex. 9 at 2.) DETM is engaged in the purchase and sale of natural gas and electricity at wholesale. (DEC Mot., Ex. C at 3.) DETM concedes personal jurisdiction in this action. (Pls.' App., Ex. A at 2.)

DETM is run by a Management Committee consisting of three representatives from the Duke Energy side and two representatives from the Exxon Mobil side. (Sealed App., Ex. L at DEMDL000400.) The Management Committee acts through the delegation of certain responsibilities and authority to the managing member, which in 2001 and 2002 was DETMI Management, Inc. **[*38]** (*Id.*) Although DETMI Management, Inc. was the managing member, and through its majority status on the committee could outvote the MNGI members on certain matters, the limited liability company agreement mandated that some actions required unanimous approval by the Management Committee. (Separate Vol. Evid., Ex. 7 at 17, 24, 26-27.) In at least one instance, the MNGI members refused to agree to a business plan supported by the DETMI Management, Inc. members. (Pls.' App., Ex. E at 67-69.)

No DEC director serves as an officer or director for DETM. (DEC Mot., Ex. A at 4.) In DEC's 2000 annual report, DEC identified a "management team" which includes Jim W. Mogg ("Mogg"), Chief Executive Officer of Duke Energy Field Services; Kirk B. Michael ("Michael"), Vice President and Chief Financial Officer for Finance and Planning; James Donnell ("Donnell"), President and Chief Executive Officer for Duke Energy North America; and Ronald Green ("Green"), President and Chief Executive Officer for Duke/Fluor Daniel. (Pls.' App., Ex. B at DEMDL001901.) Mogg, Michael, Donnell, and Green were members of the DETM Management Committee at one point or another. (Sealed App., Ex. L at DEMDL001702, DEMDL001706, **[*39]** DEMDL001711.)

DEC and DETM maintain separate corporate records. (DEC Mot., Ex. A at 4.) DEC provided corporate services to DETM, including administering employee health insurance, human resources, computer technology, legal services, and credit risk management. (Pls.' App., Ex. A at 4-5.) Throughout the relevant time period, DETM regularly used, and was permitted to use, the "Duke Energy" and "Mobil" logos. (*Id.* at 5.) DETM did not have any agency agreements or power of attorney for DEC, and did not register to do business on DEC's behalf in Wisconsin during the relevant time period. (*Id.*)

DETM was financed through a $ 150 million funding facility, of which DETMI Management, Inc. provided sixty percent and MNGI funded the other forty percent. (Separate Vol. Evid., Ex. 3 at 35.) In DETM's financial statements, it twice indicated that DEC was responsible for providing operational interest-free contributions, on a proportionate basis with Exxon Mobil, to fund DETM's operations. (Sealed App., Ex. L at DEMDL00383, DEMDL00400.) According to Richard McGee ("McGee"), former general counsel for energy services for DEC and current president of DEC's international business, these statements were **[*40]** a mistake, as PanEnergy Corp., not DEC, is responsible for making contributions under the funding facility agreement. (Pls.' App., Ex. E at 6, 138-40.) DEC's consolidated financial reports reflected sixty percent of DETM's profits and losses during the relevant time period. (Pls.' App., Ex A at 6.)

DEC describes itself, collectively with its subsidiaries, as "an integrated energy and energy services provider with the ability to offer physical delivery and management of both electricity and natural gas throughout the U.S. and abroad." (Pls.' App., Ex. B at DEMDL001846.) DEC provides these services through various "business segments," one of which includes DETM's natural gas trading. (*Id.*) DEC describes its business strategy as "develop[ing] integrated energy businesses in targeted regions where Duke Energy's extensive capabilities in developing energy assets, operating electricity, natural gas and NGL plants, optimizing commercial operations and managing risk can provide comprehensive energy solutions for customers and create superior value for shareholders." (*Id.*)

DEC has created "[c]omprehensive risk management polices" to monitor and manage market, commodity price, credit, and other **[*41]** risks to which DEC and its subsidiaries are exposed. (*Id.* at DEMDL001854-55.) As part of its risk management policies, DEC monitors certain metrics, such as value-at risk ("VAR") and daily earnings at risk ("DER") on a daily basis. (*Id.* at DEMDL001855.) DEC has several committees which perform risk management, including the Corporate Risk Management Committee, the Energy Risk Management Committee, and the Financial Risk Management Committee. (Pls.' App., Ex. E at 80.) DEC appointed the members of each of these committees. (*Id.*) Through these polices and committees, DEC sets overall risk guidelines for its subsidiaries.

For example, DEC adopted a Code of Business Ethics which applied to every DEC subsidiary. (Pls.' App., Ex. J, Ex. E at 100-01.) This policy mandated compliance with applicable antitrust laws. (Pls.' App., Ex. J at 12.) This policy was implemented and supervised by DEC's Corporate Compliance Committee. (*Id.* at 15.) The Corporate Compliance Committee was responsible for updating the code, establishing education programs for employees about ethics and compliance issues, providing guidance under the code, monitoring and auditing compliance, reporting periodically to management **[*42]** and the Audit Committee of DEC's Board of Directors, and reporting violations to the appropriate governmental authorities. (*Id.*) DETM either incorporated this policy by reference or adopted a similar policy. (Pls.' App., Ex. E at 115-16.)

DEC also has a Corporate Credit Risk policy. (Sealed App., Ex. L at DEMDL001382, DEMDL001388.) Under this policy, DEC's Chief Risk Officer chairs the Risk Management Committee. (*Id.*) The Risk Management Committee meets at least monthly and is responsible for reviewing business trends and credit exposure, monitoring compliance with the policy, identifying where new policies are needed, and ensuring "consistent and mutually reinforcing credit and market risk management strategies through various corporate risk policies and associated guidelines for implementing policy." (*Id.*) The policy also sets forth the duties of the Chief Credit Officer, which includes the ability to "stop business activity that would increase credit exposure, as is necessary, to protect Duke Energy's balance sheet." (*Id.*) The Chief Credit Officer reports to the Chief Risk Officer. (*Id.*)

DEC has a Corporate Risk Management Committee consisting of DEC's chief financial officer and **[*43]** DEC Policy Committee members. (*Id.* at DEMDL001488.) This Committee establishes "comprehensive risk management policies to monitor and control identified risks." (*Id.*) DEC's Corporate Risk Management Committee delegates some responsibilities to the Energy Risk Management Committee and the Financial Risk Management Committee, but retains oversight responsibilities. (*Id.*) The Energy Risk Management Committee has responsibility for overseeing energy risk management practices and recommending energy commodity exposure limits, subject to approval by the Corporate Risk Management Committee. (*Id.*) The Financial Risk Management Committee is responsible for managing risks related to interest rates, foreign currency, and credit. (*Id.*)

Within DETM, "[u]ltimate risk control responsibility resides with the DETM Management Committee." (*Id.* at DEMDL001489.) The DETM Management Committee oversees the risk management and control function and approves policies and controls for DETM. For example, DETM adopted its own Risk Management and Trading Policies and Controls. (*Id.* at DEMDL001484.) DETM's Management Committee "delegates the day-to-day overview of the risk management and control function" to the **[*44]** DEC Energy Risk Management Committee. (*Id.* at DEMDL001489.) "However, overall responsibility for DETM's performance targets, business plans and approved risk levels remains with the Management Committee." (*Id.*) Although DETM's Risk Management and Trading Policies and Controls states that the Management Committee delegates "day-to-day overview" to the DEC Energy Risk Management Committee, it describes the Energy Risk Management Committee's functions as meeting "at least monthly" to establish risk management policies, controls, and practices, and overseeing and approving excesses of overall limits. (*Id.* at DEMDL001489-90.) When it comes to operational control, the policy vests that authority in DETM Senior Management. (*Id.* at DEMDL001490.) DETM Senior Management is responsible for "[d]evelopment of trading strategies; [a]ctive management of trading within overall limits; [a]llocation of limits to traders and/or books; [e]nforcing the risk control environment; [a]dvocating new limits and products; and [a]dvocating exceptions or revisions to policy when appropriate." (*Id.*) Beneath DETM Senior Management, the origination and trading groups actually conduct the transactions with customers. **[*45]** (*Id.*)

DEC's Energy Risk Management Committee is not responsible for managing energy price risk for DETM. (Separate Vol. Evid., Ex. 10 at DEMDL001569.) Instead, DETM manages its own energy price risk pursuant to its own risk management policy. (*Id.*) However, that policy is subject to approval by the Corporate Risk Management Committee. (*Id.*) In similar fashion, DETM decides whether to extend credit, subject to the Financial Risk Committee's Credit Quality Guidelines. (*Id.* at DEMDL001495.) According to McGee, DEC's risk management policies "would have applied to DETM only to the extent that . . . the management committee of DETM had adopted a policy that was similar to this or [DETMI,] in discharging its responsibilities as a managing member of DETM . . . adopt[ed] policies that it saw fit in connection with discharging those duties." (Pls.' App., Ex. E at 100.) These policies "were either largely consistent with or in some cases maybe identical to some of" DEC's policies. (*Id.*)

At a July 2000 DETM management committee meeting, the MNGI representative expressed some concern that certain personnel now working for DETM would be shared between DETM and Duke Energy North America, LLC. (Sealed **[*46]** App., Ex. L at DEMDL001707.) Specifically, the MNGI representative was concerned that because DETM senior managers "would have dual responsibilities, working for both DETM and Duke Energy or Duke affiliates, [they] would face conflicts because their compensation is based on performance of two entities with differing Duke ownership shares." (*Id.*) At a September 2001 DETM management committee meeting, the Exxon

Mobil representative "objected to the way the business had been run including a perceived lack of separation between [Duke Energy North America] and DETMI." (*Id.* at DEMDL001718.)

In May 2002, DETM's outside auditor, Deloitte & Touche, sent a letter to the DETM management committee highlighting certain areas of concern. (*Id.* at DEMDL002687.) Among the concerns Deloitte & Touche highlighted was that DETM's operations were "highly integrated into the overall strategy of Duke Energy North America ('DENA'). There are instances where the distinctiveness between DETM and other affiliates of its owners could be enhanced." [6] (*Id.* at DEMDL002692.)

In September 2003, the Commodity Futures Trading Commission ("CFTC") entered into a settlement with DETM regarding allegations that DETM manipulated the natural gas market. (DEC Mot., Ex. F.) The CFTC found that from January 2000 through August 2002, DETM's Houston office reported to price reporting firms false price and volume information regarding natural gas transactions. (*Id.* at 2-3.) As part of the settlement, DETM agreed to cease and desist from any future violations, and agreed to pay a $ 28 million fine. (*Id.* at 5.) Additionally, both DETM and Duke Energy Corporation (DEC's predecessor) agreed to cooperate in any future investigations arising out of this investigation, to preserve records, to produce documents when requested, and to provide assistance in locating and contacting any prior employees. (*Id.*) DETM and Duke Energy Corporation also agreed not to publicly deny the CFTC's findings of fact. (*Id.* at 6.) DEC attorneys and senior executives participated in internal investigations into DETM's price reporting activities. (Pls.' App., Ex. A at 6.)

In April 2003, DEC announced that two of its subsidiaries, Duke Energy **[*48]** North America and Duke Energy Merchants, would cease proprietary trading of natural gas and power. (DEC Mot., Ex. G.) DETM also ceased speculative natural gas trading in 2003. (Pls.' App., Ex. A at 5.) After that time, DETM continued to buy and sell natural gas "for the purpose of meeting and hedging its obligations to supply gas-fired power plants owned by Duke Energy North America, Inc. and other affiliates and to meet natural gas supply commitments it has made." (*Id.*) By the end of 2004, DEC "made substantial progress on winding down" the DETM joint venture with Exxon Mobil, and had "completed or signed transactions to sell about 90 percent of that business." (Pls.' App., Ex. G.)

The parties now dispute the significance of these contacts under the Wisconsin long-arm statute. The parties also dispute whether this Court's exercise of personal jurisdiction over DEC would violate constitutional due process requirements.

II. PERSONAL JURISDICTION

"When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant." *Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006)*. To meet this **[*49]** burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1) permitted under the applicable state's long-arm statute and (2) that the exercise of jurisdiction does not violate federal due process. *Id.* The Court must analyze whether personal jurisdiction exists over each defendant separately. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003)*.

Where the issue is before the Court on a motion to dismiss based on affidavits and discovery materials without an evidentiary hearing, the plaintiff must make "a prima facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid dismissal." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119 (9th Cir. 2002)*. The Court accepts as true any uncontroverted allegations in the complaint and resolves any conflicts between the facts contained in the parties' evidence in the plaintiff's favor. *Id.* However, for personal jurisdiction purposes, a court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992)* (quotation **[*50]** omitted).

---

[6] DEC objects to the admission of the Deloitte & Touche letter as inadmissible hearsay. Because consideration of the letter does not affect the **[*47]** outcome of this decision, the Court will deny DEC's objection.

In diversity cases such as this, "a federal court applies the personal jurisdiction rules of the forum state provided the exercise of jurisdiction comports with due process." *Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986)*. However, "federal law is controlling on the issue of due process under the United States Constitution." *Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977)*; *see also* *Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002)*. Therefore, the Court will apply law from the United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is appropriate under the *Due Process Clause*. *See* *In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174, 265 U.S. App. D.C. 39 (D.C. Cir. 1987)* (concluding that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit"); *Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993)* (holding that "a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit").

To satisfy federal due process standards, **[*51]** a nonresident defendant must have "minimum contacts" with the forum state so that the assertion of jurisdiction does not offend traditional notions of fair play and substantial justice. *Pebble Beach Co., 453 F.3d at 1155* (citing *Int'l Shoe Co. v. Washington, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945))*. A federal district court may exercise either general or specific personal jurisdiction. *See* *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*.

To establish general personal jurisdiction, the plaintiff must demonstrate the defendant has sufficient contacts to "constitute the kind of continuous and systematic general business contacts that 'approximate physical presence.'" *Glencore Grain, 284 F.3d at 1124* (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)*, *modified*, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006))*. Courts consider such factors as whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there. *Bancroft, 223 F.3d at 1086*. "[A] defendant whose **[*52]** contacts are substantial, continuous, and systematic is subject to a court's general jurisdiction even if the suit concerns matters not arising out of his contacts with the forum." *Glencore Grain, 284 F.3d at 1123* (citing *Helicopteros, 466 U.S. at 415 n.9*).

A nonresident defendant's contacts with the forum state may permit the exercise of specific jurisdiction if: (1) the defendant has performed some act or transaction within the forum or purposefully availed himself of the privileges of conducting activities within the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction over the defendant is reasonable. *Pebble Beach Co., 453 F.3d at 1155-56*. "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995)*.

Under the first prong of the "minimum contacts test," the plaintiff must establish either that the defendant "(1) purposefully availed himself of the privilege of conducting his activities in the forum, or (2) purposefully directed his activities toward the **[*53]** forum." *Pebble Beach Co., 453 F.3d at 1155*. "Evidence of availment is typically action taking place in the forum that invokes the benefits and protections of the laws in the forum." *Id.* Evidence of direction usually consists of conduct taking place outside the forum that the defendant directs at the forum. *Id. at 1155-56*.

The purposeful direction aspect of the first prong is satisfied when a foreign act is both aimed at and has effect in the forum. *Id.* In other words, the defendant "must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Id.* To satisfy the third element of this test, the plaintiff must establish the defendant's conduct was "expressly aimed" at the forum; a "mere foreseeable effect" in the forum state is insufficient. *Id.* The "express aiming" requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct "individually targeting a known forum resident." *Bancroft, 223 F.3d at 1087*.

The second prong of the specific jurisdiction test requiring that the contacts constituting purposeful **[*54]** availment or purposeful direction give rise to the current action is measured in terms of "but for" causation. *Id. at 1088*. "If the plaintiff establishes both prongs one and two, the defendant must come forward with a 'compelling case' that the exercise of jurisdiction would not be reasonable." *Boschetto v. Hansing, 539 F.3d 1011, 1016 (9th Cir. 2008)* (quotation omitted).

No evidence in the record demonstrates DEC itself had any contacts with the state of Wisconsin. Consequently, DEC is subject to personal jurisdiction in Wisconsin only if the forum acts of its indirect subsidiary, DETM, are attributable to it through principles of alter ego, agency, or a conspiracy theory of personal jurisdiction. [7]

A. Alter Ego

A "parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes." *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1134*. However, a subsidiary's contacts may be imputed to its parent for personal jurisdiction purposes where the subsidiary is the parent's alter ego. *Id.*

To demonstrate **[*55]** a parent and its subsidiary are alter egos, the plaintiff must establish a prima facie case that the two companies share "such unity of interest and ownership" that the companies' separateness no longer exists and "failure to disregard [their separate identities] would result in fraud or injustice." *Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)* (quotation omitted). To demonstrate a unity of interest warranting disregard of corporate separateness, the plaintiff must show the parent controls its subsidiary to such a degree as to render the subsidiary a "mere instrumentality" of its parent. *Id.* (quotation omitted). Typically, this would involve showing the parent controls the subsidiary's internal affairs or daily operations. *Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980)*. [8]

A parent corporation may be involved directly in certain aspects of its wholly owned subsidiary's affairs without subjecting itself to alter ego status. For example, a parent may provide financing to its subsidiary so long as it maintains corporate formalities and properly documents loans and capital contributions to its subsidiaries, and it may act as its subsidiary's guarantor. *Doe, 248 F.3d at 927-28*. Additionally, a parent may refer to its subsidiaries as divisions of the parent in annual reports. *Id. at 928*. Further, a parent may review and approve major decisions, place its own directors on the subsidiary's board, and share offices and staff with its wholly owned subsidiary without being considered its alter ego. *Id.; Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135*.

In sum, a parent may involve itself directly in its subsidiary's activities **[*57]** without becoming an alter ego "so long as that involvement is consistent with the parent's investor status." *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135* (quotation omitted). Activities consistent with investor status include "'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures[.]'" *Doe, 248 F.3d at 926* (quoting *United States v. Bestfoods, 524 U.S. 51, 72, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998))*.

In addition to showing lack of corporate separateness, the plaintiff also must show that failure to disregard the corporate form would promote fraud or injustice. The fraud or injustice must relate to the forming of the corporation or abuse of the corporate form, not a fraud or injustice generally. *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 n.12 (9th Cir. 1984)*. For example, undercapitalization at the subsidiary's inception may be evidence of the parent's fraudulent intent. *Id.* However, a corporation that once was capitalized adequately but "subsequently fell upon bad financial times" does not support a finding of fraud or

---

[7] The Court will assume that if DETM's forum-related acts are attributable to DEC, the Wisconsin long-arm statute is satisfied.

[8] Wisconsin utilizes similar principles. In Wisconsin, the party attempting to pierce the corporate veil must show the subsidiary corporation "has no separate existence of its own and is the mere instrumentality of the shareholder and the corporate form is used to evade an obligation, to gain an unjust advantage or to commit an injustice." *Wiebke v. Richardson & Sons, Inc., 83 Wis. 2d 359, 265 N.W.2d 571, 573 (Wis. 1978)*. **[*56]** To the extent Wisconsin would look to the law of the state of incorporation to determine alter ego status, North Carolina has similar requirements. *See State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 112-15 (N.C. 2008)*; *East Market Street Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 625 S.E.2d 191, 196-201 (N.C. Ct. App. 2006)*.

injustice. *Id. at 525*. **[*58]** Further, evidence that the corporation existed as an ongoing enterprise engaged in legitimate business suggests no fraudulent intent or injustice to support piercing the corporate veil. *Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1113 (9th Cir. 1979)*. An inability to collect on a judgment "does not, by itself, constitute an inequitable result." *Id.*

Plaintiffs have failed to establish a prima facie case of personal jurisdiction based on DETM being DEC's alter ego. DEC indirectly owns only sixty percent of DETM. DETM thus is neither DEC's direct subsidiary nor its wholly owned subsidiary. The companies did not share offices and had virtually no overlapping officers or directors. That other officers and directors of other DEC subsidiaries may have overlapped or that DEC identified certain DETM Management Committee members as part of an overall "management team" does not indicate a lack of separateness between DEC and DETM. Likewise, the fact that MNGI and/or Deloitte & Touche perceived a possible lack of separateness between DETM and Duke Energy North America does not establish a lack of separateness between DETM and DEC. Nor does the possibility that DEC was responsible for making **[*59]** contributions under the funding facility or that DEC provided corporate services, such as legal or human resources support.

Plaintiffs have presented no evidence that DEC controlled DETM's daily operations. Under the limited liability company agreement, DETMI Management, Inc. was the managing agent, not DEC. And as to DETMI Management, Inc., it did not have complete control over DETM as the MNGI representatives' approval was required for any material decisions. In at least one instance, DETMI Management, Inc. was unable to implement the business plan it desired because it could not obtain the approval of the MNGI representatives on the Management Committee.

DEC's promulgation of general policies for its subsidiaries is consistent with its indirect investor status. DEC, as an investor up the corporate chain, is entitled to monitor DETM's performance. Consequently, any daily reporting of information from DETM to DEC is in accord with DEC's investor oversight role. No evidence suggests DEC gave daily control commands to DETM or even to DETMI Management, Inc. Rather, the record demonstrates that, consistent with its investor status, DEC set general policies and guidelines regarding best **[*60]** policies and practices, as well as certain overall limits, such as limits on credit risk. However, DEC's broad policies applied to DETM only to the extent DETM's Management Committee adopted those policies, in whole or in part, through DETMI Management, Inc.'s status as a majority member.

Moreover, DETM's delegation of certain risk management oversight to DEC's Energy Risk Management Committee does not demonstrate daily control. The Energy Risk Management Committee meets "at least monthly," and is responsible for establishing risk managing practices and controls, monitoring daily reports, and overseeing and approving any excesses of a risk limit. (Sealed App., Ex. L at DEMDL001490.) The Energy Risk Management Committee thus established broad guidelines under which DETM operated and became involved, if ever, only when overall limits were exceeded. Actual operational decisions, such as developing trading strategy, actively managing trading within overall limits, allocating limits among traders, and enforcing risk control, were the responsibility of DETM Senior Management.

Further, with respect to DETM's day-to-day conduct of its business within these guidelines, Plaintiffs present no evidence **[*61]** DEC had any role. For example, with respect to natural gas trading, while DEC set overall limits on certain metrics, DEC had no role in making the day-to-day decisions of who DETM was to trade with, when, for what amount of natural gas, and at what price. Plaintiffs also present no evidence DEC had any role in DETM's price reporting to indices. Plaintiffs present evidence that DEC policies granted DEC's chief credit officer with veto power over any DETM business activity, but Plaintiffs present no evidence that authority ever was exercised over DETM generally or particularly with respect to any natural gas trades in Wisconsin or anywhere else.

Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have not established a fraud or injustice would result if the Court failed to pierce the corporate veil. Plaintiffs contend it would be unjust to permit DEC to reap the benefits of DETM's alleged unlawful behavior by enjoying profits from DETM's trading activities while escaping liability for DETM's alleged misconduct. However, the alleged illegal price manipulation cannot itself constitute the fraud or injustice necessary to pierce the corporate veil. Rather, DEC **[*62]** must have had some fraudulent intent at DETM's inception or some later abuse of the corporate form such that failing to treat the entities as one would be inequitable. Plaintiffs present no evidence DETM was undercapitalized at its inception. DEC was not involved in forming DETM and became its indirect parent through DEC's acquisition of DETM's ultimate parent, PanEnergy Corp. Further, the fact that DETM operated as a legitimate business for years suggests a lack of fraudulent intent or perpetration of a fraud through use of the corporate structure on the parent's part.

Plaintiffs' fear that they may not be able to collect on a judgment in this action against DETM does not constitute fraud or injustice to support piercing the corporate veil. The Court therefore finds Plaintiffs have not met their burden of establishing DETM is DEC's alter ego, and the Court will not attribute DETM's contacts with Wisconsin to DEC for purposes of determining personal jurisdiction based on alter ego principles.

B. Agency

A subsidiary's contacts also may be imputed to its parent for personal jurisdiction purposes where the subsidiary is the parent's general agent in the forum. *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1134*. **[*63]** A subsidiary is its parent's agent for purposes of attributing its forum-related contacts to the parent if the subsidiary "performs services that are 'sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'" *Doe, 248 F.3d at 928* (quoting *Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994))*. The ultimate inquiry is whether the subsidiary's presence in the forum "substitutes" for its parent's presence. *Id. at 928-29* (quotation omitted).

Where the parent is merely a holding company, the subsidiary's forum-related contacts are not done as the parent's agent because the holding company "could simply hold another type of subsidiary" as an investment and thus the subsidiary conducts business not as the parent's agent but as its investment. *Id. at 929*. "Where, on the other hand, the subsidiaries are created by the parent, for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries." *Id.* (quotation omitted). The inquiry as to whether a subsidiary **[*64]** is its parent's general agent in the forum is "a pragmatic one." *Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992)*.

For example, where a Japanese parent company was engaged in the manufacture of watches, its subsidiaries that acted as its sole sales agents in America were "almost by definition . . . doing for their parent what their parent would otherwise have to do on its own." *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981)*. The *Bulova* court thus attributed the subsidiaries' contacts to the parent company. *Id.; see also Chan, 39 F.3d at 1405-06* (remanding to the district court for additional findings of fact regarding agency where the German parent corporation owned and operated cruise ships and its local subsidiary marketed cruises and chartered cruise ships and sold the cruise ticket to the plaintiffs out of which the claims arose); *Modesto City Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001)* (holding subsidiary was parent's agent for personal jurisdiction purposes where subsidiary acted as sole conduit for marketing and selling parent's products in the United States).

In contrast, **[*65]** where the parent company owned a subsidiary mining company's stock but did not itself engage in the business of gold mining, imputing the subsidiary's forum contacts to the parent was not appropriate. *Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000)*. As the *Sonora Diamond* court explained, had the parent company owned "the rights to the gold and used Sonora Mining as the operating and marketing entity," then perhaps general jurisdiction over the parent company would be appropriate because under those circumstances the parent company "could not reap the benefits of its rights unless it or someone else removed and sold the ore." *Id.* But where the parent simply held the mining company as an investment, the subsidiary's forum-related contacts could not be imputed to the parent company. *Id.*

Likewise, in *Doe,* the Ninth Circuit concluded a foreign company's subsidiaries were not its general agents in California because the plaintiffs presented no evidence that in the absence of the California subsidiaries' involvement in petrochemical and chemical operations, the parent would have conducted and controlled those operations. *Doe, 248 F.3d at 929*. The Court **[*66]** reached this conclusion even though the parent company issued consolidated reporting, referred to a subsidiary in an annual report as its "US unit," and stated that use of the subsidiary "would enable it to expand its marketing network and produce higher value-added specialty products in the United States." *Id.*

Here, Plaintiffs have failed to establish a prima facie case that DETM was DEC's general agent in Wisconsin. DEC's primary business is the generation and supply of electricity to end users in North and South Carolina. DEC also acts as a holding company, but it is not purely a holding company in the sense that it does not passively hold stock in companies from an unrelated range of businesses. DEC has described itself as a "an integrated energy and energy services provider with the ability to offer physical delivery and management of both electricity and natural gas throughout the U.S. and abroad." (Pls.' App., Ex. B at DEMDL001846.)

In practice, DEC itself does not perform these activities beyond the generation and transmission of electricity in North and South Carolina, but holds the shares of various subsidiaries which either engage in those activities or which in turn own subsidiaries **[*67]** which perform those business operations. Among these business operations was DEC's North American Wholesale Energy business segment, which included DETM's natural gas-related activities. (*Id.*)

Although DEC identifies natural gas trading and marketing as one of its business segments, Plaintiffs have not established that DETM's sales of natural gas in Wisconsin were sufficiently important to DEC that if DETM did not make the sales in Wisconsin, DEC would have done so itself. DEC's primary business was electricity generation and transmission in North and South Carolina. Natural gas trading activity was a separate, fragmented component of one of DEC's other business segments operated through an indirect, partially owned subsidiary. Further, the fact that DETM subsequently ceased natural gas trading in 2003 suggests that DETM's trading activities were not sufficiently important to DEC that it would perform the activities itself if DETM did not do so on its behalf.

Moreover, Plaintiffs have presented no evidence that DETM's natural gas sales in Wisconsin in particular were sufficiently important to DEC's business that DEC would have performed the sales in Wisconsin itself absent its subsidiary's **[*68]** representation in the forum. *See* *Modesto City Schs., 157 F. Supp. 2d at 1135* (noting twenty percent of parent's products were sold through subsidiary which acted as parent's "sole conduit for marketing and selling its products in the United States"); *Bulova Watch Co., Inc., 508 F. Supp. at 1344* (noting that sixty percent of parent's products were sold as exports and the United States was the parent company's largest export market through its New York subsidiaries' sales in the United States). Consequently, Plaintiffs have not shown that DETM's Wisconsin natural gas sales played a significant role in DEC's "'organizational life'" such that it acted as a substitute for DEC in the forum. [9] *Bulova Watch Co., Inc., 508 F. Supp. at 1344*.

C. Conspiracy Theory

The conspiracy theory of personal jurisdiction is based on the premise that a conspirator's acts in furtherance of a conspiracy are attributable to the other members of the conspiracy. *Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1392 (7th Cir. 1983)*. Consequently, some courts attribute a conspirator's in-forum acts to his co-conspirators for personal jurisdiction purposes.

---

[9] The result would be the same under general Wisconsin agency law. In Wisconsin, an express agency relationship exists "only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." *Johnson v. Minn. Mut. Life Ins. Co., 151 Wis. 2d 741, 445 N.W.2d 736, 738 (Wis. Ct. App. 1989)* (quotation omitted). Wisconsin also recognizes apparent agency upon a showing of "(1) acts by the agent or principal **[*69]** justifying belief in the agency; (2) knowledge of such acts by the parties sought to be held; and (3) reliance on the apparent agency consistent with ordinary care and practice." *Id. at 739*.

Plaintiffs present no evidence of any manifestation by DEC to DETM that DETM may act on DEC's account. Although Plaintiffs have presented evidence DEC permitted DETM to market natural gas using the "Duke Energy" name and logo, Plaintiffs have not presented any evidence that any third party relied on an apparent agency between DEC and DETM.

The Ninth Circuit has not expressly accepted or rejected the conspiracy theory of personal jurisdiction. In its only published opinion addressing the issue, the Ninth Circuit noted that the two district court opinions upon which the plaintiff relied required the **[*70]** plaintiff either to allege specific overt acts in the forum state that furthered the conspiracy, or to allege substantial acts in furtherance of the conspiracy in the forum and that the co-conspirator knew or should have known his co-conspirator would perform those acts in the forum. *Underwager v. Channel 9 Australia, 69 F.3d 361, 364 (9th Cir. 1995)*. Without expressing any opinion on the validity of the conspiracy theory of personal jurisdiction, the Ninth Circuit concluded the plaintiff alleged no facts suggesting a conspiracy and failed to dispute the defendants' claims that they did not know certain acts would take place in the forum. *Id.* The Court therefore affirmed the district court's dismissal for lack of personal jurisdiction. *Id.*

Since this case, the Ninth Circuit has noted that "a great deal of doubt" surrounds the conspiracy theory's legitimacy. *Chirila v. Conforte, 47 Fed. Appx. 838, 842, 2002 WL 31105149, at *3 (9th Cir. 2002)* (unpublished). Some courts have adopted it. [10] Others have rejected its application as inconsistent with due process. [11] Still others follow the Ninth Circuit's lead in *Underwager* and decline to address whether the theory comports with due process, **[*71]** but find the plaintiff failed to meet the test even if it applied. *See* *Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1070 (10th Cir. 2007)*; *Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980)*.

Although not in the personal jurisdiction context, the Ninth Circuit has rejected a similar conspiracy theory in the venue context. *Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491 (9th Cir. 1979)* (rejecting conspiracy theory of venue). In *Piedmont,* the Ninth Circuit considered whether venue in an antitrust action could be based "solely on allegations that a defendant was a member of a conspiracy and that a co-conspirator performed acts in the forum district." *Id. at 492*. The plaintiff argued that because a conspirator committed acts in the venue and a conspirator acts as his co-conspirator's agent, a defendant who otherwise had not conducted business in the forum could be said to have an agent and "transacted business" there under the relevant venue statutes. *Id. at 492-93*. Based on United States Supreme Court dictum casting doubt on the conspiracy theory of venue under the Clayton Act, the Ninth Circuit concluded that deeming a conspirator an agent of his co-conspirators would expand the venue statute beyond what Congress contemplated. *Id. at 494-95*.

Piedmont is of limited value to the question in this case, as *Piedmont* **[*73]** was focused on the plaintiff's attempt to expand a specific venue statute contrary to congressional intent. To the extent *Piedmont* cautions against freely attributing one party's acts to another, existing personal jurisdiction law already provides that this Court must examine each defendant's contacts with the forum individually. *Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1130*.

It is unclear whether and under what conditions the Ninth Circuit would find it consistent with due process to attribute a conspirator's forum-related contacts to his co-conspirators for personal jurisdiction purposes. However, general due process considerations still would apply to outline the contours of a conspiracy theory of personal jurisdiction, if one is to exist at all.

---

[10] *See, e.g.,* *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031-32, 325 U.S. App. D.C. 117 (D.C. Cir. 1997)* (applying theory but finding no personal jurisdiction); *Textor, 711 F.2d at 1392-93* (applying Illinois long-arm statute); *Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 434 (D. Del. 1999)*; *Santana Prods., Inc. v. Bobrick Washroom Equip., 14 F. Supp. 2d 710, 718 (M.D. Pa. 1998)*; *see also* *Roy v. Brahmbhatt, No. 07-5082 (PGS), 2008 U.S. Dist. LEXIS 97525, 2008 WL 5054096, at *7 (D.N.J. 2008)* (unpublished) (collecting cases).

[11] *See, e.g.,* *Silver Valley Partners, LLC v. De Motte, 400 F. Supp. 2d 1262, 1268 (W.D. Wash. 2005)*; *Karsten Mfg. Corp. v. U.S. Golf Ass'n, 728 F. Supp. 1429, 1434 (D. Ariz. 1990)*; *Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976)*; *Ploense v. Electrolux Home Prods, Inc., 377 Ill. App. 3d 1091, 882 N.E.2d 653, 666-68, 317 Ill. Dec. 773 (Ill. App. Ct. 2007)*; *Mansour v. Super Ct. of Orange County, 38 Cal. App. 4th 1750, 46 Cal. Rptr. 2d 191, 196-98 (Ct. App. 1995)*; *Hewitt v. Hewitt, 78 Wn. App. 447, 896 P.2d 1312, 1315-16 (Wash. Ct. App. 1995)*; *Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995)*; **[*72]** *see also* *Roy, 2008 U.S. Dist. LEXIS 97525, 2008 WL 5054096, at *7* (collecting cases).

Under these principles, the Court concludes that to the extent a conspiracy theory of personal jurisdiction is viable, it must be limited to the context of specific jurisdiction and cannot support general jurisdiction. To hold otherwise would create satellite litigation regarding conspiracies completely unrelated to the underlying claims simply to establish personal jurisdiction. Such a trial-within-a-trial situation based on an **[*74]** already tenuous basis to attribute a third party's contacts to a defendant to support personal jurisdiction is untenable.

Within the specific jurisdiction analysis, a plaintiff must establish the defendant purposefully availed himself of the forum. An allegation that a particular defendant caused or contributed to an effect in the forum state, by itself, is insufficient, even if it is foreseeable that the defendant's conduct would have an effect in the forum. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*. The defendant, not his co-conspirator, must choose to direct his activities at the forum in causing the effect in the forum. *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."). Consequently, a co-conspirator's activity directed at the forum, even if in furtherance of a conspiracy of which the foreign defendant is a member, cannot constitute purposeful direction at the forum by the foreign defendant. The Court thus concludes that allegations of specific acts committed by a co-conspirator in the forum in furtherance **[*75]** of the conspiracy, alone, are insufficient to establish minimum contacts by a defendant who otherwise has no contacts with the forum.

Additionally, a "forseeable effect" in the forum state is inadequate to show the purposeful direction necessary to establish specific jurisdiction. *Pebble Beach, 453 F.3d at 1155*. Consequently, a defendant's mere awareness or ability to foresee in-forum effects from his out-of-forum conduct is insufficient to establish minimum contacts with the forum. Rather, under established Ninth Circuit law regarding specific jurisdiction, a foreign defendant expressly aims his conduct at the forum when he is alleged to have engaged in wrongful conduct "individually targeting a known forum resident." *Bancroft, 223 F.3d at 1087*. The Court thus concludes that if a conspiracy theory of jurisdiction is viable, a plaintiff must set forth non-conclusory allegations that the defendant was a member of a conspiracy, that the defendant's or his co-conspirator's acts in furtherance of the conspiracy caused harm in the forum, and that the conspiracy individually targeted a known forum resident.

Absent requiring this sort of purposeful direction at the forum, the conspiracy theory **[*76]** of personal jurisdiction "threatens to confuse the standards applicable to personal jurisdiction and those applicable to liability." *Melea, Ltd., 511 F.3d at 1070*. Personal jurisdiction is more restrictive than the scope of liability on a particular claim. A state "does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." *Hanson, 357 U.S. at 254*. That a particular court lacks personal jurisdiction over a member of a conspiracy does not immunize the defendant from liability, it merely affects in what forum the plaintiff may seek to enforce that liability. *Ploense, 882 N.E.2d at 668*.

Here, Plaintiffs' SAC does not allege DEC purposefully availed itself of Wisconsin by individually targeting known Wisconsin residents. Rather, the SAC alleges a nationwide conspiracy to manipulate natural gas prices resulting in inflated prices generally, including in Wisconsin. The mere likelihood that the price manipulation allegedly occurring in other states foreseeably would affect natural gas prices in Wisconsin does not amount to purposeful direction at Wisconsin. Other conspirators, not DEC, chose to sell natural **[*77]** gas at allegedly inflated prices to customers in Wisconsin. The SAC does not allege the conspirators made an agreement specifically regarding Wisconsin or its residents. While other alleged conspirators such as DETM may have purposefully directed their conduct at known Wisconsin residents, the SAC contains no non-conclusory allegations that DEC purposefully did so. [12]

Plaintiffs argue that Wisconsin has expanded its antitrust laws to reach conduct which impacts Wisconsin "even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state." *Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 158 (Wis. 2005)*. Plaintiffs thus contend

---

[12] The SAC contains only one allegation regarding any direction towards Wisconsin: "Duke Energy Corporation's actions were intended to have, and did have, a direct, substantial and reasonably foreseeable effect on commerce in Wisconsin during the Relevant Time Period." (Corrected Second Am. Compl. at 19.)

Wisconsin must have meant to acquire personal jurisdiction over foreign antitrust co-conspirators whose out-of-forum acts impact Wisconsin.

This confuses liability with personal jurisdiction. While DEC may be liable under **[*78]** Wisconsin ***antitrust law*** for its alleged illegal conduct, that does not automatically equate to Wisconsin having personal jurisdiction over DEC. If Wisconsin does not have personal jurisdiction over a particular defendant, it must depend on other states to enforce its antitrust laws. Moreover, even if Wisconsin would adopt the conspiracy theory of personal jurisdiction for purposes of its long-arm statute, the exercise of personal jurisdiction by this Court still must comport with due process of law.

Moreover, Plaintiffs have failed to present evidence that DEC was a member of any conspiracy directed at known Wisconsin targets. Although Plaintiffs contend DEC obstructed jurisdictional discovery regarding its participation in the conspiracy, DEC provided Plaintiffs with every DEC document which DEC provided to the CFTC in conjunction with the CFTC's investigation of DETM's natural gas trading activity in the relevant time period. (Mem. of Defs. Duke Energy Carolinas, LLC & Duke Energy Trading & Marketing, LLC in Opp'n to Pls.' Mot. to Compel Disc. (Doc. # 935) ["Opp'n to Mot. Compel"], Ex. B at 2; Tr. of Proceedings (Doc. # 1138) at 55.) The documents provided to the CFTC consisted almost **[*79]** entirely of DETM documents. (Opp'n to Mot. Compel, Ex. B at 2; Tr. of Proceedings at 55.) The only DEC documents consisted of general risk management policies and board of director meeting minutes, which DEC has provided to Plaintiffs. (Opp'n to Mot. Compel, Ex. B at 2; Tr. of Proceedings at 55-56.)

Plaintiffs have not convinced the Court that further discovery would produce a different result. The Court therefore will decline Plaintiffs' request to defer the personal jurisdiction issue to be resolved with the merits. The Court will not attribute DETM's contacts with the forum to DEC, and DEC has no contacts of its own sufficient to support personal jurisdiction. The Court therefore will grant DEC's motion to dismiss for lack of personal jurisdiction.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Duke Energy Carolinas, LLC's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (Doc. # 872) is hereby GRANTED. Defendant Duke Energy Carolinas, LLC is hereby dismissed for lack of personal jurisdiction.

IT IS FURTHER ORDERED that Defendant Duke Energy Carolinas, LLC shall electronically file under seal the exhibits previously filed manually in association with Doc. # 969 and **[*80]** Doc. # 1179.

DATED: February 26, 2009

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

Bullet Concrete Materials v. Union Pac. R.R. Co.

United States District Court for the Southern District of Texas, Houston Division

February 27, 2009, Decided; February 27, 2009, Filed

Civil Action No. H-07-3182

Reporter
2009 U.S. Dist. LEXIS 148828 *

BULLET CONCRETE MATERIALS, INC., Plaintiff, vs. UNION PACIFIC RAILROAD COMPANY, Defendant.

Core Terms

summary judgment, antitrust, relevant market, unconscionability, fair dealing, railcars, conspiracy, argues, tortious interference, cause of action, monopolize, good faith, terminate, parties, RECOMMENDS, Clayton Act, violations, monopoly, track, genuine issue of material fact, matter of law, contracts, intentional interference, termination provision, special relationship, breach of contract, duty of good faith, existing contract, fail to present, breach of duty

Counsel: **[*1]** For Hoarce H Denton, Jr, Bullet Concrete Materials Inc, Plaintiffs: Horace Harold Denton, Jr, LEAD ATTORNEY, Attorney at Law, Conroe, TX; Roger Kelly Donaldson, LEAD ATTORNEY, Vincent Lopez Serafino Jenevein, P.C., Houston, TX.

For Union Pacific Railroad Company, Defendant: Deborah A Newman, LEAD ATTORNEY, Newman Law Firm, Houston, TX; Fred Stuart Wilson, LEAD ATTORNEY, Union Pacific RR Co, Spring, TX; Laura S Favaloro, Sheehy, Ware & Pappas, PC, Houston, TX.

For Global Fabrication Services Incorporated, Intervenor Plaintiff: Robert Shubael Bartlett, LEAD ATTORNEY, Attorney at Law, Conroe, TX.

Judges: Nancy K. Johnson, United States Magistrate Judge.

Opinion by: Nancy K. Johnson

Opinion

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] is Defendant's Motion for Summary Judgment(Docket Entry No. 32). The court has considered the motion, all relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** in part and **DENIED** in part.

I. Case Background

---

[1] This case was referred to the undersigned magistrate judge pursuant to *28 U.S.C. §§ 636(b)(1)(A)* and *(B)*, the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and *Federal Rule of Civil Procedure 72*. Docket Entry No. 34.

The instant case arises out of a dispute between Union Pacific Railroad Company ("Defendant") and Bullet Concrete Materials, Inc., ("Plaintiff") over Defendant's mistaken delivery of **[*2]** railcars to Plaintiff's rail terminal facility in Tamina, Texas ("Plaintiff's Facility").[2]

A. Factual Background

In 1974, Plaintiff executed a contract with Defendant[3] to provide rail service to Plaintiff's Facility.[4] The parties operated pursuant to this agreement without incident for almost twenty years.

In 1993, Plaintiff and Defendant entered into an amended track agreement ("Amended Agreement") that provided terms for the construction, maintenance, and operation of the track at Plaintiff's Facility.[5] In addition, the Amended Agreement contained a termination provision permitting either party to terminate the Amended Agreement with thirty days written notice.[6] The Amended Agreement also permitted Defendant "the right to use the Track when not to the detriment of the industry."[7]

Between the years 2002 and 2005, on numerous occasions, Defendant delivered railcars to Plaintiff's Facility that were intended to be transported to another customer.[8] When the mistaken deliveries occurred, Plaintiff notified Defendant and Defendant's locomotive would return to retrieve the railcars from Plaintiff's facility. Between the time of delivery and the time Defendant's locomotive returned to retrieve the **[*3]** railcars, the railcars sat on Plaintiff's private track and blocked access to parts of Plaintiff's Facility.[9] Because the tracks were not prepared prior to the railcars' arrival, Plaintiff alleges that these cars caused significant wear and tear on the tracks.[10] In response to Plaintiff's complaints, Defendant assured Plaintiff that it was taking steps to prevent these occurrences in the future and compensated Plaintiff for several of the mistaken railcar deliveries.[11]

Significant to the dispute before this court, on April 5, 2006, Defendant delivered railcars to Plaintiff's Facility that were intended for another customer's facility.[12] Defendant discovered the mistake immediately and attempted to retrieve the railcars from Plaintiff's Facility.[13] However, an employee of Plaintiff placed a derail device between the

---

[2] In the initial state court proceeding, Union Pacific Railroad Company was the plaintiff and Bullet Concrete Materials, Inc., and Harold Denton were the defendants. For the sake of clarity, this court refers to the parties as they are before this court. As plaintiffs Bullet Concrete Materials, Inc., and Harold Denton make identical claims, the court refers to them collectively as "Plaintiff."

[3] The original parties to the contract were Missouri Pacific Railroad Company ("MOPAC") and Plaintiff. Subsequently, Defendant acquired MOPAC and assumed the contract between Plaintiff and MOPAC. For purposes of clarity, this court uses the term Defendant to denote Union Pacific and its predecessor, MOPAC.

[4] Defendant's Motion for Summary Judgment, Docket Entry No. 32, p. 3.

[5] Id. at Ex. E, Industry Track Agreement, p. 1, Art. 1. For clarity's sake this court has renumbered exhibit E consecutively.

[6] Id. at p. 7, Sec. 8(b).

[7] Id. at p. 4, *Sec. 2(a)*.

[8] Defendant's Motion for Summary Judgment, Docket Entry No. 32, Ex. G, Deposition of Benton Bond, p. 43. Benton Bond is a lawyer for Defendant. Id. at p. 5.

[9] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, p. 6.

[10] Id.

[11] Id.

[12] Defendant's Motion for Summary Judgment, Docket Entry No. 32, Ex. G, Deposition of Benton Bond, pp. 29-30.

wheels of one of the railcars, preventing Defendant from removing the railcars.[14] Defendant requested that Plaintiff remove the derail device, and in response, Plaintiff demanded that Defendant compensate Plaintiff for the mistaken delivery in order to remove the derail device.[15] Defendant then filed an application for and was granted a temporary restraining order requiring Plaintiff **[*4]** to release the railcars.[16] Subsequently, Plaintiff released the railcars.

On April 20, 2006, Plaintiff received a letter from Defendant that terminated the Amended Agreement as of May 22, 2006.[17] Sometime after May 22, 2006, Defendant severed Plaintiff's rail connection to Defendant's main railroad line, effectively terminating rail access to Plaintiff's Facility.

B. Procedural Background

As noted above, on April 6, 2006, Defendant filed an application for a temporary restraining order in state court in Montgomery County, Texas.[18] Plaintiff then filed an answer and counter-claim against Defendant that included federal causes of action.[19]

On September 28, 2007, Defendant removed this case from Montgomery County, Texas, to this court.[20] Plaintiff filed an amended complaint asserting numerous causes of action against Defendant, including breach of contract, breach of good faith and fair dealing, tortious interference with contract, tortious interference with land, and violations of the Sherman Antitrust Act and the Clayton Act.[21]

On May 2, 2008, Global Fabrication Services, Inc., ("Global") filed a motion to intervene and this court granted Global's motion.[22] Global alleged a breach of contract claim **[*5]** against Plaintiff.[23] Global also asserted causes of action against Defendant for tortious interference with a contract, violations of the Sherman Antitrust Act, and violations of the Clayton Act.[24]

Subsequently, Defendant filed a motion for summary judgment and motion to dismiss that is currently pending before this court.[25] Before addressing the merits of Defendant's motion for summary judgment and motion to dismiss, this court must address Defendant's objections to Harold Denton's ("Denton") affidavit.

---

[13] Id.

[14] Id. A derail device is a device placed on the railroad tracks that derails a train if the railcars are pulled over the derail device.

[15] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, p. 9.

[16] Notice of Removal, Docket Entry No. 1, pp. 1-2.

[17] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, Ex. A, Affidavit of Harold Denton, Jr. p. 8. Harold Denton, Jr. is the president of Plaintiff. Id. at 1.

[18] Notice of Removal, Docket Entry No. 1, p. 1.

[19] Id. at p. 2.

[20] Id. at p. 1.

[21] Plaintiff's Amended Complaint, Docket Entry No. 18, pp. 11-12.

[22] Global's Motion to Intervene, Docket Entry No. 19; Order Granting Motion to Intervene, Docket Entry No. 21.

[23] Global's Intervenor Complaint, Docket Entry No. 20, p. 5.

[24] Id. at pp. 5-6.

[25] Defendant's Motion for Summary Judgment, Docket Entry No. 32.

II. Defendant's Objections to Denton's Affidavit

Defendant objects to Denton's affidavit on numerous grounds and argues that this court should strike the affidavit in its entirety.[26] Defendant, without particularity and adequate explanation, objects to Denton's affidavit because it contains hearsay, is conclusory, contains statements that violate the best evidence rule, and asserts legal conclusions.[27]

The court agrees that some of Denton's self-serving statements are hearsay; however, Denton's testimony relating statements of Defendant's agents is not hearsay. However, because the court does not rely on any incompetent summary judgment evidence in reaching the decision explained in this Memorandum **[*6]** and Recommendation, Defendant's objections are overruled.

III. Summary Judgment Standard

Summary judgment is warranted when the evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)*; *Brown v. City of Houston, Tex., 337 F.3d 539, 540-41 (5th Cir. 2003)*. A material fact is a fact that is identified by applicable substantive law as critical to the outcome of the suit. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*. To be genuine, the dispute regarding a material fact must be supported by evidence such that a reasonable jury could resolve the issue in favor of either party. *Id. at 250*.

The movant must inform the court of the basis for the summary judgment motion and must point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. *Celotex Corp., 477 U.S. at 323*; *Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992)*. If the moving party can show an absence of record evidence in support of one or more elements of the case for which the nonmoving party bears the burden, the movant will be entitled to summary judgment. *Celotex Corp., 477 U.S. at 322*. In response to a showing of lack of evidence, the party opposing summary judgment must go beyond the pleadings and proffer evidence that establishes each of the challenged elements of the **[*7]** case, demonstrating that genuine issues of material fact do exist which must be resolved at trial. *Id. at 324*.

When considering the evidence, "[d]oubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party." *Evans v. City of Houston, 246 F.3d 344, 348 (5th Cir. 2001)*; see also *Boston Old Colony Ins. Co. v. Tiner Assocs. Inc., 288 F.3d 222, 227 (5th Cir. 2002)*. The court should not "weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence." *Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987)*.

The nonmoving party, however, must show more than "some metaphysical doubt as to the material facts." *Meinecke v. H & R Block of Houston, 66 F.3d 77, 81 (5th Cir. 1995)*. Conclusory allegations, unsubstantiated assertions, improbable inferences, unsupported speculation, or only a scintilla of evidence will not carry this burden. *Brown, 337 F.3d at 541*; *Ramsey v. Henderson, 286 F.3d 264, 269 (5th Cir. 2002)*. The court must grant summary judgment if, after an adequate period of discovery, the nonmovant fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp., 477 U.S. at 322*.

IV. Analysis

---

[26] Defendant's Reply to Plaintiff's and Global's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 41, pp. 6-7.

[27] Id.

Defendant moves for summary judgment[28] on the following causes of action: (1) breach of contract; (2) breach of duty of good faith and fair dealing; (3) tortious interference with a contract; (4) tortious interference with land; (5) violations **[*8]** of the Sherman Antitrust Act; and (6) violations of the Clayton Act. The court examines each in turn.

A. Breach of Contract

According to Texas law, "[t]he essential elements in a breach of contract claim are as follows: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach." *Bridgmon v. Array Sys. Corp., 325 F.3d 572, 577 (5th Cir. 2003)*.

Defendant argues that summary judgment is proper on Plaintiff's claim for breach of contract related to the termination of the Amended Agreement because either party was permitted to terminate the Amended Agreement with thirty days prior written notice.[29] In response, Plaintiff does not refute that the plain language of the termination provision permits either party to terminate the Amended Agreement,[30] and instead argues that the provision is unconscionable because Defendant is the only rail carrier that services Plaintiff's facility, that "[Defendant] provided its contract on a take-it-or-leave-it basis . . .[,]" and that Defendant refused to negotiate."[31]

"In general, the term 'unconscionability' describes a contract that is unfair because of its overall one-sidedness **[*9]** or the gross one-sidedness of its terms." Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC, No. H-06-1330, 2008 WL 1999234 at 19 (S.D. Tex. May 8, 2008)(quoting *Kendziorski v. Saunders, 191 S.W.3d 395, 406 (Tex. App.—Austin 2006, no pet.))*. Texas law recognizes procedural unconscionability and substantive unconscionability. *Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 301 (5th Cir. 2004)*. Procedural unconscionability "refers to the circumstances surrounding the adoption of the [contract]," and substantive unconscionability refers to the fairness of the terms of the contract. Id.

The party seeking to invalidate a contract on the basis of unconscionability bears the burden of proof. *Ski River Dev., Inc. v. McCalla, 167 S.W.3d 121, 136 (Tex. App.—Waco 2005, pet. denied)*; *In re Turner Bros. Trucking Co., 8 S.W.3d 370, 375 (Tex. App.—Texarkana 1999, no pet)*. The court looks at the totality of the circumstances at the time the contract was formed, including an examination of: "(1) the entire atmosphere in which the agreement was made; (2) the alternatives, if any, available to the parties at the time the contract was made; (3) the non-bargaining ability of one party; (4) whether the contract was illegal or against public policy; and (5) whether the contract is oppressive or unreasonable." *Ski River Dev., Inc., 167 S.W.3d at 136* (citing *Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ))*. "The grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede, and the same is true for procedural abuse-the circumstances surrounding the negotiations must be shocking." *Ski River Dev., Inc., 167 S.W.3d at 136*. A party who enters into a merely

---

[28] This case is past the pleading stage and Plaintiff has presented evidence in response to Defendant's Motion for Summary Judgment and Motion to Dismiss; therefore, the court will analyze Defendant's motion under the *Rule 56* standard.

[29] Defendant's Motion for Summary Judgment, Docket Entry No. 32, p. 6-7.

[30] The termination provision provides that the "[Amended Agreement] may be terminated by either party on thirty days written notice to the other party." Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, Ex. D, Industry Track Agreement, p. 7 (unnumbered), Sec. 8(b). Although Plaintiff does not challenge Defendant's interpretation of the plain language of the termination provision, this court finds that as a matter of law, the termination provision in the Amended Agreement permitted Defendant to terminate the contract as long as thirty days written notice was provided.

[31] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, pp. 12-13. Plaintiff, in response, also argues that Defendant breached the contract by parking railcars on the track in violation of the provision that contemplates fair usage. This allegation was briefly mentioned in Plaintiff's Amended Complaint. Plaintiff's Amended Complaint, Docket Entry No. 18, p. 8, ¶¶ 47, 48. Defendant does not move for summary judgment on this claim; therefore, the court does not address this issue.

imprudent contract is not entitled to protection, and the determination **[*10]** of unconscionability is a question of law for the court. *Wade, 524 S.W.2d at 85-86*; *Ski River Dev., Inc., 167 S.W.3d at 136*.

Plaintiff has failed to present sufficient evidence to create a fact issue regarding either procedural or substantive unconscionability. After reciting the law to the court, Plaintiff's unconscionability argument is as follows:

> The termination provision urged by [Defendant] is unenforceable because it is procedurally and substantively unconscionable. [Defendant] and [Plaintiff] were in very different bargaining positions at the time the contract was made. [Defendant] is the only railroad that provides service at [Plaintiff's] facility—there is no alternative common rail carrier. [Defendant] provided its contract on a take-it-or-leave-it basis to [Plaintiff] and despite repeated attempts by [Plaintiff] to negotiate terms, [Defendant] refused to negotiate. In fact, [Plaintiff] repeatedly attempted to negotiate the termination provision and such attempts were refused.[32]

In this instance, Plaintiff is a sophisticated commercial enterprise and there is no evidence that the contract resulted from unfair surprise or oppression that might lead to a finding that the contract was procedurally unconscionable. See Perez v. Lemarroy, No. B-08-141, **[*11]** 2008 WL 5453604 at 5 (S.D. Tex. Sep. 12, 2008). In addition, even if this court were to assume that the Amended Agreement was an adhesion contract, as suggested by Plaintiff, under Texas law, adhesion contracts are not per se unconscionable. *In re AdvancePCS Health, L.P., 172 S.W.3d 603, 608 (Tex. 2005)*. Plaintiff also fails to cite the court to any evidence that the contract is substantively unconscionable. The contract provision at issue permits either Plaintiff or Defendant to unilaterally cancel the contract with the proper written notice.[33]

Having reviewed all of Plaintiff's allegations of unconscionability in light of the applicable Texas law, none of the allegations are sufficient to invalidate the termination provision of the Amended Agreement for unconscionability. Therefore, this court recommends that Defendant's motion for summary judgment on the breach of contract claim related to the termination of the Amended Agreement be granted.

B. Breach of the Duty of Good Faith and Fair Dealing

Under Texas law, there is no duty of good faith and fair dealing implied in every contract. *Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)*; *Bradley v. Phillips Petroleum Co., 527 F.Supp.2d 661, 686 (S.D. Tex. 2007)*. Texas courts do, however, recognize that a special relationship between the parties may create a duty of good faith and fair dealing. Id. "The special relationship necessary to create [a duty of good faith **[*12]** and fair dealing] either arises from the element of trust necessary to accomplish the goals of the contract, or has been imposed by the courts because of an imbalance of bargaining power." *Bradley, 527 F.Supp.2d at 687* (quoting *Lovell v. W. Nat'l Life Ins. Co., 754 S.W.2d 298, 302 (Tex. App.—Amarillo 1988)*(citing *Arnold, 725 S.W.2d at 167*)). In regards to commercial contracts, "[t]here is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc., 960 S.W.2d 41, 52 (Tex. 1998)*.

Defendant argues that summary judgment is proper on Plaintiff's claim for breach of the duty of good faith and fair dealing, because there is no contractual language requiring good faith and fair dealing and there is no special relationship giving rise to a duty of good faith and fair dealing.[34] Plaintiff responds that the Amended Agreement involved a special relationship because Defendant was the only provider of rail services to Plaintiff's Facility and Plaintiff had expanded the facility to receive larger trains, thus, increasing revenue for Defendant.[35]

---

[32] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, p. 13.

[33] The provision states that the "[Amended Agreement] may be terminated by either party on thirty days' written notice to the other party." Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, Ex. D, Industry Track Agreement, p. 7 (unnumbered), Sec. 8(b).

[34] Defendant's Motion for Summary Judgment, Docket Entry No. 32, pp. 7-11.

[35] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, pp. 14-16.

Plaintiff has not cited the court to any express contractual language giving rise to a duty of good faith and fair dealing on the part of Defendant. Plaintiff has also failed to raise a fact issue of the existence of a special relationship necessary to recover for a breach of the duty **[*13]** of good faith and fair dealing. There is no evidence that the Amended Agreement involved an element of trust necessary to accomplish the goals of the Amended Agreement or that there was a fiduciary relationship between the parties. And, while Plaintiff argues an imbalance in bargaining power, Plaintiff fails to support its argument with case law that a railroad owes a duty of good faith and fair dealing to its customer simply because of the nature of its business. In addition, Texas courts have specifically noted that there is no "general duty of good faith and fair dealing in ordinary, arms-length commercial transactions." *Formosa Plastics Corp. USA, 960 S.W.2d at 52*.

Plaintiff has failed in its burden to present evidence of genuine issues of material fact; therefore, Defendant's motion for summary judgment on Plaintiff's claim for a breach of the duty of good faith and fair dealing should be granted.

C. Tortious Interference with Existing Contracts [36]

In order to establish a claim for tortious interference with a contract, "a plaintiff must prove: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual **[*14]** damage or loss." *Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 210 (Tex. 1996)* see also *Lewallen v. Conmed Corp., 261 F.App'x 704, 707 (5th Cir. 2008)*(unpublished). "Intentional interference does not require intent to injure, it does require that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Lewallen, 261 F.App'x at 707* (internal quotations omitted)(quoting *Sw. Bell Tel. Co. v. John Carlo Tex., Inc., 843 S.W.2d 470, 472 (Tex. 1992))*. In other words, "[l]iability for intentional interference may not be based on a simple allegation that the defendant performed certain acts; instead, there must be a finding that the defendant performed certain acts with the knowledge or belief that interference with a contract would result." 5860-*5888 Westheimer Ltd. v. Orvis Houston, Inc., No. H-08-1327, 2009 WL 47124 at 2 (Jan. 6, 2009)*.

If a plaintiff is successful at establishing the elements of a tortious interference with contract claim, a defendant still has an affirmative defense to the claim. *Texas Beef Cattle Co., 921 S.W.2d at 210*. "A party is justified in interfering with another's contract if it exercises (1) its own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." *Gulf Shores Council of Co-Owners, Inc. v. Raul Cantu No. 3 Family Ltd. P'ship, 985 S.W.2d 667, 674 (Tex. App.—Corpus Christi 1999, pet. denied)* citing *Texas Beef Cattle Co., 921 S.W.2d at 211*. A justification defense is conclusively established "if the trial court finds as a matter of law that the defendant had a legal right to interfere with a contract . . . ." *Texas Beef Cattle Co., 921 S.W.2d at 211*.

Defendant argues that summary **[*15]** judgment is proper on Plaintiff's and Global's claims for tortious interference with existing contracts because there is no evidence that Defendant intended to interfere with the contracts and it had an independent right under the Amended Agreement to cancel the contract. In response, Plaintiff and Global argue that Defendant interfered with their contracts by terminating the Amended Agreement and removing the switch that gave Plaintiff access to Defendant's rail line.

Plaintiff and Global have failed to present sufficient facts or evidence to create a fact issue regarding their claims for tortious interference with an existing contract. As noted above, this court has recommended a finding, as a matter of

---

[36] In response to Defendant's motion, Plaintiff attempts to assert a claim for tortious interference with future contracts. Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, pp. 17-18; Plaintiff's Motion for Leave to File an Amended Complaint, Docket Entry No. 30, p. 1. In Defendant's reply, it asserts that the court should strike Plaintiff's arguments for the tortious interference with future contracts claim because Plaintiff has not pled that cause of action. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 41, p. 6. Having previously denied Plaintiff's motion to amend its complaint to include a cause of action for tortious interference with a future contract, this court agrees with Defendant. Order Denying Plaintiff's Motion for Leave to File an Amended Complaint, Docket Entry No. 35. Plaintiff's arguments in support of a claim for tortious interference with a future contract are stricken and will not be considered by the court because Plaintiff has failed to properly plead this cause of action in its live complaint.

law, that Defendant's termination of the Amended Agreement was not a breach of contract. If this recommendation is adopted, it follows that Defendant's actions are not a willful and intentional act of interference. In addition, neither Plaintiff nor Global has presented any other evidence of a willful and intentional act of interference that would permit a reasonable jury to conclude that Defendant interfered with any existing contracts.

Therefore, Defendant's motion for summary judgment **[*16]** on Plaintiff's and Global's claims for intentional interference with existing contracts should be granted.

D. Interference with Property

In Texas, "[a]ny intentional invasion of, or interference with, property, property rights, personal rights or personal liberties causing injury without just cause or excuse is an actionable tort." *Suprise v. DeKock, 84 S.W.3d 378, 380 (Tex. App.-Corpus Christi 2002, no pet.)*(quoting *King v. Acker, 725 S.W.2d 750, 754 (Tex. App.-Houston [1st Dist.] 1987, no writ))*. The elements of an interference with property cause of action are: 1) interference with one's property or property rights; 2) the interference was intentional and caused damage; and 3) the interference was without just cause or legal excuse. *Martinez v. Benavides, No. 04-05-00618-CV, 2006 WL 1993773, at *2 (Tex. App.-San Antonio, July 19, 2006, no writ)*.

Defendant argues that it is entitled to summary judgment on Plaintiff's claim for intentional interference with property because there is no evidence that Defendant intended to invade Plaintiff's property and the express terms of the contract permitted this conduct.[37] Plaintiff responds that it has presented sufficient evidence on all the required elements to survive a motion for summary judgment.[38]

In this instance, Defendant has failed to show that there are no genuine issues of material fact on Plaintiff's claim for intentional interference with property. Although the Amended Agreement permitted Defendant "to **[*17]** use the Track when not to the detriment of [Plaintiff,]"[39] Plaintiff has presented evidence that on at least seven occasions Defendant delivered railcars to Plaintiff's facility that were designated for another facility without just cause or legal excuse.[40] Denton also avers that the railcars caused wear and tear to the premises, blocked Plaintiff's intra-plant roads, and prevented proper access and use of its property for its business operations.[41]

Based on the above, a reasonable jury could conclude that Defendant's actions amounted to a tortious interference with property. Therefore, Defendant has failed to demonstrate that there are no genuine issues of material fact on Plaintiff's cause of action for tortious interference with property and summary judgment is improper.

E. Sherman Antitrust Act

Defendant moves for summary judgment on Plaintiff's and Global's claims for violations of the Sherman Antitrust Act. In response, Plaintiff and Global argue that summary judgment is improper because Defendant violated *15 U.S.C. § 1* ("*Section 1*") and *15 U.S.C. § 2* ("*Section 2*") of the Sherman Antitrust Act.

---

[37] Defendant's Motion for Summary Judgment, Docket Entry No. 32, pp. 16-17.

[38] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, pp. 18-19.

[39] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, Ex. D, Industry Track Agreement, p. 4 (unnumbered), *Sec. 2(a)*.

[40] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, Ex. A, Affidavit of Harold Denton, Jr., pp. 5-7.

[41] Id.

1. *Section 1*

Section 1 of the Sherman Antitrust Act states that, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint **[*18]** of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. *Section 1* "forbids contracts or conspiracies in restraint of trade or commerce . . . ." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993)*.

Defendant argues that Plaintiff cannot present evidence that it engaged in a conspiracy. In response, Plaintiff and Global argue that a conspiracy can be inferred from Defendant's conduct.

In order to state a cause of action under *Section 1* of the Sherman Antitrust Act, a plaintiff must offer evidence "that the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001)*. The conspiracy element requires proof that the conspirators had a "conscious commitment to a common scheme designed to achieve an unlawful objective." Id.; *Tunica Web Adver. v. Tunica Casino Operators, 496 F.3d 403, 409 (5th Cir. 2007)*.

In this instance, neither plaintiff alleges any facts or evidence of an actual conspiracy or any facts or any facts or evidence that would lead to an inference of conspiracy. Plaintiff's and Global's conclusory allegation that the court can infer that Defendant engaged in a conspiracy does not demonstrate genuine issues of material fact and is not sufficient to survive a motion for summary judgment.

Having found that the plaintiffs failed to present any evidence **[*19]** that would permit a reasonable jury to conclude that Defendant engaged in a conspiracy, summary judgment for Defendant is proper on Plaintiff's and Global's causes of action under *Section 1* of the Sherman Antitrust Act.

2. *Section 2*

Section 2 of the Sherman Antitrust Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*. *Section 2* forbids actual monopolization, attempts to monopolize, and conspiracy to monopolize. *Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986)*; *15 U.S.C. § 2*. "Monopoly power is the power to control price or exclude competition." *Seidenstein v. Nat'l Med. Enter., Inc., 769 F.2d 1100, 1105 (5th Cir. 1985)*(internal quotations omitted).

A *Section 2* monopoly claim "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 481 (1992)*; *Seidenstein, 769 F.2d at 1106*.

In order to prove attempted monopolization, a plaintiff must show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc., 506 U.S. at 456* **[*20]** ; *Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 474 (5th Cir. 2000)*.

"A prerequisite to success under *section 2* on either a completed or attempted monopolization claim is proof of the relevant market." *C.E. Services, Inc. v. Control Data Corp., 759 F.2d 1241, 1244 (5th Cir. 1985)* cert. denied, *474 U.S. 1037 (1985)*; see also *Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 781 (5th Cir. 1999)*(stating that to prove a *Section 2* monopoly claim a plaintiff must first establish the relevant product market); (National Athletic Trainers' Ass'n, Inc. v. Am. Physical Therapy Ass'n, No. 3:08-CV-0158, 2008 WL 4146022 at *12 (N.D. Tex. Sept. 9, 2008)(quoting *United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2nd Cir. 1995)* for the proposition that "[w]ithout a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist.")). "The relevant market establishes the backdrop against which to measure economic power." *C.E.*

Services, Inc., 759 F.2d at 1244 (quoting In re Mun. Bond Reporting Antitrust Litig., 672 F.2d 436, 441 (5th Cir. 1982)).

"The relevant market inquiry . . . has both geographical and product elements . . . ." C.E. Services, Inc., 759 F.2d at 1244 (internal citations omitted). Ultimately, the plaintiff is required to prove the relevant market. Id. "A definition of the market is essential because otherwise there is no context in which to determine whether defendant had the ability to lessen or destroy competition." O'Dell v. Gen. Motors Corp., 122 F.Supp.2d 721, 733-34 (E.D. Tex. 2000) (quoting Total Benefits Services, Inc. v. Group Ins. Admin., Inc., 875 F.Supp 1228, 1234 (E.D. La. 1995)). The definition of the relevant market is normally a fact question to be determined by the jury; however, "[i]n some instances, . . . the relevant market may be determined as a matter of law . . . ." Seidenstein, 769 F.2d at 1106. In addition, the Fifth Circuit **[*21]** has noted the difficulty the court faces in defining the relevant market at the summary judgment stage. See C.E. Services, Inc., 759 F.2d at 1244-45.

In this case, to the extent the parties briefed the issue, it is clear the parties do not agree on the definition of the relevant market in this case. Plaintiff argues that the relevant market should be defined narrowly to include only "the rail access for transportation of steel, soybean oil, and aggregates to [Plaintiff's facility]."[42] In contrast, although it is not perfectly clear, Defendant defines the relevant market as the "transportation services, including rail and non-rail."[43] Neither Plaintiff nor Defendant has adequately briefed the relevant market issue or sufficiently explained the reasoning behind each's proffered market definition. Although it is ultimately Plaintiff's burden to prove the relevant market, in this instance, Defendant has not met its burden on summary judgment to prove there are no genuine issues of material fact regarding the relevant market. Both Plaintiff and Defendant have only presented the court with conclusions regarding the relevant market, and Defendant has failed to present the court with sufficient facts or evidence for the court to determine **[*22]** as a matter of law the relevant market. Therefore, this court is unable to determine the relevant market that "establishes the backdrop against which to measure economic power." In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 441 (5th Cir. 1982). Based on the above, this court is unwilling to take the extraordinary step of ruling as a matter of law that there is no set of facts under which Plaintiff could recover under Section 2.

Therefore, Defendant's motion for summary judgment on the Section 2 attempted monopoly claim and actual monopoly claim should be denied.

Having found no evidence of a conspiracy above, to the extent Plaintiff asserts a cause of action for conspiracy to monopolize under Section 2, this court recommends that summary judgment be granted for Defendant.

F. Clayton Act

The Clayton Act prohibits numerous types of anticompetitive behavior, including engaging in price discrimination and exclusive dealing contracts. 15 U.S.C. §§ 13-14. In addition, the Clayton Act permits any person whose business or property is harmed by a violation of an ***antitrust law*** to maintain a private cause of action. 15 U.S.C. § 15(a). "The Supreme Court has long held that suits under section 4 of the Clayton Act (15 U.S.C. § 15(a)) for violation of either Section 1 or Section 2 of the Sherman Antitrust Act require not only injury to the plaintiff's business or property **[*23]** resulting from the alleged violation, but also a showing of antitrust injury and standing." Norris v. Hearst Trust, 500 F.3d 454, 465 (5th Cir. 2007).

"Standing to pursue an antitrust suit exists only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the [defendant's] conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." Doctor's Hosp. of Jefferson, Inc. v. Se. Medical Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997). In order for this court to determine whether a plaintiff has standing, the court should

---

[42] Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 37, p. 24.

[43] Defendant's Motion for Summary Judgment, Docket Entry No. 32, p. 21.

assume that the defendant committed the antitrust violations. *David Aldridge Co. v. Microsoft Corp., 995 F.Supp. 728, 748 (S.D. Tex. 1998)*; *Doctor's Hosp. of Jefferson, Inc., 123 F.3d at 305*.

The first element, injury-in-fact, requires a showing that the injury alleged by plaintiff was proximately caused by the conduct of the defendant. *David Aldridge Co., 995 F.Supp. at 748*; See *Doctor's Hosp. of Jefferson, Inc., 123 F.3d at 305*; *United Indus., Inc. v. Eimco Process Equip. Co., 61 F.3d 445, 448 (5th Cir. 1995)*.

For the purposes of the second element, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the [defendant's] acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*. The injury should reflect that anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Doctor's Hosp. of Jefferson, Inc., 123 F.3d at 305*.

The third element of antitrust standing, proper plaintiff status, **[*24]** requires the court to examine whether: (1) plaintiff's injuries or their casual link to defendant are speculative; (2) other parties have been more directly harmed; and (3) allowing plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment. *David Aldridge Co., 995 F.Supp. at 748* (citing *McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988))*.

Defendant challenges Global's standing to assert antitrust claims against it based on two discreet arguments and not its failure to meet one of the elements of antitrust standing. Defendant argues that "Global has no standing to assert an [antitrust] claim against [Defendant] because Global was not a direct purchaser of [Defendant's] service under the "direct purchaser" doctrine . . . ."[44] Defendant also argues that Global has no standing to bring an antitrust claim because it is not a third-party beneficiary under the contract between Plaintiff and Defendant. In response, Global argues that it has standing to sue because it was directly injured by Defendant's conduct that violated the antitrust act.

In this instance, neither argument proffered by Defendant justifies dismissal because of a lack of standing. Without discussing the cases in any detail, Defendant cites the court two cases in support **[*25]** of its argument that the "direct purchaser" doctrine proves Global has no standing to assert its claim. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)*; *Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)*. Both cases, however, are distinguishable from the instant case and neither case justifies dismissal for a lack of standing.[45] In addition, Global

---

[44] Defendant's Motion for Summary Judgment, Docket Entry No. 32, p. 25.

[45] In Hanover Shoe, Inc., the defendant argued, pursuant to the "passing on defense," that the plaintiff was not financially injured because of the defendant's antitrust violations, as the extra costs incurred by the plaintiff, were "passed on" to the final consumer. *392 U.S. 481, 487-89 (1968)*. Thus, the defendant argued that the plaintiff suffered no injury. Id. The Court rejected the defendant's assertion of the "passing on defense," and stated "that [the plaintiff] proved injury . . . when it proved that [the defendant] had overcharged it during the damage period and showed the amount of the overcharge . . . ." *Id. at 494*.

Similarly, in Illinois Brick Co., the Court rejected the plaintiffs' attempt to use the "passing on defense" offensively. *431 U.S. 720, 728 (1977)*. In that case, the plaintiffs, indirect purchasers of the defendants' concrete blocks, argued that the extra costs charged by the defendant were passed through the intermediaries to the plaintiffs. *Id. at 727*. Therefore, the plaintiffs asserted that they were injured because they were charged a higher price for the final product due to the defendants' antitrust violations. Id. Discussing at length the remote connection between the plaintiffs and the defendant in this case, the court determined that the plaintiffs were not permitted to use the "passing on defense" to prove that they were injured by the defendant's actions. *Id. at 727-29*.

In addition, it is not clear that the cases were even addressing the issue of standing. In Illinois Brick Co., the court noted that "[b]ecause we find Hanover Shoe dispositive here, we do not address the standing issue, except to note, . . . that the question of which persons have been injured by an illegal overcharge . . . is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages . . . ." *Id. at 728-29, n. 7*.

has offered direct evidence that Defendant's conduct directly injured Global because it had to pay additional transportation costs to have steel delivered to its facility.[46]

As to Defendant's second argument, Defendant generally cites the court to cases discussing third-party beneficiaries; however, Defendant has not presented the court with any legal authority in support of its argument that Global's lack of status as a third-party beneficiary to the Amended Agreement prevents it from suing for violations of the antitrust laws.

Therefore, Defendant's arguments that Global does not have standing are without merit.

Defendant also generally argues that Plaintiff and Global have failed to present any evidence of a cause of action under the Clayton Act because they have failed to come forward with any facts to support the essential element that Defendant acted anti-competitively **[*26]** on pricing, services, or use of facilities. As discussed above, a fact issue exists on the *Section 2* attempted monopolization and actual monopolization claims, and the Clayton Act permits any person whose business or property is harmed by a violation of an ***antitrust law*** to maintain a private cause of action. *15 U.S.C. § 15(a)*. Therefore, Defendant's motion for summary judgment on the Clayton Act claims should be denied.

V. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED IN PART** and **DENIED IN PART**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have ten days from the receipt thereof to file written objections thereto pursuant to *Federal Rule of Civil Procedure 72(b)* and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 27th **[*27]** day of February, 2009.

/s/ Nancy K. Johnson

Nancy K. Johnson

United States Magistrate Judge

End of Document

[46] Global's Response to Defendant's Motion for Summary Judgment, Docket Entry No. 38, Ex. A, Deposition of Rick Eaves, a sales representative of TEMTCO Steel, a company that sells steel to Global, p. 11.

LexisNexis

MacQuarie Group Ltd. v. Pac. Corporate Group, LLC

United States District Court for the Southern District of California

March 2, 2009, Decided; March 2, 2009, Filed

CASE NO. 08cv2113 - IEG - WMC

Reporter

2009 U.S. Dist. LEXIS 16554 *; 2009-1 Trade Cas. (CCH) P76,546

MACQUARIE GROUP LIMITED; DAVID CLARKE; ALLAN MOSS; RICHARD SHEPPARD; BEN BRUCK; JOHN BRACKEY, Plaintiff, vs. PACIFIC CORPORATE GROUP, LLC, Defendant.

Core Terms

plaintiffs', email, declaratory judgment, funds, investment opportunity, public pension, conversion, parties, defendant argues, allegations, consumers, defense motion, motion to dismiss, competitor, courts, deceptive act, market power, declaratory, converted, investment management, anticompetitive, factors, restraint of trade, relevant market, antitrust, damages, confidential documents, tortious interference, useful purpose, interfered

Counsel: **[*1]** For MacQuarie Group Limited, Plaintiff: Debra Jill Albin-Riley, LEAD ATTORNEY, Arent Fox LLP, Los Angeles, CA; Matthew Scott Trokenheim, Paul Michael Kaplan, LEAD ATTORNEYS, PRO HAC VICE, Jennifer L. Bougher, PRO HAC VICE, Arent Fox LLP, New York, NY.

For David Clarke, Allan Moss, Richard Sheppard, Ben Bruck, John Brackey, Plaintiffs: Paul Michael Kaplan, LEAD ATTORNEY, PRO HAC VICE, Jennifer L. Bougher, PRO HAC VICE, Arent Fox LLP, New York, NY.

For Pacific Corporate Group, LLC., Defendant: Cynthia A Fissel, Jeffrey D Lewin, LEAD ATTORNEYS, Sullivan Hill Lewin Rez and Engel, San Diego, CA.

Judges: IRMA E. GONZALEZ, United States District Court Chief Judge.

Opinion by: IRMA E. GONZALEZ

Opinion

ORDER:

(1) DENYING DEFENDANT'S MOTION TO DISMISS OR STRIKE

[Doc. No. 11]

(2) GRANTING DEFENDANT'S MOTION TO DISMISS THE REQUEST FOR DECLARATORY JUDGMENT

[Doc. No. 12]

Before the Court are defendant's *Rule 12(b)(6)* motion to dismiss, *Rule 12(f)* motion to strike, and motion to stay the action. (Doc. Nos. 11 and 12.) Plaintiffs opposed and defendant filed a reply.

BACKGROUND

The following factual background is drawn from plaintiffs' first amended complaint. All facts alleged are taken as true for the limited purposes of this motion.

A. [*2] Parties

Plaintiff Macquarie Group Limited ("MGL") and plaintiff Macquarie Bank Limited ("Macquarie") are Australian corporations with principal places of business in Sydney, Australia. Macquarie is a wholly owned subsidiary of MGL. Plaintiff Allan Moss was the Managing Director and Chief Executive of Macquarie until November 2007, when he became the Managing Director and Chief Executive of MGL. Plaintiff Ben Bruck was the Head of Macquarie Funds Management Group, a business division within MGL. Plaintiff Jeff Blakely was the head of Macquarie Funds Management Group's Alternative Investments private equity management business. Defendant, Pacific Corporate Group, is a Delaware limited liability corporation with its principal place of business in La Jolla, California. Defendant also maintains an office in New York, New York.

B. Facts Underlying the Request for Declaratory Relief

In October 2006, Peter Martenson, an employee of a MGL subsidiary, allegedly sent e-mail messages to a number of defendant's employees in which he falsely identified the author of the emails as defendant's chairman, Christopher Bower. Martenson also sent an email to Dow Jones reporter Laura Kreutzer, in which he **[*3]** falsely identified the email's author as defendant's former president. In these emails, Martenson purported to transmit disparaging information about defendant gathered from the website of one of defendant's clients.

In January 2008, defendant notified plaintiffs it intended to bring claims for violations of various federal and state laws arising from Martenson's conduct. Defendant presented plaintiffs with a proposed complaint, which defendant intended to file in the Superior Court of the State of California for the County of San Diego ("draft complaint"). (FAC, Ex. A.) In the draft complaint, defendant claimed plaintiffs were responsible for Martenson's conduct and conspired with Martenson to damage defendant. Defendant's draft complaint alleged $ 25 million in damages. Plaintiffs commenced this action in the Southern District of New York on April 7, 2008. Defendant filed a complaint in the Superior Court of the State of California for the County of San Diego on May 23, 2008.

C. The Alleged Refusal To Deal

The alleged refusal to deal stems from plaintiffs' attempted entry into the investment management services for public pension funds market in 2005. A pension fund is a pool of assets **[*4]** bought with contributions made under a pension plan. When an employee retires, she receives payment from the pension fund. Pension plans funded by governments are pubic pension funds.

Public pension funds have trillions of dollars in capital to invest on behalf of their beneficiaries. These funds are highly risk averse and are often restricted by complicated laws and regulations governing how the public pension fund can invest. Most of the funds have extensive internal rules and regulations which require a public pension fund investment manager to develop highly specialized knowledge and understanding.

Before hiring a manager, public pension funds engage in extensive due diligence, including a review of the manager's track record. Reputation is therefore essential to secure investment business. Part of this reputation is premised on a new investment manager's first investments. The ability to acquire initial investment opportunities will have a disproportionately high impact on the investment manager's ability to enter the market. For example, an investment manager's initial inability to secure access to significant investment opportunities signals the new manager may not be able to **[*5]** secure adequate, long-term investment returns.

In July 2005, Macquarie attempted to enter the public pension fund investment management market. As part of the effort, Macquarie attempted to secure the business of the Government Employees Superannuation Board ("GESB"). In August 2005, Macquarie approached Aisling Capital LLC ("Aisling"), a life science venture capital fund manager with an office in New York, New York. Aisling was amenable to dealing with Macquarie and indicated Macquarie would receive a commitment of at least $ 15 million in the Aisling fund.

On November 9, 2005, Jan Hoerrner, Aisling's Director of Investor Relations and Marketing, telephoned Macquarie concerning Macquarie's investment in the Aisling fund. Hoerrner told Macquarie she had received a call on November 9, 2005 from defendant's president. Defendant's president told Aisling to not allow Macquarie into the Aisling Fund, requested priority over Macquarie in the fund, and threatened to not recommend Aisling to clients if Macquarie entered the fund. Aisling subsequently lowered Macquarie's investment opportunity from $ 15 million to $ 5 million.

This reduction in investment opportunity signaled to investors Macquarie **[*6]** could not secure meaningful investments for its clients. Plaintiffs allege defendant knew the importance of this investment opportunity and coerced Aisling into reducing the opportunity to prevent Macquarie's entry into the market. Subsequently, defendant circulated rumors in the marketplace that Macquarie was having difficulties getting access to funds like Aisling's. As a result, Macquarie failed to receive allocations from several public pension funds.

Defendant's conduct damaged not only Macquarie, but also the market. Macquarie offered lower management fees. Therefore, by preventing Macquarie's entry into the market, defendant was able to sustain higher fees and offer lower quality service. Macquarie, as well as consumers in general, suffered financial harm from defendant's acts.

Further, without Macquarie's consent, defendant obtained confidential documents belonging to Macquarie. For example, defendant's California complaint quotes a confidential email.

D. Procedure

On October 31, 2008, Judge Castel transferred this case from the Southern District of New York to the Southern District of California pursuant to *28 U.S.C. § 1404(a)*. On November 26, 2008, plaintiffs filed a first amended **[*7]** complaint, alleging defendant (1) violated *section 1 of the Sherman Act*; (2) violated *New York General Business Law § 349* (deceptive acts and practices); (3) tortiously interfered with prospective economic relations; and (4) committed conversion. Plaintiff also requests declaratory judgment arising from the Martenson incident. On December 15, 2008, defendant filed (1) a motion to strike portions of the first amended complaint and (2) a motion to dismiss or stay the action. (Doc. Nos. 11, 12.) Plaintiffs filed an opposition and defendant replied.

LEGAL STANDARD

A. Motion to Dismiss

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of the claims asserted in the complaint. *Fed. R. Civ. P. 12(b)(6)*. To avoid a *Rule 12(b)(6)* dismissal, a complaint need not contain detailed factual allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S.544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The court's review is limited to the contents of the complaint and must accept all factual allegations pled in the complaint as true, drawing all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996)*. **[*8]** In spite of this deference, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Furthermore, a court is not required to credit conclusory legal allegations cast in the form of factual allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*.

B. Motion to Strike

Rule 12(f) permits the court to strike any "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are a drastic remedy and generally disfavored. 5C Wright & A. Miller, Federal Practice and Procedure §1380 (3d ed. 2004). A matter is impertinent if the statements do not pertain, and are not necessary, to the issues in question. *Fantasy, Inc.v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* rev'd on other grounds *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. "Scandalous" matters "casts a cruelly derogatory light on a party or other person." *In re 2TheMart.com Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)*; see, e.g. *Jacobsen-Wayne v. Calvin C.M. Kam, M.D., Inc., 198 F.3d 254 (9th Cir. 1999)* **[*9]** (striking the words "date rape" and "rape" from a reply brief in a case arising from a medical examination); *Alvarado-Morales v. Digital Equip. Corp., 843 F.2d 613 (1st Cir. 1988)* (striking the terms "concentration camp," "brainwashing," and "torture" in a tort case in the employment context).

DISCUSSION

A. Motion to Dismiss Sherman Act Claim

Plaintiffs allege a vertical agreement between defendant and Aisling, through which defendant attempted to bar plaintiffs' entry into the market for investment management for public pension funds. [1] Defendant allegedly knew a failure to procure initial investment opportunities would be a barrier to market entry and knew of plaintiffs' relationship with Aisling. Defendant allegedly called Aisling and asked the company to reduce plaintiffs' investment opportunity. Aisling subsequently reduced plaintiffs' opportunity from $ 15 million to $ 5 million. Further, defendant allegedly spread rumors regarding plaintiffs' ability to procure investment opportunities. Plaintiffs contend this, coupled with the reduction of their investment opportunity, effectively barred their entry into the market.

Section 1 of the Sherman Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." *15 U.S.C. § 1*. Because many beneficial business contracts restrain trade, courts interpret *section 1* to prohibit only those that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. To prevail on an section 1 claim, a plaintiff must prove three elements: (1) an agreement or conspiracy intended to restrain trade; (2) which actually restrains trade; and (3) which causes an injury to competition. *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir.1989)*. Further, the plaintiff must establish both the relevant market and market power. See *Newcal Industries, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*.

If the plaintiffs establish these elements, the Court must determine whether to implement the *per se* rule or the "rule of reason." See *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1154 (9th Cir.2003)*. **[*11]** *Per se* liability is reserved for those agreements "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. An agreement between a single customer and a single supplier to terminate a second supplier is not unlawful *per se.* *NYNEX Corp. v. Discon, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Therefore, the Court analyzes this type of vertical agreement using the rule of reason. *A.H. Cox & Company v. Star Machinery Co., 653 F.2d 1302, 1305-6 (9th Cir. 1981)*. The rule of reason requires the Court to "weigh the anticompetitive effects and the procompetitive effects or business justifications advanced for the challenged restraint to determine whether it is unreasonable." *Les Shockley, 884 F.2d at 507*. Below, the Court evaluates whether plaintiffs meet the *section 1* elements before applying the rule of reason.

[1] A "vertical agreement" is an agreement between entities operating **[*10]** on different marketing levels. A prototypical example would be an agreement between a manufacturer and a distributor.

1. Agreement or Conspiracy

i. Parties' Argument

Defendant argues plaintiffs cannot show an agreement because the facts alleged do not exclude the possibility defendant and Aisling Capital each acted independently. Defendant notes that, generally, a market participant may freely **[*12]** choose his clients, citing *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("A distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."); *Sorisio v. Lenox, Inc., 701 F. Supp. 950, 956 (D. Conn. 1988)*("[P]ersuasion, pressure, even argument, is permissible."); *America Channel, LLC v. Time Warner Cable, Inc., 2007 U.S. Dist. LEXIS 47966, 2007 WL 1892227 at *5 (D. Minn. June 28, 2007)*("allegations regarding [the defendant's] refusal to deal are insufficient to allege a claim of conspiracy because . . . they fail . . . to exclude the possibility of independent action.").

Plaintiffs argue coerced conduct satisfies the joint conduct requirement, citing *Spectators' Commc's Network v. Colonia Country Club, 253 F.3d 215, 225 (5th Cir. 2001)*; *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973-74 (7th Cir. 1995)*; *Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1990)*; *Oltz v. St. Petter's Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988)*.

ii. Analysis

For an agreement to constitute a restraint of trade, plaintiffs must show the conspirators had "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. **[*13]** The agreeing parties need not share a motive and "acquiescence in an illegal scheme is as much a violation of the Sherman act as the creation and promotion of one." *Spectators', 253 F.3d at 221*. An agreement to exclude a competitor from the market has been widely found to be a unlawful objective. See *Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *Quemos Theatre Co. v. Warner Bros. Pictures, 35 F. Supp. 949 (D.C.N.J. 1940)*.

In Spectator's, the Fifth Circuit found an agreement when one conspirator was allegedly "enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive." *Id. at 222*. In that case, the plaintiff alleged the PGA Tour, in an attempt to drive a competitor out of the on-site radio broadcast market, pressured Anheuser-Busch to withdraw sponsorship from a competitor's radio broadcast. *Id. at 221*. After Anheuser-Busch rescinded the agreement, its product became the official beer of the PGA Tour. Id. The Fifth Circuit found this circumstantial connection sufficient to survive a motion to dismiss.

In the instant case, plaintiffs sufficiently allege an agreement with an unlawful object. The agreement between the parties **[*14]** is evidenced by defendant's alleged phone call to Aisling and Aisling's subsequent reduction of plaintiffs' investment opportunity. Like the court in *Spectator's*, this Court may infer an agreement between the parties from this circumstantial evidence for the limited purposes of this motion. Further, the agreement was intended to exclude plaintiffs from the market, a clearly unlawful object. Plaintiffs satisfy the agreement element.

The cases cited by defendant are irrelevant because they involve either a different type of antitrust violation or are factually distinct. *Monsanto, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775* (evaluating a vertical price-fixing agreement); *Sorisio, 701 F. Supp. at 956* (same); *American Channel, 2007 U.S. Dist. LEXIS 47966, 2007 WL 1892227 at *5* (evaluating a vertical refusal to deal in which the plaintiff only alleged parallel conduct without any other proof of agreement). [2] In the instant case, plaintiffs allege an explicit agreement, evidenced by an admission by one of the co-conspirators and supported by circumstantial proof.

---

[2] "Parallel conduct" refers to the inference of agreement or concerted action which a Court may draw from "the conscious parallelism of the defendants' acts of price cutting and the like." *54 Am. Jur. 2d Monopolies § 486*. **[*15]** Parallel conduct alone, as opposed to explicit agreements, has widely been held insufficient to maintain an antitrust claim. Id.

2. Restraint on Trade

i. Parties' Argument

Defendant argues plaintiffs fail to articulate a plausible restraint on trade. Instead, defendant argues, this case involves a supplier choosing to deal with one prospective purchaser instead of another, an act that is presumptively legal absent extraordinary market power. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc., 381 F.3d 717, 736 (7th Cir. 2004)*; *E&L Consulting Ltd. v. Doman Industries Ltd., 472 F.3d 23, 29 (2d Cir. 2006)*. Plaintiffs, defendant argues, are complaining of too much competition because defendant received a larger share of the Aisling fund.

Plaintiffs allege defendant harmed competition by barring plaintiffs' entry into the investment management services for public pension funds market. According to plaintiffs, this market is concentrated in a few firms and has "high entry barriers." One of these barriers is a lack of confidence in new investment managers - which hinges, in part, on the manager's ability to secure initial investment opportunities. Allegedly, defendant ensured plaintiffs **[*16]** would not clear this barrier by depriving them of the full Aisling investment opportunity. Accordingly, plaintiffs have been unable to enter the market and defendant has been able to charge higher fees and offer lesser service.

ii. Analysis

"Not every agreement is *per se* 'in restraint of trade' within the meaning of *section 1*." *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71,76 (9th Cir. 1969)*. A single seller may unilaterally transfer his business to a competitor without violating the antitrust laws. Id. However, a refusal to deal where "there was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective" is a restraint on trade. Id.; see, e.g., *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*(finding a *section 1* violation when the objective was to put "discounters" out of business); *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*(finding a *section 1* violation when a group worked to put a competitor out of business or, at least, impair their ability to compete); *Quemos Theatre Co., Inc. v. Warner Bros. Pictures, 35 F. Supp. 949 (D.C.N.J. 1940)*.

At this stage in the proceedings, plaintiffs **[*17]** sufficiently allege defendant's vertical agreement with Aisling was a restraint on trade. Defendant allegedly pressured Aisling to reduce plaintiffs' investment opportunity in order to prevent their entry into the market, which is a form of a refusal to deal. Defendant's alleged anticompetitive motive is further evidenced by the rumors it allegedly spread about plaintiffs' inability to obtain investment opportunities. These agreements restrain trade by reducing the number of participants in the market and, as a result, plaintiffs allege defendant is able to charge supracompetitive prices. Evaluating the totality of these allegations, the Court concludes plaintiffs sufficiently allege a restraint on trade.

3. Injury to Competition (Anti-Trust Injury)

Defendant alleges plaintiffs do not properly alleged an injury to competition. A plaintiff must allege more than an injury to itself, it must allege an injury to the marketplace as a whole. *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The complaint alleges defendant's actions allowed it "to sustain higher fees and offer lower quality of service . . . and consumers in general will suffer significant financial harm from the absence **[*18]** of an effective alternative to [defendant]." (FAC P65.) This allegation of supracompetitive prices is sufficient to satisfy the injury to competition requirement at this stage of the proceedings. See *Rebel Oil Co, Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1424 (9th Cir. 1995)* (noting evidence of "restricted output and supracompetitive prices" is proof of injury to competition.).

4. Relevant Market

i. Parties' Arguments

Defendant argues there is no relevant market because "investment management services to public pension funds" are indistinguishable from general investment management services. According to defendant, there are hundreds of thousands of professionals who could potentially provide services to public pension funds. Given this vast potential market, defendant argues plaintiffs fail to plead sufficient facts other than conclusory allegations of market, citing as an example *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963 (9th Cir. 2008)*.

Plaintiffs argue the relevant market is investment management services for public pension funds. This is typically a factual rather than a legal element. *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*. **[*19]** At this stage, plaintiffs argue defendant cannot defeat a well-pleaded complaint by counter-pleading another relevant market.

ii. Analysis

To state a valid Sherman Act claim, plaintiffs must allege "a 'relevant market' exists." *Newcal Industries, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. A complaint survives a *Rule 12(b)(6)* motion "unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id. at 1045*. Determination of the existence of a relevant market is generally a factual question, but there are some legal requirements. Plaintiffs must allege both a geographic market and a product market. The product "market must encompass the product at issue as well as all economic substitutes for the product." *Id. at 1046*.

Here, plaintiffs have alleged a plausible geographic and product market - the United States market for investment management of public pension funds. Plaintiffs allege this market is highly regulated, with a limited number of investment opportunities available due to the regulation; therefore, there are few economic substitutes. Although a factual inquiry may test the legitimacy of the market, it is not **[*20]** appropriate for determination at the motion to dismiss stage.

4. Market Power

i. Parties' Arguments

Defendant argues plaintiffs do not allege market power. Defendant contends, even if it had frozen plaintiffs out of the market, "exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*(requiring market share greater than 30%). Plaintiffs aver defendant's ability to exclude competition proves its market power.

ii. Analysis

"Market power may be demonstrated through . . . direct evidence of the injurious exercise of market power." *Rebel Oil, 51 F.3d at 1421*. Plaintiffs allege defendant manages billions of dollars for large, public pension funds. Defendant allegedly exercised its market power to exclude plaintiffs from the market, which is direct evidence of the injurious exercise of market power.

Defendant's citation to *Jefferson Parish Hosp*. is unpersuasive. That case involved a tying agreement, which occurs when a monopolist attempts "to use a tie-in to a product to extend its monopoly power into a second market . . . ." Herbert **[*21]** Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 7.8 (3d ed 2005). Under ***antitrust law***, tying agreements are analyzed under a different rubric than refusals to deal. See generally id.

5. Weighing the Procompetitive and Anticompetitive factors

In general, courts find vertical agreements "among traders at different marketing levels, designed to exclude from the market direct competitors" to be impermissible. See 10A Fletcher Cyc. Corp. § 5007 (collecting cases). When a large appliance dealer used its purchasing power to induce manufacturers to sell at a higher price to competing appliance dealer, the effect of the agreement was unlawful because it drove the competitor out of business. *Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. The exclusion of competitors from the market place has the anticompetitive effect of allowing defendant to charge supracompetitive prices and, additionally, reduces consumer options.

The procompetitive factor involved is the freedom of a party to choose one client over another. The freedom of choice is a fundamental tenant of a the market system and the antitrust statutes do not restrict the right of any entity to choose **[*22]** with whom it does business. *Shawver & Son, Inc. v. Oklahoma Gas & Elec. Co., 463 F.2d 204 (10th Cir. 1972)*.

Balancing this freedom of choice against the anticompetitive factors, the Court finds plaintiffs satisfy the rule of reason. Although businesses are generally free to contract, there is a strong prohibition against agreements designed to prevent entry of a competitor into the market. Plaintiffs allege they can provide services to public pension funds at a lower price, therefore, its exclusion from the market damages consumers as a whole. The alleged damage to consumers outweighs the freedom of choice, making this alleged restraint on trade unreasonable. Accordingly, the Court DENIES defendant's motion to dismiss the antitrust claim.

B. Motion to Dismiss *New York General Business Law § 349* Claim

The complaint alleges defendant's alleged phone call to Aisling constituted a violation of *New York General Business Law § 349*.

i. Parties' Argument

Defendant argues *New York General Business Law § 349* is a consumer protection law and not applicable to this factual situation. First, defendant argues the complaint does not allege an act directed toward any New York consumers. Second, defendant **[*23]** asserts the phone call between it and Aisling was not deceptive. Finally, it argues, the damage claimed was to plaintiffs, not consumers.

Plaintiffs contend defendant's actions were consumer-oriented because they deprived New York consumers of access to a lucrative investment opportunity. Defendant's actions were deceptive because they were intended to deceive the market as to plaintiff's ability to compete for lucrative investment opportunities. Finally, defendant's actions were misleading toward New York consumers and injured plaintiffs.

ii. Analysis

Section 349 of new York's General Business Law provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." *N.Y. Gen. Bus. law § 349(a)*. To establish prima facie case, plaintiff must demonstrate that: (1) defendant's deceptive acts were directed at consumers, (2) acts are misleading in material way, and (3) plaintiffs have been injured as result. *Gristede's Foods, Inc. v. Unkechauge Nation, 532 F. Supp. 2d 439 (E.D.N.Y. 2007)*. There is no dispute plaintiffs allege they were injured as a result, therefore, the Court turns to the other **[*24]** elements.

The first element requires plaintiffs allege a "consumer injury or harm to the public interest." *New York v. Feldman, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002)* (citation omitted). This requirement is construed "liberally." Id. "[P]laintiffs suing as corporate competitors under *§349* must show that defendants allegedly deceptive practice 'affects the public interest of New York.'" *Boule v. Hutton, 320 F. Supp. 2d 132, 137 (S.D.N.Y. 2004)* (citation omitted). In Feldman, the court found injury to the public interest when defendants allegedly engaged in a scheme to manipulate public stamp auctions, thereby, "undermin[ing] New York's interest in an 'honest marketplace in which economic activity is conducted in a competitive manner." *Feldman, 210 F. Supp. 2d at 302*. In the instant case, plaintiffs allege defendant orchestrated a refusal to deal designed to prevent its entry into the market, thereby, allowing defendant to charge supracompetitive prices. This undermines New York's interest in an honest marketplace in which economic activity is conducted in a competitive manner.

Next, the Court must determine if plaintiffs adequately allege the practice was deceptive or misleading. "[A] **[*25]** deceptive act or practice has an 'objective definition, . . . limited to those [acts] likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Leider v. Ralfe, 387 F. Supp. 2d 283, 292 (S.D.N.Y. 2005)* (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995))*. In this case, the alleged collusive activity falls within *section 349*'s definition of "deceptive acts or practices." In Feldman, the court detailed a line of cases applying *section 349* "by looking to the definition of deceptive acts under *section 5 of the Federal Trade Commission Act*." *Feldman, 210 F. Supp. 2d at 302*. The *Feldman* court noted many courts routinely treated antitrust violations as deceptive acts; therefore, the court found an alleged antitrust violation was a deceptive act for pleading purposes. Id. Similarly, this Court finds the particular antitrust violation alleged constitutes a deceptive act for the purposes of *section 349*. Accordingly, the Court DENIES defendant's motion to dismiss the *section 349* claim.

C. Motion to Dismiss Other State Law Claims

1. Choice of Law Issues

As an initial matter, the parties disagree which state's laws govern **[*26]** plaintiffs' tortious interference and conversion claims. Defendant's motion rests upon the assumption both these claims are governed by California law. Plaintiffs argue New York law controls.

Following a transfer for "convenience" under *28 U.S.C. § 1404(a)*, the transferee court applies the same substantive rules - including statute of limitations - that the transferor court would have applied. *Van Dusen v. Barrack, 376 U.S. 612, 637-39, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)*; Muldoon v. Tropitone Furn. Co., *1 F.3d 964, 965 (9th Cir. 1993)*. However, the law applied will not necessarily be the law of New York, but rather the law a New York court would have applied under a choice of law analysis. See, e.g., *Myelle v. American Cyanamid Co., 57 F.3d 411, 413 (4th Cir. 1995)*.

The first step is to determine whether an actual conflict exists between the laws of the jurisdictions involved. *In re Allstate Ins. Co., 81 N.Y.2d 219, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904 (N.Y. 1993)*. When no conflict exists, "the court should apply the law of the forum state in which the action is being heard." *Frazer Exton Dev., LP v. Kemper Envtl., Ltd., 2004 WL 1752580 at * 12 (S.D.N.Y. July 29, 2004)*. If there is a conflict, "New York has adopted an 'interest analysis,' which **[*27]** requires . . . 'the law of the jurisdiction having the greatest interest in the litigation … be applied.'" *Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 (2d Cir.1993)* (quoting *Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 582, 300 N.Y.S.2d 817 (1969))*. The most important contacts to consider are "the locus of the tort and the domicile of the parties." *Cooney v. Osgood Mach., Inc., 179 A.D. 2d 240, 242, 582 N.Y.S.2d 873 (N.Y. App. Div., 1992)*. "Where the parties are domiciled in different states, the locus of the tort will almost always be determinative in cases involving conduct regulating laws." *Krock v. Lipsay, 97 F.3d 640, 646 (2d Cir. 1996)*. Interference with prospective economic relations is a conduct regulating law. The locus of the tort is where the last event occurred that triggered liability. *Hamilton v. Accu-Tek, 47 F. Supp. 2d 330, 337 (E.D.N.Y. 1999)*.

The tortious interference claim is governed by New York law because there is no conflict between New York and California law. [3] New York requires a plaintiff establish: "(1) the plaintiff had a business relationship with a third party; (2) defendant knew of such relationship and intentionally interfered with it; (3) defendant **[*28]** acted solely out of malice, or used dishonest, unfair, or improper means; and (4) defendant's actions injured the relationship between plaintiff and third party." *Henneberry v. Sumitomo Corp. of America, 415 F. Supp. 2d 423, 467 (S.D.N.Y. 2006)*. California requires a plaintiff establish:

> [1] An economic relationship between plaintiff and some third party . . .; [2] The defendant's knowledge of the relationship; [3] Intentional acts by the defendant designed to disrupt the relationship; [4] Actual disruption of the relationship; [5] Economic harm to the plaintiff proximately caused by the acts of the defendant; [6] Conduct that was wrongful by some legal measure other than the fact of interference itself.

5 Witkin, Summary of California Law, Torts, § 742 (10th ed. 2005). The only arguable difference is California's requirement the act be "wrongful by some other legal measure." However, this is a false distinction as New York defines "improper means" to mean the conduct "must amount to a crime or an independent tort." *Henneberry, 415 F. Supp. 2d at 468* (citation omitted). Because there is no material difference, a New York court would find New York law controls this claim.

The conversion claim is also governed by New York law because there is not conflict between the two potential laws. The elements of conversion in California are: (1) plaintiff's right of possession; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. *Burlesci v. Petersen, 68 Cal. App. 4th 1062, 80 Cal. Rptr. 2d 704 (1998)*. The elements of conversion in New York, (1) the plaintiff's right to possession, (2) intent of the defendant, and (3) defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights. *Meese v. Miller, 79 A.D.2d 237, 436 N.Y.S.2d 496 (N.Y. App. Div., 1981)*. A New York court would apply New York conversion law.

Because there is no true conflict between these laws, rebriefing is unnecessary because defendant's arguments apply with equal vigor to New York law.

2. Tortious Interference with Prospective Economic [*30] Relations

Defendant allegedly interfered with plaintiffs' prospective economic relations by placing a phone call to Aisling, thereby convincing Aisling to reduce plaintiffs' investment opportunity.

i. Parties' Argument

As a threshold matter, defendant asserts plaintiffs' claim is time-barred. Defendant then argues the claim fails because plaintiffs have failed to show the act was independently wrongful, citing *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* ("[T]he requirement of pleading that a defendant has engaged in an act that was independently wrongful distinguishes lawful competitive behavior from tortious interference."). Finally, defendant claims its conduct was fully privileged under the doctrine of competition privilege and California's statutory common interest privilege, *California Civil Code § 47(c)*.

Plaintiffs argue the claim is timely under New York law. Further, plaintiffs argue the complaint alleges the prima facie elements for its interference claim. Finally, plaintiffs argue neither the competition privilege nor the common interest privileges support dismissal.

ii. Analysis

[3] Even if a reviewing **[*29]** court finds a conflict, New York law still controls because the locus of the tort was New York. The majority of alleged tortious conduct occurred in New York: Aisling received defendant's phone call in New York, decided to reduce plaintiff's subscription in New York, and in fact reduced plaintiff's subscription.

The statute of limitations for this claim is three years from the date **[*31]** injury. *N.Y. CPLR § 214*. The injury did not occur until "Aisling succumbed to [defendants] threats and agreed to reduce [plaintiff's] $ 15 million investment in the Aisling Fund to $ 5 million." (FAC, P 57.) Plaintiffs assert this occurred after November 26, 2005, less than three years before the filing of the FAC. Therefore, the statute of limitations does not bar the claim.

Under New York law, a claim for tortious interference with prospective economic advantage lies where "(1) the plaintiff had a business relationship with a third party; (2) defendant knew of such relationship and intentionally interfered with it; (3) defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) defendant's actions injured the relationship between plaintiff and third party." *Henneberry, 415 F. Supp. 2d at 467*. The complaint satisfies elements one, two and four by adequately alleging plaintiffs had a relationship with Aisling, defendant knew of the relationship, defendant intentionally interfered with the relationship, and defendant's actions injured the relationship. Accordingly, the Court turns its analysis to the third element.

Plaintiffs must allege conduct that "amount[s] **[*32]** to a crime or an independent tort, or must be engaged in 'for the sole purpose of inflicting intentional harm to the plaintiffs.'" *Henneberry, 415 F. Supp. 2d at 468* (quoting *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 818 N.E.2d 1100, 1103, 785 N.Y.S.2d 359 (N.Y. 2004))*. Plaintiffs satisfy the third element because, as stated above, they adequately allege defendant's conduct constituted an antitrust violation.

The competition privilege and the common interest privilege are affirmative defenses and, as such, not grounds for dismissal. The "justification [for the competition privilege] is a question for the jury" based on various factual elements. *United Euram Corp. v. Occidental Petroleum Corp., 123 Misc. 2d 574, 474 N.Y.S.2d 372, 375 (N.Y. Sup. Ct. 1984)*. Similarly, the common interest privilege "constitutes an affirmative defense . . ., [therefore,] it does not lend itself to a pre-answer motion to dismiss." *Demas v. Levitsky, 291 A.D.2d 653, 738 N.Y.S.2d 402, 410 (NY. App. Div. 2002)*. Accordingly, the Court DENIES defendant's motion to dismiss the interference claim.

3. Conversion

Defendant allegedly converted "confidential documents (including the referenced e-mail)." (FAC P 76.) The "referenced e-mail" was an internal email defendant allegedly took **[*33]** from plaintiffs.

i. Parties Argument

Defendant argues (1) an email cannot be converted, (2) plaintiffs have failed to allege defendant wrongfully obtained the email, (3) the possession of the email did not substantially interfere with plaintiffs' possession, and (4) plaintiffs have not identified any confidential documents converted.

Plaintiffs argue they have pled (1) ownership and right to possession of the confidential e-mail, (2) defendant's intentional interference with plaintiffs' right of possession, and (3) damages. Plaintiffs discuss at length whether email can be converted.

ii. Analysis

The elements of conversion in New York are (1) the plaintiff's right to possession, (2) intent of the defendant, and (3) defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights. *Meese v. Miller, 79 A.D.2d 237, 436 N.Y.S.2d 496 (N.Y. App. Div., 1981)* Plaintiffs allege a right to possess the confidential documents (including the email), defendant intended to convert the documents, and defendant interfered with plaintiffs' property right by using the documents to the exclusion of plaintiffs' rights. Further plaintiffs allege the conversion has caused damages in excess of **[*34]** $ 75,000. This is sufficient to maintain a conversion action in New York.

The issue of whether an email can be converted is irrelevant because the complaint clearly alleges the conversion of "confidential documents (including the referenced e-mail)." (FAC P 77.) A plain reading of this paragraph implies defendant also converted documents other than the referenced email. Even if the email cannot be converted, plaintiffs have sufficiently alleged defendant converted other confidential documents. Therefore, the Court need not reach the question at this juncture and DENIES defendant's motion to dismiss the conversion claim.

D. Motion to Strike Pursuant to *Rule 12(f)*

i. Parties' Argument

Defendant urges the Court strike paragraphs 18-43 of plaintiffs' complaint because they purportedly violate California's litigation privilege and the Federal Noerr-Pennington doctrine. Defendant cites cases extending both doctrines to prelawsuit communications. *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083, 1088 (S.D. Cal. 2007)* (extending California litigation privilege to demand letters); *Sosa v. DIRECTV, Inc., 437 F.3d 923, 933 (9th Cir. 2006)* (extending Noerr-Pennington **[*35]** doctrine to demand letters). Defendant argues the factual allegations reference a draft complaint it sent to plaintiffs as a prelawsuit invitation to settle, therefore, these allegations should be barred under both Sengchanthalangsy and Sosa.

Plaintiffs argue defendant's motion fails to identify the privileged communication and does not explain how plaintiffs' use violated the privilege. Plaintiffs also argue the reliance on the draft complaint does not violate either privilege.

ii. Analysis

As a preliminary matter, for the reasons discussed above, the Court applies New York litigation privilege law. In New York, "a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation." *Lacher v. Engel, 33 A.D.3d 10, 817 N.Y.S.2d 37 (N.Y. App. Div. 2006)* (citing *Youmans v. Smith, 153 N.Y. 214, 47 N.E. 265 (N.Y. 1897))*. The privilege extends to "preliminary stages or investigative stages of the process." *Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 866 N.E.2d 439, 443, 834 N.Y.S.2d 494 (N.Y. 2007)*. The privilege is intended to prevent parties from being held liable for exercising their right to access the courts. Id. The usual context in which this arises is suits for defamation based upon the filing **[*36]** of a complaint. See, e.g., *Toker v. Pollak, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (N.Y. 1978)*.

The Noerr-Pennington doctrine "ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000)*. The purpose of the doctrine is to protect the right to petition the government. Id.

Both the litigation privilege and the Noerr-Pennington doctrine seek to prohibit suits aimed to punish parties for seeking access to the courts. In the instant case, plaintiffs do not bring any cause of action to punish defendant for its prelawsuit communications. This is not an action for defamation and plaintiffs do not rely on the act of sending the complaint as a basis for a cause of action. The draft complaint may have been a catalyst for the instant litigation, but these doctrines do not bar access to the courts in this situation. Accordingly, the Court DENIES defendant's motion to strike.

E. Motion to Dismiss or Stay the Declaratory Relief Claim

Plaintiffs request the Court declare the rights of the parties concerning the **[*37]** alleged conduct of Macquarie's former employee Peter Martenson. Martenson allegedly sent emails to defendant's employees and the press pretending to be an executive working for defendant. These actions allegedly caused $ 25,000,000 in damages to defendant. On May 23, 2008, defendant filed a complaint in California state court based on these facts.

i. Parties' Arguments

Defendant moves the Court to dismiss or stay plaintiffs' declaratory judgement action in favor of defendant's California state lawsuit. Defendant notes the Court has broad discretion to exercise its jurisdiction under the Declaratory Judgment act. Assessing factors set forth in *Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 62 S.*

Ct. 1173, 86 L. Ed. 1620 (1942), defendant argues dismissal would avoid needless determination of state laws issues, discourage forum shopping, and avoid duplicative litigation. Further, defendant argues the declaratory judgment action serves no useful purpose, would not finalize the controversy, is merely "procedural fencing," and raises unnecessary federalism issues. [4] Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998).

Plaintiffs argue the presence of their other substantive claims weighs in favor of the Court retaining jurisdiction, citing Dizol, 133 F.3d at 1225-26. Plaintiffs assert adjudication of the declaratory judgment action would not be duplicative because the state court has stayed the action and the parties are substantially similar. Further, plaintiffs argue adjudication of the declaratory judgment action would not lead to needless determination of state law. Plaintiffs aver they have not engaged in forum shopping and the action serves the useful purpose of clarifying liabilities.

ii. Analysis

"The Declaratory Judgment Act embraces both constitutional and prudential concerns." Dizol, 133 F.3d at 1222. A plaintiff seeking federal declaratory relief must have Article III standing, satisfy the case and controversy requirement, and fulfill all statutory prerequisites. Id. at 1222-23. The parties do not dispute plaintiff has fulfilled these requirements and the Court, upon its own review, finds plaintiff satisfies these prerequisites. "If the suit passes constitutional and statutory muster, the district court **[*39]** must also be satisfied that entertaining the action is appropriate. This determination is discretionary . . .." Id.

A federal district court's broad discretion to abstain in declaratory relief actions empowers it to stay or dismiss such actions in favor of pending state court proceedings involving the same issue and parties. Wilton v. Seven Falls Co., 515 U.S. 277, 287-89, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995). The Court is guided by the factors first articulated in Brillhart - avoidance of needless determination of state law issues, discouragement of forum shopping, and avoidance of duplicative litigation. Brillhart, 316 U.S. 491, 495, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942). Additionally, courts may inquire: (1) whether the declaratory action will settle all aspects of the controversy; (2) whether the declaratory action will serve a useful purpose; (3) whether the action is brought merely for "procedural fencing"; and (4) whether the declaratory action will unnecessarily entangle the state and federal courts. Dizol, 133 F.3d at 1225 n.5 (citations omitted).

Turning first to the Brillhart factors, entertaining the declaratory judgment claim would result in needless determination of state law issues. When the sole basis of jurisdiction is diversity **[*40]** of citizenship, the federal interest is at its nadir and the policy of avoiding unnecessary determination of state law is especially strong. Allstate Life Ins. Co. v. Sundboll, 1995 U.S. Dist. LEXIS 14247, 1995 WL 566040 at *3 (N.D. Cal. 1995). According to plaintiffs, defendant does not allege plaintiffs violated any federal laws (see defendant's draft complaint (FAC, Ex. A)); therefore, diversity would be the sole basis of jurisdiction. Further, the declaratory judgment claim arises from a different case and controversy than plaintiffs' other claims. The declaratory judgment claim concerns Peter Martenson, who allegedly sent false materials to defendant's employees and the press, pretending to be an executive working for defendant. Plaintiffs' other claims involve defendant's interference with its investment opportunities, a factually and temporally distinct controversy. Therefore, the Court need not determine the state law issues underlying the declaratory judgment claim. Further, entertaining the declaratory judgment claim would encourage forum shopping. "A **[*41]** party should not be allowed to choose a less appropriate federal forum by hasty initiation of a federal proceeding which is parallel to a state proceeding." Allstate, 1995 U.S. Dist. LEXIS 14247, 1995 WL 566060 at *3. Here, the federal forum is inappropriate because the federal proceeding involves only state claims and is parallel to a state proceeding; therefore plaintiffs should not be allowed to force defendant, who is the natural plaintiff, into the federal forum. Finally, duplicative litigation would result if both this Court and the

[4] "Procedural fencing" means that the action is merely the product of forum **[*38]** shopping. Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 390 n. 2 (5th Cir. 2003).

state court allow the claims to proceed. All of these factors weigh against entertaining the declaratory judgment claim.

Similarly, the other Ninth Circuit factors also weigh against hearing the declaratory judgment claim. The declaratory judgment claim would not completely resolve the controversy because plaintiff omitted key parties in interest - most notably Peter Martenson. Further, the action serves no useful purpose. "The 'useful purpose' served by the declaratory judgment action is the clarification of legal duties for the future, rather than the past harm a coercive tort action is aimed at redressing." *Amsouth Bank v. Dale, 386 F.3d 763, 786 (6th Cir. 2004)*. Plaintiffs **[*42]** merely seek to have the court conduct a tort-style inquiry into the past conduct of Peter Martenson and determine liability - this is not the useful purpose described in Amsouth. See also, 10B C. Wright, A. Miller & M. Kane, Federal Practice & Procedure §2758 (3d ed 1998) ("[I]t is not the function of the federal declaratory action merely to anticipate a defense that otherwise could be presented in a state action."). Additionally, the declaratory judgment claim appears to be procedural fencing, an attempt to place the action in a federal forum rather than the appropriate state forum. Finally, the claim would unnecessarily cause friction between the state and federal courts because both courts would be adjudicating the same issue simultaneously. These factors weigh against entertaining the declaratory judgment claim in this Court.

The next issue is whether the Court should dismiss the claim or stay the action. In *Exxon Shipping Co. v. Airport Depot Diner, Inc., 120 F.3d 166 (9th Cir. 1997)*, the Ninth Circuit remanded a declaratory judgment action with directions to dismiss when the court determined the declaratory judgment served the improper purpose of attempting to displace a state **[*43]** court ruling. Similarly, in the instant case, plaintiffs are trying to bring this state action into a federal court by bringing a declaratory judgment claim. This Court GRANTS defendant's motion to dismiss the declaratory judgment claim.

CONCLUSION

For the foregoing reasons, the Court DENIES defendant's motion to dismiss the antitrust claim, the New York Business Law Claim, the conversion claim, and the tortious interference with prospective economic advantage claim. The Court DISMISSES WITH PREJUDICE plaintiff's declaratory judgment claim because any amendment to that claim would be futile.

IT IS SO ORDERED.

DATED: March 2, 2009

/s/ Irma E. Gonzalez

IRMA E. GONZALEZ, Chief Judge

United States District Court

End of Document

Capitol Records, Inc. v. Mp3tunes, LLC

United States District Court for the Southern District of New York

March 3, 2009, Decided; March 4, 2009, Filed

07 Civ. 9931 (WHP)

Reporter
611 F. Supp. 2d 342 *; 2009 U.S. Dist. LEXIS 40821 **

CAPITOL RECORDS, INC. et al., Plaintiffs, -against- MP3TUNES, LLC et al., Defendants.

Subsequent History: Later proceeding at *Capitol Records, Inc, v. MP3tunes, LLC, 261 F.R.D. 44, 2009 U.S. Dist. LEXIS 73447 (S.D.N.Y., Aug. 13, 2009)*

Prior History: *Capitol Records, Inc. v. MP3tunes, LLC, 2008 U.S. Dist. LEXIS 75329 (S.D.N.Y., Sept. 29, 2008)*

Core Terms

counterclaim, infringing, songs, Notice, music, motion to dismiss, allegations, recordings, download, websites, declaratory judgment, unfair competition, practices, copyright infringement, misrepresentation, non-infringing, distribute, deception

Counsel: **[**1]** Andrew H. Bart, Esq., Jenner & Block LLp, New York, NY, Counsel for Plaintiffs.

Gregory P. Gulia, Esq., John Dellaportas, Esq., Duane Morris LLP, New York, NY, Counsel for Defendants.

Judges: WILLIAM H. PAULEY III, United States District Judge.

Opinion by: WILLIAM H. PAULEY III

Opinion

[*344] *MEMORANDUM AND ORDER*

WILLIAM H. PAULEY III, District Judge:

Plaintiffs, fourteen record companies and music publishers (collectively "EMI"), bring this copyright infringement action against Defendant MP3tunes, LLC ("MP3tunes"). Plaintiffs move to dismiss MP3tunes's counterclaims. For the following reasons, Plaintiffs' motion is granted in part and denied in part.

BACKGROUND

For the purposes of this motion, the Court accepts the following facts as true. MP3tunes operates two websites: *www.mp3tunes.com* and *www.sideload.com*. (Amended Answer, Affirmative Defenses, and Counterclaims dated Nov. 3, 2008 ("Answer") P 35.) Mp3tunes.com offers online storage "lockers" where users can store music, while sideload.com is a search engine that allows users to search for free music downloads. (Answer PP 36, 38.)

Plaintiffs allege that MP3tunes violates federal copyright law by enabling users to listen to infringing music through its websites, make copies **[**2]** of infringing music to store in a "locker," and download copies of music to myriad locations and individuals. On September 4, 2007, Plaintiffs sent MP3tunes a take-down notice alleging that the conduct of both websites constituted copyright infringement (the "Take Down Notice"). (Answer Ex. A: Letter from Steven Fabrizio dated Sept. 4, 2007.) While Plaintiffs provided a "representative list" of over 350 songs that were "copied, performed, stored, distributed, and made available for download on or by MP3tunes," they also demanded that MP3tunes take action with respect to all of Plaintiffs' copyrighted recordings, even if not included on the representative list. (Answer Ex. A at 2.) MP3tunes removed the songs identified on the representative list from its websites, but took no action concerning the broader demand to take down other copyrighted recordings. (Answer P 55.)

Prior to the commencement of this action, MP3tunes filed a declaratory judgment action against EMI in the Southern District of California. There, MP3tunes **[*345]** sought both a declaration that its activities did not constitute infringement and money damages on the grounds that EMI violated the Digital Millennium Copyright Act **[**3]** ("DMCA") by knowingly materially misrepresenting that certain recordings on MP3tunes's websites were infringing. MP3tunes's complaint alleged that the Take Down Notice included "some songs" that "are freely available for digital download," but only specified two such songs and alleged that many songs were from the "Paste Store," which lawfully distributes promotional songs. *See* Order Granting Defendants' Motion to Dismiss (the "California Order"), 07 Civ. 1844 (WQH), at 11 (S.D. Cal. Apr. 18, 2008). Judge Hayes dismissed the declaratory judgment claim as an anticipatory filing. Judge Hayes also dismissed the DMCA claim without prejudice on the grounds that MP3tunes had not identified a single track "as definitely lawful, non-infringing, and wrongfully included in the cease-and-desist letter," that the complaint failed to allege facts showing that Plaintiffs knew or should have known the recordings were non-infringing, and that the non-infringing songs alleged in the Complaint were not material given the breadth of infringement complained of in the Take Down Notice. *See* California Order at 12-13.

In this action, MP3tunes alleges as a counterclaim that in addition to the songs identified **[**4]** in the California action, there are five more recordings on the Take Down Notice that "appear to be authorized by EMI for free download" or that "MP3tunes believes ? [are] lawfully available." (Answer PP 49-52.) These are "merely examples of the many links EMI represented as being associated with infringing copies of their allegedly copyrighted works, which were not, in fact, infringing." (Answer P 54.) MP3tunes asserts it was injured by Plaintiffs' misrepresentations because it relied on the Take Down Notice to remove links to allegedly infringing material and was forced to counterclaim. (Answer P 95.)

In addition, MP3tunes submits a declaration from Michael Robertson enumerating additional allegations it would plead if this Court concludes that the counterclaims fail to state a claim as pled. According to Mr. Robertson, EMI pays third-parties to distribute free MP3s over the internet; at least six of Plaintiffs' record label websites distribute songs for free; and EMI engages in active marketing of its music directly and through "hundreds if not thousands" of online music partners. (Declaration of Michael Robertson dated Dec. 30, 3008 ("Robertson Decl.") PP 9-13, 15.) In addition, **[**5]** EMI and other record companies are aware that music blogs and related online sites post infringing downloads, but "either choose to ignore them or, in many cases, openly cooperate with and license them, because exposure of artists on such web sites can lead to increased sales." (Robertson Decl. P 14.) More than 140 links on the Take Down Notice are to music blogs and related online sites. (Robertson Decl. P 14.)

DISCUSSION

I. *Legal Standard*

On a motion to dismiss, the Court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998)*. Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)* (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery **[*346]** will reveal evidence of [his claim]"); *see also* *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493*

F.3d 87, 98 (2d Cir. 2007) ("We have declined to read *Twombly's* flexible 'plausibility standard' **[**6]** as relating only to antitrust cases.").

A court may also consider "documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

II. *DMCA Claim*

A. *Collateral Estoppel*

"The litigation of an issue presented and necessarily decided in a prior action between the same parties is foreclosed by the doctrine of issue preclusion." Deutsch v. Flannery, 823 F.2d 1361, 1364 (2d Cir. 1987). In considering the preclusive effect of the dismissal of a prior action, "[i]t matters not that the prior action resulted in a dismissal without prejudice, so long as the determination being accorded preclusive effect was essential to the dismissal." Deutsch, 823 F.2d at 1364. "To the extent that there are no differences in the two complaints, or that the differences obviously lack substantive significance," the later complaint is precluded. Deutsch, 823 F.2d at 1364.

MP3tunes's Section 512(f) counterclaim adds little to the complaint dismissed by Judge Hayes. The accretion of five songs which "appear to be authorized by EMI for free download" or that "MP3tunes believes … **[**7]** [are] lawfully available" and the conclusory allegation that they are "merely examples" of works that are not infringing does not transform the counterclaim in any meaningful way from the DMCA claim dismissed in the California action. Because the counterclaim suffers from the same defects as the prior claim in California, it is precluded.

B. *Proposed Amendments*

In light of Rule 15(a)'s lenient standard for amendment, this Court considers the allegations MP3tunes proposes to add to the counterclaim. *See* Oliver Sch. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991) ("[W]hen a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.")

The DMCA requires that copyright owners follow the notice provisions provided in 17 U.S.C. 512(c)(1)--a DMCA "Take Down Notice"--in order to hold internet service providers liable for copyright infringement. *See* Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 2008 WL 4065872, at *7-21 (N.D. Cal. 2008). Section 512(f) provides that a person who "knowingly materially misrepresents under [Section 512]--(1) that material or activity is infringing . . . shall be liable for any damages, including costs **[**8]** and attorneys' fees, incurred by the alleged infringer … or by a service provider, who is injured by such misrepresentation, as a result of the service provider relying on such misrepresentation in removing or disabling access to the material or activity claimed to be infringing." 17 U.S.C. § 512(f).

A material misrepresentation is one that "affected the [infringer or service provider's] response to a DMCA letter." Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004). Here, MP3tunes only removed the songs on the representative list. It did not respond to the demand that it remove all links to any of Plaintiffs' copyrighted recordings. Accordingly, Plaintiffs' representation that any link to its copyrighted recording was infringing cannot be a material misrepresentation. Moreover, MP3tunes suffered no injury because it **[*347]** took no action other than filing an anticipatory lawsuit in California.

As for the songs that MP3tunes removed as a result of the Take Down Notice, MP3tunes's proposed additional allegations that Plaintiffs distribute music for free over the internet through a variety of methods amounts to no more than an allegation that some of the songs on **[**9]** the representative list might be non-infringing. An allegation that there is a possibility that some songs on the representative list are non-infringing is too speculative to meet the Twombly standard. Accordingly, amendment of the counterclaims would be futile and the motion to dismiss the DMCA claim is granted.

III. *State Law Claims*

A. New York General Business Law §349

To state a claim under *N.Y.G.B.L. § 349*, a plaintiff must demonstrate, *inter alia*, that the defendant's deceptive acts were directed at consumers. *Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000)*; *S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp., 84 F.3d 629, 636 (2d Cir. 1996)* (*Section 349* claims "requires a finding of conduct that is consumer-oriented"); *International Sport Divers Ass'n v. Marine Midland Bank, N.A., 25 F. Supp. 2d 101, 114 (W.D.N.Y. 1998)* ("[T]he gravamen of the Complaint must be consumer injury or harm to the public interest."). Business-to-business transactions generally do not give rise to *§ 349* claims. *See Exxonmobil Inter-America v. Advanced Info. Eng'g Servs., 328 F. Supp. 2d 443, 448 (S.D.N.Y. 2004)*.

MP3tunes's *§ 349* claim alleges that Plaintiffs engaged in unfair, deceptive, or illegal **[**10]** acts or practices because they were aware their conduct violated *17 U.S.C. § 512(f)*. The Take Down Notice was directed to MP3tunes, not consumers. Accordingly, Plaintiffs' motion to dismiss the *§ 349* claim is granted.

B. *Common Law Unfair Competition*

"New York courts have noted the incalculable variety of illegal practices falling within the unfair competition rubric, . . . calling it a broad and flexible doctrine that depends more upon the facts set forth . . . than in most causes of action." *Roy Export Co. Estab. Of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1105 (2d Cir. 1982)* (internal quotation marks and citations omitted). While some courts have stated that common law unfair competition claims can be "grounded in *either* deception or appropriation of the exclusive property of the plaintiff," *see, e.g., H.L. Hayden Co. of N. Y. Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1025 (2d Cir. 1989)* (emphasis added), "[t]he essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse **[**11]** of a fiduciary or confidential relationship," *Telecom Intern. Am., Ltd. v. AT & T Corp., 280 F.3d 175, 197 (2d Cir. 2001)*; *see also Sears Petroleum & Transp. Corp. v. Archer Daniels Midland Co., No. 5:03-CV-1120 (DEP), 2006 U.S. Dist. LEXIS 27540, 2006 WL 1304699 (N.D.N.Y. May 9, 2006)* (considering and rejecting plaintiff's claim that allegations of deception are sufficient to state a claim for unfair competition without allegations of misappropriation under the vast majority of law in this Circuit and in New York state courts).

Because MP3tunes's fails to allege that Plaintiffs misappropriated MP3tunes's labors or expenditures, Plaintiffs' motion to dismiss the common law unfair competition claim is granted.

[*348] C. *California Business and Professional Code § 17200*

Section 17200 of the California Business and Professional Code prohibits business acts or practices that are "unlawful, unfair, or fraudulent." Unlawful conduct is defined as "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Express, LLC v. Fetish Group, Inc., 464 F. Supp. 2d 965, 980 (CD. Cal. 2006)* (internal quotation marks and citations omitted). "[T]he word 'unfair' in *[§ 17200]* **[**12]** means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Carter v. Variflex, Inc., 101 F. Supp. 2d 1261, 1270 (CD. Cal. 2000)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (1999))*. "Fraudulent as used in *§ 17200* does not refer to the common law tort of fraud but only requires a showing members of the public are likely to be deceived." *Express, 464 F. Supp. 2d at 980*; *see also Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1077-78 (CD. Cal. 2003)* ("A business practice is fraudulent if members of the public are likely deceived.").

Since this Court dismisses all the other counterclaims seeking monetary relief, MP3tunes's *§ 17200* claim cannot be based on allegedly unlawful acts or business practices. As for unfair acts or business practices, MP3tunes does not allege any anti-competitive conduct. Finally, as this Court held with respect to the *N.Y.G.B.L. § 349* counterclaim, MP3tunes's allegations have nothing to do with consumer **[**13]** or public harm. Accordingly, the *§ 17200* counterclaim is also dismissed.

IV. *Declaratory Judgment Claim*

MP3 tunes seeks a declaratory judgment that it is a service provider protected by the safe harbor provision in *17 U.S.C. § 512*, that it complied with its obligations under the DMCA, that the Take Down Notice was deficient, and that the activities of its websites do not constitute copyright infringement. This claim is duplicative of MP3tunes's affirmative defense that it is protected by the DMCA safe harbor provisions and the Plaintiffs' copyright infringement claims. However, there is no harm to Plaintiffs in letting these claims stand. Discovery relating to Plaintiffs' claims and MP3tunes's defense will proceed regardless of whether the declaratory judgment claim is dismissed. Allowing the counterclaim to remain ensures that the dispute will be resolved, even if Plaintiffs decide not to pursue their claims. Accordingly, Plaintiffs' motion to dismiss the declaratory judgment counterclaim is denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to dismiss MP3tunes's counterclaims is granted in part and denied in part. All of Defendant's state law counterclaims and the Digital **[**14]** Millennium Copyright Act counterclaim seeking affirmative relief are dismissed. The motion to dismiss the declaratory judgment counterclaim is denied. In view of this Memorandum and Order, the motion for a stay of discovery relating to the counterclaims is moot.

Dated: March 3, 2009

New York, New York

SO ORDERED:

/s/ William H. Pauley III

WILLIAM H. PAULEY III

U.S.D.J.

End of Document

Hynix Semiconductor, Inc. v. Rambus, Inc.

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

March 3, 2009, Decided; March 3, 2009, Filed

No. C-00-20905 RMW; No. C-05-00334 RMW; No. C-06-00244 RMW

Reporter

609 F. Supp. 2d 988 *; 2009 U.S. Dist. LEXIS 17791 **

HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR U.K. LTD., and HYNIX SEMICONDUCTOR DEUTSCHLAND GmbH, Plaintiffs, v. RAMBUS INC., Defendant. RAMBUS INC., Plaintiff, v. HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR MANUFACTURING AMERICA INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., SAMSUNG AUSTIN SEMICONDUCTOR, L.P., NANYA TECHNOLOGY CORPORATION, NANYA TECHNOLOGY CORPORATION U.S.A., Defendants. RAMBUS INC., Plaintiff, v. MICRON TECHNOLOGY, INC., and MICRON SEMICONDUCTOR PRODUCTS, INC., Defendants.

Subsequent History: Later proceeding at *Hynix Semiconductor, Inc. v. Rambus Inc., 2009 U.S. Dist. LEXIS 18171 (N.D. Cal., Mar. 10, 2009)*

Affirmed by *Hynix Semiconductor Inc. v. Rambus Inc., 2011 U.S. App. LEXIS 9728 (Fed. Cir., May 13, 2011)*

Prior History: *Hynix Semiconductor Inc. v. Rambus Inc., 609 F. Supp. 2d 951, 2009 U.S. Dist. LEXIS 13530 (N.D. Cal., 2009)*

Core Terms

patent, disclosure, Manufacturers, minutes, disclose, patent application, Counterclaims, technology, license, intellectual property, infringement, ballot, tracking, Manual, equitable estoppel, negotiations, Memory, defenses, Reply, products, sign-in, presentations, coverage, laches, attachment, unfair, royalties, meetings, policies, unfair competition

LexisNexis® Headnotes

Civil Procedure > Remedies > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

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

HN1[] **Civil Procedure, Remedies**

The *Seventh Amendment* requires a court to apply the jury's implicit and explicit factual determinations when ruling on equitable claims that are based on the same facts as the legal claims tried to the jury.

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

HN2[] Trade Practices & Unfair Competition, State Regulation

Cal. Bus. & Prof. Code § 17200 defines "unfair competition" as any unlawful, unfair, or fraudulent business act or practice. It establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent. Although the unfair competition law is broadly written to permit courts to restrain dishonest or unfair business dealings, the scope of the law is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair.

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

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

HN3[] State Regulation, Claims

The California Supreme Court has set the standard for establishing a violation of *Cal. Bus. & Prof. Code § 17200* by an "unfair" act or practice. When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *§ 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Patent Law > ... > Defenses > Estoppel & Laches > Elements

HN4[] Estoppel & Laches, Elements

Equitable estoppel, which bars a patentee from receiving relief, consists of three elements: (i) the patentee must communicate to the accused infringer (by words, conduct or silence) that the patentee will not pursue an infringement claim; (ii) the accused infringer must rely on that communication; and (iii) the accused infringer must establish that it would be materially prejudiced if the patentee is now permitted to proceed with the infringement claim. Silence alone will not create an estoppel unless there is a clear duty to speak or somehow the patentee's continued silence reinforces the defendant's belief that the defendant will be unmolested. Even if the three elements are met, the court must take into consideration all other evidence respecting the equities of the parties in exercising its discretion in deciding whether to allow the defense to bar the suit.

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN5[] Infringement Actions, Burdens of Proof

In the context of a patent infringement action, except where equitable estoppel is based solely upon intentional fraud, the burden of proof is the preponderance of evidence. While the facts relied upon to establish equitable estoppel must be clear, positive, and unequivocal in their implication, these facts need not be established by any more than a fair preponderance of the evidence.

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN6[] Defenses, Estoppel & Laches

In the context of a patent infringement action, an estoppel may be found even though the party estopped did not actually intend to mislead or to defraud the other person.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > Defenses > General Overview

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN7[] Defenses, Demurrers & Objections, Affirmative Defenses

Although often discussed together, waiver and equitable estoppel are separate concepts with different requirements. Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN8[] Defenses, Misuse

Patent misuse arises from the equitable doctrine of unclean hands, and relates generally to the use of patent rights to obtain or to coerce an unfair commercial advantage. The key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect. The United States Court of Appeals for the Federal Circuit has cautioned that the defense not be read broadly to capture any generally-alleged "wrongful" use of patents. Rather, the defense is generally directed towards conduct that affects competition in unpatented goods or that otherwise extends the economic effect beyond the scope of the patent grant.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Implied Licenses

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN9[] Defenses, Implied Licenses

In patent law, an implied license merely signifies a patentee's waiver of the statutory right to exclude others from making, using, or selling the patented invention. An implied license can also arise from conduct that supports a finding of equitable estoppel.

Evidence > Inferences & Presumptions > Presumptions > Creation

Patent Law > ... > Defenses > Estoppel & Laches > Elements

HN10[] **Presumptions, Creation**

A defendant, in order to invoke the defense of laches, must prove: (1) that the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its claim against the defendant; and (2) that the delay operated to the prejudice or injury of the defendant. A presumption of laches arises upon proof that the patentee delayed filing suit for more than six years after actual or constructive knowledge of the defendant's alleged infringing activity.

Counsel: **[**1]** For Hynix Semiconductor Inc., Plaintiff: Allen Ruby, LEAD ATTORNEY, Law Offices of Allen Ruby, San Jose, CA; Belinda Martinez Vega, Kenneth Ryan O'Rourke, Susan Gregory van Keulen, LEAD ATTORNEYS, O'Melveny & Myers LLP, Los Angeles, CA; Geoffrey Hurndall Yost, LEAD ATTORNEY, Thelen Reid & Priest, LLP, San Francisco, CA; Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Patrick Lynch, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Theodore G. Brown, III, LEAD ATTORNEY, Joseph A. Greco, Townsend and Townsend and Crew LLP, Palo Alto, CA; Jan Ellen Ellard, Jason Sheffield Angell, Orrick Herrington & Sutcliffe, LLP, Menlo Park, CA; Jared Bobrow, John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Linda Jane Brewer, Quinn Emanuel Urquhart Oliver & Hegdes, LLP, San Francisco, CA; Robert Jason Becher, Yonaton M Rosenzweig, Quinn Emanuel Urquhart Oliver & Hedges LLP, Los Angeles, CA.

For Hynix Semiconductor America Inc., Plaintiff: Allen Ruby, LEAD ATTORNEY, Law Offices of Allen Ruby, San Jose, CA; Belinda Martinez Vega, Kenneth Ryan O'Rourke, Susan Gregory van Keulen, LEAD ATTORNEYS, O'Melveny & Myers LLP, Los Angeles, CA; Geoffrey **[**2]** Hurndall Yost, Thelen Reid & Priest, LLP, San Francisco, CA; Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Patrick Lynch, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Theodore G. Brown, III, LEAD ATTORNEY, Joseph A. Greco, Townsend and Townsend and Crew LLP, Palo Alto, CA; Aaron Bennett Craig, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; Jan Ellen Ellard, Jason Sheffield Angell, Orrick Herrington & Sutcliffe, LLP, Menlo Park, CA; Jared Bobrow, John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Linda Jane Brewer, Quinn Emanuel Urquhart Oliver & Hegdes, LLP, San Francisco, CA.

For Hynix Semiconductor U.K. Ltd, Hynix Semiconductor Deutschland GmbH, Plaintiffs: Allen Ruby, LEAD ATTORNEY, Law Offices of Allen Ruby, San Jose, CA; Belinda Martinez Vega, Kenneth Ryan O'Rourke, Susan Gregory van Keulen, LEAD ATTORNEYS, O'Melveny & Myers LLP, Los Angeles, CA; Geoffrey Hurndall Yost, LEAD ATTORNEY, Thelen Reid & Priest, LLP, San Francisco, CA; Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Patrick Lynch, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Theodore **[**3]** G. Brown, III, LEAD ATTORNEY, Joseph A. Greco, Townsend and Townsend and Crew LLP, Palo Alto, CA; Jan Ellen Ellard, Jason Sheffield Angell, Orrick Herrington & Sutcliffe, LLP, Menlo Park, CA; Jared Bobrow, John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Linda Jane Brewer, Quinn Emanuel Urquhart Oliver & Hegdes, LLP, San Francisco, CA.

For Rambus, Inc., Defendant: Carolyn Hoecker Luedtke, LEAD ATTORNEY, Burton Alexander Gross, Esq., Erin C. Dougherty, Jennifer Lynn Polse, Peter A. Detre, Rosemarie Theresa Ring, Esq., Munger, Tolles & Olson LLP, San Francisco, CA; Catherine Rajwani, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, Dallas, TX; Gregory P. Stone, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA; Jeannine Yoo Sano, LEAD ATTORNEY, Howrey LLP, East Palo Alto, CA; Kelly Max Klaus, Sean Eskovitz, Steven McCall Perry, LEAD ATTORNEYS, David C. Yang, Jeffrey Y. Wu, Kathryn Kalb Anderson, Keith Rhoderic Dhu Hamilton, II, Lynn Healey Scaduto, Munger, Tolles & Olson LLP, Los Angeles, CA; Michelle B. Goodman, Rollin Andrew Ransom, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA; Peter Ivan Ostroff, LEAD ATTORNEY, Sidley Austin Brown & Wood, Los Angeles, CA; Scott **[**4]** W. Hejny, LEAD ATTORNEY, Dallas, TX; Thomas N Tarnay, V. Bryan Medlock, LEAD ATTORNEYS, Sidley Austin LLP, Dallas, TX; William Hans Baumgartner, Jr., LEAD ATTORNEY, Sidley Austin LLP, Chicago, IL; Craig N. Tolliver, Pierre J. Hubert, McKool Smith, Austin, TX; John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Miriam Kim, Munger, Tolles & Olson, San Francisco, CA.

For Reed Elsevier, Inc., Movant: Grayson Seyichi Taketa, LEAD ATTORNEY, Grayson S. Taketa, Inc., San Jose, CA.

For Mosaid Technologies Incorporated, Movant: Tharan Gregory Lanier, LEAD ATTORNEY, Jones Day, Palo Alto, CA.

For Micron Technology Inc., Movant: Jared B. Bobrow, LEAD ATTORNEY, Weil Gotshal & Manges LLP, Redwood Shores, CA; Jason Sheffield Angell, Orrick, Herrington & Sutcliffe, LLP, Menlo Park, CA.

For Samsung Semiconductor, Inc., Samsung Electronics, Co. Ltd., Samsung Electronics America, Inc., Samsung Austin Semiconductor, L.P., Movants: Brian C. Riopelle, LEAD ATTORNEY, McGuire Woods LLP, Richmond, VA; David J. Healey, LEAD ATTORNEY, Fish & Richardson P.C., Houston, TX; David C. Radulescu, LEAD ATTORNEY, PRO HAC VICE, Weil Gotshal & Manges LLP, New York, NY; Edward Robert Reines, LEAD ATTORNEY, Weil Gotshal **[**5]** & Manges LLP, Redwood Shores, CA.

For Elpida Memory, Inc., Intervenor: Christina E. Rios, LEAD ATTORNEY, Foley & Lardner, San Francisco, CA; John J. Feldhaus, LEAD ATTORNEY, Foley & Lardner LLP, Washington, DC.

For United States of America, Intervenor: Eugene S. Litvinoff, LEAD ATTORNEY, McDermott Will & Emery LLP, Palo Alto, CA; May Lee Heye, Niall Edmund Lynch, LEAD ATTORNEYS, United States Department of Justice, Antitrust Division, San Francisco, CA.

For Rambus, Inc., Counter-claimant: Catherine Rajwani, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, Dallas, TX; Kelly Max Klaus, Sean Eskovitz, Keith Rhoderic Dhu Hamilton, II, Lynn Healey Scaduto, LEAD ATTORNEYS, Steven McCall Perry, Munger, Tolles & Olson LLP, Los Angeles, CA; Scott W. Hejny, LEAD ATTORNEY, Dallas, TX; Thomas N Tarnay, V. Bryan Medlock, LEAD ATTORNEYS, Sidley Austin LLP, Dallas, TX; William Hans Baumgartner, Jr., LEAD ATTORNEY, Sidley Austin LLP, Chicago, IL; Carolyn Hoecker Luedtke, Erin C. Dougherty, Jennifer Lynn Polse, Peter A. Detre, Rosemarie Theresa Ring, Esq., Munger, Tolles & Olson LLP, San Francisco, CA; Craig N. Tolliver, Pierre J. Hubert, McKool Smith, Austin, TX; John D Beynon, Weil, Gotshal & Manges LLP, **[**6]** Redwood Shores, CA.

For Hyundai Electronics Indust. Co., Ltd., Hyundai Electronics America, INC., Counter-defendants: Daniel J. Furniss, Jordan Trent Jones, Theodore G. Brown, III, LEAD ATTORNEYS, Townsend and Townsend and Crew LLP, Palo Alto, CA; Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Kenneth Ryan O'Rourke, LEAD ATTORNEY, O'Melveny & Myers LLP, Los Angeles, CA; Patrick Lynch, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Susan Dana Roeder, LEAD ATTORNEY, Thelen Reid & Priest LLP, San Jose, CA; Geoffrey Hurndall Yost, Thelen Reid & Priest, LLP, San Francisco, CA; John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA.

For Hyundai Electronics U.K., Ltd, Hyundai Electronics Deutschland GmbH, Counter-defendants: Theodore G. Brown, III, LEAD ATTORNEY, Townsend and Townsend and Crew LLP, Palo Alto, CA; Geoffrey Hurndall Yost, Thelen Reid & Priest, LLP, San Francisco, CA; John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Kenneth Lee Nissly, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA.

For Rambus, Inc., Counter-claimant: Catherine Rajwani, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, Dallas, **[**7]** TX; Kelly Max Klaus, Sean Eskovitz, Lynn Healey Scaduto, LEAD ATTORNEYS, Steven McCall Perry, Munger, Tolles & Olson LLP, Los Angeles, CA; Kevin S. Kudlac, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges LLP, Austin, TX; Scott W. Hejny, LEAD ATTORNEY, Dallas, TX; Thomas N Tarnay, V. Bryan Medlock, LEAD ATTORNEYS, Sidley Austin LLP, Dallas, TX; William Hans Baumgartner, Jr., LEAD ATTORNEY, Sidley Austin LLP, Chicago, IL; Carolyn Hoecker Luedtke, Peter A. Detre, Rosemarie Theresa Ring, Esq., Munger, Tolles & Olson LLP, San Francisco, CA; Craig N. Tolliver, Pierre J. Hubert, McKool Smith, Austin, TX; John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Gregory P. Stone, Munger Tolles & Olson, Los Angeles, CA.

For Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd, Hynix Semiconductor Deutschland GmbH, Counter-defendants: Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Kenneth Ryan O'Rourke, Patrick Lynch, Susan Gregory van Keulen, LEAD ATTORNEYS, O'Melveny & Myers LLP, Los Angeles, CA; Patrick Lynch, LEAD

ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Theodore G. Brown, III, LEAD ATTORNEY, **[**8]** Townsend and Townsend and Crew LLP, Palo Alto, CA; Geoffrey Hurndall Yost, Thelen Reid & Priest, LLP, San Francisco, CA; Jan Ellen Ellard, Jason Sheffield Angell, Orrick Herrington & Sutcliffe, LLP, Menlo Park, CA; Jared Bobrow, John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA; Linda Jane Brewer, Quinn Emanuel Urquhart Oliver & Hegdes, LLP, San Francisco, CA.

For Rambus, Inc., Counter-claimant: Catherine Rajwani, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, Dallas, TX; Gregory P. Stone, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA; Kelly Max Klaus, Sean Eskovitz, LEAD ATTORNEYS, Lynn Healey Scaduto, Steven McCall Perry, Munger, Tolles & Olson LLP, Los Angeles, CA; Scott W. Hejny, LEAD ATTORNEY, Dallas, TX; Thomas N Tarnay, V. Bryan Medlock, LEAD ATTORNEYS, Sidley Austin LLP, Dallas, TX; William Hans Baumgartner, Jr., LEAD ATTORNEY, Sidley Austin LLP, Chicago, IL; Carolyn Hoecker Luedtke, Peter A. Detre, Rosemarie Theresa Ring, Esq., Munger, Tolles & Olson LLP, San Francisco, CA; Craig N. Tolliver, Pierre J. Hubert, McKool Smith, Austin, TX; John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA.

For Hynix Semiconductor Inc., Hynix Semiconductor America **[**9]** Inc., Counter-defendants: Kenneth Lee Nissly, LEAD ATTORNEY, Tomomi Katherine Harkey, O'Melveny & Myers LLP, Menlo Park, CA; Kenneth Ryan O'Rourke, Susan Gregory van Keulen, O'Melveny & Myers LLP, Los Angeles, CA; Patrick Lynch, LEAD ATTORNEY, O'Melveny & Myers, Los Angeles, CA; Theodore G. Brown, III, LEAD ATTORNEY, Townsend and Townsend and Crew LLP, Palo Alto, CA; Geoffrey Hurndall Yost, Thelen Reid & Priest, LLP, San Francisco, CA; Jan Ellen Ellard, Jason Sheffield Angell, Orrick Herrington & Sutcliffe, LLP, Menlo Park, CA; Jared Bobrow, John D Beynon, Weil, Gotshal & Manges LLP, Redwood Shores, CA.

Judges: RONALD M. WHYTE, United States District Judge.

Opinion by: RONALD M. WHYTE

Opinion

[*990] PHASE III (CONDUCT TRIAL) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This patent/antitrust litigation involves dynamic random access memory ("DRAM") interface technology patented by Rambus and incorporated into industry-standard DRAMs. The litigation involves four actions. In the first action (Case No. 00-20905 or "*Hynix I*"), Hynix [1] (then Hyundai Electronics Industries Co., Ltd. and its subsidiaries) sued Rambus for a declaratory judgment regarding various Rambus patents. The court divided the issues into three trial phases. The **[**10]** issue in the first phase concerned whether Rambus's patent infringement counterclaims were barred by the doctrine of unclean hands. On January 5, 2006 the court issued its Findings of Fact and Conclusions of Law on Unclean Hands in favor of Rambus. *Hynix Semiconductor Inc. v. Rambus Inc., 591 F. Supp. 2d 1038 (N.D. Cal. 2006)*. The second phase concerned Rambus's allegations that Hynix's DRAMs infringed several of its patents. On April 26, 2006 a jury returned a verdict that Rambus's patent claims were infringed and not invalid and that Rambus was entitled to $ 306,967,272 in damages. The court remitted the jury's award to $ 133,584,129, which Rambus accepted.

The third phase concerned Hynix's **[**11]** allegations that Rambus obtained its patents in violation of a disclosure obligation to members of the Joint Electron Device Engineering Council ("JEDEC"), a standards setting organization of which Rambus was a member. Hynix alleged that Rambus committed antitrust and related violations by

[1] By "Hynix," the court refers to the four entities sued by Rambus: Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., and Hynix Semiconductor Deutschland GmbH. The latter three entities are all wholly-owned subsidiaries of Hynix Semiconductor, Inc. *See* Docket No. 1649, C-00-20905-RMW, at 5, P 4 (N.D. Cal. Feb. 2, 2006). "Hynix" also includes Hynix Semiconductor Manufacturing America, a subsidiary named in the 05-00334 case but not the 00-20905 case.

attempting to assert its patent claims against manufacturers of DRAMs that complied with the JEDEC standard. Hynix also raised a number of defenses to its infringement based on this conduct. On March 26, 2008 a jury returned a verdict in favor of Rambus and against the Manufacturers on their legal claims. With these Findings of Fact and Conclusions of Law on the equitable claims and defenses, all issues in *Hynix I* have been resolved.

As mentioned, there are three other cases involving Rambus, DRAM manufacturers, and Rambus's conduct at JEDEC. The court and the parties identified the issues regarding Rambus's conduct common to these cases and *Hynix I* and the court consolidated those issues for trial. Thus, these findings and conclusions apply equally to these further cases as discussed below.

I. THE SCOPE OF THE CONSOLIDATED TRIAL PROCEEDINGS

These Findings of Fact and Conclusions of Law are made with **[**12]** respect to the non-jury claims and defenses asserted by the **[*991]** following entities: Hynix in cases C-00-20905 and C-05-00334; Nanya Technology Corp. and Nanya Technology Corp. U.S.A. ("Nanya") in case C-05-00334; and Micron Technology, Inc., and Micron Semiconductor Products, Inc. ("Micron") in case C-06-00244. The court refers to these entities collectively as "the Manufacturers." The court consolidated for trial the claims and defenses delineated in Attachments 1-3 and 5 of the parties' July 31, 2007 Joint Case Management Statement. [2] The trial, which the court and the parties refer to as "the Conduct Trial," involved the following claims and defenses:

A. Consolidated Issues From *Hynix I*

The *Hynix I* action commenced on August 29, 2000, when Hyundai Electronics Industries **[**13]** Co., Ltd. and Hyundai Electronics America sought a declaratory judgment of noninfringement, invalidity, and unenforceability with respect to the following Rambus patents: U.S. Patents Nos. 5,915,105, 5,953,263, 5,954,804, 5,995,443, 6,032,214, 6,032,215, 6,034,918, 6,035,365, 6,038,195, 6,067,592, and 6,101,152. [3] Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America amended their complaint on October 17, 2000 to add Hyundai Electronics U.K., Ltd. and Hyundai Electronics Deutschland GmbH as plaintiffs and to add antitrust and other claims against Rambus. In response, Rambus counterclaimed on February 5, 2001 for infringement of the patents listed above. Hynix filed a Second Amended Complaint on June 11, 2001, which added claims against Rambus for fraud and constructive fraud and reflected the intervening change in the names of the Hynix entities. On November 25, 2002, Rambus amended its counterclaim to add infringement of four additional Rambus patents: U.S. Patents Nos. 6,324,120, 6,378,020, 6,426,916, and 6,452,863. On December 16, 2002, Hynix answered the counterclaims and asserted various affirmative defenses.

As discussed, the court held a bench trial in 2005 on Hynix's unclean hands defense. Hynix contended that Rambus spoliated evidence resulting in prejudice to Hynix. The court rejected Hynix's allegations of unclean hands. In the second phase of trial, held in March and April 2006, Rambus elected to assert infringement of certain claims from the '105, '918, '120, '020, '916 and '863 patents. A jury found that the patents-in-suit were not invalid and infringed by Hynix's DDR SDRAM, GDDR SDRAM, DDR SGRAM, DDR2 SDRAM, GDDR2 SDRAM, DDR3 SDRAM, and GDDR3 SDRAM devices, and that a subset of those claims were also infringed by Hynix's SDRAM, SGRAM, and Handy SDRAM products.

As a result of the prior two trial phases and the court's rulings on Rambus's motions for summary adjudication, the following claims and defenses involving Hynix were left for trial in the consolidated Conduct Trial:

---

[2] The Samsung entities - Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., Samsung Semiconductor, Inc., and Samsung Austin Semiconductor, L.P. ("Samsung") - that are parties to Case No. C-05-00334 and C-05-02298 did not assert antitrust claims, did assert some claims that uniquely applied to them and did not make a jury demand. Therefore, the court tried the Samsung claims and defenses in a separate proceeding.

[3] Throughout this order, the court refers to specific **[**14]** patents by the patent's last three digits, i.e., U.S. Patent No. 5,915,105 is referred to as "the '105 patent."

Claim/Defense	Nature	Trier of Fact
First Claim For Relief	Monopolization (15 U.S.C. § 2)	Jury
Second Claim for Relief	Attempted Monopolization (15 U.S.C. § 2)	Jury
Third Claim For Relief	Unfair Competition (Cal. Bus. & Prof. Code § 17200)	Court
Eighth Claim For Relief	Actual Fraud	Jury
Fifth Affirmative Defense	Equitable Estoppel "relating to JEDEC [and] JEDEC's Disclosure Rules"	Court
Sixth Affirmative Defense	Equitable Estoppel based on Rambus's conduct during the course of its RDRAM relationship with Hynix	Court
Seventh Affirmative Defense	Waiver	Court
Ninth Affirmative Defense	Prosecution Laches	Court
Eleventh Affirmative Defense	Unclean Hands (not including spoliation)	Court

[*992]

B. [15] Consolidated Issues From Case No. 05-00334**

The '334 action commenced on January 25, 2005, when Rambus sued Hynix, Infineon, Nanya, and Inotera Memories, Inc. for infringement of the following Rambus patents: U.S. Patent Nos. 6,182,184, 6,260,097, 6,266,285, 6,314,051, 6,324,120, 6,378,020, 6,426,916, 6,452,863, 6,493,789, 6,496,897, 6,546,446, 6,564,281, 6,584,037, 6,697,295, 6,701,446, 6,715,020, 6,781,696, and 6,807,598. Inotera Memories, Inc. and Infineon were later dismissed from the case.

Rambus filed its First Amended Complaint on June 6, 2005, asserting the same patents as the original January 25, 2005 complaint, but adding the Samsung entities as defendants. Hynix answered the First Amended Complaint and counterclaimed on June 27, 2005. It filed a First Amended Answer and First Amended Counterclaims on February 22, 2007. Nanya answered the First Amended Complaint and counterclaimed on July 18, 2005. Nanya filed a First Amended Answer and First Amended Counterclaims on July 9, 2007. The Hynix and Nanya answers and counterclaims assert equitable defenses including prosecution laches, equitable estoppel, waiver, laches, and claims for declaratory judgment, monopolization, attempted **[**16]** monopolization, fraud, and unfair competition (*Cal. Bus. & Prof. Code § 17200*).

In response to Hynix and Nanya's answers and counterclaims, Rambus filed its answer and Counterclaims in Reply on July 9, 2007 and July 24, 2007 respectively. In these Counterclaims in Reply, Rambus added infringement claims against, *inter alia,* DDR3 SDRAM and GDDR4 SDRAM products. On July 30, 2007, Hynix replied to Rambus's Counterclaims in Reply and filed its own Counterclaims in Reply to the Counterclaims in Reply, alleging the same claims and defenses as its First Amended Answer and First Amended Counterclaims had alleged. Rambus replied to Hynix's Counterclaims in Reply on August 20, 2007. On December 21, 2007, Nanya replied to Rambus's Counterclaims in Reply and filed its own Counterclaims in Reply to the Counterclaims in Reply, alleging the same claims and defenses as its First Amended Answer and First Amended Counterclaims had alleged earlier. From these pleadings, the court consolidated for trial the following claims and defenses:

[*993] 1. Hynix's Claims and Defenses in C-05-00334

Hynix's claims and defenses from the '334 action that were tried in the Conduct Trial are:

Claim/Defense	Nature	Trier of Fact
First Counterclaim	Monopolization (15 U.S.C. § 2)	Jury
Second Counterclaim	Attempted Monopolization (15 U.S.C. § 2)	Jury
Third Counterclaim	Unfair Competition (Cal. Bus. & Prof. Code § 17200)	Court
Fourth Counterclaim	Fraud	Jury
Eighth Affirmative Defense	Prosecution Laches	Court
Ninth Affirmative Defense	Estoppel regarding JEDEC	Court
Tenth Affirmative Defense	Estoppel regarding "Other DRAM"	Court
Eleventh Affirmative Defense	Waiver	Court
Twelfth Affirmative Defense	Unclean Hands (not including spoliation)	Court
Thirteenth Affirmative Defense	Laches	Court

2. [**17] Nanya's Claims and Defenses

Nanya's claims and defenses from the '334 action that were tried in the Conduct Trial are:

Claim/Defense	Nature	Trier of Fact
First Counterclaim	Monopolization (15 U.S.C. § 2)	Jury
Second Counterclaim	Attempted Monopolization (15 U.S.C. § 2)	Jury
Third Counterclaim	Unfair Competition (Cal. Bus. & Prof. Code § 17200)	Court
Fourth Counterclaim	Fraud	Court [4]
Seventh Counterclaim	Declaratory Judgment of Unenforceability	Court
Eighth Affirmative Defense	Prosecution Laches	Court
Ninth Affirmative Defense	Estoppel regarding JEDEC	Court
Eleventh Affirmative Defense	Laches	Court
Twelfth Affirmative Defense	Equitable Estoppel	Court

---

[4] Rambus moved *in limine* to prelude presentation of the Manufacturers' fraud claims to a jury because, according to Rambus, the Manufacturers had no evidence that they had suffered damages as the result of the alleged fraud. The court found that Nanya had not offered any evidence of fraud damages but nevertheless let the fraud issue as to Nanya go to the jury for an advisory verdict. Sufficient evidence was offered to support a claim for fraud damages by Hynix and Micron. *Hynix Semiconductor Inc. v. Rambus, Inc., 527 F. Supp. 2d 1084 (N.D. Cal. 2007)*.

Claim/Defense	Nature	Trier of Fact
Thirteenth Affirmative Defense	Waiver	Court
Sixteenth Affirmative Defense	Patent Misuse	Court

[*994]

C. [**18] Consolidated Issues From Case No. 06-00244

The '244 action commenced on January 13, 2006, when Rambus sued Micron for patent infringement. Rambus then filed a Corrected First Amended Complaint on April 18, 2006 alleging infringement of the following Rambus patents: U.S. Patent Nos. 6,182,184, 6,260,097, 6,266,285, 6,314,051, 6,493,789, 6,496,897, 6,546,446, 6,564,281, 6,584,037, 6,697,295, 6,701,446, 6,715,020, 6,781,696, and 6,807,598. Micron answered the Corrected First Amended Complaint and alleged its own Counterclaims on June 2, 2006. It then filed a First Amended Answer and First Amended Counterclaims on May 30, 2007. Micron's answer and counterclaims include equitable defenses of prosecution laches, equitable estoppel, waiver, implied license, promissory estoppel, laches, and claims for declaratory judgment, monopolization, attempted monopolization, fraud, and unfair competition (*Cal. Bus. & Prof. Code §17200*) and fraud. In response to Micron's answers and counterclaims, Rambus filed its answer and Counterclaims in Reply on July 9, 2007. In these Counterclaims in Reply, Rambus added infringement claims against DDR3 SDRAM products. On December 3, 2007, Micron replied to Rambus's **[**19]** Counterclaims in Reply and filed its own Counterclaims in Reply to the Counterclaims in Reply, alleging the same claims and defenses as its First Amended Answer and First Amended Counterclaims had alleged. Rambus answered Micron's Counterclaims in Reply on December 26, 2007.

Micron's claims and defenses from the '244 action that were tried in this phase of the trial of this action are:

Claim/Defense	Nature	Trier of Fact
Fifteenth Counterclaim	Monopolization and Attempted Monopolization (15 U.S.C. § 2)	Jury
Eighteenth Counterclaim	Fraud	Jury
Twenty-first Counterclaim	Unfair Competition (Cal. Bus. & Prof. Code § 17200)	Court
First through Fourteenth Counterclaims	Declaratory Judgments of Unenforceability	Court
Ninth Affirmative Defense	Implied License	Court
Thirteenth Affirmative Defense	Equitable Estoppel	Court
Fourteenth Affirmative Defense	Waiver	Court
Sixteenth Affirmative Defense	Laches	Court

II. FINDINGS OF FACT

The focus of the Conduct Trial was on the disclosure obligation, if any, that Rambus had to JEDEC or its members with respect to possible patent coverage of any DRAM built in accordance with industry standards adopted by JEDEC. The court first makes findings of fact with respect to whether JEDEC members had an **[**20]** expectation that Rambus would disclose any intent it had to seek patent coverage of any standard being proposed at JEDEC. The **[*995]** court then sets forth its factual findings relevant to whether Rambus misled any of the Manufacturers by its conduct at JEDEC. Finally, the court makes findings relevant to whether Rambus misled any Manufacturer by its dealings with that Manufacturer.

A. 1991-1996: Rambus and its Involvement with JEDEC

1. Rambus was founded in 1990 by two professors, Dr. Michael Farmwald and Dr. Mark Horowitz, who had been working together to address the increasing gap between microprocessor performance and DRAM performance. Conduct Trial Transcript at 4079:8-4081:24, 4091:9-4095:10, 5489:23-5490:3 ("Tr. __").

2. On April 18, 1990, Drs. Farmwald and Horowitz filed a patent application, serial number 07/510,898 ("the '898 application") containing numerous claims relating to their efforts to solve this performance gap problem. Exh. 5131.

3. On April 16, 1991, Rambus filed an international patent application pursuant to the Patent Cooperation Treaty (the "PCT application"). Exh. 3583. The PCT application was published on October 31, 1991. The specification contained in the PCT application **[**21]** was identical to that contained in the '898 application and described, according to Rambus, the inventions that are at issue in Rambus's infringement claims. *Id.*

4. Rambus attended its first JEDEC meeting as a guest on December 4-5, 1991. Ex. 3001 at 2. Rambus attended its final JEDEC meeting in December 1995. Tr. 1288:5-9. Rambus formally resigned from JEDEC by letter in June of 1996. Tr. 960:24-961:4.

5. Hynix was found to infringe all the patents Rambus selected to assert in the *Hynix I* trial. None of those patents were applied for until well after Rambus had resigned from JEDEC. Those patents are:

Patent Number	Title	Date of Application	Date of Issue
5,915,105	Integrated Circuit I/O Using a High Performance Bus Interface	11/26/1997	06/22/1999
6,034,918	Method of operating a Memory Having a Variable Data Output Length and a Programmable Register	02/19/1999	03/07/2000
6,324,120 B2	Memory Device Having a Variable Data Output Length	02/08/2001	11/27/2001
6,378,020 B2	System Having Double Data Transfer Rate and Integrated Circuit Therefor	04/10/2000	04/23/2002
6,426,916 B2	Memory Device Having a Variable Data Output Length and a Programmable Register	02/27/2001	07/30/2002
6,452,863 B2	Method of Operating a Memory Device Having a Variable Data Input Length	02/27/2000	09/17/2002

[*996] 6. **[**22]** Rambus's patent infringement claims against Hynix, Nanya and Micron in the '334 and '244 cases have been consolidated for trial but trial has not yet occurred. Not one of the patents Rambus has selected for assertion in the consolidated proceeding was applied for until approximately three-and-one-half years after Rambus resigned from JEDEC. Those patents include the '120, '020, '916, and '863 listed above plus the following:

Patent Number	Title	Date of Application	Date of Issue
6,182,184	Method of Operating a Memory Device Having a Variable Data Input Length	02/22/2000	01/30/2001
6,266,285	Method of Operating a Memory Device Having Write Latency	05/08/2000	07/24/2001
6,314,051	Method of Operating a Memory Device Having Write Latency	07/31/2000	11/06/2001
6,546,446	Synchronous Memory Device Having Automatic Precharge	12/21/2001	04/08/2003
6,584,037	Memory Device Which Samples Data after an Amount of Time Transpires	02/04/2002	06/25/2003
6,751,696	Memory Device Having a Programmable Register	04/13/2001	06/15/2004

B. Background Regarding JEDEC

7. JEDEC is a standards development organization. It develops standards for semiconductor products, including DRAMs. Tr. 444:9-24.

8. JEDEC is a non-profit organization. It formerly existed **[**23]** as part of the Electronic Industry Association (EIA), but it is now an independent organization. Tr. 457:13-458:3; 619:5-621:18. While Rambus was a member of JEDEC, JEDEC operated as part of the EIA.

9. JEDEC has a board of directors. Below the board of directors, JEDEC has approximately 50 committees. *See* Tr. 457:21-460:13.

10. The DRAM standards relevant to this case were developed by one such committee, JC-42.3. *See* Tr. 539:1-11.

11. JEDEC's membership comprises numerous companies involved in industries related to semiconductors. It includes manufacturers like Hynix, Micron, Nanya and Samsung. It also includes users like HP, IBM, Intel and Sun. Tr. 446:5-446:25.

12. The JC-42.3 committee met about four to seven times a year. Meetings typically revolved around presentations made by committee members, which triggered discussions about the technology or feature that was the subject of the presentation. *See* Tr. 460:14-462:13. Meetings also included balloting during which members voted (2/3 majority required) on the contents of the standard being developed. Tr. 463:21-464:9.

13. JEDEC typically prepared minutes for all of its committee meetings. The minutes covered the "highlights" of activity **[**24]** at the meetings and are distributed to every member. Tr. 464:10-24. The minutes strived to reflect the "key decisions" and to "note presentations." *Id.* After a meeting, the minutes were distributed to every member. Tr. 464:21-24. A meeting's minutes were normally approved at the next committee meeting. *See, e.g.,* **[*997]** Ex. 3005 at 4 (agenda item immediately following introductions was corrections and approval of prior meeting minutes). The fidelity of the minutes is significant because on various topics the minutes disagree with the trial testimony of various witnesses. Given that approximately fifteen years have elapsed and the natural biases of many of the

witnesses, the court finds that the minutes are a more trustworthy source of evidence regarding what happened at JC-42.3's meetings than most of the witness testimony.

C. JEDEC's Patent Policy - JEDEC's Manuals

14. When asked whether JEDEC had a "big rule book," Desi Rhoden - a JEDEC board member and paid expert witness of the Manufacturers - responded, "Not really. Engineers wouldn't read it anyway, I suppose." Tr. 479:25-480:2. [5]

15. Nonetheless, a few manuals existed. When Rambus joined JEDEC in 1991, JEDEC Manual of Organization and Procedure 21-H was in effect. Tr. 595:22-596:5; Ex. 6769. Manual 21-H lacks any rules or guidelines regarding disclosure of patent rights. *See* Ex. 6769.

16. Thus, while Manual 21-H was in effect, any written patent policy applicable to JEDEC trickled down from EIA's rules. *See* Tr. 620:8-622:9. For example, at Richard Crisp's first JEDEC meeting, the minutes reflect that JC-42.3 chairman Jim Townsend presented "the EIA patent policies." Ex. 3002 at 5; Tr. 1039:8-1040:6. The "patent policy," section 3.4 of the EIA Style Manual from August 1990, shown to the attendees was:

> Avoid requirements in EIA standards that call for the exclusive use of a patented item or process. No program standardization shall refer to a patented item or process unless **[**26]** all of the technical information covered by the patent is known to the formulating committee or working group, and the committee chairman has received a written expression from the patent holder that one of the following conditions prevails:
> (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing this standard, or
> (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.
>
> Ex. 3002 at 28; *see* Tr. 1040:7-1041:15.

17. The EIA patent policy shown at the February 1992 JC-42.3 meeting says nothing about patent applications. It says nothing about a member's intentions to file for patent coverage. It is unclear whether or how it imposes a duty on members of JEDEC to disclose issued patents, but it does require JEDEC not to include patented items or processes in a standard unless certain licensing conditions pertain.

[*998] 18. At the September 1993 JC-42.3 meeting, the attendees saw a different patent policy presented. Tr. 506:10-507:16; 509:10-510:6; Ex. 3214 at 10. This "EIA/JEDEC PATENT POLICY SUMMARY" read as follows:

> Standards that call for **[**27]** the use of a patented item or process may not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent *or pending patent* is known to the committee, subcommittee, or working group. In addition, the committee Chairperson must have received written notice from the patent holder *or applicant* that one of the following conditions prevails:
> (1) a license shall be made available without charge to applicants desiring to utilize the patent for the purpose of implementing this standard(s), or
> (2) a license shall be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination
>
> Ex. 3214 at 12 (emphasis added to note substantive changes); see Tr. 509:10-15. At page 3 of the minutes, this attachment is described as "the policies." Ex. 3214 at 3. On the actual attachment, the policy is clearly

---

[5] On cross-examination, Mr. Rhoden wavered, testifying that JEDEC's patent policy was "written down." Tr. 627:25-628:20. **[**25]** Mr. Rhoden then backed off, suggesting he believed that he understood JEDEC's patent policy more as something that was explained at meetings to the engineers present. *Id.* 628:22-25. Incidents like this one, and other conflicts in his testimony described below, as well as an obvious pro-JEDEC, anti-Rambus bias, undermined Mr. Rhoden's credibility.

marked "JEDEC Manual No. 21-I (Draft 3.1)." Ex. 3214 at 12. It also states "This material is a proposed revision of Std. 21-H and has not been approved by JEDEC." *Id.*

19. Unlike the EIA policies previously shown at JC-42.3 meetings, this policy mentions patent applications but still does not mention "intentions" **[**28]** to file patent applications. The policy remains focused on the work of the committee and whether it may approve standards including patented technology. The policy does not clearly explain any disclosure mechanism.

20. The "final" version of Manual 21-I contains language that is much more detailed than the draft summary shown in September 1993. The version of Manual 21-I in evidence contains three provisions touching on patent disclosure, section 9.3, 9.3.1, and 9.3.2. *See* Ex. 3215, 19-20; Tr. 517:14-22 (admitting exhibit 3215).

21. The pertinent portion of section 9.3, titled "Reference to Patented Products in EIA Standards," reads as follows:

> EIA and JEDEC standard and nonproduct registration (e.g., package outline drawings) that require the use of patented items should be considered with great care. While there is no restriction against drafting a proposed standard in terms that include the use of a patented item ** if technical reasons justify the inclusion, committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all the relevant technical information covered by the patent is known to the formulating committee [sic] **[**29]** subcommittee, or working group. If the committee determines that the standard requires the use of patented items, then the committee chairperson must receive a written assurance from the organization holding the rights to such patents that a license will be made available without compensation to applicants desiring to implement the standard, or written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free if any unfair discrimination.
> . . .
>
> ** For the purpose of this policy, the word "patented" also includes items and **[*999]** processes for which a patent has been applied and may be pending.

22. The pertinent portion of section 9.3.1, titled "Committee Responsibility Concerning Intellectual Property," reads as follows:

> The Chairperson of any JEDEC committee, subcommittee, or working group must call to the attention of all those present the requirements contained in the EIA Legal Guides, and call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking. Appendix E (Legal Guidelines Summary) **[**30]** provides copies of viewgraphs that should be used at the beginning of the meeting to satisfy this requirement. Additionally, all participants must be asked to read the statement on the back of each EIA Sign-in/Attendance Roster. . . .

23. Section 9.3.2, "Policy Statements on EIA/JEDEC Sign-in/Attendance Rosters," states that "[t]he policy statements reproduced on the reverse side of EIA/JEDEC Sign-in/Attendance Rosters shall become an integral part of all Committee and working group meetings' minutes, and a statement shall be included in the minutes indicating compliance with the foregoing policy."

24. Finally, Appendix E includes the sample viewgraph that was intended to convey the patent policies to committee meeting attendees. Ex. 3215 at 27. The sample viewgraph is substantially similar to the one shown at the September 1993 meeting and reproduced above in paragraph 18. The sample viewgraph does not mention section 9.3.1's "obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking."

25. It is not clear when or whether JEDEC Manual 21-I was approved. The admitted version **[**31]** of manual 21-I bears the date "October 1993." *See* Ex. 3215 at 1. Mr. Rhoden believed that the seals and appearance of the manual confirm that it was approved by JEDEC by October 1993. Tr. 767:4-768:1. On the other hand, testimony from John Kelly, the president of JEDEC and general counsel to EIA in 2001, suggested that manual 21-I was

never properly approved by the appropriate governing body. *See* Tr. 5168:24-5169:22l; Docket No. 3573 (Mar. 19, 2008) (lodged video testimony of John Kelly played at trial).

26. It is also not clear when or how JEDEC Manual 21-I was distributed to JEDEC members. Rambus's JEDEC representative Richard Crisp did not receive a copy of Manual 21-I until the middle of 1995, and he received it only after making a special request for "some rules" because "[he] was considering making a proposal for standardization." Tr. 1083:14-1084:8.

27. Putting aside whether Manual 21-I was ever officially approved, it appears to have guided JEDEC's activities throughout the remaining period of Rambus's attendance, at least in name. Tr. 771:13-772:5. For example, the minutes from the JC-42.3 committee meeting of September 1994 conclude with the prominent statement "THIS MEETING **[**32]** WAS CONDUCTED IN ACCORDANCE WITH EIA **[*1000]** LEGAL GUIDES AND THE JEDEC MANUAL OF ORGANIZATION AND PROCEDURE 21-I." Ex. 3005 at 13; Tr. 611:3-14; 1208:10-20 (admitting exhibit into evidence). On the other hand, the "patent policies" presented by the chairman, Jim Townsend, and included as attachment A to the minutes of the September 1994 meeting, continue to recite the EIA policy from 1990 discussed above and attached to the 1992 minutes. *See* Ex. 3005 at 14; Tr. 611:21-612:10. Attachment A does not include the viewgraph purportedly required by Manual 21-I. It does not mention an obligation by members to disclose anything.

28. Whichever official manual governed JEDEC's conduct, it is clear from the testimony of the secretary of JC-42 Kenneth McGhee and the manuals in evidence that no written policy ever required a JEDEC member to "reveal its intention . . . to file patent applications in the future." Docket No. 3551 (Mar. 17, 2008) (lodged video testimony of Kenneth McGhee played at trial).

D. JEDEC's Patent Policy - JEDEC's Sign-in Sheets

29. Mr. Rhoden also testified at length about the sign-in sheets used at JC-42.3 meetings. *See* Tr. 520:17-522:6; Ex. 3233. According to Mr. Rhoden, JEDEC's **[**33]** patent policies were "very important" and the sign-in sheets "ma[de] sure that nobody can forget it." Tr. 521:17-21. To that end, the sign-in sheet included on its backside language about JEDEC's patent policies. Tr. 521:23-522:6.

30. The sample sign-in sheet reproduces what, at first glance, appears to be section 9.3 of Manual 21-I. *Compare* Ex. 3233 at 2 *with* Ex. 3215 at 19. Upon inspection, an important difference emerges. The sample sign-in sheet refers only to a "patented item." It does not mention anything about features covered by pending applications. The sample sign-in sheet also lacks any language resembling section 9.3.1 of Manual 21-I. The sign-in sheet says nothing about any obligation to disclose any known patents or applications. It speaks only of using "great care" in considering whether to use a patented feature in a standard and of the obligation of the committee chairperson to ensure that no standard include a patented feature unless assurances have been made.

31. Notably, the sign-in sheet includes other reminders aimed at ensuring JEDEC's and its members' compliance with the antitrust laws. Among those provisions is the reminder that "the exchange of company information **[**34]** relating to future plans affecting the design, research and development, production, and distribution or marketing of products" is improper. Ex. 3233 at 2; *see* Tr. 623:8-627:24. From the evidence presented at trial, a JEDEC member did not have guidance and would probably not understand, at least from any information acquired from JEDEC, how a JEDEC member could safely comply with both (a) the purported duty requiring a member to disclose its "intentions" to file a patent application as advocated by the Manufacturers and (b) the duty *not* to disclose a company's future plans relating to the research and development of products given the intertwined nature **[*1001]** of conducting research and preparing a patent application.

32. By contrast to Mr. Rhoden's testimony that JEDEC's patent policies were "very important" and that the sign-in sheets were used to "make sure that nobody can forget it," Micron's Terry Lee (a JEDEC representative) explained the flaws in the sign-in process: "[T]he way the sign-in process worked is they would just pass around a stapled form and you'd check your name off, or you'd sign your name on. And if I was out of my seat at the time, I would

sign in. But sometimes you **[**35]** were out of the room talking or checking in or out of the hotel." Tr. 3169:10-22. This process explains why Mr. Lee "usually" but "not always" signed in at meetings. Tr. 3169:10-15. Based on Mr. Lee's testimony, it is doubtful that many JEDEC representatives read the EIA patent policy on the reverse side of the sign-in sheet or that it meaningfully informed their expectations.

E. JEDEC's Patent Policy - JEDEC's Ballots

33. In addition to sign-in sheets, Mr. Rhoden testified that JEDEC's ballots were "another expression of the importance that JEDEC placed upon disclosure of [intellectual property]." Tr. 524:1-4. The Manufacturers submitted a ballot from June 1992 as a sample of the "ballot form used at JEDEC at or about [1992]." *Id.* 522:12-523:3; Ex. 3613.

34. The Manufacturers did not submit ballot forms from the 1993-1996 period, leading the court to infer that JEDEC did not change the ballot forms with respect to patent disclosure during that time period.

35. The 1992 ballot form states: "If anyone receiving this ballot is aware of patents involving this ballot, please alert the committee accordingly during your voting response." Ex. 3613 at 2; Tr. 522:17-25. The ballot form does *not* **[**36]** state that anyone receiving the ballot must disclose patent applications or intentions to file applications of which the recipient is aware.

36. Rambus's JEDEC representatives received ballots instructing them to disclose such patents. Tr. 524:5-9.

37. When asked whether Rambus "actually voted in any of the elections that they . . .were presented ballots for," Mr. Rhoden testified: "Yes. They, they voted quite often, actually. I counted the ballots. That's how I know." Tr. 524:10-25. He further testified: "The chairman - the person that's actually doing the, the distribution of the ballots is the person that winds up counting them. So in this case, it was associated with SDRAM, and I was the one who actually counted the ballots. So, yes, I counted their ballots many times." *Id.*

38. To the extent Mr. Rhoden's testimony suggests that Rambus voted at more than one meeting, it is misleading. On the contrary, the unrebutted evidence of Rambus's voting record presented at trial is as follows. Rambus voted at only one meeting. Tr. 1003:23-1004:6. The ballots concerned four technologies that the committee was considering to be included in SDRAM. *Id.* Rambus's representative at the time, Richard **[**37]** Crisp, voted "no" as to each technology. *Id.;* Tr. 1154:23-25; Tr. 1383:12-18. The **[*1002]** technologies on the ballot included programmable CAS latency and programmable burst length. *See* Ex. 3613 at 3.

39. After Rambus voted "no," Hitachi's representative Farhad Tabrizi criticized Rambus for its vote. Tr. 1385:7-23 (Crisp); Tr. 3780:9-13 (Tabrizi). Mr. Tabrizi explained that his criticism was based on his opinion that Rambus's "no" vote was intended to delay the standardization of SDRAM. Tr. 3780:9-3782:16. While Mr. Tabrizi initially testified that he made this criticism privately, Tr. 3780:20-3781:1, his refreshed recollection was that he criticized Rambus in front of many other JEDEC members and that the rest of the committee agreed with his criticism of Rambus, Tr. 3782:8-16.

40. Following this incident, Mr. Crisp's superior Dave Mooring instructed him not to vote at JEDEC meetings. Rambus (through Mr. Crisp) never voted again. Tr. 1385:24-1386:9.

F. JEDEC's Patent Policy - Other Minutes' Records of the Patent Policy Presentations

41. As discussed above, the JC 42.3 committee meeting minutes from February 1992 attached EIA's policy referring to the use of features covered by issued patents. **[**38]** The September 1993 minutes attached a draft of the "policy summary" of Manual 21-I that suggested that standards should not include features covered by pending patents. The September 1994 minutes state that Manual 21-I governed the conduct of the meeting, but attached the old EIA guidelines that do not mention pending patents.

42. The minutes from the September 11, 1995 meeting include the familiar 1990 EIA policy (seen in the February 1992 and September 1994 minutes) regarding the use of features covered by issued patents. Ex. 3224 at 20; Tr. 1107-20-1109:5 (admitting the exhibit into evidence). The attachment of the "patent policy" does not include the 21-I viewgraph mentioning applications. The minutes include no other "patent policy."

43. The attachment from the September 1995 meeting lays out the following procedure:

- Show JEDEC Patent Policy at each Task Group and Committee meeting.
- Include JEDEC Policy in each committee's official minutes.
- Request Presentation Sponsors to state their Company's patent position.
- Continue to ask for ballot response forms to indicate patent position.
- Submit proposed ballot items known to have patents to EIA Legal Counsel.

- Review items identified **[**39]** as of potential patent interest at each meeting, and resolve patent status prior to (choose one):
  - A. Presentation
  - B. Approval to go to Ballot
  - C. Ballot Approval
  - D. Ballot Submission to Council
  - E. Ballot Approval by Council

Ex. 3224 at 20. An identical "procedure" appears in the attachment to the September 1994 minutes. *See* Ex. 3005 at 14.

44. This procedure - in use long after the purported adoption of Manual 21-I - "request[ed] *presentation sponsors* to state their Company's patent position." Such a requirement **[*1003]** accords well with principles of equitable estoppel - that a JEDEC member could rely on the assumption that if a sponsor advocated a particular standard the sponsor's company did not have and had not applied for patent coverage on the standard. A reasonable inference, however, is that members other than presentation sponsors were not expected to disclose any knowledge they possessed of patents, patent applications, or intentions to file patent applications anytime such materials related to the work of the committee. Also curious is the procedure's repeated reference to a need to "*continue* to ask for ballot response forms to indicate patent position." The sensible inference from this **[**40]** bullet point in the patent policy procedure is that members of JC-42.3 *repeatedly* failed to disclose patent positions on ballots, despite the wording on the ballots. Such repeated failure does not reconcile with Mr. Rhoden's belief that JEDEC members shared a broad disclosure expectation.

45. Before every JC-42.3 meeting, JEDEC held a plenary session for all of the JC-42 committees. Tr. 3839:16-25. At the December 9, 1996 JC-42 plenary session (i.e., shortly after Rambus's resignation), the combined committees went over the "EIA/JEDEC patent policies" and attached them. Ex. 8307 at 4; Tr. 3838:23-3839:4 (admitting pages 1, 4 and 10 of Ex. 8307). Page 10 of the minutes show the "patent policy." Tr. 3840:21-3841:3. The attached "patent policy" is an updated (1995) version of the EIA rule urging the committee to "avoid requirements in EIA Standards that call for use of a patented item or process." Ex. 8307 at 10. No mention of patent applications appears in the attachment. *See id.* No mention of disclosure obligations appears in the attachment. *See id.* The same 5-step procedure discussed above also appears in the December 1996 plenary session minutes. *Id.*

46. In 1997 in correspondence between **[**41]** Hynix's Farhad Tabrizi and JEDEC, Mr. Tabrizi asked for "a copy of the JEDEC patent laws or part of the JEDEC bylaws that deals with patent and patent disclosure and licensing." Jim Townsend wrote back: "[T]hat is in every set of minutes- we shgow [sic] it at the plenary session each time. The exact p[aragraphs [sic] are cited and reproduced as part of the cover material." Ex. 6293; Tr. 3835:10-3838:5. Mr. Tabrizi understood Mr. Townsend to be telling him that if Mr. Tabrizi consulted the minutes, he would find the patent policy. Tr. 3838:2-5.

47. Minutes from other JC-42.3 meetings following the 21-I policy were authenticated, e.g., December 1994 (Ex. 3491), March 1995 (Ex. 3492), May 1995 (Ex. 3033), January 1996 (Ex. 3070), and March 1996 (Ex. 3080). Tr.

1301:17-1304:5. Most of these exhibits were never received into evidence, and the pages of the exhibits that were eventually received did not relate to patent policies.

G. JEDEC's Patent Policy - Patent Tracking List

48. A prominent feature of the committee's minutes was Jim Townsend's "patent tracking list." According to Desi Rhoden, the list kept track of everything "that has been disclosed **[*1004]** inside the committee so we can make appropriate **[**42]** decisions as we're moving forward on the standards." Tr. 471:21-473:13.

49. Jim Townsend introduced the patent tracking list at JC-42.3's meeting in December of 1991 (Rambus's first meeting). *See* Ex. 3003 at 11. The minutes reflect that Texas Instruments (TI) "asked what the purpose of the list was." *Id.* The minutes note the response: "The purpose was only to track and identify patented items of Committee proposals. Companies who hold patents identified can respond to Committee, *if they wish.*" *Id.* (emphasis added).

50. When confronted with the minutes' statement that members could respond to the patent tracking list "if they wish," Mr. Rhoden testified "well, they - they - perhaps the wording is not right. But they are required to disclose. They were required to disclose at this time. So the - they can respond if they wish, but it was - it's not optional." Tr. 637:17-22. Mr. Rhoden previously testified that the minutes reflect the "highlights" and "key decisions" of meetings. He conceded that no one corrected the minutes to reflect the "not optional" nature of patent disclosure in 1991. *Id.* 637:23-638:8.

51. The patent tracking list from the September 1993 meeting was admitted into evidence **[**43]** and discussed. *See* Tr. 471:13-474:22; Ex. 3005 at 16-18. The entries listed the "patent number," holder, subject matter or feature, the source of the information, and the committee whose work the patent involved. Ex. 3005 at 16-18. A portion of the September 1993 tracking list is reproduced below:

__Patent Issues to Track__

Patent Number	**Holder**	**Subject**	**Source**	**Status**
3,771,145	P. Weiner	ROM Addressing	Toshiba	JC42.3
7	AMD	Slew Rate-CTT	Ramtron	JC42.3
		Negative GTL	AT&T	JC16
Japan?	AMP	Small Outline SIMM	AMP	JC42.5
(3)	AMP	SIMM SOCKETS	AMP	JC42.5
4,851,834	DEC	3-Port VRAM	DEC	JC42.3
	Foxconn	card polarization	Foxconn	JC42.5
pending	Fujitsu	VSMP	Fujitsu	JC42.3
	Gould	ZIP-SIP	HP	JC42.5
4,811,299	Hitachi	WCBR	Hyundei	JC42.3
pending	Hitachi	ST-ZIP Package	Hitachi	JC42.5
Further Study	Hitachi?	Addressing with Redundant Address	IBM	JC42.3
4,928,265	Hitachi	SDRAM	Toshiba	JC42.3
5,083,296	Hitachi	SDRAM	Toshiba	JC42.3
4,984,214	IBM	Half SAM	IBM	JC42.3
pending	IBM	8 byte SIMM	IBM	JC42.5
	IBM?	BGA	Toshiba	JC42.3
5,126,975	IDTI	Burst Mode	Unisys	JC42.3

[*1005]

52. A few aspects of the list deserve attention. First, the entire list runs three pages and contains sixty entries. Three of the entries (all included in the excerpt shown above) are "pending," i.e., patent applications. In other words, the patent **[**44]** tracking list reflects that as of September 1993 there had been only three instances of a JEDEC representative disclosing a pending patent application that related to the work of the committee.

53. Approximately one-third of the entries on the list reflect a "source" that is different than the "holder." In other words, a substantial portion of the "patent issues to track" were not voluntarily disclosed but first raised by others. This explains why the patent tracking list was referred to as "the squealer's list" among the members of JC-42.3. Tr. 4707:17-4708:9 (testimony of Alan Grossmeier, Cray's JEDEC representative).

54. The last patent tracking list in evidence comes from JC 42's plenary session from December 1996. *See* Ex. 8307 at 11-12; Tr. 8341:4-17 (admitting pages 11 and 12). For comparison, the same portion of the list is reproduced below:

[*1006] Patent Issues to Track

Patent Number	**Holder**	**Subject**	**Source**	**Status**
1,771,145	P. Weiner	ROM Addressing	Toshiba	JC42.1
	AMD	Slew Rate-CTT	Ramtron	JC42.3
		Negative GTL	AT&T	JC16
5,383,792	AMP	SO SIMM Socket	AMP	JC42.5
431	AMP	SIMM SOCKETS	AMP	JC42.5
4,649,372	AT&T	EDO		JC42.3
4,851,834	DEC	3-Port VRAM	DEC	JC42.3
	Foxconn	card polarization	Foxconn	JC42.5
pending	Fujitsu	VSMP	Fujitsu	JC42.1
	Gould	ZIP-SIP	HP	JC42.5
4,811,299	Hitachi	WCBR	Hyundai	JC42.3
pending	Hitachi	ST-ZIP Package	Hitachi	JC42.5
Further Study	Hitachi?	Addressing with Redundant Address	IBM	JC42.3
4,928,265	Hitachi	SDRAM	Toshiba	JC42.3
5,083,296	Hitachi	SDRAM	Toshiba	JC42.3
5,396,102	Hitachi	DRAM offset on SIMM		JC42.3
pending	Hitachi	SSTL	Hitachi	16/42.3
4,984,214	IBM	Half SAM	IBM	JC42.3
pending	IBM	8 byte SIMM	IBM	JC42.5
	IBM?	BGA	Toshiba	JC42.3
	IBM	FPM/MDO/SD DIMM COMPAC	Micron	JC42.3
5,513,135	IBM	SDRAM DIMM	IBM	JC42.3
5,126,975	IDTI	Burst Mode	Unisys	JC42.3

55. **[**45]** The list is notable for its similarities. The three previously disclosed "pending" patent applications remain pending, over three years later. The Hitachi matter that required "further study" in September of 1993 continued to require "further study" at the end of 1996.

56. In total, the tracking list as of December 1996 comprised 84 entries. In addition to three prior "pending" disclosures (all of which remained "pending"), the list identified two further disclosures of "pending" applications related to a feature.

57. In other words, over the span of two years (implying at least eight meetings of JC-42), the committee had identified 24 new patent issues to track, or approximately 3 per meeting. At each meeting of JC 42's various committees, Desi Rhoden believed that "fifty or one hundred [presentations] would not be **[*1007]** uncommon." Tr. 463:6-11. Based on Mr. Rhoden's approximation and the two patent tracking lists, the court estimates that roughly (and generously) 1 in 15 presentations about a feature or technology at JEDEC also included a disclosure of a "patent issue." *Compare with* Tr. 552:2-22 (Rhoden testimony about how disclosures happened at presentations).

58. The December 1996 list **[**46]** reflects no disclosures of Hyundai (now Hynix) intellectual property. The list reflects two disclosures of Micron intellectual property, both of which were on the September 1993 list. The list reflects no disclosures of VLSI (Desi Rhoden's employer) intellectual property. In other words, trial witnesses Farhad Tabrizi, Terry Lee, and Desi Rhoden made no disclosures of their companies' intellectual property between 1993 and 1996.

59. In its June 1996 resignation letter, Rambus identified a number of patents. JEDEC did not add any of those patents to the December 1996 patent tracking list. *Compare* Ex. 3120 at 2 *with* Ex. 8307 at 11-12.

60. As seen on both of the patent tracking list excerpts reproduced above, Toshiba suggested by September of 1993 that IBM might have intellectual property rights to "BGA" or "ball grid array." This confrontation produced substantial testimony at trial about how the patent tracking list and any JEDEC disclosure duty functioned in practice, *e.g.,* Tr. 644:14-654:5.

61. Following Toshiba's disclosure, IBM's representative, Gordon Kelley, responded regarding the BGA feature with an August 31, 1993 fax to JC-42.3 chairman Jim Townsend and JC-42.3 secretary Ken **[**47]** McGhee. *See* Ex. 6092. The subject of the fax was "BGA Patent/License Rights" and read:

> Jim: IBM Intellectual Property Law attorney's [sic] have informed me that we will not use JEDEC as a forum for discussing this subject. It is the responsibility of the producer to evaluate the subject and to workout [sic] the proper use of rights. So, I can not confirm or deny any [intellectual property law] rights,
> Gordon Kelley
> IBM Member JC-42.3

62. Mr. Kelley testified that he believed that his response complied with his understanding of any disclosure duty. He explained that he further investigated the subject of whether IBM had patents to ball grid arrays, and his investigation uncovered 5,000 (five thousand) such patents held by IBM and relating to ball grid arrays. He "looked at the first 200 to 300 of those patents" and determined that those patents did not apply to the standard under consideration and that he told this to the JC-42.3 committee following the fax. Tr. 3605:12-3608:9; *see also* Docket No. 3508 (lodged Kelley video testimony).

63. The December 1993 JC-42.3 meeting also involved "lots of patent issues" (related to TI) and more involvement by Gordon Kelley. Tr. 654:6-656:5. The minutes **[**48]** state that "[a]s a side issue, IBM noted that in the future they will not come to the Committee with a list of applicable patents on standards proposals. It is up to the user of **[*1008]** the standard to discover which patents apply." Ex. 6098 at 8.

64. Mr. Rhoden testified that with both BGA and this December 1993 disclosure, Mr. Kelley actually said to the committee that IBM would not search their patent database. This did not bother Mr. Rhoden because he understood JEDEC's policy to be that if a member does not disclose a patent, that member could not enforce the patent against the standard. Thus, Mr. Rhoden felt that IBM's declination was "no harm, no foul." Tr. 656:6-658:4. Mr. Rhoden's testimony on this point is not credible because the actual documents - the minutes and the August fax - are inconsistent with the theory that IBM did not intend to assert its BGA, or other, patents. They are also inconsistent with Mr. Kelley's "promise" to the committee that he would "give you all of the information that I am aware of as the member for IBM, but I cannot promise to give you all of the tens of thousands of patents that are created annually by IBM Corporation." Docket No. 3508 (lodged Kelley **[**49]** video testimony).

65. Gordon Kelley also testified that he disclosed more patents and patent applications than ended up on the patent tracking list. *See* Tr. 3627:9-21. Mr. Kelley admitted that he made no effort to correct the minutes to reflect such

additional disclosures. *Id.* 3627:22-3628:9. To the extent Mr. Kelley did make disclosures on IBM's behalf that do not appear on the patent tracking list, it appears that Mr. Kelley would have made those disclosures in conflict with directions he received from IBM's lawyers. *See id.* 3628:10-3629:3. This might explain Mr. Kelley's failure to correct the minutes, but raises the possibility that JEDEC representatives like Mr. Kelley deliberately disobeyed their principals' instructions in favor of JEDEC. Furthermore, his testimony calls into question the accuracy of the minutes and their trustworthiness. In short, if the testimony is true, it implies that JEDEC's records are deliberately incomplete and that some JEDEC representatives acted in JEDEC's interests at the expense of their principals'. This is a plausible interpretation of the evidence, but the court is more inclined to believe that Mr. Kelley's memory about additional disclosures **[**50]** was incorrect, that the patent tracking list is accurate, and that JEDEC representatives like Mr. Kelley did not act at cross-purposes to their lawyers. The court therefore declines to credit the testimony that additional disclosures were made that were not reflected on the list.

66. Mr. Rhoden testified that the patent tracking list helped the committee "make appropriate decisions as we're moving forward on the standards." After a critical analysis of the patent tracking lists in evidence, how the lists were updated, and how many entries there are, the court draws three conclusions. First, if any disclosure duty within JEDEC was as broad as suggested, the patent tracking list should have been substantially longer. Second, the gaps and failures to follow up on "?" entries on the list suggest that JEDEC's members did not consider tracking patent issues to be terribly important. Third, the JEDEC disclosure duty advocated by the Manufacturers could not **[*1009]** have possibly accomplished the purported goal of creating an "open standard" because the alleged duty was limited to the knowledge (and potential willful ignorance) of JEDEC's member representatives. Because it would have been ineffectual, **[**51]** it is less likely the disclosure duty advocated by the Manufacturers existed.

H. JC-42.3 Committee Members' Expectations and Recollections

67. Desi Rhoden testified that his understanding of JEDEC's patent disclosure policy was: "JEDEC members are required to disclose anything in the patent process for which they have knowledge that's relevant to or involving work for JEDEC." Tr. 481:15-19; *see id.* 473:4-13; 510:7-22. He believed such disclosures had to be made "as early as possible whenever presentations are made." *Id.* 552:23-553:8. He summarized it as "early and often" and testified that disclosures had to be repeated. *Id.* 553:9-13.

68. Richard Crisp, Rambus's representative, believed that he should disclose any patents or pending patents that he thought related to a feature if he proposed that feature, but that he also had the impression that any disclosure was voluntary. Tr. 1368:7-13; 1400:12-1401:16.

69. Richard Crisp's contemporaneous documents from his time as a JEDEC representative support the prevailing confusion about the scope of any duty. *See* Tr. 1057:22-1059:22; Ex. 3030. Exhibit 3030, an email of Mr. Crisp's reporting on a December 1992 JEDEC meeting, indicated that a patent **[**52]** lawyer from Bronson, Bronson, & McKinnon had come to speak to the committee and that the lawyer was unclear on what JEDEC required its members to disclose and that it would be "inadvisable" to require the disclosure of patent applications. Ex. 3030.

70. Alan Grossmeier was Cray's representative at JC-42.3 meetings from 1989 through 2000. Tr. 4704:14-4705:3. There was no indication that Mr. Grossmeier was biased in favor of either Rambus or the Manufacturers. On the other hand, Mr. Grossmeier conceded that "patent issues were not necessarily the priority for [him]" and that others at JEDEC were more interested in the requirements of the patent policy. *Id.* 4710:8-15. Taken as a whole, the court found Mr. Grossmeier's testimony credible.

71. Mr. Grossmeier recalled Jim Townsend's presentations differently than Desi Rhoden: "Typically he would flash these slides, usually not long enough to read them. He would just kind of, these are the JEDEC patent policy and don't worry about reading them. They will be in the minutes. He would flash the, the first couple slides and then he had a tracking list of, it was humorously referred to as the squealer's list, basically." *Id.* 4707:9-20.

72. Mr. Grossmeier **[**53]** recalled that Mr. Townsend presented EIA's patent policy and that JEDEC was governed by EIA's patent policy. Tr. 4708:18-4709:1. He did not recall "any formal documentation" of the patent policies and "[his] interpretation was based more on how the committee members themselves handled it." *Id.* 4709:2-11.

[*1010] 73. Mr. Grossmeier believed that JEDEC required sponsors presenting features to disclose patents and that the rules were otherwise vague about disclosing issued patents. Tr. 4709:12-4709:25. He was adamant that patent applications did *not* have to be disclosed. *Id.* 4710:1-7 ("They were not. They were not. No, I did not expect that someone would [disclose applications].").

74. Gordon Kelley of IBM testified that he understood the JEDEC disclosure duty to require members to disclose patents and patent applications of which the member was aware that would be required for use of the patented feature. Tr. 3602:13-3603:3. He felt the need to be clear though that any duty was limited to the JEDEC representative's personal knowledge; he was not willing "to crawl through 5,000 patents" held by IBM. Docket No. 3508 (Mar. 11, 2008) (lodged video testimony of Gordon Kelley); Tr. 3620:12-16.

75. The **[**54]** Manufacturers also presented expert testimony from Graham Allan, an engineer who attended JC-42.3 meetings and was "very active" in setting the SDRAM, DDR, and DDR2 standards. Tr. 2578:10-2580:22. Mr. Allan represented Mosaid, a "third party designer" that does not build DRAMs; rather, Mosaid designs memory schematics for other people. *See id.* 2578:4-9; 2578:15-2579:1. Despite Mr. Allan's intimate involvement with JEDEC, the Manufacturers explicitly declined to ask him about his expectations and understanding of any disclosure duties. *See id.* 2581:12-21. Although the Manufacturers had their reasons for not asking Mr. Allan such questions, the court infers that had Mr. Allan testified on this topic, his testimony would not have supported the broad disclosure duty urged by the Manufacturers. [6]

76. Hynix's JEDEC representative, Farhad Tabrizi, testified that his understanding of the JEDEC disclosure duty was: "The policy was you have to disclose anything that you know about your intention of patent, patent application, your intention of filing. If you don't disclose, you cannot collect later." Tr. 3722:25-3724:1. Squaring Mr. Tabrizi's testimony about his memory of the disclosure duty with his 1997 email **[**56]** requesting copies of "the JEDEC patent laws or part of the JEDEC bylaws that deals with patent and patent disclosure and licensing" **[*1011]** is somewhat difficult. Mr. Tabrizi's testimony supports a broad disclosure duty based on expectations, but his writing in 1997 suggested that he (a) did not know where to find JEDEC's rules regarding patent disclosure, and (b) believed that such rules would be written down. Further, his intense bias against Rambus may have colored his testimony.

77. Micron's JEDEC representative, Terry Lee, also testified about the JEDEC disclosure duty from 1994 to 1996. *See* Tr. 3242:17-3243:25. His testimony corroborated Mr. Grossmerier's that the committee chairman Jim Townsend would take a transparency and "stick one down on the overhead and say this is the patent policy." *Id.* 3243:12-18. He described Mr. Townsend as a "colorful character" and that sometimes people would ask him questions about the policy and "Jim would usually answer them." *Id.* 3243:15-21. Mr. Lee remembered the disclosure duty as: "a requirement to disclose any patents or patent pending that may relate to the work of the committee. And the committee had the responsibility to avoid the use of the patents **[**57]** in the standard. And in

---

[6] The Manufacturers took this approach to avoid opening the door to evidence about Micron's litigation with Mosaid in which Micron makes similar allegations that Mosaid breached JEDEC's disclosure duty by failing to disclose information about its patent portfolio. Tr. 2376:25-2378:20; 2381:16-22.

The Manufacturers argued in their new trial motion that such an inference cannot ethically be drawn because **[**55]** Mr. Allan's expert report suggests that he understood the disclosure obligation at JEDEC to extend to applications and the intent to file patent applications. The court disagrees, as stated in its denial of the new trial motion. *Hynix Semiconductor Inc. v. Rambus Inc.,* 2008 WL 2951341, *9-*10 (N.D. Cal. Jul. 24, 2008).

Neither Mr. Allan's report, nor the reason the Manufacturers did not question Mr. Allan, is in evidence. The court is left with evidence that someone with first hand knowledge about the disclosure policy was not asked about it. This permits the inference drawn by the court and the court sees no ethical problem in drawing that inference. However, it is not an inference on which the court places much weight in light of the testimony of Messrs. Crisp and Grossmeier.

the case that a patent was identified, then there was a requirement to provide what we called a rand licensing term, or whoever held the patent had to agree on a reasonable and non-discriminatory licensing term." *Id.* 3244:17-3245:1. In other words, Mr. Lee - a Micron witness - did not recall a duty to disclose intentions to file patent applications. He did, however, testify that he believed he had to disclose patent applications.

I. Rambus Did Not Breach Any Clearly Defined Disclosure Expectation

78. The evidence suggests that the scope of a JEDEC member's expectation of disclosure ranged from non-existent to astonishingly broad. The jury found that the JEDEC members did not share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications:

> <u>Disclosure expectations.</u> "Did JEDEC members share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard? No.
> Special Verdict Form P 45.

79. It does appear, however, that members **[**58]** at least expected those making sponsoring presentations to disclose any patents the sponsoring company had covering the advocated standard. The members may well have had a broader disclosure expectation. However, Mr. Rhoden's testimony suggesting that the applications Rambus had in prosecution during its membership should have been disclosed was equivocal and lacking in analysis. He testified that he believed certain applications should have been disclosed based on his reading of the claim language. Tr. 553:14-559:2. This analysis was cursory and turned on Mr. Rhoden's belief that the applications should have been disclosed because they "involved the work of JEDEC," a standard that has no clear definition or meaningful support. In any **[*1012]** event, Rambus's alleged conduct - failing to disclose intentions to seek patents and failing to disclose certain applications it had in prosecution (which were based on the same specification that was disclosed twice to JEDEC) - did not violate any clearly defined disclosure expectation. By the time it withdrew from JEDEC, Rambus had not filed a patent application claiming a standardized feature under consideration during its JEDEC membership.

J. Rambus's [59] Representations at JEDEC - The 1992 SDRAM Ballot**

The Manufacturers' also base their estoppel defense arising from JEDEC on the nature of the few statements Rambus actually made at JEDEC.

80. As discussed above, Rambus voted on one set of ballots involving SDRAM. The members of JC-42.3 were aware of Rambus's voting and publicly disapproved of Rambus's behavior because of their belief that Rambus was trying to stall the standardization of SDRAM.

81. In light of the narrow scope of the duty to disclose defined on the ballot, no reasonable person within JEDEC could interpret Rambus's ballots as a statement that Rambus would not seek intellectual property on matters related to the ballot.

K. Rambus's Representations at JEDEC - Richard Crisp's Head Shake

82. According to Mr. Rhoden, the JC-42.3 chairman Gordon Kelley asked Richard Crisp "if Rambus had any, any I.P. that related to any of the things that were present." Tr. 539:1-17. Mr. Rhoden testified that Mr. Crisp "just shook his head. He didn't say a word." Tr. 539:21. Mr. Rhoden testified that he personally witnessed this because he was in the room at the time. Tr. 540:4-5. Mr. Rhoden could not recall clearly when this occurred however. **[**60]** Tr. 538:14-19.

83. Mr. Crisp remembered the interaction differently. *See* Tr. 1138:21-1139:1. Mr. Crisp testified that "he asked me if I cared to comment." Mr. Crisp says that he declined to comment. Tr. 1138:21-1139:10. Mr. Crisp did this by shaking his head "no." Tr. 1140:7-14. Mr. Crisp also testified that no one followed up on his refusal to comment or complained that "not commenting" was forbidden. *Id.* 1347:5-1348:9.

84. Mr. Crisp sent contemporaneous emails from JEDEC meetings to other Rambus personnel. In an email he sent from this JEDEC meeting, Mr. Crisp wrote: "Siemens expressed concern over potential Rambus Patents covering 2 bank designs. Gordon Kelly [sic] of IBM asked me if we would comment which I declined." Ex. 3412; Tr. 1144:12-23 (admitting exhibit).

85. The portions of the JEDEC minutes from the meeting in evidence contain no mention of this discussion. *See* Tr. 1128:8-13; Ex. 3003, 1-2, 30-37. The court infers from the absence of evidence in the record that the minutes lack any record of this event.

86. The deposition testimony of Gordon Kelley accords with Mr. Crisp's version of events. *See* Docket No. 3568, 379:14-380:2 ("I remember that both Motorola and Rambus were **[**61]** represented at that meeting and did not comment on those patents.").

[*1013] 87. Of the two versions of the events, the court believes Mr. Crisp's. First, his story is confirmed by contemporaneous documentation that long pre-dated any litigation. Second, Mr. Crisp's testimony is corroborated by Mr. Kelley's. Third, Mr. Crisp's testimony was consistent with Rambus's policy of not commenting. Finally, Mr. Rhoden's testimony was contradicted by the contemporaneous documentation of events, suggesting that Mr. Rhoden's memory of these events (which took place about 15 years ago) has slipped.

88. The court therefore finds that when Rambus was asked to comment about patents related to 2-bank memory architecture (a feature not at issue in this case), Rambus declined to comment. The committee did not follow up on the issue, nor consider the issue worth following with its patent tracking lists.

89. Mr. Crisp's head shake could not have been reasonably construed as a statement that Rambus lacked any form of intellectual property on the 2-bank design, let alone a statement that Rambus lacked any form of intellectual property covering any other feature under consideration.

L. Rambus's Representations at JEDEC [62] - The '703 Patent**

90. Richard Crisp disclosed one Rambus patent to the JC-42.3 committee, U.S. Patent No. 5,423,703 (Exhibit 3219). The '703 patent has the same specification as all of the patents-in-suit. The claims-in-suit, however, were not even drafted while Rambus was a member of JEDEC.

91. The '703 patent was Rambus's first issued patent. Tr. 928:5-16. Mr. Crisp was proud of Rambus's first issued patent. *Id.* 1143:6-11. He was, however, later reprimanded by Rambus for disclosing a patent to JEDEC without authorization. *Id.* 1212:6-21.

92. Richard Crisp did not believe the patent related to JEDEC's work, but he disclosed it at the September 1993 JEDEC meeting. Tr. 928:22-931:24. Despite the patent's "unrelatedness" to the work of JEDEC, the '703 patent was placed on the patent tracking list and remained there until at least December of 1996. *See* Ex. 8307 at 11.

93. Nobody at the September 1993 JEDEC meeting followed up the '703 disclosure with questions about the patent, or the list of related applications listed on the patent. Tr. 1346:16-25.

94. Farhad Tabrizi, a Hitachi JEDEC representative and eventually Hynix's JEDEC representative, "looked at" the '703 patent but "did not analyze **[**63]** it." By "looked at," Mr. Tabrizi meant that he reviewed the first page, i.e., the abstract. *See* Tr. 3940:5-3941:12. The '703 patent was the only Rambus patent Farhad Tabrizi reviewed before the litigation began. *Id.* 3938:22-3939:8.

95. Mr. Crisp's disclosure of the '703 patent could have given JEDEC members the impression in 1993 that Rambus would disclose its issued patents. Rambus's later statements clarified this point. Whether or not Rambus disclosed issued patents, however, is not relevant, because the Manufacturers do **[*1014]** not accuse Rambus of failing to disclose an issued patent.

M. Rambus's Representations at JEDEC - Rambus's SyncLink Statement

96. In May 1995, a proposal for a different DRAM architecture - SyncLink or SLDRAM - was introduced at JEDEC. Tr. 1254:2-20. Because the SyncLink proposal resembled Rambus's RDRAM, [7] Rambus was asked whether it possessed patents related to SyncLink. *Id.* 1254:21-1255:16. Richard Crisp did not answer at that meeting, but instead consulted with his superiors at Rambus about how to answer. *Id.* The Manufacturers authenticated the minutes from this meeting through Mr. Crisp, but did not move the document into evidence during Mr. Crisp's examination. **[**64]** *Id.* 1302:20-23. The court infers from this that nothing in the minutes would bolster the Manufacturers' case.

97. Mr. Crisp prepared a response to the committee's concern with the help of Rambus's in-house counsel, Anthony Diepenbrock. Messrs. Crisp and Diepenbrock were concerned about equitable estoppel, and they prepared Rambus's response accordingly. Tr. 1256:9-1258:2. It bears noting that Mr. Diepenbrock was concerned about Rambus's attendance at JEDEC, and Rambus stopped attending JEDEC by the end of 1995 and formally resigned in 1996.

98. Accordingly, Mr. Crisp read a prepared statement at the September 1995 statement to address the committee's concerns about Rambus's intellectual property and SLDRAM. Tr. 1258:3-25; 1259:10-21. Rambus's statement to the committee, Exhibit 3090, was as follows:

> At the last JEDEC meeting it was noted that the subject of the Synclink DRAM proposal bears a strong resemblance to Rambus DRAMs and so I was asked to make a comment about the Rambus intellectual property **[**65]** position as it may relate to the Synclink proposal.
> The first Rambus patents were filed more than five years ago, with development starting years before. We have confirmed that the first Ramlink and Synclink committee meetings and draft proposals occurred years after Rambus began development.
> Today there is no finalized Synclink specification or DRAMs to analyze for potential infringement. Best case, it will be several years before they will exist. So to fully determine Synclink patent risk, this committee should look not just to Rambus but also internally.
> For example, we are aware of 13 US patents relating to SDRAMs which were issued to member companies of this committee. All were active participants in the SDRAM standardization process. Included in this list are Hitachi, Mitsubishi, Mosaid, Motorola, Oki, Samsung, TI, and Toshiba.
>
> Additionally, Synclink is being sponsored by an organization with a less stringent patent policy than JEDEC. Under the bylaws of the IEEE working groups, attendees represent themselves only, not their employers. Furthermore they are free to patent whatever they desire, and are not bound to relinquish **[*1015]** any of their rights to their patents by presenting their **[**66]** ideas for standardization.
> Therefore, we conclude that products defined by committees are not guaranteed to be free of patent encumberances [sic].
> At this time, Rambus elects to not make a specific comment on our intellectual property position relative to the Synclink proposal. Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee's consideration nor does it make any statement regarding potential infringement of Rambus intellectual property.

---

[7] "RDRAM" or "Rambus DRAM" refers to Rambus's proprietary memory architecture that it developed in the early 1990s and that competed with JEDEC's standards and SLDRAM throughout the 1990s.

> Ex. 3090. In addition to reading the statement, Mr. Crisp showed it on the overhead and provided a copy to be included in the minutes. Tr. 1265:2-10; *accord* Tr. 1392:6-1393:4; Ex. 3224 at 26 (including Mr. Crisp's statement as Attachment C to the September 1995 minutes).

99. The committee's response to Rambus's statement was less than enthusiastic. The chairman, Gordon Kelley, responded "I heard a lot of words, but I don't know if anything was said." Tr. 1265:11-15.

100. Construed in isolation, portions of Rambus's statement could be misleading, specifically the insinuation that JEDEC had stronger rules than IEEE. Taken as a whole, however, no reasonable JEDEC member could have been misled **[**67]** by this statement. The statement is replete with warnings, and ends with the most clear warning of all: "Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee's consideration nor does it make any statement regarding potential infringement of Rambus intellectual property."

101. Even were it reasonable to be misled by Mr. Crisp's statement, the JC-42.3 committee was not, as evidenced by chairman Gordon Kelley's skeptical and pointed response.

N. Rambus's Representations at JEDEC - Rambus's Resignation Letter and the Omitted Patent

102. Rambus sent its resignation letter to JEDEC on June 17, 1996. Tr. 1293:13-1294:1; Ex. 3120. The letter contained two substantive paragraphs:

> Recently at JEDEC meetings the subject of Rambus patents has been raised. Rambus plans to continue to license its proprietary technology on terms that are consistent with the business plan of Rambus, and those terms may not be consistent with the terms set by standards bodies, including JEDEC. A number of major companies are already licensees of Rambus technology. We trust you will understand that Rambus reserves all rights regarding its intellectual property. **[**68]** Rambus does, however, encourage companies to contact Dave Mooring of Rambus to discuss licensing terms and sign up as licensees.
> To the extent that anyone is interested in the patents of Rambus, I have enclosed a list of Rambus U.S. and foreign patents. Rambus has also applied for a number of additional patents in order to protect Rambus technology.
> Ex. 3120 at 1.

103. The resignation letter contains a number of explicit warnings to JEDEC and JEDEC's members. First, it emphasizes that Rambus's business model and licensing plan are not necessarily the same **[*1016]** as JEDEC's. Second, Rambus clarified that it "reserve[d] all rights regarding its intellectual property." While such a phrase is somewhat vague, it does communicate the position that Rambus did not believe it had waived any rights or intend to waive any rights. Third, it concluded with a clear statement that Rambus had a number of patent applications pending.

104. The letter also included a list of over twenty Rambus patents. Ex. 3120 at 2. The letter omitted one Rambus patent, the '327 patent, which issued on April 30, 1996. Tr. 1298:8-1299:5.

105. The omission was innocent. Rambus's outside patent attorney, Lester Vincent, generated **[**69]** the list of Rambus patents by doing a Lex Pat database search in March of 1996 when helping Richard Crisp prepare a draft of the resignation letter. *See* Tr. 1814:16-1817:9. Because the '327 patent issued after the database search but before Rambus sent the resignation letter, it was accidentally left off the list.

106. There is no evidence that any JEDEC member relied on the letter's list of Rambus's patents. The December 1996 tracking list does not include *any* of the patents disclosed in the letter. *See* Ex. 8307 at 11-12. No witness for any Manufacturer testified that they read or relied on Rambus's resignation letter.

O. Rambus's Representations at JEDEC - Reasons Not to Disclose Patent Applications

107. Rambus had a number of reasons for choosing not to disclose patent applications or its intentions to seek patents. Rambus's outside patent prosecutor, Lester Vincent, repeatedly advised Rambus to keep its patent applications confidential. Tr. 1634:5-8; 1707:21-1708:5. Mr. Vincent advised Rambus that disclosing its patent applications could lead others to file interferences and to give others a head start at designing around (or copying) Rambus's technology. *Id.* 1708:6-1711:6.

108. Mr. **[**70]** Vincent's advice to Rambus was the generic advice he gave to all of his clients. *Id.* 1711:7-13.

P. Rambus's Representations at JEDEC - Conclusions

109. Rambus made no affirmative representations that it had no intellectual property pertaining to the work of JEDEC. *See* Jury's Special Verdict PP 12, 19 and 26. Further, Rambus uttered no half-truths about its intellectual property coverage or potential coverage of products compliant with synchronous DRAM standards being considered by JEDEC. *Id.* at P 31. Consistent with the jury's finding, the court agrees that Rambus made no misrepresentations and uttered no deceptive half-truths to JEDEC and its members.

Q. 1993-2000: Rambus's Dealings with Hynix: The "Other DRAM" Clause

110. Rambus contacted Hynix about licensing Rambus's technology in 1993 and began negotiations. Tr. 1847:12-21. In December 1995, Dr. Kye Hwan Oh signed a license agreement with Rambus on behalf of Hynix (then Hyundai Electronics). **[*1017]** Tr. 1845:2-1846:24; Ex. 4028 (the license agreement).

111. While Rambus and Hynix were negotiating the license agreement, Hynix was a member of the SyncLink consortium, an organization of DRAM manufacturers seeking to develop a next-generation **[**71]** DRAM. Tr. 1857:22-1858:12. Rambus cautioned Hynix that a SyncLink DRAM might infringe Rambus's patents. *Id.* 1861:3-18.

112. The December 1995 agreement licensed Hynix to make Rambus's RDRAM. Tr. 1862:3-14. The agreement also licensed Hynix to make "Other DRAM," which the contract defined as: "each DRAM which incorporates part of the Rambus Interface Technology but is not Compatible with the Rambus Interface Specification." Ex. 4028 P 1.5. The license set a royalty rate of 2.5% for "Other DRAMs." *Id.* P 5.3(a)(ii).

113. Dr. Oh believed that "Other DRAM means SyncLink." Tr. 1862:24-1863:1; 1864:212-1865:19. He did not believe "Other DRAM" encompassed Hynix's JEDEC-standard SDRAM and did not intend to pay royalties to Rambus under the Other DRAM provision on Hynix's SDRAM sales. *See id.* 1863:11-18. [8] On the other hand, the clause was written without making a specific reference to SyncLink and former Rambus CEO Geoff Tate did not believe that Hynix ever told Rambus that the clause was "intended to apply only to a SyncLink device." *Id.* 3094:19-23. Mr. Tate understood the clause to be broader "[o]therwise we would have called it the SyncLink clause." *Id.* 3095:4-9.

114. The license lacked provisions dictating how the parties would decide whether an "Other DRAM" incorporates part of the Rambus Interface Technology such that Hynix would owe Rambus royalties on such a DRAM. *See generally* Ex. 4028. Rambus asked Dr. Oh whether Hynix would have paid 2.5% royalties on SyncLink DRAM sales without proof that "SyncLink infringed Rambus patents." Tr. 1908:16-1909:5. Dr. Oh's response was clear: "of course not." *Id.* 1909:5. Dr. Oh clearly affirmed again that Hynix would only have paid royalties under the Other DRAM clause if Rambus proved that the "Other DRAM" infringed a Rambus patent. *Id.* 1909:6-10; *see also* Docket No. 3578, 268:5-11, 15-17 (testimony of Hynix employee D.S. Chung that "I think that we would have refused to

---

[8] Min Kwon Yoo, the Hynix employee **[**72]** responsible for memory technical marketing and for negotiating with Rambus three years later in 1998, admitted that at that time "I myself didn't quite understand as to what 'Other DRAMs' was in reference to, so I asked the folks at Rambus about that, but didn't really get a straight answer." Docket No. 3322, 12:1-13:3; 43:2-43:8 (video testimony).

pay any royalty even if you had asked for that."); Tr. 5069:16-5070:6 (Hynix's refusals **[**73]** to admit that it would have paid royalties with respect to SDRAM and DDR SDRAM pursuant to the "Other DRAM" clause).

115. Mr. Tate's testimony suggested that Hynix perhaps should have paid even if Rambus did not have an issued patent, but he believed that "practically speaking" Rambus **[*1018]** would have to prove the "Other DRAM" infringed a patent. *Id.* 3095:22-3096:4.

116. Rambus did not possess issued patents that read on Hynix's SDRAM in 1995. The first patent Hynix was found by the jury to infringe issued on June 22, 1999.

117. Rambus never demanded royalties from Hynix for its SDRAM and DDR SDRAM sales under the "Other DRAM" clause. Tr. 3096:6-8. According to Mr. Tate, there was a "very small number of months, two or three months, where we had issued patents and the, this contract was in effect[.]" *Id.* 3096:21-23.

R. 1993-2000: Rambus's Dealings with Hynix: Negotiations About Amending the "Other DRAM" Provision

118. In April 1998, a dispute arose between Hynix and Rambus regarding whether Hynix was complying with the license and making its "best efforts" to manufacture and market Rambus's RDRAM memories. *See* Exs. 3226; 3228 (correspondence between Mr. Yoo and Deepak Mithani, Rambus's then-Director **[**74]** of Business Development).[9]

119. In June 1998, Hynix and Rambus met to discuss issues related to Hynix's efforts to develop and promote RDRAM. *See* Ex. 3229. In exchange for excusing Hynix's obligations with respect to RDRAM, Rambus proposed "removing the clause on 'Other DRAMs.'" *Id.*

120. July of 1998 saw further negotiations regarding the "Other DRAM" clause. Docket No. 3322, 44:8-11; 53:16-54:1. At a meeting on July 6, Hynix shared its product roadmap with Rambus and revealed its intentions and timeline for developing and selling SDRAM, DDR SDRAM, Rambus's concurrent RDRAM and SyncLink (or "SLDRAM"). *Id.* 60:9-61:15; Ex. 3238. Following the meeting, Rambus responded with another proposal for modifying the "Other DRAM" clause. *Id.* 74:22-75:5; Ex. 3156.

121. Rambus's letter proposed amending the agreement's royalty rate provision for "Other DRAMs" to read "an 'Other DRAM Product' means a particular type of Other DRAM (e.g., if otherwise within the definition of Other DRAM, each of a SDRAM, DDR SDRAM, and SLDRAM would be a separate Other Dram [sic] Product, **[**75]** regardless of density). The royalty rate for each Other DRAM Product shall be negotiated separately by the parties upon Hyundai's first Sale of that Other DRAM Product[.]" Ex. 3156 at 2. Notwithstanding the timing of the proposal, Mr. Yoo testified that there was "none whatsoever" discussion of SDRAM, DDR, or SLDRAM being "Other DRAM" at the July 6 meeting. Docket No. 3322, 76:6-76:10.

122. Hynix responded to the proposed changes to the "Other DRAM clause" and found them "difficult to accept." Ex. 3239. Hynix explained that under Rambus's proposal, if a dispute arose as to whether a Hynix DRAM incorporated "Rambus Interface Technology" **[*1019]** (and thus would be an "Other DRAM" under the license), Hynix would "always bear the burden to prove that it has not made use of the Rambus Interface Technology in every future DRAM product developed by itself if Rambus should simply assert [Hynix's] use of Rambus Interface Technology." *Id.* at 1-2. Hynix believed that "[n]o one will treat this language as fair or consistent with the License Agreement." *Id.* at 2.

123. Hynix further explained that it believed Rambus had been hesitant to grant the Other DRAM clause, and that "SLDRAM, DDR SDRAM, and Synchronous **[**76]** DRAMs might be counted as Other DRAMs from the perspective of Rambus." *Id.* at 2; *accord* Tr. 3094:6-13 (former Rambus CEO Geoff Tate testified that the "Other

---

[9] Various trial exhibits corresponding to documents used in Mr. Yoo's depositions were admitted into evidence. *See* Tr. 2177:5-2179:8.

DRAM" clause "was a concession that we made very reluctantly"). The following lines are significant, but their meaning is unclear: "Undoubtedly, [Hynix] has been, and will be, willing and ready to protect Rambus' valuable intellectual properties developed with huge amount of money and time invested. Nonetheless, please be reminded that Rambus already withdrew from its initial position that it eventually granted [Hynix] the license that Rambus Interface Technology could be incorporated by [Hynix] into the competitive DRAM products, including, but not limited to, SLDRAM, DDR and Synchronous DRAMs, as well, subject to [Hynix] paying running royalties calculated at the rate of 2.5%. We believe that [Hynix] shall not be required to concede any more in terms of the running royalty rates applicable to Other DRAMs." *Id.* It is not clear what the middle line means. One interpretation is that Hynix is conceding that SDRAM and DDR SDRAM are covered and should be subject to a 2.5% royalty, and no more. Another interpretation is that Hynix **[**77]** is reminding Rambus that Rambus withdrew its contention that SDRAM and DDR SDRAM were "Other DRAMs."

124. That aside, Mr. Yoo stated that by the time Hynix saw Rambus's July 10 proposal and responded with its letter, Hynix knew that Rambus believed that SDRAM and DDR SDRAM used "Rambus Interface Technology" and that Rambus believed Hynix owed Rambus royalties under the "Other DRAM" clause. Docket No. 3322, 124:10-14; 124:17-126:25. Mr. Yoo responded that Hynix took no action, however, because Hynix did not believe that SDRAM and DDR SDRAM used "Rambus Interface Technology" and were not "Other DRAMs." *Id.* 127:1-5, 9-12. Mr. Yoo also expressed disappointment that Rambus had not shared this interpretation of the "Other DRAM" clause in 1997 when Hynix began work on those products because Hynix might then have "taken certain measures to do things differently." *Id.* 129:6-9; 129:12-130:5.

125. There is no evidence of how Rambus responded to Hynix's rejection of the proposed amendment to the "Other DRAM" clause. In August of 1999, Rambus internally considered looking into how much **[*1020]** it stood to gain if Hynix were to pay royalties under the "Other DRAM" clause for DDR SDRAM. Tr. 3636:19-3638:10; **[**78]** Ex. 3163. The tone of the Rambus email - Exhibit 3163 - suggests that Rambus did not believe Hynix would pay royalties on DDR SDRAM pursuant to the "Other DRAM" clause.

126. In 1999, Hynix (then Hyundai) merged with LG Electronics, which also had a license with Rambus. The resulting entity operated under LG's version of the license, and this version of the license lacked an "Other DRAM" clause. Tr. 3096:9-15.

S. 1993-2000: Rambus's Dealings with Hynix: Understanding of the Parties Regarding the Meaning of the "Other DRAM" Clause

127. The parties' decision to word the "Other DRAM" clause such that it was not explicitly limited to SyncLink, and Rambus's reluctance in granting the provision at all, suggest that Hynix in 1995 understood, or should have realized, that Rambus's intellectual property coverage might one day extend to SDRAM and other designs Hynix might pursue.

128. By 1998, Rambus and Hynix were both aware that the other side possessed a different understanding of the scope of "Rambus Interface Technology" and of the universe of products covered by the "Other DRAM" clause.

129. Hynix's unwillingness to pay royalties under the clause without proof of infringement was known to Rambus **[**79]** and explains Rambus's failure to press Hynix for royalties. Furthermore, Rambus's desire to encourage Hynix to produce RDRAM explains its unwillingness at the time to push Hynix on the "Other DRAM" clause.

130. Hynix was not misled about the possible scope of Rambus's patent portfolio by Rambus's failure to seek royalty payments. On the contrary, Hynix suspected that Rambus might have patent coverage of products like SDRAM in 1995 when it sought the expansive language in the "Other DRAM" clause and knew that Rambus believed it would have patents covering SDRAM and DDR SDRAM by the middle of 1998.

T. 1995-2000: Rambus's Dealings with Micron - The December 1995 Meeting

131. Terry Lee, Micron's JC-42.3 representative, first met with Rambus in December 1995 at Micron's facility in Boise. Tr. 3149:18-22; 3152:16-21. Mr. Lee, Gene Cloud (VP of marketing), Kevin Ryan, and Jeff Mailloux represented Micron at the meeting. *Id.* 3152:22-3153:2. The meeting was called to discuss an RDRAM license. *See id.* 3153:6-14. Rambus had contacted Micron to license it as an RDRAM manufacturer. *Id.* 3153: 6-10.

132. To prepare for the meeting, Mr. Lee downloaded information from Rambus's website because he "didn't **[**80]** know too much about Rambus." Tr. 3153:15-23. Mr. Lee also reviewed a collection of Rambus's patents' abstracts. Tr. 3153:24-3154:2.

133. Rambus presented its RDRAM technology to Micron at the meeting. **[*1021]** Tr. 3158:16-22. At no point did Rambus indicate anything about SDRAM. *Id.* 3158:23-3159:9. Rambus did not disclose whether or not it was seeking patents on SDRAM. *Id.* 3159:7-9.

134. The meeting ended with Micron declining to take an RDRAM license. *Id.* 3159:10-15.

U. 1995-2000: Rambus's Dealings with Micron - The December 1996 Meeting

135. Micron (represented by Mr. Lee, Kevin Ryan, Jeff Mailloux, and Gene Cloud) next met with Rambus and Intel in December 1996. Tr. 3159:16-3160:6. At this point, Rambus had resigned from JEDEC. Intel had announced that it had selected Rambus's RDRAM design as the next memory that would work with the chips Intel designed. *Id.* 3160:14-23. The purpose of the meeting was to license Micron to manufacture RDRAM. *Id.* 3161:4-21.

136. SDRAM was not discussed at the meeting. Tr. 3162:8-15.

137. Micron entered into an RDRAM license with Rambus around March of 1997. Tr. 3163:12-18.

V. 1995-2000: Rambus's Dealings with Micron - Rambus Did Not Mislead Micron

138. Rambus did not **[**81]** make any misrepresentations or utter any half-truths about the scope of its intellectual property during its RDRAM license negotiations with Micron. *See* Special Verdict Form PP 19, 31.

W. Nanya's Failed RDRAM Negotiations

139. Nanya Technology Corp. was formed around 1995. It founded its subsidiary, Nanya Technology Corp. USA, in 1997. *Id.* 2730:9-12. Nanya formed its American subsidiary to sell JEDEC-standard DRAMs. *Id.* 2741:3-23.

140. Rambus met with Ken Hurley (the founder of Nanya USA) in late 1998 to discuss an RDRAM license. Tr. 2749:13-2750:4. The negotiations lasted about a year. *Id.* 2750:10-2752:3.

141. At no point did Rambus advise Nanya that Rambus believed that its JEDEC-standard DRAMs were infringing Rambus patents. Tr. 2750:10-2752:3. However, Nanya only began selling some infringing SDRAM at the end of 1998. *Id.* 2752:3-23. It began selling DDR SDRAM "in the 2000 time frame." In other words, when Rambus first negotiated with Nanya, Nanya did not sell any infringing devices. As negotiations progressed, Nanya began to sell some infringing SDRAM. At no point in Nanya's negotiations with Rambus did Nanya sell infringing DDR SDRAM.

142. Mr. Hurley confirmed that during these negotiations, **[**82]** he was *not* told that Rambus's intellectual property was limited to RDRAM and he was *not* told what Rambus's intellectual property did cover. Tr. 2763:18-2764:3.

143. Mr. Hurley first learned that Rambus believed its patents covered SDRAM and DDR SDRAM when he read about Rambus's litigation against Hitachi in early 2000. Tr. 2765:9-2766:7. Despite **[*1022]** learning about this litigation in 2000, Mr. Hurley was not aware of any steps taken by Nanya (a) to determine if it needed a license from Rambus, and (b) to develop a non-infringing DRAM. *Id.* 2777:6-20.

144. Rambus sued Nanya alleging that Nanya's DDR2 SDRAM infringed Rambus's patents in January 2005. Rambus accused Nanya's SDRAM and DDR SDRAM of infringement in its counterclaims in reply in July 2007. Tr. 2754:23-2756:2.

145. Nanya did not rely to its detriment on any misrepresentation or concealment by Rambus of its patent coverage of SDRAM and DDR SDRAM or on the fact that Rambus delayed in instituting suit against Nanya. *See* Special Verdict Form PP 26, 31.

X. Jury's Findings from Conduct Trial Adopted by Court

146. The Conduct Trial commenced before a jury selected on January 31, 2008 and concluded on March 26, 2008 when the jury rendered its **[**83]** Special Verdict. The jury found in favor of Rambus on each of the Manufacturers' claims submitted to it. Special Verdict Form (Docket No. 3613, *Hynix Semiconductor, Inc. v. Rambus Inc.,* C-00-20905-RMW).

147. The jury found that the six technology markets alleged by the Manufacturers existed (latency technology market, burst length technology market, data acceleration technology market, clock synchronization technology market, precharge technology market, and write latency technology market) (*id.* at P 1) but that Rambus did not commit anticompetitive conduct in any of the six technology markets. *Id.* at P 8; *see also* P 4.

148. The jury also found that Rambus did not make important representations that it did not have any intellectual property pertaining to the work of JEDEC and intend or reasonably expect that the representations would be heard by or repeated to others including Hynix, Micron and Nanya. *Id.* at PP 12, 19, and 26.

149. In addition, the jury found that Rambus did not utter half-truths about its intellectual property coverage or potential coverage of products compliant with synchronous DRAM standards then being considered by JEDEC by disclosing some facts but failing to disclose **[**84]** other important facts, making the disclosure deceptive. *Id.* at P 31.

150. Finally, the jury found that JEDEC members did not share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard. *Id.* at P 45.

III. CONCLUSIONS OF LAW

A. The *Seventh Amendment* Requirement to Adopt Jury's Factual Findings

HN1[] The *Seventh Amendment* requires the court to apply the jury's "implicit [and] explicit factual determinations" when ruling on equitable claims that are "based on the same facts" as the legal claims tried to the jury. *Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1473 (9th* **[*1023]** *Cir. 1993)*. Because of the substantial factual overlap between the claims tried to the jury and the Manufacturers' equitable claims and defenses, the court therefore adopts the findings of the jury.

B. Unfair Competition (*Cal. Bus. & Prof. Code § 17200 et seq.*)

All three Manufacturers claim that Rambus engaged in unfair competition in violation of *California Business & Profession Code §17200*. ***HN2***[] That statute defines "unfair competition" as "any unlawful, unfair, **[**85]** or fraudulent business act or practice." *Cal. Bus. Prof. Code. §17200*. "[I]t establishes three varieties of unfair competition - acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. "Although the unfair competition law is broadly written to permit courts to restrain dishonest or unfair business dealings, the scope of the law is not unlimited. 'Courts may not simply impose their own notions of the day as to what is fair or unfair.'" *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 938, 134 Cal. Rptr. 2d 101 (2003)* (quoting *Cel-Tech, 20 Cal 4th at 180*).

The Manufacturers described their *§ 17200* claims in the Joint Case Management Conference Statement dated July 31, 2007. Hynix said: "Claim arises out of Rambus's anticompetitive conduct at JEDEC; the continuing exercise of its unlawful monopoly and deception outside of JEDEC; and Rambus's conduct arising out of the Rambus/Hynix RDRAM relationship." Attachment 1 to 7/31/07 PTC Stmt. Nanya similarly described the claim: "This claim arises, without limitation, out of Rambus's anticompetitive conduct at JEDEC; the continuing exercise of its unlawful monopoly **[**86]** and deception outside of JEDEC including its enforcement of patents known to be invalid; and Rambus's conduct during the course of its relationships with the DRAM manufacturers, and others."

Attachment 3 to 7/31/07 PTC Stmt. [10] Micron gave an essentially identical description: "This arises, without limitation, out of Rambus's anticompetitive conduct at JEDEC; and the continuing exercise of its unlawful monopoly and deception outside of JEDEC." Attachment 2 to 7/31/07 PTC Stmt.

To support their *§ 17200* claims, the Manufacturers focused on attempting to show that Rambus failed to disclose its intent to seek patent coverage of the DRAM standards being considered by JEDEC. The jury's findings defeat any claim by the Manufacturers that Rambus's conduct was "unlawful" or "fraudulent," specifically the findings: (1) that Rambus did not commit anticompetitive conduct in any of the six technology markets (Finding of Fact 147 ("FOF __")); (2) that Rambus did not make any misrepresenations about having intellectual **[**87]** property pertaining to the work of JEDEC (FOF 148); (3) that Rambus did not utter half-truths about its intellectual property coverage or potential coverage of products compliant with synchronous DRAM standards then being considered by JEDEC (FOF 149); and (4) that JEDEC members did not share a clearly defined expectation that members would disclose patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard. (FOF 150).

The Manufacturers, nonetheless, assert that the evidence showed that Rambus's **[*1024]** conduct was "unfair" and violated *§ 17200*. ***HN3***[] The California Supreme Court has set the standard for establishing a violation of *§ 17200* by an "unfair" act or practice.

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech., 20 Cal. 4th at 187. Since the jury **[**88]** found that Rambus's conduct was not anti-competitive and that JEDEC members did not have a clearly defined expectation of disclosure, Rambus's failure to disclose cannot be considered "unfair." Not only did Rambus not have an obligation to disclose pending or anticipated patent applicatioins, it had sound reasons for not doing so. As advised by counsel, Rambus understood that patent applications were confidential and that disclosure of the contents of an application before a patent actually issued exposed the applicant to various risks or claims. (FOF 107-08). In light of the jury's findings and the evidence presented, the court concludes that the Manufacturers failed to establish that Rambus violated *§ 17200* by its conduct before JEDEC.

The totality of the evidence concerning a disclosure duty showed that, as the jury found, there was no clearly understood agreement of JEDEC members to disclose patent applications or the intent to seek patents relevant to standards being discussed at JEDEC. The strongest evidence of such an obligation appears in section 9.3.1 of Manual 21-I dated "October 1993" which may or may not have been adopted and distributed. (FOF 18-28). Even if adopted and **[**89]** distributed, the purported obligation in Manual 21-I goes further than any contemporaneous

---

[10] Any claim by Nanya that the PTO issued patents to Rambus which Rambus knew were invalid but yet attempted to enforce was not included in the trial and reserved by Nanya for later resolution.

disclosure request or requirement recited in sign-in sheets (refer only to "patented item" (FOF 30; *see* 29-32)), printed on ballots ("if anyone receiving this ballot is aware of patents involving this ballot, please alert the committee accordingly during you voting response" (FOF 35; *see* 33-40)), or contained in the meeting minutes (FOF 41-47; *see, e.g.* FOF 43-44 which refers to disclosure by "presentation sponsors"). In any event, nothing ever required a JEDEC member to reveal an intent to file for a patent in the future. *See* *Rambus, Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1102 (Fed. Cir. 2003)* (holding on a similar record "that the record supports only the conclusion that a member's intentions to file or amend applications do not fall within the scope of JEDEC's disclosure duty.").

The testimony of JEDEC members concerning any disclosure obligations was varied and, in some cases, inconsistent, thus bolstering the conclusion that there was no clearly defined disclosure obligation at least with respect to a member's patent applications or intentions to file for patents in the future. *See, e.g.,* **[**90]** FOF 73 (Grossmeier); 75 (Tabrizi). The relatively modest length and static nature of the patent tracking list also suggests that JEDEC members were not generally disclosing patent applications or even making much effort to disclose their companies' relevant patents. The minutes of the December 1991 committee meeting, the first that Rambus attended and the meeting at which the tracking list was introduced, described the list's purpose: "The purpose was only to track and identify items of Committee proposals. Companies who hold patents identified can respond to Committee, *if they wish.*" FOF 49 (emphasis added). The subsequent development of the list seems consistent with this purpose and not with a broader disclosure obligation.

[*1025] At the time of its withdrawal from JEDEC, Rambus had not even applied for any of the patents-in-suit. *See* FOF 5-6. Accordingly, the court concludes that the Manufacturers are not entitled to recover on their unfair competition claims. *See also infra* § III-E (Equitable Estoppel).

C. Fraud

Nanya was the only Manufacturer whose fraud claim was tried to the court. Although the jury's verdict as to the fraud issues was only advisory as to Nanya, the court accepts the **[**91]** advisory verdict. The evidence did not support a finding of any material misrepresentation, half truths or fraudulent concealment by Rambus related to JEDEC upon which Nanya relied.

D. Prosecution Laches

The Manufacturers did not put on evidence relevant to their prosecution laches defenses. For example, the Manufacturers did not call either of their two disclosed expert witnesses (Gerald Mossinghoff and R. Polk Wagner) on prosecution laches. This absence led Rambus to move for judgment as a matter of law. Tr. 4066:3-8; Docket No. 3444 (Mar. 10, 2008). Following Rambus's motion, the Manufacturers indicated that they did not "intend to proceed with the prosecution laches part of the case." *Id.* 4511:4-12.

The only evidence related to Rambus's patent prosecution came from its patent attorney in the mid-nineties, Lester Vincent. Nothing in his testimony established that Rambus unduly delayed in prosecuting the claims in suit.

E. Equitable Estoppel

1. Elements of Equitable Estoppel

All the Manufacturers assert the doctrine of equitable estoppel as a bar to Rambus's claims for patent infringement.

> *HN4*[] Equitable estoppel, which bars a patentee from receiving relief, consists of three elements: (i) the **[**92]** patentee must communicate to the accused infringer (by words, conduct or silence) that the patentee will not pursue an infringement claim; (ii) the accused infringer must rely on that communication; and (iii) the

> accused infringer must establish that it would be materially prejudiced if the patentee is now permitted to proceed with the infringement claim.

B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1425 (Fed. Cir. 1997); *see* *A. C. Aukerman Co. v. R. L. Chaides Const. Co., 960 F.2d 1020 (Fed. Cir. 1992)*. Silence alone will not create an estoppel unless there is a clear duty to speak or somehow the patentee's continued silence reinforces the defendant's belief that the defendant will be unmolested. *Id. at 1043-44*; *see also* *Hemstreet v. Computer Entry Sys. Corp., 972 F.2d 1290, 1295 (Fed. Cir. 1992)* ("mere silence must be accompanied by some other factor which indicates that the silence was sufficiently misleading as to amount to bad faith"). Even if the three elements are met, the court must take into consideration all other evidence respecting the equities of the parties in exercising its discretion in deciding whether to allow the defense to bar the suit. *Id. at 1043*.

2. Burden [93] of Proof**

HN5[] Except where equitable estoppel is based solely upon intentional fraud, the burden of proof is the preponderance of evidence. "[W]hile the facts relied upon to establish equitable estoppel must be clear, positive, and unequivocal in their implication, these facts need not be established by any more than a fair preponderance of the evidence." *Aukerman Co., 960 F.2d at 1046*.

3. Equitable Estoppel Based Upon Rambus's Participation in JEDEC

All the Manufacturers assert that Rambus's words, conduct and silence in **[*1026]** connection with its participation in JEDEC communicated an intent by Rambus not to enforce the patents-in-suit. Although the Manufacturers did offer some evidence supporting an obligation by JEDEC members to make disclosures concerning their patents relevant to any standard being considered, the evidence was not persuasive that there was any understanding among members that they had to disclose pending patent applications or the intent to file such applications. The jury specifically found that JEDEC members did *not* share a clearly defined expectation that such disclosures would be made (FOF 150).

The recent case of *Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004 (Fed. Cir. 2008)* **[**94]** involved similar issues but is factually distinguishable in several critical ways. It held that Qualcomm had a duty to disclose the existence of patents it owned that "reasonably might be necessary" to practice the standard being considered by the standards setting organization of which it was a member. The court found that Qualcomm participated in the standard setting during the time the relevant standard was being considered despite Qualcomm's denials and affirmative attempts to conceal that participation. The court found that not only the written policies of the SSO required disclosure (*id. at 1012-15*) but that the understanding among the members required disclosure of patents that reasonably might be necessary to practice the standard. *Id. at 1015-17*. The court further found that Qualcomm's intentional nondisclosure in face of the duty to speak constituted an implied waiver of the right to assert infringement. *Id. at 1019-22*. It also suggested that such conduct would result in a defense of equitable estoppel, but did not remand the action for consideration of that defense since there had been an implied waiver.

The instant case is distinguishable from *Qualcomm* in the following material **[**95]** ways. First, the written JEDEC disclosure policies did not clearly require members to disclose information about patent applications and the intent to file applications in the future and there is no indication that members ever legally agreed to do so. FOF 14-77; *see* *Infineon, 318 F.3d at 1098*. In *Infineon,* a case involving similar claims against Rambus based upon its involvement with JEDEC, the court observed "there is a staggering lack of defining details in the EIA/JEDEC patent policy." *318 F.3d 1081, 1102 (Fed. Cir. 2003)*. Similarly, in *Rambus Inc. v. F.T.C., 380 U.S. App. D.C. 431, 522 F. 3d 456, 462 (D.C. Cir. 2008)*, the D.C. Circuit commented in reversing the Federal Trade Commission's finding that Rambus, as a member of JEDEC, had engaged in an unfair method of competition and unfair or deceptive acts or practices prohibited by § 5(a) of the FTC Act:

> We . . . conclude that the Commission failed to demonstrate that Rambus's conduct was exclusionary under settled principles of ***antitrust law***. Given that conclusion, we need not dwell very long on the substantiality of the evidence, which we address only to express our serious concerns about the breadth the Commission ascribed to JEDEC's disclosure policies **[**96]** and their relation to what Rambus did or did not disclose.

Id. at 462.

Second, the jury in this case expressly found that JEDEC members did not share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard. The evidence supported that finding (FOF 67-79).

Third, Qualcomm failed to disclose existing patents which it intentionally concealed. **[*1027]** The patent-at-issue in this case had not even been applied for during Rambus's membership in JEDEC. The only suggestion that other patents that Rambus had obtained or applied for might reasonably have been of interest to JEDEC came from Mr. Rhoden who was both vague and not convincing in his testimony on the subject (FOF 67, 82).

However, ***HN6***[] an estoppel may be found even though the party estopped did not actually intend to mislead or to defraud the other person. *See A.C. Aukerman Co., 960 F.2d at 1044, fn 18*. The Manufacturers assert that in addition to Rambus's knowledge that at least some members of JEDEC believed there was an obligation to disclose, Rambus was aware that JEDEC had taken adverse **[**97]** action against Wang and Texas Instruments for their failures to disclose. However, both those situations involved affirmative conduct at JEDEC and the failure to disclose relevant, issued patents and not mere silence about an intent to obtain future patents with particular coverage.

Rambus's involvement at JEDEC was primarily through Richard Crisp, Rambus's representative at JEDEC. Essentially, his only outward expressions of significance were his negative shake of his head at a May 1992 JEDEC meeting when Rambus was asked if it cared to comment on specific patent issues (FOF 82-89), his disclosure of the '703 patent in 1993 (FOF 90-95) and his reading of a letter dated September 12, 1995 at a JEDEC meeting concerning Rambus's refusal to comment on potential patent coverage of the SyncLink design (FOF 96-101). Mr. Crisp did not discuss non-public Rambus intellectual property at JEDEC, nor did he actively advocate adopting the standards JEDEC eventually adopted. Further, at the time Mr. Crisp attended his last meeting of JEDEC in late 1995 (Rambus officially withdrew in June 1996), Rambus did not have any patent application pending that covered a JEDEC standard and it was months before **[**98]** it did. (FOF 5-6).

The Manufacturers' suggestion that Rambus misled JEDEC's members when Mr. Crisp read the letter wherein Rambus responded to a question about Synclink, a type of DRAM being developed that bore a strong resemblance to Rambus DRAMs, is not persuasive. *See* Ex. 3090. In the letter Rambus noted that Synclink was being sponsored by an organization with a less stringent patent policy than JEDEC. *Id.* At the close of the letter Rambus stated that it "elects to not make a specific comment on our intellectual property position relative to the Synclink proposal. Our presence or silence at committee meetings does not constitute an endorsement of any proposal under the committee's consideration nor does it make any statement regarding potential infringement of Rambus intellectual property." *Id.* The Manufacturers suggest that this comment about Synclink implied that Rambus did not have intellectual property that covered standards that were being developed at JEDEC. Since Rambus was responding to a question raised specifically about Synclink, it is not reasonable to infer that Rambus was commenting beyond Synclink or that patents it might obtain in the future would cover DRAMs built **[**99]** in accordance with standards then being developed by JEDEC. Further, the last sentence of the letter is consistent with Rambus's policy of not commenting on potential infringement of Rambus's intellectual property.

4. Estoppel Based On the "Other DRAM" Clause in Hynix License

Hynix contends that Rambus's silence during its licensing negotiations with Rambus resulting in the December 1995 licensing agreement between Hynix and Rambus supports its asserted defense of **[*1028]** equitable estoppel. In particular, Hynix contends that Rambus's silence about the scope of its intellectual property in light of the inclusion of the "Other DRAM" clause in the agreement misled the company into believing that the "Other DRAM" clause would not require Hynix to pay royalties on SDRAMs or DDR SDRAMs incorporating Rambus's inventions and that Rambus should therefore be estopped from enforcing its patent rights against Hynix for these products. However, Hynix offered little more than a statement by its former Executive Vice President for Semiconductors, Dr. Kye-hwan Oh, that "Other DRAM means Synclink." (FOF 110-130). Although he insisted that Hynix understood that "Other DRAM" carried this specific meaning, Dr. **[**100]** Oh could not explain why the 1995 licensing agreement never refers to Synclink. His credibility on this issue was questionable. Moreover, Dr. Oh acknowledged that, at the time of the negotiations with Rambus, he was aware of Rambus's royalty-based business model and knew Rambus had 40 patent applications related to its technologies, that he had read about Rambus's inventions in the international and trade press, and that it was a common practice for companies seeking to protect their intellectual property to file broad applications. Although it may well be that Hynix did not appreciate the extent of Rambus's intellectual property at the time, its failure to appreciate the scope does not mean that Rambus communicated to Hynix that it would not pursue an infringement claim. Accordingly, Hynix has failed to establish the first element of its equitable estoppel claim by a preponderance of the evidence.

5. Estoppel Based on Conduct with Micron Outside of JEDEC

In their Proposed Findings of Fact and Conclusions of Law, the Manufacturers propose as Finding of Fact 194 that "Rambus's conduct and communications with Micron outside of JEDEC were also deceptive and misleading." However, they do **[**101]** not explain what particular conduct or communications were deceptive or misleading.

In December 1995 Rambus met with Micron and presented its RDRAM technology in the hope of being able to license that technology to Micron. No agreement was reached. There was no discussion concerning SDRAM and no reason for Rambus to discuss its patenting intentions with Micron. (FOF 131-134).

Micron next met with Rambus and Intel in December 1996. (FOF 135-137). At this point, Rambus had resigned from JEDEC and Intel had announced that it had selected Rambus's RDRAM design as the next memory that would work with the chips Intel designed. The purpose of the meeting was to license Micron to manufacture direct RDRAM. Micron entered into a license with Rambus around March of 1997. SDRAM was not discussed at the December 1996 meeting, and Rambus did not suggest that it had patent rights that extended to SDRAM.

Neither Rambus's conduct nor communications with Micron with respect to RDRAM was misleading nor did the relationship between them create any obligation on Rambus's part to disclose its intent to obtain patent coverage (FOF 138). Rambus is not estopped from asserting its infringement claims based upon **[**102]** any conduct toward or communications with Micron.

6. Estoppel Based on Conduct with Nanya Outside JEDEC

Nanya dropped any claim for equitable estoppel other than with respect to Rambus's conduct at JEDEC. Tr. 803:24-804:5.

[*1029] F. Waiver Defenses

1. Waiver Based Upon Participation in JEDEC

The Manufacturers contend that Rambus's "misleading omissions and unfair conduct as a whole" manifested a waiver of its right to sue for infringement. *See* Manu. Brf. Re: Clms. and Def. at 15. The Manufacturers focus on the same evidence as they do for their claim of equitable estoppel-- Rambus's participation in JEDEC and its failure to disclose its intent to obtain patents covering the JEDEC standard. Nanya asserts that Rambus's failure to file suit against it until 2005 further supports a finding of waiver, particularly in light of Rambus's failure to reveal its intent from 1998 to 2000 when Rambus unsuccessfully negotiated an RDRAM licensing agreement with Nanya. ***HN7***[] Although often discussed together, waiver and equitable estoppel are separate concepts with different requirements.

> Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden, **[**103]** moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver.

DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd., 30 Cal. App. 4th 54, 60, 35 Cal. Rptr. 2d 515 (1994).

Rambus's conduct at JEDEC, and specifically its alleged failure to comply with the alleged JEDEC disclosure policy, did not constitute a waiver of its rights to enforce its patents. The Manufacturers' evidence did not show clearly and convincingly, or even by a preponderance of the evidence, that Rambus's conduct at JEDEC manifested an intent to relinquish any right to sue for infringemnt of any patents it should later obtain. As the jury found, there was no clearly defined expectation that patent applications or anticipated applications would be disclosed. Rambus's refusal to comment on its intellectual property tends to negate any inference that its silence manifested an intent to relinquish. Moreover, the Manufacturers failed to establish that Rambus's conduct at JEDEC violated any "clear duty to speak" that might have implied a waiver. *See* *Kaha v. Allstate Ins. Co., 140 Cal. App. 4th 1023, 1034, 45 Cal. Rptr. 3d 92 (2006)*.

2. [**104] Nanya's Waiver Defense

Nanya's waiver defense focuses on the delay between the alleged abandonment of licensing negotiations between Rambus and Nanya for SDRAM in April 2001 (evidence of such negotiations is lacking) and April 2004 when Rambus contacted Nanya about infringement. An infringement suit was filed by Rambus against Nanya on January 25, 2005. Between April 2001 and April 2004 Nanya claims to have spent millions of dollars producing JEDEC compliant DRAM products. These facts do not establish that Rambus in any way intended to relinquish any patent rights. In fact, during that time Rambus was in, or had been in, litigation with other DRAM manufacturers which was public knowledge and illustrated that Rambus intended to pursue infringement claims. Also, many of the patents asserted against Nanya did not issue until after April 2001 thus showing Rambus filed suit within a short time after many of the patents issued. [11] Further, there is no evidence suggesting that Nanya would have done anything differently had it been sued in 2001 rather than 2005. Nanya's waiver defense lacks both evidentiary and legal support.

[*1030] G. Patent Misuse Defenses Asserted By Nanya and Micron

Nanya and Micron assert that Rambus's patent claims are not enforceable because Rambus engaged in patent misuse. The patent misuse defense in this consolidated proceeding appears to be based upon Rambus's alleged anticompetitive conduct in failing to disclose patent applications and intended applications to JEDEC and then asserting the patents after they issued. [12] ***HN8***[] Patent misuse "arises from the equitable doctrine of unclean hands, and relates generally to the use of patent rights to obtain or to coerce an unfair commercial advantage." *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998)*. "The key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent

---

[11] The latest patent-in-suit was U.S. Patent No. 6,751,696 issued June **[**105]** 15, 2004.

[12] Nanya's patent misuse defense base upon Rambus's alleged procurement of the patents-in-suit by fraud on the patent office was not tried in this phase of the lawsuit Rambus brought against Nanya and is reserved for later resolution.

grant with anticompetitive effect." *Id.* The Federal Circuit has cautioned that the defense not be read broadly to capture any generally-alleged "wrongful" use of patents. *Id. at 1373* ("Although the defense of patent misuse . . . evolved to protect against 'wrongful' use of patents, the catalog of practices labeled 'patent misuse' does not include a general notion **[**106]** of 'wrongful' use."). Rather, the defense is generally directed towards conduct that "affect[s] competition in unpatented goods or that otherwise extend[s] the economic effect beyond the scope of the patent grant." *Id.* Since Micron and Nanya base that their patent misuse defense on the same allegations as their antitrust and unfair competition claims and since those claims were not proved, the defense necessarily fails.

H. Micron's Claim of an Implied License

Micron alleges as a defense that it had an implied license to use Rambus's patents. This defense is asserted on the theory that Rambus either waived its right to assert the patents-in-suit or that it is equitably estopped from doing so. ***HN9***[] "In patent law, an implied license merely signifies a patentee's waiver of the statutory right to exclude others from making, using, or selling the patented invention." *Wang Labs., Inc. v. Mitsubishi Electronics America, Inc., 103 F.3d 1571, 1580 (Fed. Cir. 1997)*. An **[**107]** implied license can also arise from conduct that supports a finding of equitable estoppel. *Id. at 1580-2*. Since Micron failed to prove that Rambus either waived its right to enforce its patents or is estopped from attempting to enforce them, Micron cannot claim it has an implied license.

I. Laches

All of the Manufacturers assert the defense of laches. Nanya contends that Rambus unreasonably delayed in bringing suit against it following the termination of licensing negotiations between them. The only evidence of negotiations between Rambus and Nanya involved RDRAM and occurred in the late 1990's. However, what Nanya's papers appear to allege is unreasonable delay between April of 2001 (when there were purportedly negotiations for SDRAM and DDR SDRAM) and April of 2004.

> ***HN10***[] A defendant, in order to invoke the defense of laches, must prove: "(1) [that] the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its **[*1031]** claim against the defendant, and (2) [that] the delay operated to the prejudice or injury of the defendant." *A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1032 (Fed. Cir. 1992)* **[**108]** (en banc). A presumption of laches arises "upon proof that the patentee delayed filing suit for more than six years after actual or constructive knowledge of the defendant's alleged infringing activity." *Id. at 1035-36*.

Symantec Corp. v. Computer Associates Int'l, Inc., 522 F.3d 1279, 1294 (Fed. Cir. 2008).

Nanya's evidence fails to show that Rambus unreasonably delayed in bringing suit against Nanya. The earliest issue date of a patent selected by Rambus for assertion against Nanya is January 30, 2001 (the issue date of the '184 patent) and the latest is June 24, 2004 (the issue date of the '696 patent). Although calculation should probably be made from the date Rambus knew of its claim under the '696 patent, even if Rambus knew of its claim under the '184 patent the day it issued and if that is the beginning date for calculating laches, the delay in bringing suit was not unreasonable or inexcusable. *See* *Meyers v. Asics Corp., 974 F.2d 1304, 1307 (Fed. Cir. 1992)* (suggesting time runs from the latest issue date of the patents on which suit is brought). Further, Nanya made no showing of reliance to its prejudice on any statement or conduct of Rambus.

Hynix and Micron do not appear to be **[**109]** seriously pursuing laches as a separate defense. They offered no proposed Findings of Fact and Conclusions of Law directed to the defense. In the July 31, 2007 Joint Case Management Conference Statement Hynix said its defense is based upon "Rambus's deception of the industry as to the scope of its proprietary technology, including the conduct arising out of the Rambus/Hynix RDRAM relationship." July 31, 2007 Joint Case Management Conference Statement Attachment 1 at 2:24-27. Micron set forth its defense as "Rambus's failure to timely assert claims for patent infringement and its deception regarding its alleged proprietary technology." *Id.,* Attachment 2 at 5:20-25. The court believes that Hynix and Micron are just putting another label on their equitable estoppel defense that Rambus should be barred from suing for infringement for its allegedly misleading conduct concerning its patenting intentions during the time it was a member of JEDEC and during licensing negotiations. Neither Hynix nor Micron, to the extent either is relying on a laches defense, has explained or marshaled the evidence supporting the defense.

The Manufacturers' laches defenses fail.

J. Unenforceability and Unclean [110] Hands**

Finally, Hynix asserts a defense of unclean hands, distinct from Rambus's alleged spoliation, arising from Rambus's conduct discussed above. Micron and Nanya seek a declaratory judgment that Rambus's patents are unenforceable based on Rambus's conduct. In light of the jury's verdict and the court's findings, there is no basis for the unclean hands defense or unenforceability claim.

DATED: 3/3/2009

/s/ Ronald M. Whyte

RONALD M. WHYTE

United States District Judge

In re TFT-LCD Antitrust Litig.

United States District Court for the Northern District of California

March 3, 2009, Decided; March 3, 2009, Filed

No. M 07-1827 SI; MDL. No. 1827

Reporter

599 F. Supp. 2d 1179 *; 2009 U.S. Dist. LEXIS 23240 **

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Order Relates to: ALL CASES

Subsequent History: Motion denied by, Request denied by *In re TFT-LCD (Flat Panel) Antitrust Litig., 2009 U.S. Dist. LEXIS 132973 (N.D. Cal., Mar. 3, 2009)*

Prior History: *In re TFT-LCD Antitrust Litig., 2009 U.S. Dist. LEXIS 17792 (N.D. Cal., Mar. 3, 2009)*

Core Terms

purchaser, indirect, plaintiffs', unjust enrichment, defendants', motion to dismiss, allegations, antitrust, complaints, consolidated, conspiracy, antitrust claim, meetings, direct benefit, alleged conspiracy, price-fixing, conferred, anti trust law, federal law, harmonization, cases, amended complaint, lack standing, consumers, prices, antitrust statute, state law, Sherman Act, products, damages

LexisNexis® Headnotes

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

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

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

Dismissal of a complaint may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. On a motion to dismiss, the court accepts the facts alleged in the complaint as true.

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

HN2[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*. While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. The complaint must contain sufficient factual allegations to raise a right to relief above the speculative level.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] **Sherman Act, Claims**

In complex antitrust litigation, motive and intent play leading roles, and the proof is largely in the hands of the alleged conspirators.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] **Sherman Act, Claims**

With regard to an antitrust action, although the plaintiffs will need to provide evidence of each defendants' participation in any conspiracy, they only need to make allegations that plausibly suggest that each defendant participated in the alleged conspiracy.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Private Actions, Standing**

Virginia's harmonization statute broadly mandates: this chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions. *Va. Code Ann. § 59.1-9.17*. The Virginia Act specifically provides that it is to be interpreted and applied in harmony with federal ***antitrust law***. *Va. Code Ann. § 59.1-9.17*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6[] **Sherman Act, Claims**

The Supreme Court of Montana holds that sections of the Montana Unfair Trade Practices Act, *Mont. Code Ann. § 30-14-201 et seq.*, are modeled after the Sherman Act, and that where the statutes are similar, the court will give due weight to the federal courts' interpretation of the alleged antitrust violation. Montana law differs from the Sherman Act is some respects, such as the Sherman Act's requirement of two or more persons to be involved in an lawful restraint of trade, while one person acting alone may violate the Montana act.

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

HN7[] **Private Actions, Standing**

With regard to antitrust claims, the standing provision of the Montana statute allows any "person who is or will be injured" to sue for damages and injunctive relief. *Mont. Code Ann. § 30-14-222*. Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, allows any person who shall be injured to sue for damages and injunctive relief.

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

HN8[] **Private Actions, Standing**

P.R. Laws Ann. tit. 32, § 3342 states that there is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf of said merchants or consumers based on the Antitrust Act of the Commonwealth, *P.R. Laws Ann. tit. 10, §§ 257-274*.

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

HN9[] **Regulated Practices, Private Actions**

Mississippi's antitrust laws prohibit understandings or agreements to restrain trade, increase the price of a commodity, or hinder competition in the production, importation, or sale or purchase of a commodity. *Miss. Code Ann. § 75-21-1*.

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

HN10[] **Private Actions, Standing**

The Mississippi Antitrust Act requires some allegations of intrastate conduct.

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

HN11[] **Private Actions, Standing**

The Mississippi Antitrust Act should be construed to require allegations of at least some activity or conduct occurring in intrastate commerce or trade. Courts will dismiss a complaint with leave to amend where the plaintiffs failed to allege any activity of any kind -- sales, purchases, or other activities in trade or commerce.

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

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

HN12[] **Private Actions, Standing**

Nevada's ***antitrust law*** states that monopolization of trade or commerce in this state, including, without limitation, attempting to monopolize or otherwise combining or conspiring to monopolize trade or commerce in this state constitutes a contract, combination or conspiracy in restraint of trade, and it is unlawful to conduct any part of such activity in this state. *Nev. Rev. Stat. § 598A.060(1)(e)*.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN13[] **Equitable Relief, Quantum Meruit**

Under Michigan law, a party can bring an unjust enrichment claim against a defendant even in the absence of privity or a contract between the parties.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN14[] **Equitable Relief, Quantum Meruit**

With regard to a claim of unjust enrichment, whether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must show that his detriment and the defendant's benefit are related and flow from the challenged conduct.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN15[] **Equitable Relief, Quantum Meruit**

Under North Carolina law, in order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN16[] **Equitable Relief, Quantum Meruit**

The North Dakota Supreme Court holds that the doctrine of unjust enrichment is invoked when a person has and retains money or benefits which in justice and equity belong to another. For a complainant to recover, it is sufficient if another has, without justification, obtained a benefit at the direct expense of the complainant, who then has no legal means of retrieving it.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN17[] **Equitable Relief, Quantum Meruit**

With regard to a claim of unjust enrichment, a "direct benefit" is required under North Dakota law.

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

HN18[] **Regulated Practices, Private Actions**

Arkansas ***antitrust law*** only permits predatory pricing claims alleging that items were sold "at less than cost" and does not create a private right of action for an alleged conspiracy to raise prices. *Ark. Code Ann. § 4-75-310*.

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

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

HN19[] **Regulated Practices, Private Actions**

In jurisdictions which possess antitrust statutes conferring standing on indirect purchasers, an indirect purchaser may only bring a statutory claim for alleged anti-competitive behavior.

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

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

HN20[] **Regulated Practices, Private Actions**

Tennessee, Arizona, and Vermont all permit indirect purchasers to pursue antitrust claims; thus, an unjust enrichment claim will not circumvent the procedural and substantive limitations of these antitrust statutes.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN21[] **Equitable Relief, Quantum Meruit**

Under Tennessee law, a plaintiff must demonstrate that he or she has exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract. However, to maintain an action for unjust enrichment, a plaintiff is not required to exhaust all remedies against the party with whom the plaintiff is in privity if the pursuit of the remedies would be futile.

Counsel: **[**1]** For Fern M Smith, Special Master: Fern M. Smith, JAMS, San Francisco, CA.

For Judd Eliasoph, 06-7588, Plaintiff: Henry A. Cirillo, Judith A. Zahid, Matthew Rutledge Schultz, LEAD ATTORNEYS, Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, LEAD ATTORNEY, Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Joseph M. Alioto, LEAD ATTORNEY, Alioto Law Firm, INTRIM LEAD COUNSEL/INDIRECT PURCHASER CASES, San Francisco, CA; Bradley K Beasley, Boesche McDermott LLP, Tulsa, OK; Brendan Patrick Glackin, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Jo Nash, 06-7601, Plaintiff: Henry A. Cirillo, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Will Henderson, 06-7609, Plaintiff: Christopher L. Lebsock, Jon T. King, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, **[**2]** Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Bradley K Beasley, Boesche McDermott LLP, Tulsa, OK; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Henry Truong, 06-7639, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bradley K Beasley, Boesche McDermott LLP, Tulsa, OK; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Robert Kerson, 06-7678, Plaintiff: Joseph Marid Patane, LEAD ATTORNEY, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Russell, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.

For Karen Brock, 06-7679, Plaintiff: Lauren Clare Russell, LEAD ATTORNEY, Mario Nunzio Alioto, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.

For Arthur Sorokin, 06-7600, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Christopher L. Lebsock, Jon T. King, Hausfeld **[**3]** LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Amy Forlan, 06-7602, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, Hausfeld LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Stephanie Truong, 06-7640, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, LEAD ATTORNEY, Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Frederick Rozo, 06-7693, Plaintiff: Craig C. Corbitt, Henry A. Cirillo, LEAD ATTORNEYS, Christopher Thomas Micheletti, Francis Onofrei Scarpulla, Demetrius X. Lambrinos, Judith A. Zahid, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.

For Crago Corporation 06-7644, Plaintiff: Cadio R. Zirpoli, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Dan Owen, Shughart Thomson & Kilroy, P.C., Kansas City, MO; Patrick John Brady, Polsinelli Shughart, P.C., Kansas **[**4]** City, MO.

For John McKay, 07-1348, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN; Michael L. Roberts, Roberts Law Firm, Little Rock, AR; Richard Quintus, Roberts Law Firm, PA, Little Rock, AR.

For James Burt, 06-7831, Plaintiff: Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Christopher Thomas Micheletti, Craig C. Corbitt, Francis Onofrei Scarpulla, Demetrius X. Lambrinos, Judith A. Zahid, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Jeffrey Figone, 07-0042, Plaintiff: Mario Nunzio Alioto, LEAD ATTORNEY, Lauren Clare Russell, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Joseph Marid Patane, Law Office of Joseph M. Patane, San Francisco, CA; Sherman Kassof, Law Offices of Sherman Kassof, Lafayette, CA.

For Candace Rowlette, 07-0039, Michael Francis Ayers, 07-0039, Plaintiffs: Craig C. Corbitt, Henry A. Cirillo, LEAD ATTORNEYS, Christopher Thomas Micheletti, Francis Onofrei Scarpulla, Demetrius X. Lambrinos, **[**5]** Judith A. Zahid, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For Orion Home Systems LLC, 07-0045, Plaintiff: Guido Saveri, LEAD ATTORNEY, Cadio R. Zirpoli, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Randy R. Renick, Law Offices of Randy Renick, Pasadena, CA.

For Audio Video Artistry, 07-2325, Plaintiff: B. J. Wade, Glassman Edwards Wade & Wyatt, P. C., Memphis, TN.

For Nathan Muchnick, Inc., 07-2326, Plaintiff: H. Laddie Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Jeffrey Herrmann, Peter S. Pearlman, Cohn Lifland Pearlman Herrmann & Knopf LLP, Saddle Brook, NJ; Marc Howard Edelson, Edelson & Associates, LLC, Doylestown, PA.

For Richard A. Markham, 07-2327, Plaintiff: Allyn Z. Lite, LEAD ATTORNEY, Lite DePalma Greenberg & Rivas, LLC, Newark, NJ.

For Roberta Harrell, 07-2329, Plaintiff: Allyn Z. Lite, Bruce D. Greenberg, Jason Elliot Macias, LEAD ATTORNEYS, Lite DePalma Greenberg & Rivas, LLC, Newark, NJ; Benjamin F. Johns, Joseph G. Sauder, LEAD ATTORNEYS, Chimicles & Tikellis LLP, Haverford, PA

For Chris **[**6]** Ferencsik, 07-2357, Plaintiff: Daniel Hume, LEAD ATTORNEY, Beverly Tse, Kirby McInerney LLP, New York, NY.

For Gladys Baker, 07-2359, Jack Elbaz, 07-2358, Steven Nakash, 07-3074, Plaintiffs: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian LLP, New York, NY.

For Marshall Myers, 07-1232, Plaintiff: Stephen Michael Garcia, LEAD ATTORNEY, Garcia Law Firm, Long Beach, CA; Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For Phelps Technologies, Inc., 07-1231, Plaintiff: Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Patrick John Brady, Polsinelli Shughart, P.C., Kansas City, MO.

For Sara Cabezas, 07-0084, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, Hausfeld LLP, San Francisco, CA.

For CMP Consulting Services, Inc., 07-3071, Plaintiff: Richard Jo Kilsheimer, LEAD ATTORNEY, Laurence D. King, Linda Phyllis Nussbaum, Lori Sambol Brody, Robert N. Kaplan, Kaplan Fox & Kilsheimer LLP, New York, NY.

For Ajax Philadelphia, Inc., 07-3083, Plaintiff: Mindee J. Reuben, LEAD ATTORNEY, Weinstein Kitchenoff & Asher, LLC, Philadelphia, PA; David Haym Weinstein, Steven A. **[**7]** Asher, Weinstein Kitchenoff & Asher, Philadelphia, PA.

For Karen Stromberg, 07-1842, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Lynn Lincoln Sarko, Keller Rohrback L.L.P., Seattle, WA.

For Bart LLC, 7-1249, Plaintiff: Daniel C. Girard, Elizabeth Cheryl Pritzker, LEAD ATTORNEYS, Girard Gibbs LLP, San Francisco, CA.

For Michael Juetten, 07-0009, Plaintiff: Henry A. Cirillo LEAD ATTORNEY, Craig C. Corbitt, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.

For Arthur Goodelman, 07-1283, Plaintiff: Joseph Richard Saveri, Brendan Patrick Glackin, Eric B. Fastiff, Jordan S Elias, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Richard Martin Heimann, LEAD ATTORNEY, Lieff Cabraser Heimann & Bernstein, INTERIM LEAD COUNSEL, DIRECT PURCHASER CASES, San Francisco, CA; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA.

For Isaac Salem, 07-1364, Erin Drew, 07-1368, Plaintiffs: Aaron H. Darsky, Schubert & Reed LLP, San Francisco, CA; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY.

For Dr. Steven Martel, 06-7888, Plaintiff: Micha Star Liberty, LEAD ATTORNEY, Liberty **[**8]** Law Office, San Francisco, CA; Aaron H. Darsky, Schubert & Reed LLP, San Francisco, CA; Robert C. Schubert, Schubert Jonckheer Kolbe & Kralowec LLP, San Francisco, CA.

For Michael J. Eliav, 06-7931, Plaintiff: Kathleen Styles Rogers, LEAD ATTORNEY, Susan Gilah Kupfer, Sylvie K. Kern, Glancy Binkow & Goldberg LLP, San Francisco, CA.

For Albert Wong, 07-0889, Plaintiff: Terry Gross, Gross & Belsky LLP, San Francisco, CA.

For Royal Data Services, Inc. 7-1046, Plaintiff: Elizabeth R. Odette, W. Joseph Bruckner, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN.

For Jonathan Hee, 07-0722, Plaintiff: Jack Wing Lee, LEAD ATTORNEY, Minami Tamaki LLP, San Francisco, CA; Joseph M. Alioto, LEAD ATTORNEY, Angelina Alioto-Grace, Joseph Michelangelo Alioto, Jr, Theresa Driscoll Moore, Thomas P. Pier, Alioto Law Firm, San Francisco, CA; Ronald D. Foreman, Foreman & Brasso, San Francisco, CA.

For Byron Ho, 07-0708, Plaintiff: Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Derek G. Howard, Gilmur Roderick, Scott Justin Yundt, Murray, Murray & Howard, LLP, Oakland, CA; Larry Gabriel, **[**9]** Jenkins, Mulligan & Gabriel, San Francisco, CA.

For Home Technologies Bellevue LLC, 07-3215, Plaintiff: Anthony D. Shapiro, Steve W. Berman, LEAD ATTORNEYS, George W. Sampson, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Ronnie Seidel Spiegel, Hagens Berman Sobol Shapiro, Seattle, WA.

For Christopher Bessette, 07-2740, Plaintiff: Eric James Pickar, LEAD ATTORNEY, Bangs, McCullen, Butler, Foye & Simmons, L.L.P., Rapid City, SD; Gregory James Erlandson, LEAD ATTORNEY, Bangs McCullen Butler Foye & Simmons, Rapid City, SD; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Christopher Murphy, 07-2761, Plaintiff: Daniel D'Angelo, Kenneth George Gilman, LEAD ATTORNEYS, Gilman and Pastor, LLP, Boston, MA.

For Miles H Humphrey, 07-2759, Plaintiff: Thomas D. Kershaw, Jr., LEAD ATTORNEY, Twin Falls, ID; Ian Otto, Straus & Boies LLP, Fairfax, VA. Mark D. Stubbs, Matthew R. Howell, Fillmore Spencer LLC, Provo, UT; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Chad Hansen, 07-2760, Plaintiff: Clint L. Sargent, LEAD ATTORNEY, Danforth & Meierhenry, Sioux Falls, SD; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN.

For Flourine On Call, Ltd., 07-1096, Plaintiff: Brian **[**10]** S Umpierre, Robert S. Green, Green, Welling LLP, San Francisco, CA.

For FME Architecture + Design, 07-1344, Plaintiff: Josef D. Cooper, Cooper & Kirkham, P.C., San Francisco, CA.

For Joseph Kovacevich, 07-5372, Plaintiff: Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN; Robert J. Gralewski, Jr., Gergosian & Gralewski LLP, San Diego, CA.

For EMW, Inc., 07-2796, File Reply Memorandum Indirect Purchaser Leadership Proposal of Lingel H. Winters P.C., Plaintiff: Lingel Hart Winters, Lingel H. Winters, Esq., San Francisco, CA; Thomas V. Girardi, Girardi & Keese, Los Angeles, CA.

For Jeffrey L. Walters, 07-2891, Plaintiff: Steven Edward Grubb, LEAD ATTORNEY, Harrisburg, PA; Christine A. Williams, Edward J. Westlow, Durrette Bradshaw PLC, Richmond, VA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA; Richard Lyle Coffman, The Coffman Law Firm, Beaumont, TX; Wyatt B. Durrette, Jr., Durrette Bradshaw, Richmond, VA.

For Tabbatha Benson, 07-2892, Scott Friedson, 07-2892, Michelle Brooks, 07-2892, Joe Solo, 07-2892, Brittany Chung, 07-2892, Plaintiffs: Gordon Ball, LEAD ATTORNEY, Ball & Scott, Knoxville, TN.

For Robert George, **[**11]** 07-2911, Plaintiff: Daniel E. Gustafson, LEAD ATTORNEY, Brian L. Williams, Renae D. Steiner, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, Minneapolis, MN; Michael S. Montgomery, Montgomery, Goff & Bullis, Fargo, ND.

For Thomas P Mitt, 07-2912, Plaintiff: Douglas P. Dehler, LEAD ATTORNEY, Shepard Findelman Miller & Shah LLC, Milwaukee, WI; Natalie Finkelman Bennett, Nathan Zipperian, LEAD ATTORNEYS, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA;

For Michele Wojnowski, 07-1184, Plaintiff: Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Al Gober, 07-2913, Jeffrey Larson, 07-2914, Plaintiffs: Daniel E. Gustafson, Renae D. Steiner, LEAD ATTORNEYS, Brian L. Williams, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN.

For Susan Selfridge, 07-2915, Amiee Corlett, 07-2915, Plaintiffs: Dennis Stewart, LEAD ATTORNEY, Hulett Harper Stewart LLP, San Diego, CA.

For Tammy Long, 07-2916, Plaintiff: Grady F. Tollison, Jr., LeRoy Davis Percy, LEAD ATTORNEYS, Tollison Law Firm, P.A., Oxford, MS Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Judith Griffith, 07-2933, Plaintiff: Andrew A. Nickelhoff, LEAD ATTORNEY, Sachs Waldman, Detroit, MI; Ian Otto, Straus **[**12]** & Boies LLP, Fairfax, VA.

For Ling-Hung Jou, 07-2934, Plaintiff: S. Thomas Wienner, LEAD ATTORNEY, Wienner & Gould, P.C., Rochester, MI; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Christopher C Rywelski, 07-2935, Plaintiff: Barton Carl Gernander, J Robert Keena, LEAD ATTORNEYS, Hellmuth & Johnson, PLLC, Eden Prairie, MN; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Martha Mulvey, 07-2937, Plaintiff: Jordan M. Lewis, LEAD ATTORNEY, Siegel Brill Greupner Duffy & Foster, Minneapolis, MN ; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Robert Harmon, 07-2938, Plaintiff: Christopher D. Jennings, John G. Emerson, Scott E. Poynter, LEAD ATTORNEYS, Emerson Poynter LLP, Little Rock, AR.

For Timothy J. Lauricella, 07-2953, Plaintiff: Andrew S. Friedman, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint, P.C, Phoenix, AZ; David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; Francis Joseph Balint, Jr., Manfred Patrick Muecke, Bonnett Fairbourn Friedman & Balint, PC, Phoenix, AZ.

For Kou Srimoungchanh, 07-2954, Plaintiff: Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen, Bonner Springs, KS; **[**13]** Thomas H. Brill, LEAD ATTORNEY, Office of Thomas H. Brill, Mission Hills, KS.

For Peter Coyle, 07-2955, Plaintiff: Angela K. Drake, Lowther Johnson, Attorneys at Law, LLC, LEAD ATTORNEY, Springfield, MO; Michael L. Belancio, LEAD ATTORNEY, Bower Belancio LLC, Kansas City, MO; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Lee R. Chamberlain, 07-2956, Plaintiff: Chad A. McGowan, John Gressette Felder, Jr., LEAD ATTORNEYS, McGowan Hood Felder and Johnson, Rock Hill, SC.

For Oscar Cintron, 07-2957, Plaintiff: Jose R. Gonzalez-Nogueras, LEAD ATTORNEY, Jimenez Graffam & Lausell, San Juan, PR; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Custom Audio Video, 07-2958, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Faucher LLP, Philadelphia, PA.

For Benjamin G Northway, 07-3024, Plaintiff: Justin LaVan, LEAD ATTORNEY, LaMarca & Landry P.C., Des Moines, IA; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Allen Nassiff, 07-3025, Plaintiff: Mary Gilmore Kirkpatricxk, LEAD ATTORNEY, Kirkpatrick & Goldsborough, PLLC, South Burlington, VT.

For Kari J Nehring, 07-3026, Plaintiff: Daniel E. Gustafson, LEAD ATTORNEY, Gustafson gluek PLLC, Minneapolis, MN; Jason Kilene, LEAD ATTORNEY, Minneapolis, **[**14]** MN; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN.

For R Rex Getz, 07-3066, Plaintiff: Rodney Olsen, LEAD ATTORNEY, Morrison, Frost, Olsen & Irvine, LLP, Manhattan, KS; Brian L. Williams, Daniel E. Gustafson, Gustafson Gluek PLLC, Minneapolis, MN.

For James T Watson, 07-3067, Plaintiff: Darin M. Conklin, LEAD ATTORNEY, Alderson Alderson Weiler Conklin, Topeka, KS; Joseph Michael Weiler, LEAD ATTORNEY, Topeka, KS; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Donna Jeanne Flanagan, 07-3068, Plaintiff: James F. Wyatt, III, LEAD ATTORNEY, Wyatt & Blake LLP, Charlotte, NC; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Scott Beall, 07-3069, Plaintiff: Mark J. Schirmer, LEAD ATTORNEY, Ian Otto, Straus & Boies, LLP, Birmingham, AL.

For Kathleen C. Davis, 07-3070, Plaintiff: C. Dewey Branstetter, Jr., James G. Stranch, IV, LEAD ATTORNEYS, Branstetter Stranch & Jennings, Nashville, TN; Daniel E. Gustafson, LEAD ATTORNEY, Gustafson gluek PLLC, Minneapolis, MN; Garrett D. Blanchfield, Jr., LEAD ATTORNEY, Brian L. Williams, Reinhardt Wendorf **[**15]** & Blanchfield, St. Paul, MN; Jason Kilene, Minneapolis, MN; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Tom DiMatteo, 07-3072, Plaintiff: David E. Kovel, LEAD ATTORNEY, Mark Allen Strauss, Kirby McInerney LLP, New York, NY.

For Robert Schuyler Watson, 07-3073, Plaintiff: Christopher Lovell, Imtiaz A. Siddiqui, LEAD ATTORNEYS, Lovell Stewart Halebian LLP, New York, NY.

For Ryan J. Bierling, 07-3075, Plaintiff: Christopher A. Seeger, David R. Buchanan, LEAD ATTORNEYS, Seeger Weiss LLP, New York, NY; Jonathan Shub, LEAD ATTORNEY, Seeger Weiss, Philadelphia, PA; Jonathan Shub, Seeger Weiss LLP, Philadelphia, PA.

For Jose Juan, 07-3076, Plaintiff: David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; Kenneth G. Walsh, LEAD ATTORNEY, Straus & Boies, LLP, Bedford Hills, NY.

For Patricia Ronco, 07-3078, Plaintiff: Samuel W. Lanham, Jr., LEAD ATTORNEY, Lanham & Blackwell, Bangor, ME; Ian Otto, Straus & Boies, LLP, Fairfax, VA.

For John Martich, 07-3079, Plaintiff: M. Eric Frankovitch, Michael G. Simon, LEAD ATTORNEYS, Frankovitch Anetakis Colantonio & Simon, Weirton, WV; Ian Otto, Straus & Boies, LLP, **[**16]** Fairfax, VA.

For Richard Granich, 07-3081, Plaintiff: Cory M. Jones, LEAD ATTORNEY, Royal Jones Miles Dunkley & Wilson, Henderson, NV.

For Allen Kelley, 07-3082, Plaintiff: George Oliver West, III, LEAD ATTORNEY, Law Offices of George O. West III, Las VEGAS, NV. Ian Otto, Straus & Boies, LLP, Fairfax, VA.

For Art's TV & Appliance, 07-0393, Plaintiff: Douglas A. Millen, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Daniel Bruce Allanoff, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA; Eugene A. Spector, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Harry Shulman, The Mills Law Firm, San Rafael, CA; Kathleen M. Konopka, Richard Adam Koffman, Cohen Milstin Hausfeld & Toll PLLC, Washington, DC; Robert G. Eisler, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY; Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Michael Paul Lehman.

For George Mays, 07-3084, Plaintiff: Scott Ames, Steven J. Serratore, LEAD ATTORNEYS, Serratore & Ames, Los Angeles, CA.

For Cynthia Saia, 07-0457, Geoffrey T. Korwan, 07-457, Tina Chapman, 07-0457, Jeannette Edwards, 07-0457, Gayle L. Powelson, 07-0457, Plaintiffs: Perry Michael Yancey, McCallum, Methvin **[**17]** & Terrell, P.C., Birmingham, AL.

For Shawn Stern, 07-3128, Plaintiff: Christine A. Williams, Edward J. Westlow, LEAD ATTORNEY, Durrette Bradshaw PLC, Richmond, VA; Christopher Garrett Hill, LEAD ATTORNEY, Durrette Bradshaw PLC, Richmond, VA; Richard Lyle Coffman, LEAD ATTORNEY, Beaumont, TX; Wyatt B. Durrette, Jr., Durrette Bradshaw, Richmond, VA; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Wendy Williams, 07-3129, Plaintiff: Chief Nnamdi A. Ekenna, LEAD ATTORNEY, The Ekenna Law Firm, apc., Los Angeles, CA; Lawrence Dumzo Nwajei, LEAD ATTORNEY, Law Offices of Lawrence D. Nwajei, Los Angeles, CA.

For Rebecca Bly, 07-3158, Plaintiff: Donna F Solen, LEAD ATTORNEY, The Mason Law Firm, LLP, Washington, DC.

For Univisions-Crimson Holding, Inc., 07-1666, Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Manuel Juan Dominguez, Berman DeValerio, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Law Office of Marc J. Greenspon, Lake Worth, FL.

For Rosemary Valdez, 7-3210, Plaintiff: Gregg Vance Fallick, LEAD ATTORNEY, Albuquerque, NM; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, **[**18]** CA.

For Jai Paguirigan, 07-3216, Plaintiff: Susan LaCava, LEAD ATTORNEY, Susan LaCava.SC, Madison, WI; Ian Otto, LEAD ATTORNEY, Straus & Boies LLP, Fairfax, VA.

For Univisions-Crimson Holding, Inc., 07-1666, Plaintiff: Christopher T. Heffelfinger, Berman DeValerio, San Francisco, CA; Manuel Juan Dominguez, Berman DeValerio, Palm Beach Gardens, FL; Marc Jeffrey Greenspon, Law Office of Marc J. Greenspon, Lake Worth, FL.

For Tara Perry, 07-3254, Plaintiff: Andrew C. Skinner, LEAD ATTORNEY, Nichols & Skinner L.C., Charles Town, WV; Ian Otto, Straus & Boies LLP, Fairfax, VA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Sarah Hansen, 07-0304, Plaintiff: James Belford Brown, LEAD ATTORNEY, Jennifer Anne Scott, Herum Crabtree Brown, Stockton, CA.

For Lynne M. Holtkamp, 07-3366, Plaintiff: Adam Stein, LEAD ATTORNEY, Ferguson Stein Wallas Adkins Gresham & Sumter, PA, Chapel Hill, NC; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For William J. Fisher, 07-3367, Plaintiff: William F. Patterson, Jr., LEAD ATTORNEY, Forman Rossabi Black P.A., Greensboro, NC.

For Advanced Technology Distributors, Inc., 07-0580, Plaintiff: Clinton Paul Walker, Roger M. Schrimp, Fred A. Silva, LEAD ATTORNEYS, Damrell, **[**19]** Nelson, Schrimp, Pallios, Pache, Modesto, CA; Kathy Lee Monday, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA.

For Magic Video, Inc., 07-1380, Plaintiff: Michael Paul Lehman, LEAD ATTORNEY; Kathleen M. Konopka, Richard Adam Koffman, Cohen Milstin Hausfeld & Toll PLLC, Washington, DC; Robert G. Eisler, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY.

For WOW LLC, 07-1339, Gina Cerda, 07-1339, Jean-Marie Wolf 07-1339, Carlos Ponce, 07-1339, Patrick Piper 07-1339, Gary Gornick, 07-1339, Karol Juskiewicz, 07-1339, Edward Decoite, 07-1339, John Candido, 07-1339, Anne Lewis, 07-1339, Don Carmignani, 07-1339, Terry Adami, 07-1339, Saki Kavouniaris, 07-1339, Linda Klare, 07-1339, Thomas Mitchell, 07-1339, Plaintiffs: Mario Nunzio Alioto, LEAD ATTORNEY, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA.

For Lisa Blackwell, 07-0706, Plaintiff: Reginald Von Terrell, LEAD ATTORNEY, The Terrell Law Group, Richmond, CA.

For Francis Frybarger, 07-0967, Plaintiff: Daniel Jay Mogin, LEAD ATTORNEY, The Mogin Law Firm P.C., San Diego, CA.

For Jeff Jafarian, 07-0994, Plaintiff: Henry A. Cirillo, Jon T. King, LEAD ATTORNEYS, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; **[**20]** Jayne Arnold Goldstein, Shepherd, Finkelman, Miller & Shah, LLP, Weston, FL; Lee Albert, Murray, Frank & Sailer LLP, New York, NY.

For Kaine Kornegay, 07-1146, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN;.

For Elena Ralik, 07-12722, Plaintiff: Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Ian Otto, Straus & Boies LLP, Fairfax, VA.

For Ann Scott, 07-1822, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Steyer, Lowenthal, Boodrookas, Alvarez & Smith, San Francisco, CA.

For Omnis Computer Supplies, Inc., 07-1362, Plaintiff: Christopher L. Lebsock, Jon T. King, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA; Michael Paul Lehmann, LEAD ATTORNEY; Robert G. Eisler, Hausfeld LLC, Washington, DC.

For John Okita, 07-3490, Plaintiff: Gail Y. Cosgrove, Kunio Kuwabe, Steven K. Hisaka, LEAD ATTORNEYS; David Boies, III, Ian Otto, Timothy D. Battin, Straus & Boies, LLP, Fairfax, VA.

For Aspen Building Technology, Inc., 07-2995, Plaintiff: Hector R. Martinez, Stanley Scott Mallison, LEAD ATTORNEYS, Law Offices of Mallison **[**21]** & Martinez, Lafayette, CA.

For Timothy J Purdy, 07-3080, Plaintiff: Mark Albright, LEAD ATTORNEY, Albright Stoddard Warnick & Albright, Las Vegas, NV; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN.

For Lynn Sweatman, 07-4933, Plaintiff: Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN.

For Joseph T. Piscitello, 07-2466, Plaintiff: Bruce Lee Simon, LEAD ATTORNEY, Esther L Klisura, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA; Kathleen M. Konopka, Richard Adam Koffman, Cohen Milstin Hausfeld & Toll PLLC, Washington, DC.

For Timothy R. Gregory, 07-3670, David Walker, 07-3670, Plaintiffs: Steven N. Berk, LEAD ATTORNEY, Chavez & Gertler LLP, Washington, DC; Brian L. Williams, Daniel E. Gustafson, Gustafson gluek PLLC, Minneapolis, MN.

For Heidi Bates, 07-3671, Plaintiff: Jennifer R. Seltenrich, LEAD ATTORNEY, Michaels, Ward & Rabinovitz, LLC, Boston, MA; Marwa Elzankaly, McManis, Faulkner, San Jose, CA.

For Elenor Giusti, 07-3813, Plaintiff: Michael S. Bearse, LEAD ATTORNEY, Finnegan & Bearse, Boston, MA.

For Edward Lawrence, 07-4764, Jerry McCleery, 07-4764, Shelley Jean Peck, 07-4764, Roc Hutchison, 07-4764, Plaintiffs: **[**22]** James M. Dombroski, LEAD ATTORNEY, Attorney at Law, Petaluma, CA; Ekaterina Schoenefeld, Gil D. Messina, Messina Law Firm, P.C., Holmdel, NJ; Eric I. Unrein, Thomas A. Kelliher, Gary D. McCallister, Chicago, IL; Gary Dean McCallister, Jamie Goldstein, Gary D. McCallister & Associates, LLC, Chicago, IL; Jeffery Kenneth Perkins, Law Offices of jeffrey K. Perkins, San Francisco, CA; John Haslet Boone, Law Offices of John H. Boone, San Francisco, CA; Russell F. Brasso, Foreman & Brasso, San Francisco, CA.

For Marcia Weingarten, 07-4931, Plaintiff: David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, LEAD ATTORNEYS, Straus & Boies, LLP, Fairfax, VA; David A. Freedman, Matthew L. Garcia, LEAD ATTORNEYS, Freedman Boyd Daniels Hollanderg Goldberg & Ives, P.A., Albuquerque, NM; Adam C Briggs, PRO HAC VICE, Kevin J. O'Connor, Godfrey & Kahn SC, Madison, WI.

For Carman Pellitteri, 07-4932, Jeannie Pellitteri, 07-4932, Plaintiffs: Walter Henry Bundy, Jr., LEAD ATTORNEY, Smith Bundy Bybee & Barnett, P.C., Mount Pleasant, SC.

For John Pulasky, 07-4934, Plaintiff: Thomas E. Towe, LEAD ATTORNEY, Towe, Ball, Enright, Mackey & Sommerfeld, Billings, MT.

For Gregory P. Sloan, 07-4970, Plaintiff: **[**23]** Carl Lewis Solomon, LEAD ATTORNEY, Gergel Nickles and Solomon, Columbia, SC; Joseph Preston Strom, Jr., Mario A. Pacella, LEAD ATTORNEYS, Strom Law Firm, Columbia, SC;

For Walden Minoli, 07-4969, John David Kittleson, 07-4969, Plaintiffs: James Jonathan Rosemergy, Michael J. Flannery, James Jonathan Rosemergy, Michael J. Flannery, LEAD ATTORNEYS, Carey & Danis LLC, St. Louis, MO; Michael Steven Jahner, LEAD ATTORNEY, Albuquerque, NM; Patrick Dyer Allen, LEAD ATTORNEY, Yenson, Lynn, Allen & Wosick, Albuquerque, NM;

For Mauricio Defrancisco, 07-5020, Plaintiff: Greg A. Lewen, James Fox Miller, LEAD ATTORNEYS, Miller Schwartz & Miller, Hollywood, FL.

For Community Business Bank, 7-0813, Plaintiff: William Henry Parish, LEAD ATTORNEY, Parish & Small, Stockton, CA.

For IMCA, Inc., 07-5348, Plaintiff: Glenn Carl James-Hernandez, LEAD ATTORNEY, James Law Offices, Guaynabo, PR.

For William E. Stack, 07-5296, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA.

For Robin Feins, 07-5021, Annie Cirrone, 07-5021, Plaintiffs: Douglass A. Kreis, Joshua Aaron Jones, Esq., Justin Graem Witkin, Neil D. Overholtz, LEAD ATTORNEYS, Aylstock, Witkin & Sasser, **[**24]** PLC, Pensacola, FL.

For Fred I. Waki, 08-3787, Plaintiff: Daniel E. Gustafson, Renae D. Steiner, LEAD ATTORNEYS, Gustafson gluek PLLC, Minneapolis, MN; Donald Edward Fisher, Ryan W. Roylo, William Copulos, LEAD ATTORNEYS, Copulos Fisher & Roylo, LLC, Honolulu, HI; Jason Kilene, LEAD ATTORNEY, Minneapolis, MN; Renae D. Steiner, Gustafson Gluek PLLC, Minneapolis, MN.

For LG Display Co., Ltd., (D, I) formerly known as LG Philips LCD Co., LTD., Defendant: Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I), Samsung Electronics America, Inc., (D, I), Defendants: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Sharp Corporation, (D, I), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Sharp Electronics Corporation, (D, I), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Fusae Nara, Ryan Takemoto, Susan Greenberg, Tara Michele Desautels, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; August Orval Stofferahn, Pillsbury Winthrop Shaw Pittman **[**25]** LLP, San Francisco, CA.

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

For Hitachi Ltd., (D, I), Hitachi Displays, Ltd., (D, I), IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., (D, I), Defendant: Candice Simone Petty, William James Taylor, LEAD ATTORNEYS; Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For AU Optronics Corporation, (D, I), Defendant: Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I), Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Christopher Alan Nedeau, Sedgwick Detert Moran & Arnold, LLP, San Francisco, CA; Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA. Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Michael F. Healy, Esq., Sedwick, Detert, Moran & Arnold, **[**26]** San Francisco, CA.

For Chi Mei Optoelectronics USA, Inc., (D, I), Defendant: Nathan Loy Walker, LEAD ATTORNEY, WilmerHale, Palo Alto, CA; Brent J. Gurney, PRO HAC VICE, Gordon Pearson, Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I), Defendant: Joshua David Hess, Gibson Dunn & Crutcher LLP, San Francisco, CA.

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

For Samsung Semiconductor, Inc., (D, I), Defendant: Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I), Chi Mei Corporation, (D, I), Chi Mei Optoelectronics Corporation, (D, I), Nexgen Mediatech, Inc. ("Nexgen"), (D), Defendants: Gordon Pearson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Nexgen Mediatech USA Inc, (D), Defendant: Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering **[**27]** Hale & Dorr, New York, NY; Brent J. Gurney, PRO HAC VICE, Gordon Pearson, Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Epson Electronics America, Inc. (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant: Kevin C. McCann, LEAD ATTORNEY, Chad A. Westfall, Sean David Unger, Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

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

For Toshiba America Electronics Components, Inc., (D, I), Defendant: John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY; Kristen J. McAhren, Wayne A. Cross, LEAD ATTORNEYS, White & Case LLP, Washington, DC.

For Toshiba America Information Systems, Inc., (D, I), Defendant: John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For LG Display America, Inc., (D, I) formerly known as LG Philips LCD America, Inc. LG Philips LCD America, Inc., Defendant: Michael Robert Lazerwitz, LEAD **[**28]** ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For State of California, Amicus: Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

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

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

[*1182] ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS DIRECT PURCHASER PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS INDIRECT PURCHASER PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT; GRANTING DIRECT PURCHASER PLAINTIFFS' MOTION TO FILE SECOND AMENDED CONSOLIDATED AMENDED COMPLAINT

On February 27, 2009, the Court heard argument on defendants' motions to dismiss the direct purchaser plaintiffs' first amended consolidated complaint, defendants' motions **[*1183]** to dismiss the indirect purchaser plaintiffs' second amended consolidated complaint, and the direct purchaser plaintiffs' motion to amend the complaint. [1] For the reasons set **[**29]** forth below, the Court DENIES defendants' motions to dismiss the direct purchaser plaintiffs' first amended complaint, [2] GRANTS IN PART and DENIES IN PART defendants' motions to dismiss the indirect purchaser plaintiffs' second amended consolidated complaint, and GRANTS the direct purchaser plaintiffs' motion to file a second amended consolidated complaint.

BACKGROUND

---

[1] The motion to amend was set for hearing on March 6, 2009. However, defendants' opposition to the motion to amend centers on the same issues which are decided in this order. Hence, the March 6, 2009 hearing on the motion to amend is VACATED and the motion will be decided in this order.

[2] The Court will issue a separate order on Tatung Company of America, Inc.'s motion to dismiss the direct purchaser plaintiffs' first amended consolidated complaint.

By order filed August 25, 2008, the Court largely denied defendants' motions to dismiss the direct and indirect purchaser consolidated complaints. Docket No. 666. The Court found, however, that the complaints lacked sufficient allegations specific to each defendant, and granted defendants' motions to dismiss in that respect. The Court granted plaintiffs leave to amend to more specifically **[**30]** plead how each defendant joined the alleged price-fixing conspiracy. The Court stated that "plaintiffs need not plead each defendant's involvement in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy." *Id*. at 6-7.

On December 5, 2008, the direct purchaser plaintiffs filed a first amended consolidated complaint and the indirect purchaser plaintiffs filed a second amended consolidated complaint. The complaints include new allegations about the alleged price-fixing conspiracy, including details about group and bilateral meetings through which the alleged conspiracy was effectuated. The complaints also add new information about guilty pleas recently entered by three TFT-LCD manufacturers who are defendants in this multi-district litigation: LG Display Co. Ltd. (and its U.S. subsidiary, LG Display America, Inc.), Sharp Corporation, and Chunghwa Picture Tubes, Ltd. DP-FACC PP 137-145; IP-SACC PP 189-191.

Defendants have moved to dismiss the complaints on several grounds. Defendants contend that the complaints do not adequately allege each defendant's participation in the alleged **[**31]** conspiracy, and that the case should be limited to the 2001 - 2006 time period, the same time period covered by the related criminal pleas. [3] Defendants raise additional arguments with respect to particular state law claims alleged by the indirect purchaser plaintiffs.

The direct purchaser plaintiffs seek leave to file a second amended consolidated complaint to add a new plaintiff, Texas Digital Systems, Inc. Defendants oppose the motion solely on the grounds articulated in the motion to dismiss the first amended consolidated complaint.

LEGAL STANDARD

HN1[] Dismissal of a complaint may be based "on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. On a motion to dismiss, the Court accepts the facts alleged in the complaint as true. *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*.

HN2[] *Federal Rule of Civil Procedure 8* **[**32]** requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements **[*1184]** of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. The complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level." *Id. at 1965*.

DISCUSSION

I. Sufficiency of allegations specific to each defendant

Defendants contend that the amended consolidated complaints do not adequately allege each defendant's role in the alleged conspiracy. Defendants argue that the complaints continue to "lump together" the twenty-six different

[3] Notwithstanding their entry of guilty pleas to felony violations of *15 U.S.C. § 1*, defendants LG Display Co. Ltd., LG Display America, Inc., and Sharp Corporation have joined in the motions to dismiss the amended complaints for failure to meet the notice pleading requirements of the Federal Rules of Civil Procedure.

named defendants in general allegations referring to "defendants," or groups of defendants sorted by country or corporate family. All plaintiffs counter that the new paragraphs added to the amended complaints sufficiently allege each defendant's participation **[**33]** and role in the alleged conspiracy.

The Court finds that the amended consolidated complaints more than adequately allege the involvement of each defendant and put defendants on notice of the claims against them. Contrary to defendants' suggestion, neither *Twombly* nor the Court's prior order requires elaborate fact pleading. Further, the Supreme Court has recognized that ***HN3***[] "in complex antitrust litigation," "motive and intent play leading roles," and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. The amended complaints add detail about numerous illicit conspiratorial communications between and among defendants (DP-FACC PP 105-133; IP-SACC PP 130-148), and facts of the guilty pleas entered by four defendants for fixing prices of TFT-LCD. DP-FACC PP 137-147; IP-SACC PP 189-191. The complaints contain additional specific information about the group and bilateral meetings by which the alleged price-fixing conspiracy was effectuated. The complaints allege that group or "crystal" meetings were attended by employees at three general levels of defendants' corporations, and contains details about the structure and **[**34]** content of these meetings, as well as the types of employees who attended the meetings. DP-FACC PP 106-113; IP-SACC PP 133-141. The complaints allege that the "crystal" meetings were supplemented by bilateral discussions between various defendants about past and future pricing, as well as information about shipments, and that these discussions took the form of in-person meetings, telephone calls, e-mails and instant messages. DP-FACC PP 114-115; IP-SACC PP 142-143. The complaint also alleges which types of meetings the defendants and co-conspirators participated in, and in some instances includes more detail such as the year of a meeting and other meeting participants. *See, e.g*. DP-FACC PP 126-128; IP-SACC PP 144-148.

Defendants complain that the complaints still do not differentiate between related corporate entities. As described in the complaints, the alleged conspiracy was organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees. The complaints allege that the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that "individual participants entered into agreements on behalf of, **[**35]** and reported these meetings and discussions to, their respective corporate families." DP-FACC P 130; *see also* IPSACC PP 96, 100. Plaintiffs also allege that "the individual participants in conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, **[*1185]** nor did they distinguish between the entities within a corporate family." *Id*. The complaints allege a complex, multinational price-fixing conspiracy and, taken as a whole, they sufficiently allege each defendants' participation in that conspiracy, as well as present a factual basis for the allegations of agency. *See In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008)* (***HN4***[] "Although Plaintiffs will need to provide evidence of each Defendants' participation in any conspiracy, they now only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.").

II. Proper time period

Defendants contend that plaintiffs have not alleged any facts that would support a plausible inference of anticompetitive conduct before 2001. Defendants argue that the complaints allege that the "crystal" meetings only began in 2001, **[**36]** the guilty pleas in the criminal cases only cover the 2001-2006 time period, and that the "price dispersion" charts in the complaints do not show diminished price dispersion consistent with a conspiracy prior to 2001.

Plaintiffs counter that the complaints include numerous allegations about the period prior to 2001, including allegations that beginning in at least 1996, Hitachi, Sharp and Toshiba met or talked with at least one other defendant in order to agree on TFT-LCD product prices and the amount of TFTLCD products each would produce. DP-FACC P 4; IP-SACC P 130. The complaints also allege indicia of price-fixing and market manipulation, such as unusual pricing practices, prior to 2001. *See, e.g*., DP-FACC PP 147, 150, 157; IP-SACC PP 153-157. Plaintiffs also argue that defendants' arguments are misplaced at the pleadings stage of the litigation, and that there are any number of plausible reasons why the criminal guilty pleas would cover the 2001-2006 time period while still allowing for civil liability during the 1996-2001 period, such as criminal statutes of limitation and higher burdens of proof in criminal cases.

The Court finds that the complaints sufficiently allege anticompetitive **[**37]** conduct during the 1996-2001 time period, and will not limit the class period at this stage of the litigation. [4] Whether discovery bears out plaintiffs' allegations regarding the earlier time period is a different matter, and defendants may renew their challenges to the pre-2001 claims upon a fuller factual record.

III. State law claims alleged in indirect purchaser plaintiffs' second amended consolidated complaint

A. Virginia, Montana, and Puerto Rico

The indirect purchaser plaintiffs have alleged claims under the state antitrust laws of Virginia, Montana and Puerto Rico. Defendants move to dismiss these claims on the ground that these state antitrust laws are, pursuant to either statutory harmonization provisions or case law, required to be interpreted in accordance with federal ***antitrust law***. Defendants contend that because indirect purchasers lack **[**38]** standing under federal law pursuant to *Illinois Brick*, and Virginia, Montana and Puerto Rico have not repealed *Illinois Brick* either by statute or case law, the indirect purchaser plaintiffs lack standing here. Defendants note that there are no antitrust **[*1186]** cases in Virginia, Montana or Puerto Rico permitting indirect purchasers to bring suit under the state antitrust laws, and that both Judge Alsup and Judge Hamilton have held that indirect purchasers lack standing under similar circumstances. *See* *California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1150 (N.D. Cal. 2007)* (indirect purchasers lack standing to seek antitrust damages under Virginia Antitrust Act); *In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1027 (N.D. Cal. 2007)* (stating, in context of striking allegations of nationwide class under California law, that in states that have not repealed *Illinois Brick*, "indirect purchasers are barred from bringing antitrust claims, other than for injunctive relief").

1. Virginia

With regard to Virginia, plaintiffs respond that the state harmonization provision, *Va. Code Ann. § 59.1-9.17*, was enacted prior to *Illinois Brick*, at a time when indirect purchasers **[**39]** had standing under federal law. Thus, plaintiffs contend that the harmonization provision indicates legislative intent to allow indirect purchaser suits under the then-prevailing federal law. Plaintiffs also argue that the differences between the Virginia statute -- namely the statement of the Virginia statute's purpose, and the fact that treble damages are discretionary under the state statute -- support a determination that Virginia law would permit indirect purchaser suits.

The Court disagrees, and finds that in light of Virginia's harmonization provision requiring courts to interpret the Virginia Antitrust Act in harmony with federal law, and the absence of any Virginia authority holding that indirect purchasers have standing under the state statute, indirect purchasers may not seek damages under the Virginia statute. ***HN5***[] Virginia's harmonization statute broadly mandates: "This chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." *See* *Va. Code Ann. § 59.1-9.17*; *see also* *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 710 (4th Cir. 1991)* ("[T]he Virginia Act specifically provides that **[**40]** it is to be interpreted and applied in harmony with federal ***antitrust law***. *Va.Code Ann. § 59.1-9.17*. Because Oksanen has failed to establish his restraint of trade and monopoly claims under federal law, his state law antitrust claims likewise fail."). Once *Illinois Brick* was decided, the Virginia legislature was free to pass an *Illinois Brick* repealer statute, as many states did. Virginia did not, and the Court is required to follow the plain language of the harmonization provision, rather than attempt to divine the

[4] Defendants have also moved to dismiss direct purchaser plaintiff Phelps Technology Inc. on the ground that Phelps' claims arise out of pre-2001 purchases of TFT-LCD panels. Because the Court finds that the complaint's pre-2001 allegations are sufficient, the Court denies defendants' motion to dismiss Phelps Technology Inc. on this ground.

legislative intent of the *pre-Illinois Brick* legislature in passing the harmonization provision. The Virginia Antitrust Act does not explicitly confer standing on indirect purchaser plaintiffs, and plaintiffs have not cited any Virginia case law suggesting that indirect purchasers have standing under the state statute. Plaintiffs have not articulated any reason why the purported differences between the Virginia statute and the Sherman Act are relevant to the question of indirect purchaser standing. Accordingly, the Court agrees with Judge Hamilton's ruling in *Infineon Technologies, 531 F. Supp. 2d at 1150*, and holds that the indirect purchaser plaintiffs lack standing under **[**41]** the Virginia Antitrust Act. The Court GRANTS defendants' motion to dismiss this claim.

2. Montana

In *Smith v. Video Lottery Consultants, Inc., 260 Mont. 54, 858 P.2d 11 (Mont. 1993)*, ***HN6***[] the Supreme Court of Montana noted that sections of the Montana Unfair Trade Practices Act, *Mont. Code Ann. §§ 30-14-201 et seq*., were modeled after the Sherman **[*1187]** Act, and that where "the statutes are similar, we will give due weight to the federal courts' interpretation of this type of alleged antitrust violation." *Id. at 13*. The Smith court noted that Montana law differed from the Sherman Act is some respects, such as the Sherman Act's requirement of two or more persons to be involved in an lawful restraint of trade, while one person acting alone may violate the Montana act. *Id. at 11*.

Defendants contend that there is no facial difference between the standing provisions of federal and Montana law, and thus this Court must give "due weight" to *Illinois Brick* and dismiss the indirect purchaser plaintiffs' claims under Montana law. ***HN7***[] The standing provision of the Montana statute allows any "person who is or will be injured" to sue for damages and injunctive relief. *Mont. Code Ann. § 30-14-222*. Section 4 of the Clayton Act, *15 U.S.C. § 15*, **[**42]** allows "any person who shall be injured" to sue for damages and injunctive relief. Plaintiffs respond that *Smith* stands for the proposition that the Montana statute is generally broader than the Sherman Act, and thus that the Court should construe the Montana act to confer standing on indirect purchaser plaintiffs.

In the absence of any Montana authority holding that indirect purchaser plaintiffs have standing under Montana ***antitrust law***, the Court declines to find so. Contrary to plaintiffs' characterization of *Smith*, the Supreme Court of Montana did not hold, as a general matter, that the Montana statute is broader than federal law. Instead, the court distinguished between instances when state and federal law differed, and those sections of the Montana statute that were modeled after the Sherman Act. With regard to the latter, the *Smith* court instructed that where "the statutes are similar, we will give due weight to the federal courts' interpretation of this type of alleged antitrust violation." *858 P.2d at 13*. Here, the standing provisions of the Montana act and the Sherman Act are almost identically worded. Plaintiffs have not identified any relevant difference between the two **[**43]** statutes that would require a different result, nor have plaintiffs cited any Montana authority holding that indirect purchaser plaintiffs have standing under Montana law. Accordingly, the Court GRANTS defendants' motion to dismiss the claims under Montana law.

3. Puerto Rico

Defendants similarly contend that plaintiffs' claims under the Puerto Rico Antitrust Act are barred because that statute is to be construed in harmony with federal ***antitrust law***, and there has been no repeal of *Illinois Brick*. Plaintiffs respond that the Puerto Rico legislature has specifically recognized the rights of "consumers" to bring class actions under the Puerto Rico Antitrust Act, and that thus indirect purchasers -- who are consumers -- have standing under the statute. *See* ***HN8***[] *32 L.P.R.A. § 3342* ("There is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf of said merchants or consumers based on the Antitrust Act of the Commonwealth, *§§ 257-274* of Title 10."). Plaintiffs also cite *Arroyo-Melecio v. Puerto Rican American Insurance Co., 398 F.3d 56, 72 (1st Cir. 2005)*, which held that the plaintiff consumers had standing **[**44]** under the Puerto Rico Antitrust Act. However, that case involved a class action brought by consumers of compulsory automobile insurance against insurance companies, and thus the plaintiffs there were not akin to indirect purchasers. Plaintiffs also cite *Comes v. Microsoft Corporation, 646 N.W.2d*

440, 448 (Iowa 2002), which states in dicta that "In total, nineteen states, the District of Columbia, and Puerto Rico have statutes **[*1188]** explicitly authorizing indirect purchasers to maintain an antitrust suit." The *Comes* court does not cite a Puerto Rico statute in support of this statement.

The Court finds, for the same reasons discussed above, that the indirect purchaser plaintiffs lack standing under the Puerto Rico statute. The Court is reluctant to find standing in the absence of an explicit *Illinois Brick* repealer, either by statute or case law. Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' claims under the Puerto Rico antitrust statute.

B. Mississippi and Nevada

Defendants move to dismiss the indirect purchaser plaintiffs' state law antitrust claims under Mississippi and Nevada law because plaintiffs have not alleged that any part of defendants' conduct took place **[**45]** in those states. ***HN9***[] Mississippi's antitrust laws prohibit understandings or agreements to "restrain trade," "increase . . . the price of a commodity," or "hinder competition in the production, importation, . . . or sale or purchase of a commodity." *Miss. Code Ann. § 75-21-1*. Defendants note that the indirect purchaser plaintiffs allege that defendants' conduct occurred mainly in the State of California, and that the complaint only alleges *effects* in Mississippi, not *conduct*.

The Court agrees with defendants that ***HN10***[] the Mississippi Antitrust Act requires some allegations of intrastate conduct, but finds that plaintiffs have sufficiently alleged such conduct. The complaint alleges that "LCD price competition was restrained, suppressed, and eliminated throughout Mississippi," "LCD prices were raised, fixed, maintained and stabilized at artificially high levels throughout Mississippi," and that plaintiffs "were deprived of free and open competition" and "paid supra competitive, artificially inflated prices for LCD." IP-SACC P 269(a). Courts have held that similar allegations are sufficient to state a claim under the Mississippi Act. *See* **[**46]** *In re Graphics Processing Units Antitrust Litig. ("GPU II"), 540 F. Supp. 2d 1085, 1099 (N.D. Cal. 2007)* (permitting claim under Mississippi law where plaintiffs alleged that defendants' conspiracy substantially affected commerce in state, injured Mississippi residents, defendants promoted products in state and harmed competition in state); *see also Infineon Techs., 531 F. Supp. 2d at 1158-59* (***HN11***[] "the Mississippi Antitrust Act should be construed to require allegations of at least some activity or conduct occurring in intrastate commerce or trade"; dismissing complaint with leave to amend where plaintiffs failed to allege "any activity of any kind -- sales, purchases, or other activities in trade or commerce"). Plaintiffs' allegation that defendants' conduct occurred mainly in California is not inconsistent with alleging anticompetitive conduct in Mississippi. *See Standard Oil Co. of Ky. v. State ex rel. Attorney General, 107 Miss. 377, 65 So. 468 (Miss. 1914)*, *overruled in part on other grounds sub nom. Mladinich v. Kohn, 250 Miss. 138, 164 So. 2d 785 (Miss. 1964)* (sustaining claim where plaintiffs alleged nationwide conspiracy to monopolize trade in petroleum and petroleum products, no petroleum produced in Mississippi, defendants sold and distributed petroleum products **[**47]** in Mississippi).

Likewise, ***HN12***[] Nevada's ***antitrust law*** states that "[m]onopolization of trade or commerce in this state, including, without limitation, attempting to monopolize or otherwise combining or conspiring to monopolize trade or commerce in this state" constitutes a "contract, combination or conspiracy in restraint of trade, and it is unlawful to conduct any part of such activity in this state." *Nev. Rev. Stat. Ann. § 598A.060(1)(e)*. Plaintiffs' allegations **[*1189]** with regard to Nevada are similar to those for Mississippi. IP-SACC P 271(a). The Court finds these allegations are sufficient to state a claim under the Nevada statute. *See In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 413-14 (D. Del. 2007)* (denying motion to dismiss Nevada claim where complaint alleged nationwide price-fixing conspiracy and goods sold in Nevada).

Accordingly, the Court DENIES defendants' motion to dismiss plaintiffs' Mississippi and Nevada state law antitrust claims.

C. Michigan, Florida, North Carolina and North Dakota

Defendants argue that plaintiffs' unjust enrichment claims under Michigan, Florida, North Carolina, and North Dakota law must be dismissed because the law of these states **[**48]** require that plaintiffs have conferred a "direct benefit" on defendants, and the indirect purchasers cannot allege such a direct benefit.

1. Michigan

Citing *A & M Supply Co. v. Microsoft Corp., No. 274164, 2008 Mich. App. LEXIS 433, 2008 WL 540883, (Mich. App. Feb. 28, 2008)* (per curiam), defendants contend that Michigan's "highest court" recently held that indirect purchasers in a price-fixing case cannot bring a claim for unjust enrichment because a plaintiff must have conferred a direct benefit upon the defendant. Joint motion at 14; Reply at 12. [5] In *A&M Supply*, the Michigan Court of Appeals (not the Michigan Supreme Court, which is Michigan's highest court), affirmed a trial court's dismissal for failure to prosecute. In an unpublished per curiam decision, the court alternatively held that the lawsuit was subject to dismissal on the merits because, "the unjust enrichment doctrine does not apply under the facts alleged by plaintiff here." *2008 Mich. App. LEXIS 433, [WL] at *2*. The court noted that there was "no [] direct contact between Microsoft and the indirect purchasers in the class they seek to have certified. Nor can they show that Microsoft received any direct payment or other benefit from those purchasers." *2008 Mich. App. LEXIS 433, [WL] at *2*. There is **[**49]** no further discussion of the facts of the case. While *A& M* provides some support for defendants' position, it is hardly the controlling authority that defendants suggest.

Plaintiffs cite several cases, including a Michigan Supreme Court case, for the proposition that they need not allege a direct benefit to defendants to state an unjust enrichment claim in Michigan. *See, e.g., Kammer Asphalt Paving Co., Inc. v. East China Tp. Schools, 443 Mich. 176, 504 N.W.2d 635, 640-41 (Mich. 1993)*; *Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 729 N.W.2d 898, 904-905 (Mich. Ct. App. 2006)*; *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 670-71 (E.D. Mich. 2000)*. These three cases hold that a ***HN13***[] party can bring an unjust enrichment claim against a defendant even in the absence of privity or a contract between the parties. *In re Cardizem* is the most factually apposite. In that antitrust case, the indirect purchaser plaintiffs "alleged that they conferred a benefit, in the form of overpayments and increased profits, on Defendants, that Defendants accepted that **[**50]** benefit and that it would be unjust under the alleged circumstances for Defendants to retain that benefit." *105 F. Supp. 2d at 671*. The court rejected the defendants' "narrow" argument that a direct benefit was required under Michigan law. ***HN14***[] "Whether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must **[*1190]** show that his detriment and the defendant's benefit are related and flow from the challenged conduct." *Id*.

Here, plaintiffs' allegations are similar to those alleged in *In re Cardizem*. The Court finds that plaintiffs have stated a claim for unjust enrichment under Michigan law, and DENIES defendants' motion to dismiss this claim.

2. North Carolina

Defendants rely on *Effler v. Pyles, 94 N.C. App. 349, 380 S.E. 2d 149 (N.C. Ct. App. 1989)*, in which the North Carolina Court of Appeals affirmed summary judgment in favor of a defendant because the plaintiff had not shown that she conferred a benefit directly on the defendant. Cases since *Effler*, however, have suggested that *Effler's* holding is narrow, and that there is no requirement of "direct benefit" in cases alleging fraud or civil conspiracy. *See, e.g., Perkins v. HealthMarkets, Inc., 2007 NCBC 25, 2007 WL No. 06 CVS 21053, 2007 WL 2570242, at *9 (N.C. Super. Ct. July 30, 2007)*. **[**51]** In any event, in affirming the trial court's summary judgment, the *Effler* court relied on the North Carolina Supreme Court's decision in *Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554 (N.C. 1988)*. *Booe* did not, however, require that a benefit be direct to state an unjust enrichment claim. ***HN15***[] "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must

[5] Indeed, defendants strenuously argue that plaintiffs' lower court authority should be disregarded because *A&M* was issued by the highest court in Michigan.

not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable." *Booe, 322 N.C. at 570*.

Here, plaintiffs have alleged that they conferred a benefit on defendants by paying higher prices for LCD products than they would have in the absence of the alleged price-fixing conspiracy. The Court finds under *Booe* that these allegations are sufficient to state a claim, and DENIES defendants' motion to dismiss plaintiffs' unjust enrichment claims under North Carolina law.

3. North Dakota

Relying on *Apache Corporation v. MDU Resources Group, Inc., 1999 ND 247, 603 N.W.2d 891, 895 (N.D. 1999)*, defendants move to dismiss the indirect purchaser **[**52]** plaintiffs' unjust enrichment claim under North Dakota law. In *Apache*, ***HN16***[] the North Dakota Supreme Court stated that the doctrine of unjust enrichment "is invoked when a person has and retains money or benefits which in justice and equity belong to another. . . . For a complainant to recover, it is sufficient if another has, without justification, *obtained a benefit at the direct expense* of the [complainant], who then has no legal means of retrieving it." (internal quotations omitted, emphasis added). Apache alleged that it was a third-party beneficiary of contracts between the defendant and a third party, and that when the defendant breached that contract, the defendant was unjustly enriched at Apache's expense. The court affirmed the dismissal of Apache's unjust enrichment claim, noting that "the money MDU saved by breaching its contract with Koch was not a 'benefit at the direct expense of' Apache." *Id. at 895*.

Plaintiffs argue that *Apache* does not establish that a "direct benefit" is a requirement under North Dakota law, and they emphasize language in *Apache* that "the essential element of recovering under a theory of unjust enrichment -- receipt of a benefit by the defendant from the **[**53]** plaintiff which would be inequitable to retain without paying for its value -- is present here." *Id*. (internal quotations and citations omitted). Plaintiffs distinguish *Apache* on the ground that there the plaintiff had not in fact conferred any benefit **[*1191]** on the defendant, whereas here plaintiffs do allege that they have conferred a benefit on defendants. Although this factual distinction is correct, the broader language of *Apache* suggests that a ***HN17***[] "direct benefit" is required under North Dakota law. See *In re Relafen Antitrust Litig., 225 F.R.D. 14, 28 (D. Mass. 2004)* (interpreting *Apache* to require direct benefit and dismissing unjust enrichment claims brought by indirect purchasers). Plaintiffs have not cited any authority holding that North Dakota law does not require a direct benefit, and in the face of *Apache*, the Court is inclined to agree with defendants.

Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' unjust enrichment claims under North Dakota law.

D. Unjust enrichment-- Arkansas, Virginia, Montana and Puerto Rico

Defendants move to dismiss plaintiffs' unjust enrichment claims under Arkansas, Virginia, Montana and Puerto Rico law, arguing that plaintiffs are **[**54]** improperly attempting to circumvent the antitrust laws of those jurisdictions, under which they lack antitrust standing. [6] Defendants contend that plaintiffs may not circumvent the restrictions on antitrust claims under Arkansas, Virginia, Montana and Puerto Rico law by reframing those claims as unjust enrichment actions, and they cite a number of cases which stand for that general proposition. *See, e.g., In re Microsoft Corp. Antitrust Litig., 401 F. Supp. 2d 461, 464 (D. Md. 2005)* ("[T]he specific bar on indirect purchaser recovery incorporated into South Carolina's antitrust statutes prohibits Plaintiff's general common-law [unjust

[6] Defendants contend -- and plaintiffs do not disagree -- that plaintiffs do not have standing to seek relief under ***HN18***[] Arkansas ***antitrust law*** because that law only permits predatory pricing claims alleging that items were sold "at less than cost" and does not create a private right of action for an alleged conspiracy to raise prices. *See Ark. Code Ann. § 4-75-310*; *see also FTC v. Mylan Labs, Inc., 62 F. Supp. 2d 25, 44-45 (D.D.C. 1999)*.

enrichment] claim."); *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 211 (D. Me. 2004)* ("For those states that have maintained the *Illinois Brick* prohibition on indirect purchaser recovery, I conclude that it would subvert the statutory scheme to allow these same indirect purchasers to secure, for the statutory violation, restitutionary relief at common law (or in equity)."); *see also* *GPU II, 540 F. Supp. 2d at 1100* (allowing plaintiffs to maintain unjust enrichment claims because they have "excised unjust-enrichment claims **[**55]** for states that do not recognize antitrust remedies for indirect purchasers, so this claim is no longer attempting to circumvent the laws of states that do not recognize claims for damages by indirect purchasers.").

Plaintiffs rely on *In re Cardizem* to argue that in that case, "defendants made a similar argument that plaintiff indirect purchasers could not proceed with unjust enrichment claims in states where they could not recover under the state's antitrust or consumer protection laws," and that the court "resoundly rejected" that argument. Indirect Purchasers' Opposition at 19. In fact, in *In re Cardizem*, the defendants moved to dismiss state law antitrust claims on a variety of grounds, but did not contend that indirect purchaser plaintiffs lacked antitrust **[**56]** standing based on *Illinois Brick* and harmonization with federal law. *See generally, In re Cardizem, 105 F. Supp. 2d at 645* (antitrust injury); *Id at 659* (whether state law claims preempted by Hatch-Waxman Act); *Id at 664* (whether state claims required court to enforce FTC consent decree); *Id at 665-68* (whether Wisconsin and Tennessee antitrust **[*1192]** statutes require wholly intrastate conduct). Further, the *In re Cardizem* court *denied* the defendants' motion to dismiss the state antitrust claims. The *Cardizem* defendants moved to dismiss the state unjust enrichment claims arguing first "that Plaintiffs' unjust enrichment claims are dependent upon the allegations supporting their state law antitrust claims and thus suffer from the same flaws that preclude Plaintiffs from stating an antitrust claim." *Id. at 669*. It is within this context that the court denied the motion to dismiss, holding "[t]he first of Defendants' arguments fails to read Plaintiffs' complaint in the light most favorable to Plaintiffs and confuses Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with its right to recover a remedy at law for an alleged violation of a state's **[**57]** antitrust laws." *Id*. Contrary to plaintiffs' suggestion, the *Cardizem* court did not hold that indirect purchaser plaintiffs who lacked standing under a state antitrust statute could repackage that claim as an unjust enrichment claim.

Plaintiffs also cite *D.R. Ward Construction Company v. Rohm & Haas Co., 470 F. Supp. 2d 485 (E.D. Pa. 2006)*. There, the defendants moved to dismiss unjust enrichment claims under Tennessee, Arizona and Vermont law, and argued that ***HN19***[] "in jurisdictions which possess antitrust statutes conferring standing on indirect purchasers, an indirect purchaser may only bring a statutory claim for alleged anti-competitive behavior." *Id. at 506*. The defendants also argued that if the plaintiffs' state antitrust claims were defective, the plaintiffs could not recover restitution through an unjust enrichment claim based on the same predicate wrong. *Id*. The court rejected the defendants' arguments and permitted the three state unjust enrichment claims, holding that "the viability of these claims does not hinge upon the success of the state statutory antitrust claims." *Id*. However, unlike the situation presented here, and as the *D.R. Ward* court noted "most importantly" in reaching **[**58]** its conclusion, ***HN20***[] "Tennessee, Arizona, and Vermont all permit indirect purchasers to pursue antitrust claims; thus, an unjust enrichment claim would not circumvent the procedural and substantive limitations of these antitrust statutes." *Id. at 507*. Thus, rather than supporting plaintiffs' position, *D.R. Ward* undermines it.

Here, plaintiffs have not cited any authority from Arkansas, Virginia, Montana or Puerto Rico holding that an indirect purchaser plaintiff may bring an unjust enrichment claim when that same claim would be barred under state ***antitrust law***. In the absence of such authority, the Court declines to recognize such a claim because the Court agrees with defendants that permitting such claims would allow plaintiffs to circumvent limitations of state antitrust laws.

E. Unjust enrichment-- Tennessee and Florida

[7]

[7] As previously indicated, plaintiffs have agreed to dismiss their Florida unjust enrichment claims. Therefore, the Court need not address the issue of exhaustion of remedies as to Florida law.

Defendants argue that plaintiffs' unjust enrichment claims under Tennessee law must be dismissed because plaintiffs have not alleged that they first exhausted their administrative **[**59]** remedies. ***HN21***[] Under Tennessee law, a plaintiff must demonstrate that he or she has exhausted "all remedies against the person with whom the plaintiff enjoyed privity of contract." *Freeman Indus., LLC v. Eastman Chemical Co., 172 S.W. 3d 512, 525 (Tenn. 2005)*. However, "to maintain an action for unjust **[*1193]** enrichment, a plaintiff is not required to exhaust all remedies against the party with whom the plaintiff is in privity if the pursuit of the remedies would be futile." *Id. at 526*.

Plaintiffs respond that futility is self-evident in these circumstances where the alleged price-fixing was done by the defendants in the manufacture of LCD panels and LCD products, and there has been no allegation that the resellers were involved in the conspiracy. The Court agrees that under the facts alleged in the complaint, futility is evident. Accordingly, the Court DENIES defendants' motion to dismiss the Tennessee claim.

CONCLUSION

For the foregoing reasons, the Court hereby DENIES defendants' motions to dismiss the direct purchaser plaintiffs' first amended complaint, and GRANTS IN PART AND DENIES IN PART defendants' motions to dismiss the indirect purchaser plaintiffs' second amended complaint. (Docket Nos. **[**60]** 769, 771, 777, 778, 779, 782). The Court GRANTS the direct purchaser plaintiffs' motion to amend the complaint, and VACATES the March 6, 2009 hearing scheduled for that motion. (Docket No. 806). The direct purchaser plaintiffs shall file the amended complaint by *March 13, 2009*.

IT IS SO ORDERED.

Dated: March 3, 2009

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

In re TFT-LCD Antitrust Litig.

United States District Court for the Northern District of California

March 3, 2009, Decided; March 3, 2009, Filed

No. M 07-1827 SI; MDL. No. 1827

Reporter

2009 U.S. Dist. LEXIS 17792 *; 2009-1 Trade Cas. (CCH) P76,523

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates to: ALL CASES

Subsequent History: Motion denied by, Motion granted by, in part, Motion denied by, in part, Claim dismissed by, Motion granted by *In re TFT-LCD Antitrust Litig., 599 F. Supp. 2d 1179, 2009 U.S. Dist. LEXIS 23240 (N.D. Cal., 2009)*

Reconsideration denied by *In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 38111 (N.D. Cal., Mar. 28, 2010)*

Prior History: *In re TFT-LCD Antitrust Litig., 2008 U.S. Dist. LEXIS 106012 (N.D. Cal., Dec. 5, 2008)*

Core Terms

purchaser, indirect, plaintiffs', unjust enrichment, defendants', motion to dismiss, allegations, antitrust, complaints, consolidated, conspiracy, antitrust claim, meetings, direct benefit, alleged conspiracy, price-fixing, conferred, anti trust law, federal law, harmonization, cases, amended complaint, lack standing, consumers, prices, antitrust statute, state law, Sherman Act, products, damages

LexisNexis® Headnotes

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

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

Dismissal of a complaint may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. On a motion to dismiss, a court accepts the facts alleged in the complaint as true.

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

HN2[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A complaint must contain sufficient factual allegations to raise a right to relief above the speculative level.

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

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

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

The Twombly decision does not require elaborate fact pleading. In complex antitrust litigation, motive and intent play leading roles, and the proof is largely in the hands of the alleged conspirators.

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

Evidence > Burdens of Proof > Allocation

HN5[] Complaints, Requirements for Complaint

Although a plaintiff will need to provide evidence of each defendants' participation in any conspiracy, he or she at the pleading stage only needs to make allegations that plausibly suggest that each defendant participated in the alleged conspiracy.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

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

HN6[] State Regulation, Claims

In light of Virginia's harmonization provision requiring courts to interpret the Virginia Antitrust Act in harmony with federal law and the absence of any Virginia authority holding that indirect purchasers have standing under the state statute, indirect purchasers may not seek damages under the Virginia statute.

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

Governments > Legislation > Interpretation

HN7[] **Trade Practices & Unfair Competition, State Regulation**

Virginia's harmonization statute broadly mandates that the chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions. *Va. Code Ann. § 59.1-9.17*. That statute specifically provides that it is to be interpreted and applied in harmony with federal ***antitrust law***. *Va. Code Ann. § 59.1-9.17*.

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

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

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN8[] **Private Actions, Standing**

The Virginia Antitrust Act does not explicitly confer standing on indirect purchasers.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Trade Practices & Unfair Competition, State Regulation**

The Supreme Court of Montana has noted that sections of the Montana Unfair Trade Practices Act, *Mont. Code Ann. § 30-14-201 et seq.*, were modeled after the Sherman Act, and that where the statutes are similar, it will give due weight to the federal courts' interpretation of that type of alleged antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN10[] **Standing, Clayton Act**

The standing provision of the Montana Unfair Trade Practices Act, *Mont. Code Ann. § 30-14-201 et seq.*, allows any person who is or will be injured to sue for damages and injunctive relief. *Mont. Code Ann. § 30-14-222*. Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, allows any person who shall be injured to sue for damages and injunctive relief.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN11[] Trade Practices & Unfair Competition, State Regulation

In the Smith decision, the Supreme Court of Montana did not hold, as a general matter, that the Montana Unfair Trade Practices Act (Montana Act), *Mont. Code Ann. § 30-14-201 et seq.*, is broader than federal law. Instead, the court distinguished between instances when state and federal law differed, and those sections of the Montana statute that were modeled after the Sherman Act. The standing provisions of the Montana Act and the Sherman Act are almost identically worded.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN12[] Private Actions, Standing

See *P.R. Laws Ann. tit. 32, § 3342*.

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

HN13[] Trade Practices & Unfair Competition, State Regulation

Mississippi's antitrust laws prohibit understandings or agreements to restrain trade, increase the price of a commodity, or hinder competition in the production, importation, or sale or purchase of a commodity. *Miss. Code Ann. § 75-21-1*.

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

HN14[] State Regulation, Claims

The Mississippi Antitrust Act requires some allegations of intrastate conduct.

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

Governments > Legislation > Interpretation

HN15[] State Regulation, Claims

The Mississippi Antitrust Act should be construed to require allegations of at least some activity or conduct occurring in intrastate commerce or trade.

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

HN16[] Trade Practices & Unfair Competition, State Regulation

Nevada's ***antitrust law*** states that monopolization of trade or commerce in the state, including, without limitation, attempting to monopolize or otherwise combining or conspiring to monopolize trade or commerce in this state constitutes a contract, combination or conspiracy in restraint of trade, and it is unlawful to conduct any part of such activity in this state. Nev. Rev. Stat. Ann. § 598A.0601(e).

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

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

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

HN17[] **State Regulation, Claims**

In the context of an indirect purchaser's claim for unjust enrichment in a price-fixing case under Michigan law, whether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must show that his detriment and the defendant's benefit are related and flow from the challenged conduct.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN18[] **Equitable Relief, Quantum Meruit**

In order to establish a claim for unjust enrichment under North Carolina law, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN19[] **Equitable Relief, Quantum Meruit**

In the Apache decision, the North Dakota Supreme Court stated that the doctrine of unjust enrichment is invoked when a person has and retains money or benefits which in justice and equity belong to another. For a complainant to recover, it is sufficient if another has, without justification, obtained a benefit at the direct expense of the complainant, who then has no legal means of retrieving it.

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

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

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

HN20[] **Private Actions, Standing**

For those states that have maintained the Illinois Brick prohibition on indirect purchaser recovery, it would subvert the statutory scheme to allow those same indirect purchasers to secure, for the statutory violation, restitutionary relief at common law or in equity.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN21[] Private Actions, Standing

The Arkansas ***antitrust law*** only permits predatory pricing claims alleging that items were sold at less than cost and does not create a private right of action for an alleged conspiracy to raise prices. *Ark. Code Ann. § 4-75-310*.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

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

HN22[] State Regulation, Claims

The Cardizem decision does not hold that indirect purchaser plaintiffs who lack standing under a state antitrust statute could repackage that claim as an unjust enrichment claim.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN23[] Reviewability, Exhaustion of Remedies

Under Tennessee law, a plaintiff must demonstrate that he or she has exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract. However, to maintain an action for unjust enrichment, a plaintiff is not required to exhaust all remedies against the party with whom the plaintiff is in privity if the pursuit of the remedies would be futile.

Counsel: [*1] For Judd Eliasoph, Plaintiff (3:06-cv-07588-SI): Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle, Hofmann, Voelbel, Mason & Gette LLP, San Francisco, CA; Jon T. King, LEAD ATTORNEY, Christopher L. Lebsock, Hausfeld LLP, San Francisco, CA; Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Thomas Patrick Dove, The Furth Firm LLP, San Francisco, CA.

For EMW, Inc., 07-2796, File Reply Memorandum Indirect Purchaser Leadership Proposal of Lingel H. Winters P.C., Plaintiff (3:06-cv-07588-SI): Lingel Hart Winters, Lingel H. Winters, Esq., San Francisco, CA.

For LG Philips LCD America, Inc., Defendant (3:06-cv-07588-SI): Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Sharp Electronics Corporation, Defendant (3:06-cv-07588-SI): Albert J. Boro, Jr., LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Hitachi America Ltd., Hitachi Electronic Devices (USA), Inc., Defendants (3:06-cv-07588-SI): Candice Simone Petty, William James Taylor, Morgan, Lewis & Bockius LLP, San Francisco, CA.

For NEC Electronics **[*2]** America, Inc., Defendant (3:06-cv-07588-SI): Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For AU Optronics Corporation America, Defendant (3:06-cv-07588-SI): Matthew Clark Lovell, Sedgwick Detert Moran & Arnold, LLP, San Francisco, CA.

For Chi Mei Optoelectronics USA, Inc., Defendant (3:06-cv-07588-SI): Nathan Loy Walker, WilmerHale, Palo Alto, CA.

For Dr. Steven Martel, 06-7888, Movant (3:06-cv-07588-SI): Aaron H. Darsky, Schubert & Reed LLP, San Francisco, CA.

For Bart LLC, 07-1249, Movant (3:06-cv-07588-SI): Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA.

For Aspen Building Technologies, Movant (3:06-cv-07588-SI): Jennie Lee Anderson, Andrus Anderson LLP, San Francisco, CA.

For Francis Frybarger, 07-0967, 3rd party plaintiff (3:06-cv-07588-SI): Daniel Jay Mogin, The Mogin Law Firm P.C., San Diego, CA.

For Marshall Myers, 07-1232, Phelps Technologies, Inc., 07-1231, 3rd party plaintiffs (3:06-cv-07588-SI): Bruce Lee Simon, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For Byron Ho, 7-708, 3rd party plaintiff (3:06-cv-07588-SI): Derek G. Howard, LEAD ATTORNEY, Scott Justin Yundt, Murray & Howard, LLP, Oakland, CA; Daniel Joseph Mulligan, Jenkins Mulligan & **[*3]** Gabriel LLP, San Francisco, CA; Larry W. Gabriel, Jenkins Mulligan & Gabriel, San Francisco, CA.

For Fern M Smith, Special Master (M:07-cv-01827-SI): Fern M Smith, JAMS, San Francisco, CA.

For LG Display Co., Ltd., (D, I) formerly known as LG Philips LCD Co., LTD., LG Display America, Inc., (D, I) formerly known as LG Philips LCD America, Inc., Defendant (M:07-cv-01827-SI): Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I), Samsung Electronics America, Inc., (D, I), Defendants (M:07-cv-01827-SI): Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Sharp Corporation, (D, I), Defendant (M:07-cv-01827-SI): Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Sharp Electronics Corporation (D, I) (M:07-cv-01827-SI): Jacob R. Sorensen, LEAD ATTORNEY, August Orval Stofferahn, Ryan Takemoto, Susan Greenberg, Tara Michele Desautels, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA.

For Toshiba Corporation, **[*4]** (D, I), Toshiba Matsushita, Defendants (M:07-cv-01827-SI): John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For Hitachi Ltd., (D, I), Hitachi Displays, Ltd., (D, I), IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants (M:07-cv-01827-SI): Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., (D, I), Defendant (M:07-cv-01827-SI): Candice Simone Petty, Kent Michael Roger, William James Taylor, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, San Francisco, CA.

For AU Optronics Corporation, (D, I), Defendant (M:07-cv-01827-SI): Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I), Defendant (M:07-cv-01827-SI): John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Christopher Alan Nedeau, Sedgwick Detert Moran & Arnold LLP, San Francisco, CA; Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Michael F. Healy, Esq., Sedwick, Detert, Moran **[*5]** & Arnold, San Francisco, CA.

For Chi Mei Optoelectronics USA, Inc., (D, I), Defendant (M:07-cv-01827-SI): Nathan Loy Walker, LEAD ATTORNEY, WilmerHale, Palo Alto, CA; Gordon Pearson, Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I), Defendant (M:07-cv-01827-SI): Joshua David Hess, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Hannstar Display Corporation, (D, I), Defendant (M:07-cv-01827-SI): Hugh F. Bangasser, Jeffrey L. Bornstein, K&L Gates LLP, Seattle, WA; Hugh Frederick Bangasser, Julie Anne Halter, Ramona M. Emerson, K&L Gates, Seattle, WA.

For Samsung Semiconductor, Inc., (D, I), Defendant (M:07-cv-01827-SI): Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I), Chi Mei Corporation, (D, I), Chi Mei Optoelectronics Corporation, (D, I), Nexgen Mediatech, Inc. ("Nexgen"), (D), Defendants (M:07-cv-01827-SI): Gordon Pearson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Nexgen Mediatech USA Inc, (D), Defendant (M:07-cv-01827-SI): **[*6]** Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, New York, NY; Gordon Pearson, Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant (M:07-cv-01827-SI): Kevin C. McCann, LEAD ATTORNEY, Chad A. Westfall, Sean David Unger, Paul Hastings Janofsky & Walker LLP, San Francisco, CA.

For Tatung Company of America, Inc. ("Tatung America"), (D), Defendant (M:07-cv-01827-SI): Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Nancy Chung Allred, Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Karen Sewell, Roxane C. Busey, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL.

For Toshiba America Electronics Components, Inc., (D, I), Defendant (M:07-cv-01827-SI): John H. Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; Kristen J. McAhren, Wayne A. Cross, LEAD ATTORNEYS, White & Case LLP, Washington , DC.

For Toshiba America Information Systems, Inc., (D, I), Defendant (M:07-cv-01827-SI): John H. **[*7]** Chung, LEAD ATTORNEY, White & Case LLP, New York, NY; Wayne A. Cross, White & Case LLP, Washington, DC.

For State of California, Amicus (M:07-cv-01827-SI): Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division, Department of Justice, Intervenor (M:07-cv-01827-SI): Alexandra Jill Shepard, Heather S. Tewksbury, Niall Edmund Lynch, United States Department of Justice, Antitrust Division, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Divsion, San Francisco Field Office, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS DIRECT PURCHASER PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS INDIRECT PURCHASER PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT; GRANTING DIRECT PURCHASER PLAINTIFFS' MOTION TO FILE SECOND AMENDED CONSOLIDATED AMENDED COMPLAINT

On February 27, 2009, the Court heard argument on defendants' motions to dismiss the direct purchaser plaintiffs' first amended consolidated complaint, defendants' **[*8]** motions to dismiss the indirect purchaser plaintiffs' second amended consolidated complaint, and the direct purchaser plaintiffs' motion to amend the complaint. [1] For the reasons set forth below, the Court DENIES defendants' motions to dismiss the direct purchaser plaintiffs' first amended complaint, [2] GRANTS IN PART and DENIES IN PART defendants' motions to dismiss the indirect purchaser plaintiffs' second amended consolidated complaint, and GRANTS the direct purchaser plaintiffs' motion to file a second amended consolidated complaint.

BACKGROUND

By order filed August 25, 2008, the Court largely denied defendants' motions to dismiss the direct and indirect purchaser consolidated complaints. Docket No. 666. The Court found, however, that the **[*9]** complaints lacked sufficient allegations specific to each defendant, and granted defendants' motions to dismiss in that respect. The Court granted plaintiffs leave to amend to more specifically plead how each defendant joined the alleged price-fixing conspiracy. The Court stated that "plaintiffs need not plead each defendant's involvement in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging that defendant's role in the alleged conspiracy." *Id*. at 6-7.

On December 5, 2008, the direct purchaser plaintiffs filed a first amended consolidated complaint and the indirect purchaser plaintiffs filed a second amended consolidated complaint. The complaints include new allegations about the alleged price-fixing conspiracy, including details about group and bilateral meetings through which the alleged conspiracy was effectuated. The complaints also add new information about guilty pleas recently entered by three TFT-LCD manufacturers who are defendants in this multi-district litigation: LG Display Co. Ltd. (and its U.S. subsidiary, LG Display America, Inc.), Sharp Corporation, and Chunghwa Picture Tubes, Ltd. DP-FACC PP 137-145; IP-SACC **[*10]** PP 189-191.

Defendants have moved to dismiss the complaints on several grounds. Defendants contend that the complaints do not adequately allege each defendant's participation in the alleged conspiracy, and that the case should be limited to the 2001 - 2006 time period, the same time period covered by the related criminal pleas. [3] Defendants raise additional arguments with respect to particular state law claims alleged by the indirect purchaser plaintiffs.

The direct purchaser plaintiffs seek leave to file a second amended consolidated complaint to add a new plaintiff, Texas Digital Systems, Inc. Defendants oppose the motion solely on the grounds articulated in the motion to dismiss the first amended consolidated complaint.

LEGAL STANDARD

HN1[] Dismissal of a complaint may be based "on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable **[*11]** legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. On a motion to dismiss, the Court accepts the facts alleged in the complaint as true. *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*.

[1] The motion to amend was set for hearing on March 6, 2009. However, defendants' opposition to the motion to amend centers on the same issues which are decided in this order. Hence, the March 6, 2009 hearing on the motion to amend is VACATED and the motion will be decided in this order.

[2] The Court will issue a separate order on Tatung Company of America, Inc.'s motion to dismiss the direct purchaser plaintiffs' first amended consolidated complaint.

[3] Notwithstanding their entry of guilty pleas to felony violations of *15 U.S.C. § 1*, defendants LG Display Co. Ltd., LG Display America, Inc., and Sharp Corporation have joined in the motions to dismiss the amended complaints for failure to meet the notice pleading requirements of the Federal Rules of Civil Procedure.

HN2[] *Federal Rule of Civil Procedure 8* requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. **HN3**[] "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. The complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level." *Id. at 1965*.

DISCUSSION

I. Sufficiency of allegations specific to each defendant

Defendants contend that the amended consolidated complaints do not adequately allege each defendant's role in the alleged conspiracy. Defendants argue that the complaints continue to "lump together" the twenty-six different **[*12]** named defendants in general allegations referring to "defendants," or groups of defendants sorted by country or corporate family. All plaintiffs counter that the new paragraphs added to the amended complaints sufficiently allege each defendant's participation and role in the alleged conspiracy.

The Court finds that the amended consolidated complaints more than adequately allege the involvement of each defendant and put defendants on notice of the claims against them. Contrary to defendants' suggestion, neither **HN4**[] *Twombly* nor the Court's prior order requires elaborate fact pleading. Further, the Supreme Court has recognized that "in complex antitrust litigation," "motive and intent play leading roles," and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. The amended complaints add detail about numerous illicit conspiratorial communications between and among defendants (DP-FACC PP 105-133; IP-SACC PP 130-148), and facts of the guilty pleas entered by four defendants for fixing prices of TFT-LCD. DPF-ACC PP 137-147; IP-SACC PP 189-191. The complaints contain additional specific information about the group and **[*13]** bilateral meetings by which the alleged price-fixing conspiracy was effectuated. The complaints allege that group or "crystal" meetings were attended by employees at three general levels of defendants' corporations, and contains details about the structure and content of these meetings, as well as the types of employees who attended the meetings. DP-FACC PP 106-113; IP-SACC PP 133-141. The complaints allege that the "crystal" meetings were supplemented by bilateral discussions between various defendants about past and future pricing, as well as information about shipments, and that these discussions took the form of in-person meetings, telephone calls, e-mails and instant messages. DP-FACC PP 114-115; IP-SACC PP 142-143. The complaint also alleges which types of meetings the defendants and co-conspirators participated in, and in some instances includes more detail such as the year of a meeting and other meeting participants. *See, e.g*. DP-FACC PP 126-128; IP-SACC PP 144-148.

Defendants complain that the complaints still do not differentiate between related corporate entities. As described in the complaints, the alleged conspiracy was organized at the highest level of the defendant organizations **[*14]** and carried out by both executives and subordinate employees. The complaints allege that the conspiracy was implemented by subsidiaries and distributors within a corporate family, and that "individual participants entered into agreements on behalf of, and reported these meetings and discussions to, their respective corporate families." DP-FACC P 130; *see also* IPS-ACC PP 96, 100. Plaintiffs also allege that "the individual participants in conspiratorial meetings and discussions did not always know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family." *Id*. The complaints allege a complex, multinational price-fixing conspiracy and, taken as a whole, they sufficiently allege each defendants' participation in that conspiracy, as well as present a factual basis for the allegations of agency. *See In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008)* (**HN5**[] "Although Plaintiffs will need to provide evidence of each Defendants' participation in any conspiracy, they now only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.").

II. [*15] Proper time period

Defendants contend that plaintiffs have not alleged any facts that would support a plausible inference of anticompetitive conduct before 2001. Defendants argue that the complaints allege that the "crystal" meetings only began in 2001, the guilty pleas in the criminal cases only cover the 2001-2006 time period, and that the "price dispersion" charts in the complaints do not show diminished price dispersion consistent with a conspiracy prior to 2001.

Plaintiffs counter that the complaints include numerous allegations about the period prior to 2001, including allegations that beginning in at least 1996, Hitachi, Sharp and Toshiba met or talked with at least one other defendant in order to agree on TFT-LCD product prices and the amount of TFT-LCD products each would produce. DP-FACC P 4; IP-SACC P 130. The complaints also allege indicia of price-fixing and market manipulation, such as unusual pricing practices, prior to 2001. *See, e.g.*, DPF-ACC PP 147, 150, 157; IP-SACC PP 153-157. Plaintiffs also argue that defendants' arguments are misplaced at the pleadings stage of the litigation, and that there are any number of plausible reasons why the criminal guilty pleas would **[*16]** cover the 2001-2006 time period while still allowing for civil liability during the 1996-2001 period, such as criminal statutes of limitation and higher burdens of proof in criminal cases.

The Court finds that the complaints sufficiently allege anticompetitive conduct during the 1996-2001 time period, and will not limit the class period at this stage of the litigation. [4] Whether discovery bears out plaintiffs' allegations regarding the earlier time period is a different matter, and defendants may renew their challenges to the pre-2001 claims upon a fuller factual record.

III. State law claims alleged in indirect purchaser plaintiffs' second amended consolidated complaint

A. Virginia, Montana, and Puerto Rico

The indirect purchaser plaintiffs have alleged claims under the state antitrust laws of Virginia, Montana and Puerto Rico. Defendants move to dismiss **[*17]** these claims on the ground that these state antitrust laws are, pursuant to either statutory harmonization provisions or case law, required to be interpreted in accordance with federal ***antitrust law***. Defendants contend that because indirect purchasers lack standing under federal law pursuant to *Illinois Brick*, and Virginia, Montana and Puerto Rico have not repealed *Illinois Brick* either by statute or case law, the indirect purchaser plaintiffs lack standing here. Defendants note that there are no antitrust cases in Virginia, Montana or Puerto Rico permitting indirect purchasers to bring suit under the state antitrust laws, and that both Judge Alsup and Judge Hamilton have held that indirect purchasers lack standing under similar circumstances. *See* *California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1150 (N.D. Cal. 2007)* (indirect purchasers lack standing to seek antitrust damages under Virginia Antitrust Act); *In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1027 (N.D. Cal. 2007)* (stating, in context of striking allegations of nationwide class under California law, that in states that have not repealed *Illinois Brick*, "indirect purchasers are barred **[*18]** from bringing antitrust claims, other than for injunctive relief").

1. Virginia

With regard to Virginia, plaintiffs respond that the state harmonization provision, *Va. Code Ann. § 59.1-9.17*, was enacted prior to *Illinois Brick*, at a time when indirect purchasers had standing under federal law. Thus, plaintiffs

[4] Defendants have also moved to dismiss direct purchaser plaintiff Phelps Technology Inc. on the ground that Phelps' claims arise out of pre-2001 purchases of TFT-LCD panels. Because the Court finds that the complaint's pre-2001 allegations are sufficient, the Court denies defendants' motion to dismiss Phelps Technology Inc. on this ground.

contend that the harmonization provision indicates legislative intent to allow indirect purchaser suits under the then-prevailing federal law. Plaintiffs also argue that the differences between the Virginia statute -- namely the statement of the Virginia statute's purpose, and the fact that treble damages are discretionary under the state statute -- support a determination that Virginia law would permit indirect purchaser suits.

The Court disagrees, and finds that ***HN6***[] in light of Virginia's harmonization provision requiring courts to interpret the Virginia Antitrust Act in harmony with federal law, and the absence of any Virginia authority holding that indirect purchasers have standing under the state statute, indirect purchasers may not seek damages under the Virginia statute. ***HN7***[] Virginia's harmonization statute broadly mandates: "This chapter shall be applied and construed to effectuate **[*19]** its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." *See Va. Code Ann. § 59.1-9.17*; *see also Oksanen v. Page Memorial Hosp., 945 F.2d 696, 710 (4th Cir. 1991)* ("[T]he Virginia Act specifically provides that it is to be interpreted and applied in harmony with federal ***antitrust law***. *Va.Code Ann. § 59.1-9.17*. Because Oksanen has failed to establish his restraint of trade and monopoly claims under federal law, his state law antitrust claims likewise fail."). Once *Illinois Brick* was decided, the Virginia legislature was free to pass an *Illinois Brick* repealer statute, as many states did. Virginia did not, and the Court is required to follow the plain language of the harmonization provision, rather than attempt to divine the legislative intent of the *pre-Illinois Brick* legislature in passing the harmonization provision. ***HN8***[] The Virginia Antitrust Act does not explicitly confer standing on indirect purchaser plaintiffs, and plaintiffs have not cited any Virginia case law suggesting that indirect purchasers have standing under the state statute. Plaintiffs have not articulated any reason why the purported differences between the Virginia statute **[*20]** and the Sherman Act are relevant to the question of indirect purchaser standing. Accordingly, the Court agrees with Judge Hamilton's ruling in *Infineon Technologies, 531 F. Supp. 2d at 1150*, and holds that the indirect purchaser plaintiffs lack standing under the Virginia Antitrust Act. The Court GRANTS defendants' motion to dismiss this claim.

2. Montana

In *Smith v. Video Lottery Consultants, Inc., 260 Mont. 54, 858 P.2d 11 (Mont. 1993)*, ***HN9***[] the Supreme Court of Montana noted that sections of the Montana Unfair Trade Practices Act, *Mont. Code Ann. §§ 30-14-201 et seq*., were modeled after the Sherman Act, and that where "the statutes are similar, we will give due weight to the federal courts' interpretation of this type of alleged antitrust violation." *Id. at 13*. The *Smith* court noted that Montana law differed from the Sherman Act is some respects, such as the Sherman Act's requirement of two or more persons to be involved in an lawful restraint of trade, while one person acting alone may violate the Montana act. *Id. at 11*.

Defendants contend that there is no facial difference between the standing provisions of federal and Montana law, and thus this Court must give "due weight" to *Illinois Brick* and dismiss **[*21]** the indirect purchaser plaintiffs' claims under Montana law. ***HN10***[] The standing provision of the Montana statute allows any "person who is or will be injured" to sue for damages and injunctive relief. *Mont. Code Ann. § 30-14-222*. Section 4 of the Clayton Act, *15 U.S.C. § 15*, allows "any person who shall be injured" to sue for damages and injunctive relief. Plaintiffs respond that *Smith* stands for the proposition that the Montana statute is generally broader than the Sherman Act, and thus that the Court should construe the Montana act to confer standing on indirect purchaser plaintiffs.

In the absence of any Montana authority holding that indirect purchaser plaintiffs have standing under Montana ***antitrust law***, the Court declines to find so. Contrary to plaintiffs' characterization of ***HN11***[] *Smith*, the Supreme Court of Montana did not hold, as a general matter, that the Montana statute is broader than federal law. Instead, the court distinguished between instances when state and federal law differed, and those sections of the Montana statute that were modeled after the Sherman Act. With regard to the latter, the *Smith* court instructed that where "the statutes are similar, we will give due weight to **[*22]** the federal courts' interpretation of this type of alleged antitrust violation." *858 P.2d at 13*. Here, the standing provisions of the Montana act and the Sherman Act are almost identically worded. Plaintiffs have not identified any relevant difference between the two statutes that would require a different result, nor have plaintiffs cited any Montana authority holding that indirect purchaser plaintiffs have standing under Montana law. Accordingly, the Court GRANTS defendants' motion to dismiss the claims under Montana law.

3. Puerto Rico

Defendants similarly contend that plaintiffs' claims under the Puerto Rico Antitrust Act are barred because that statute is to be construed in harmony with federal ***antitrust law***, and there has been no repeal of *Illinois Brick*. Plaintiffs respond that the Puerto Rico legislature has specifically recognized the rights of "consumers" to bring class actions under the Puerto Rico Antitrust Act, and that thus indirect purchasers -- who are consumers -- have standing under the statute. *See 32 L.P.R.A. § 3342* (***HN12***[] "There is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf **[*23]** of said merchants or consumers based on the Antitrust Act of the Commonwealth, *§§ 257-274* of Title 10."). Plaintiffs also cite *Arroyo-Melecio v. Puerto Rican American Insurance Co., 398 F.3d 56, 72 (1st Cir. 2005)*, which held that the plaintiff consumers had standing under the Puerto Rico Antitrust Act. However, that case involved a class action brought by consumers of compulsory automobile insurance against insurance companies, and thus the plaintiffs there were not akin to indirect purchasers. Plaintiffs also cite *Comes v. Microsoft Corporation, 646 N.W.2d 440, 448 (Iowa 2002)*, which states in dicta that "In total, nineteen states, the District of Columbia, and Puerto Rico have statutes explicitly authorizing indirect purchasers to maintain an antitrust suit." The *Comes* court does not cite a Puerto Rico statute in support of this statement.

The Court finds, for the same reasons discussed above, that the indirect purchaser plaintiffs lack standing under the Puerto Rico statute. The Court is reluctant to find standing in the absence of an explicit *Illinois Brick* repealer, either by statute or case law. Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' claims under **[*24]** the Puerto Rico antitrust statute.

B. Mississippi and Nevada

Defendants move to dismiss the indirect purchaser plaintiffs' state law antitrust claims under Mississippi and Nevada law because plaintiffs have not alleged that any part of defendants' conduct took place in those states. ***HN13***[] Mississippi's antitrust laws prohibit understandings or agreements to "restrain trade," "increase . . . the price of a commodity," or "hinder competition in the production, importation, . . . or sale or purchase of a commodity." *Miss. Code Ann. § 75-21-1*. Defendants note that the indirect purchaser plaintiffs allege that defendants' conduct occurred mainly in the State of California, and that the complaint only alleges *effects* in Mississippi, not *conduct*.

The Court agrees with defendants that ***HN14***[] the Mississippi Antitrust Act requires some allegations of intrastate conduct, but finds that plaintiffs have sufficiently alleged such conduct. The complaint alleges that "LCD price competition was restrained, suppressed, and eliminated throughout Mississippi," "LCD prices were raised, fixed, maintained and stabilized at artificially high levels throughout Mississippi," and that plaintiffs "were deprived of free and **[*25]** open competition" and "paid supracompetitive, artificially inflated prices for LCD." IP-SACC P 269(a). Courts have held that similar allegations are sufficient to state a claim under the Mississippi Act. *See In re Graphics Processing Units Antitrust Litig. ("GPU II"), 540 F. Supp. 2d 1085, 1099 (N.D. Cal. 2007)* (permitting claim under Mississippi law where plaintiffs alleged that defendants' conspiracy substantially affected commerce in state, injured Mississippi residents, defendants promoted products in state and harmed competition in state); *see also Infineon Techs., 531 F. Supp. 2d at 1158-59* (***HN15***[] "the Mississippi Antitrust Act should be construed to require allegations of at least some activity or conduct occurring in intrastate commerce or trade"; dismissing complaint with leave to amend where plaintiffs failed to allege "any activity of any kind -- sales, purchases, or other activities in trade or commerce"). Plaintiffs' allegation that defendants' conduct occurred mainly in California is not inconsistent with alleging anticompetitive conduct in Mississippi. *See Standard Oil Co. of Ky. v. State ex rel. Attorney General, 107 Miss. 377, 65 So. 468 (Miss. 1914)*, *overruled in part on other grounds* ***[*26]*** *sub nom. Mladinich v. Kohn, 250 Miss. 138, 164 So. 2d 785 (Miss. 1964)* (sustaining claim where plaintiffs alleged nationwide conspiracy to monopolize trade in petroleum and petroleum products, no petroleum produced in Mississippi, defendants sold and distributed petroleum products in Mississippi).

Likewise, ***HN16***[] Nevada's ***antitrust law*** states that "[m]onopolization of trade or commerce in this state, including, without limitation, attempting to monopolize or otherwise combining or conspiring to monopolize trade or commerce in this state" constitutes a "contract, combination or conspiracy in restraint of trade, and it is unlawful to conduct any part of such activity in this state." *Nev. Rev. Stat. Ann. § 598A.0601(e)*. Plaintiffs' allegations with regard to Nevada are similar to those for Mississippi. IP-SACC P 271(a). The Court finds these allegations are sufficient to state a claim under the Nevada statute. *See In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 413-14 (D. Del. 2007)* (denying motion to dismiss Nevada claim where complaint alleged nationwide price-fixing conspiracy and goods sold in Nevada).

Accordingly, the Court DENIES defendants' motion to dismiss plaintiffs' Mississippi **[*27]** and Nevada state law antitrust claims.

C. Michigan, Florida, North Carolina and North Dakota

Defendants argue that plaintiffs' unjust enrichment claims under Michigan, Florida, North Carolina, and North Dakota law must be dismissed because the law of these states require that plaintiffs have conferred a "direct benefit" on defendants, and the indirect purchasers cannot allege such a direct benefit.

1. Michigan

Citing *A & M Supply Co. v. Microsoft Corp., No. 274164, 2008 Mich. App. LEXIS 433, 2008 WL 540883, (Mich. App. Feb. 28, 2008)* (per curiam), defendants contend that Michigan's "highest court" recently held that indirect purchasers in a price-fixing case cannot bring a claim for unjust enrichment because a plaintiff must have conferred a direct benefit upon the defendant. Joint motion at 14; Reply at 12. [5] In *A&M Supply*, the Michigan Court of Appeals (not the Michigan Supreme Court, which is Michigan's highest court), affirmed a trial court's dismissal for failure to prosecute. In an unpublished per curiam decision, the court alternatively held that the lawsuit was subject to dismissal on the merits because, "the unjust enrichment doctrine does not apply under the facts alleged by plaintiff here." *2008 Mich. App. LEXIS 433, [WL] at *2*. **[*28]** The court noted that there was "no [] direct contact between Microsoft and the indirect purchasers in the class they seek to have certified. Nor can they show that Microsoft received any direct payment or other benefit from those purchasers." *2008 Mich. App. LEXIS 433, [WL] at *2*. There is no further discussion of the facts of the case. While *A& M* provides some support for defendants' position, it is hardly the controlling authority that defendants suggest.

Plaintiffs cite several cases, including a Michigan Supreme Court case, for the proposition that they need not allege a direct benefit to defendants to state an unjust enrichment claim in Michigan. *See, e.g., Kammer Asphalt Paving Co., Inc. v. East China Tp. Schools, 443 Mich. 176, 504 N.W.2d 635, 640-41 (Mich. 1993)*; *Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 729 N.W.2d 898, 904-905 (Mich. Ct. App. 2006)*; *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 670-71 (E.D. Mich. 2000)*. These three cases hold that a party can bring an unjust enrichment claim against a defendant even in the absence of privity or a contract **[*29]** between the parties. *In re Cardizem* is the most factually apposite. In that antitrust case, the indirect purchaser plaintiffs "alleged that they conferred a benefit, in the form of overpayments and increased profits, on Defendants, that Defendants accepted that benefit and that it would be unjust under the alleged circumstances for Defendants to retain that benefit." *105 F. Supp. 2d at 671*. The court rejected the defendants' "narrow" argument that a direct benefit was required under Michigan law. ***HN17***[] "Whether or not the benefit is directly conferred on the defendant is not the critical inquiry; rather, the plaintiff must show that his detriment and the defendant's benefit are related and flow from the challenged conduct." *Id*.

[5] Indeed, defendants strenuously argue that plaintiffs' lower court authority should be disregarded because *A&M* was issued by the highest court in Michigan.

Here, plaintiffs' allegations are similar to those alleged in *In re Cardizem*. The Court finds that plaintiffs have stated a claim for unjust enrichment under Michigan law, and DENIES defendants' motion to dismiss this claim.

2. North Carolina

Defendants rely on *Effler v. Pyles, 94 N.C. App. 349, 380 S.E. 2d 149 (N.C. Ct. App. 1989)*, in which the North Carolina Court of Appeals affirmed summary judgment in favor of a defendant because the plaintiff had not shown that she conferred a benefit **[*30]** directly on the defendant. Cases since *Effler*, however, have suggested that *Effler's* holding is narrow, and that there is no requirement of "direct benefit" in cases alleging fraud or civil conspiracy. *See, e.g., Perkins v. Healthmarkets, Inc., No. 06 CVS 21053, 2007 NCBC 25, 2007 NCBC LEXIS 25, 2007 WL 2570242, at *9 (N.C. Super. Ct. July 30, 2007)*. In any event, in affirming the trial court's summary judgment, the *Effler* court relied on the North Carolina Supreme Court's decision in *Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554 (N.C. 1988)*. *Booe* did not, however, require that a benefit be direct to state an unjust enrichment claim. ***HN18***[] "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable." *Booe, 322 N.C. at 570*.

Here, plaintiffs have alleged that they conferred a benefit on defendants by paying higher prices for LCD products than they would have in the absence of the alleged price-fixing conspiracy. The Court finds **[*31]** under *Booe* that these allegations are sufficient to state a claim, and DENIES defendants' motion to dismiss plaintiffs' unjust enrichment claims under North Carolina law.

3. North Dakota

Relying on *Apache Corporation v. MDU Resources Group, Inc., 1999 ND 247, 603 N.W.2d 891, 895 (N.D. 1999)*, defendants move to dismiss the indirect purchaser plaintiffs' unjust enrichment claim under North Dakota law. ***HN19***[] In *Apache*, the North Dakota Supreme Court stated that the doctrine of unjust enrichment "is invoked when a person has and retains money or benefits which in justice and equity belong to another. . . . For a complainant to recover, it is sufficient if another has, without justification, *obtained a benefit at the direct expense* of the [complainant], who then has no legal means of retrieving it." (internal quotations omitted, emphasis added). Apache alleged that it was a third-party beneficiary of contracts between the defendant and a third party, and that when the defendant breached that contract, the defendant was unjustly enriched at Apache's expense. The court affirmed the dismissal of Apache's unjust enrichment claim, noting that "the money MDU saved by breaching its contract with Koch was not a 'benefit **[*32]** at the direct expense of' Apache." *Id. at 895*.

Plaintiffs argue that *Apache* does not establish that a "direct benefit" is a requirement under North Dakota law, and they emphasize language in *Apache* that "the essential element of recovering under a theory of unjust enrichment -- receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value -- is present here." *Id*. (internal quotations and citations omitted). Plaintiffs distinguish *Apache* on the ground that there the plaintiff had not in fact conferred any benefit on the defendant, whereas here plaintiffs do allege that they have conferred a benefit on defendants. Although this factual distinction is correct, the broader language of *Apache* suggests that a "direct benefit" is required under North Dakota law. *See In re Relafen Antitrust Litig., 225 F.R.D. 14, 28 (D. Mass. 2004)* (interpreting *Apache* to require direct benefit and dismissing unjust enrichment claims brought by indirect purchasers). Plaintiffs have not cited any authority holding that North Dakota law does not require a direct benefit, and in the face of *Apache*, the Court is inclined to agree with defendants.

Accordingly, **[*33]** the Court GRANTS defendants' motion to dismiss plaintiffs' unjust enrichment claims under North Dakota law.

D. Unjust enrichment-- Arkansas, Virginia, Montana and Puerto Rico

Defendants move to dismiss plaintiffs' unjust enrichment claims under Arkansas, Virginia, Montana and Puerto Rico law, arguing that plaintiffs are improperly attempting to circumvent the antitrust laws of those jurisdictions, under which they lack antitrust standing. [6] Defendants contend that plaintiffs may not circumvent the restrictions on antitrust claims under Arkansas, Virginia, Montana and Puerto Rico law by reframing those claims as unjust enrichment actions, and they cite a number of cases which stand for that general proposition. *See, e.g., In re Microsoft Corp. Antitrust Litig., 401 F. Supp. 2d 461, 464 (D. Md. 2005)* ("[T]he specific bar on indirect purchaser recovery incorporated into South Carolina's antitrust statutes prohibits Plaintiff's general common-law [unjust enrichment] claim."); *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 211 (D. Me. 2004)* (***HN20***[] "For those states that have maintained the *Illinois Brick* prohibition on indirect purchaser recovery, I conclude that **[*34]** it would subvert the statutory scheme to allow these same indirect purchasers to secure, for the statutory violation, restitutionary relief at common law (or in equity)."); *see also GPU II, 540 F. Supp. 2d at 1100* (allowing plaintiffs to maintain unjust enrichment claims because they have "excised unjust-enrichment claims for states that do not recognize antitrust remedies for indirect purchasers, so this claim is no longer attempting to circumvent the laws of states that do not recognize claims for damages by indirect purchasers.").

Plaintiffs rely on *In re Cardizem* to argue that in that case, "defendants made a similar argument that plaintiff indirect purchasers could not proceed with unjust enrichment claims in states where they could not recover under **[*35]** the state's antitrust or consumer protection laws," and that the court "resoundly rejected" that argument. Indirect Purchasers' Opposition at 19. In fact, in *In re Cardizem*, the defendants moved to dismiss state law antitrust claims on a variety of grounds, but did not contend that indirect purchaser plaintiffs lacked antitrust standing based on *Illinois Brick* and harmonization with federal law. *See generally, In re Cardizem, 105 F. Supp. 2d at 645* (antitrust injury); *659* (whether state law claims preempted by Hatch-Waxman Act); *664* (whether state claims required court to enforce FTC consent decree); *665-68* (whether Wisconsin and Tennessee antitrust statutes require wholly intrastate conduct). Further, the *In re Cardizem* court *denied* the defendants' motion to dismiss the state antitrust claims. The *Cardizem* defendants moved to dismiss the state unjust enrichment claims arguing first "that Plaintiffs' unjust enrichment claims are dependent upon the allegations supporting their state law antitrust claims and thus suffer from the same flaws that preclude Plaintiffs from stating an antitrust claim." *Id. at 669*. It is within this context that the court denied the motion to dismiss, holding **[*36]** "[t]he first of Defendants' arguments fails to read Plaintiffs' complaint in the light most favorable to Plaintiffs and confuses Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with its right to recover a remedy at law for an alleged violation of a state's antitrust laws." *Id*. Contrary to plaintiffs' suggestion, ***HN22***[] the *Cardizem* court did not hold that indirect purchaser plaintiffs who lacked standing under a state antitrust statute could repackage that claim as an unjust enrichment claim.

Plaintiffs also cite *D.R. Ward Construction Company v. Rohm & Haas Co., 470 F. Supp. 2d 485 (E.D. Pa. 2006)*. There, the defendants moved to dismiss unjust enrichment claims under Tennessee, Arizona and Vermont law, and argued that "in jurisdictions which possess antitrust statutes conferring standing on indirect purchasers, an indirect purchaser may only bring a statutory claim for alleged anti-competitive behavior." *Id. at 506*. The defendants also argued that if the plaintiffs' state antitrust claims were defective, the plaintiffs could not recover restitution through an unjust enrichment claim based on the same predicate wrong. *Id*. **[*37]** The court rejected the defendants' arguments and permitted the three state unjust enrichment claims, holding that "the viability of these claims does not hinge upon the success of the state statutory antitrust claims." *Id*. However, unlike the situation presented here, and as the *D.R. Ward* court noted "most importantly" in reaching its conclusion, "Tennessee, Arizona, and Vermont all permit indirect purchasers to pursue antitrust claims; thus, an unjust enrichment claim would not circumvent the

---

[6] Defendants contend -- and plaintiffs do not disagree -- that plaintiffs do not have standing to seek relief under Arkansas ***antitrust law*** because ***HN21***[] that law only permits predatory pricing claims alleging that items were sold "at less than cost" and does not create a private right of action for an alleged conspiracy to raise prices. *See Ark. Code Ann. § 4-75-310*; *see also FTC v. Mylan Lab., Inc.., 62 F. Supp. 2d 25, 44-45 (D.D.C. 1999)*.

procedural and substantive limitations of these antitrust statutes." *Id. at 507*. Thus, rather than supporting plaintiffs' position, *D.R. Ward* undermines it.

Here, plaintiffs have not cited any authority from Arkansas, Virginia, Montana or Puerto Rico holding that an indirect purchaser plaintiff may bring an unjust enrichment claim when that same claim would be barred under state ***antitrust law***. In the absence of such authority, the Court declines to recognize such a claim because the Court agrees with defendants that permitting such claims would allow plaintiffs to circumvent limitations of state antitrust laws.

E. Unjust enrichment-- Tennessee and Florida

7

Defendants argue that plaintiffs' unjust enrichment claims under Tennessee law must be dismissed because plaintiffs have not alleged that they first exhausted their administrative remedies. ***HN23***[] Under Tennessee law, a plaintiff must demonstrate that he or she has exhausted "all remedies against the person with whom the plaintiff enjoyed privity of contract." *Freeman Indus., LLC v. Eastman Chemical Co., 172 S.W. 3d 512, 525 (Tenn. 2005)*. However, "to maintain an action for unjust enrichment, a plaintiff is not required to exhaust all remedies against the party with whom the plaintiff is in privity if the pursuit of the remedies would be futile." *Id. at 526*.

Plaintiffs respond that futility is self-evident in these circumstances where the alleged pricefixing was done by the defendants in the manufacture of LCD panels and LCD products, and there has been no allegation that the resellers were involved in the conspiracy. The Court agrees that under the facts alleged in the complaint, futility is evident. Accordingly, the Court DENIES defendants' **[*39]** motion to dismiss the Tennessee claim.

CONCLUSION

For the foregoing reasons, the Court hereby DENIES defendants' motions to dismiss the direct purchaser plaintiffs' first amended complaint, and GRANTS IN PART AND DENIES IN PART defendants' motions to dismiss the indirect purchaser plaintiffs' second amended complaint. (Docket Nos. 769, 771, 777, 778, 779, 782). The Court GRANTS the direct purchaser plaintiffs' motion to amend the complaint, and VACATES the March 6, 2009 hearing scheduled for that motion. (Docket No. 806). The direct purchaser plaintiffs shall file the amended complaint by **March 13, 2009**.

IT IS SO ORDERED.

Dated: March 3, 2009

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

---

[7] As previously indicated, plaintiffs **[*38]** have agreed to dismiss their Florida unjust enrichment claims. Therefore, the Court need not address the issue of exhaustion of remedies as to Florida law.

In re Chocolate Confectionary Antitrust Litig.

United States District Court for the Middle District of Pennsylvania

March 4, 2009, Decided

MDL DOCKET NO. 1935; (Civil Action No. 1:08-MDL-1935)

Reporter

602 F. Supp. 2d 538 *; 2009 U.S. Dist. LEXIS 20975 **; 2009-1 Trade Cas. (CCH) P76,593

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL CASES

Core Terms

products, prices, Global, defendants', general jurisdiction, chocolate candy, subsidiaries, consumers, motion to dismiss, contacts, markets, chocolate, personal jurisdiction, plaintiffs', antitrust, manufacturing, conspiracy, discovery, price-fixing, allegations, courts, possesses, increased price, stream-of-commerce, unfair, DEFERRED, in-forum, purchasers, common law, commerce

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

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

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

HN1[] **In Personam Actions, Challenges**

Motions to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)*, like those for failure to state a claim under *Rule 12(b)(6)*, require the court to accept as true the allegations of the pleadings and all reasonable inferences therefrom. However, unlike *Rule 12(b)(6)*, *Rule 12(b)(2)* does not limit the scope of the court's review to the face of the pleadings. Consideration of affidavits submitted by the parties is appropriate and, typically, necessary.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Evidence > Burdens of Proof > Initial Burden of Persuasion

Evidence > Burdens of Proof > Preponderance of Evidence

HN2[] **In Personam Actions, Challenges**

Although plaintiffs bear the ultimate burden of proving personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the preliminary stages of litigation. Rather, the plaintiffs must merely allege sufficient facts to establish a prima facie case of jurisdiction over the person. Once these allegations are contradicted by an opposing affidavit, however, the plaintiffs must present similar evidence in support of personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

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

HN3[] **In Personam Actions, Challenges**

At no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's *Fed. R. Civ. P. 12(b)(2)* motion to dismiss for lack of in personam jurisdiction. Once the motion is made, the plaintiff must respond with actual proofs, not mere allegations. When the plaintiff responds with affidavits or other evidence in support of its position, however, the court is bound to accept these representations and defer final determination as to the merits of the allegations until a pretrial hearing or the time of trial.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Evidence > Burdens of Proof > Initial Burden of Persuasion

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

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN4[] **In Personam Actions, Challenges**

If a party moving to dismiss for lack of personal jurisdiction fails to submit evidence contravening the allegations of the complaint, the court is bound to accept the plaintiff's allegations regardless of whether the plaintiff presents further evidence in support thereof. Unless the court hears evidence on the jurisdictional issues, all allegations must be taken as true for purposes of assessing whether the plaintiff has established a prima facie case of jurisdiction. In other words, although the burden of persuasion always lies with the non-moving party, the burden of production rests initially with the party moving for dismissal under *Fed. R. Civ. P. 12(b)(2)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN5[] **In Personam Actions, Minimum Contacts**

A federal court entertaining a suit must possess one of two forms of personal jurisdiction over each defendant. The first type of jurisdiction, known as specific jurisdiction, requires that the plaintiff's claim arise from the defendant's contacts with the forum in which the court sits. In contrast, the court may exercise general jurisdiction over a defendant who possesses systematic and continuous contacts with the forum regardless of whether the plaintiff's claim derives from the defendant's in-forum activities. The court must determine whether to exercise either form of jurisdiction in light of the relationship among the defendant, the forum, and the litigation.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN6[] Sherman Act, Jurisdiction

When a statute such as the Sherman Act permits nationwide service of process, the *Fifth Amendment Due Process Clause* guides a court's personal jurisdiction inquiry.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Jurisdiction

HN7[] Sherman Act, Jurisdiction

Section 12 of the Clayton Act, *15 U.S.C.S. § 22*, authorizes nationwide service of process in antitrust cases, including those brought under *15 U.S.C.S. § 1* of the Sherman Act.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN8[] In Personam Actions, Minimum Contacts

Specific jurisdiction allows a court to adjudicate claims related to the defendants' contacts with the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN9[] In Personam Actions, Placement of Product in Commerce

Three alternative theories allow a court to acquire specific jurisdiction over a defendant. First, under principles of purposeful availment, the court may exercise jurisdiction over a defendant that has directed its activities into a forum, thereby producing the alleged injury. Second, the stream-of-commerce theory provides jurisdiction over an out-of-forum defendant if plaintiff's in-forum injury arises from a product that defendant placed into channels of commerce. Third, the effects test announced in Calder v. Jones confers jurisdiction over a defendant whose tortious conduct performed outside the forum produced effects within the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN10[] In Personam Actions, Minimum Contacts

Under purposeful availment doctrine, a court may exercise specific jurisdiction if (1) the defendant purposefully directs its activities into a forum, (2) the case arises from those activities, and (3) the exercise of jurisdiction comports with fair play and substantial justice. The purposeful availment and relatedness inquiries are often described collectively as requiring "minimum contacts" between the defendant and the relevant forum. If a federal statute authorizes nationwide service of process, the court appraises the defendant's contacts with the United States as a whole.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN11[] In Personam Actions, Purposeful Availment

The first component of the jurisdictional inquiry assays whether a defendant availed himself of the privilege of conducting activities within the forum. It requires the defendant to invoke the forum's laws by performing a volitional act directed toward the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN12[] In Personam Actions, Purposeful Availment

To establish specific personal jurisdiction, a plaintiff's claim must arise from one of the defendant's forum-related activities. The inquiry ensures that the defendant's "jurisdictional exposure" remains proportionate to its in-forum activities. The cost of enjoying the benefits of a forum is specific jurisdiction. The link between the defendant's action and the plaintiff's claim need not rise to the level of proximate causation, but the connection must be intimate enough to keep the quid pro quo between in-forum activity and jurisdictional exposure proportional and personal jurisdiction reasonably foreseeable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN13[] In Personam Actions, Minimum Contacts

Minimum contacts alone will not confer personal jurisdiction over a defendant. The plaintiff must also establish that the exercise of jurisdiction harmonizes with traditional notions of fair play and substantial justice. At this stage of the analysis, the court evaluates the reasonableness of jurisdiction in light of a variety of interests, including burden that litigation places on the defendant, the forum's interest in the litigation, plaintiff's interest in obtaining convenient relief, the interest of the interstate judicial system in efficient resolution of controversies, and the shared interests of the several states in furthering fundamental substantive social policies. No single factor is dispositive of the jurisdictional analysis. A court rejects any talismanic jurisdictional formulas. In federal question cases, when concerns of comity among the states are less pronounced, courts should consider the policies of the federal laws from which the dispute arises.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Evidence > Burdens of Proof > General Overview

HN14[] In Personam Actions, Minimum Contacts

While minimum contacts alone are insufficient to support personal jurisdiction, a defendant that possesses minimum contacts must make a compelling case that litigation in the forum state would be unreasonable and unfair to prevent jurisdiction from attaching.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Evidence > Burdens of Proof > General Overview

HN15[] In Personam Actions, Challenges

When defendants challenge personal jurisdiction and have supplied affidavits in support of their motions, the plaintiffs incur the burden of rebutting the defendants' assertions through sworn affidavits or other competent evidence.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Evidence > Burdens of Proof > General Overview

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

HN16[] In Personam Actions, Challenges

Fed. R. Civ. P. 12(b)(2) motions require that plaintiffs establish personal jurisdiction as to each particular corporate defendant. The specific jurisdiction determination is both claim-specific and defendant-specific. The plaintiffs will be required to demonstrate that each of the defendants individually possesses sufficient contacts with the forum to warrant exercise of personal jurisdiction regardless of whether their corporate families, considered as a whole, possess such contacts.

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

HN17[] Regulated Practices, Price Fixing & Restraints of Trade

A plaintiff cannot hold a manufacturer liable for a price-fixing harm occurring after the product left the manufacturer's hands absent a showing that the manufacturer retained control over product pricing.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN18[] In Personam Actions, Minimum Contacts

Specific jurisdiction requires a plaintiff's injury to be related and proportional to the defendant's in-forum activities.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Evidence > Burdens of Proof > General Overview

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

HN19[] In Personam Actions, Challenges

Upon a motion to dismiss, although all allegations in the complaint are taken as true, a plaintiff may not solely rely on bare pleadings to satisfy his jurisdictional burden.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

HN20[] In Personam Actions, Placement of Product in Commerce

The stream-of-commerce theory generally allows a court to exercise personal jurisdiction over a defendant that directs its products into a forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

HN21[] In Personam Actions, Placement of Product in Commerce

As a specific jurisdiction doctrine the stream-of-commerce theory requires that a plaintiff's claim arise out of the flow of the defendant's products into the forum. Specific jurisdiction requires a link between the defendant's activity directed in the forum and the plaintiff's harm.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

HN22[] In Personam Actions, Placement of Product in Commerce

The stream-of-commerce test for jurisdiction is met if a nonresident's product is purchased by or delivered to a consumer in the forum state, so long as the nonresident's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there for claims arising out of that conduct.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

HN23[] In Personam Actions, Placement of Product in Commerce

The basic theory of the stream-of-commerce analysis is one of foreseeability: One who puts a product into the stream of commerce in such a fashion as to reasonably foresee its sale in a certain jurisdiction cannot complain of having to defend against claims in that jurisdiction arising out of the product's presence there.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

HN24[] In Personam Actions, Minimum Contacts

Stream-of-commerce jurisdiction must comport with notions of fair plan and substantial justice. Even if a defendant has the requisite minimum contacts with the forum, other factors may militate against exercising jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

Torts > Products Liability > General Overview

HN25[] **In Personam Actions, Placement of Product in Commerce**

Originally developed in the products liability context, courts have extended the stream-of-commerce doctrine to a variety of cases in which the plaintiff's claims are directly related to particular characteristics of the defendant's product or to the defendants' act of shipping the product into the forum.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

Antitrust & Trade Law > Clayton Act > Jurisdiction

HN26[] **Sherman Act, Jurisdiction**

No antitrust case has been identified imposing jurisdiction upon a defendant that simply shipped products into a forum and lacked control over in-forum pricing.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

HN27[] **In Rem & Personal Jurisdiction, In Personam Actions**

A plaintiff may predicate specific jurisdiction upon a defendant's activities outside of the relevant forum if the plaintiff suffered the effects of the conduct within the forum. Often denominated the "Calder effects test" after the U.S. Supreme Court decision from which it derives, this form of specific jurisdiction requires the plaintiff to establish: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. To satisfy the final element of the test, the plaintiff must (a) demonstrate that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum and (b) point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum. A plaintiff may rely upon the Calder effects test to acquire jurisdiction over a defendant in cases involving business torts, including price fixing.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN28[] **In Personam Actions, Substantial Contacts**

General jurisdiction arises when a defendant possesses continuous and systematic contacts with the forum. It empowers a court to hear any claim against a defendant regardless of the claim's relationship to the defendant's in-forum contacts.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN29[] **In Personam Actions, Substantial Contacts**

If general jurisdiction exists, the contacts between the defendant and the forum need not be specifically related to the underlying cause of action in order for an exercise of personal jurisdiction over the defendant to be proper.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN30[] **Piercing the Corporate Veil, Alter Ego**

A court may acquire general jurisdiction over a defendant under two alternative theories. First, a court may obtain jurisdiction over any defendant that exhibits systematic and continuous contacts with the forum. Second, a court, already imbued with general jurisdiction over a corporation, may obtain jurisdiction over an affiliated entity when the two companies have fully integrated their operations and function as a single, unified entity. The latter doctrine is frequently identified as alter ego jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN31[] **In Personam Actions, Substantial Contacts**

A defendant must possess significantly more than mere minimum contacts to support exercise of general jurisdiction; rather, the defendant's contacts with the forum must be systematic and continuous. The court must evaluate the nature and quality of a defendant's contacts in light of factors such as whether the defendant sells products, maintains a sales staff, derives significant revenue from, or advertises in the forum. Other activities favoring general jurisdiction include holding a business license, filing tax returns or administrative reports, owning land or personal property, purchasing products, or employing an agent in the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN32[] **In Rem & Personal Jurisdiction, In Personam Actions**

Execution of a contract with a forum resident is alone insufficient to subject a defendant to the court's jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN33[] **In Personam Actions, Substantial Contacts**

Issuance of American Depository Receipts does not support general jurisdiction without additional in-forum contacts.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

Patent Law > Jurisdiction & Review > Personal Jurisdiction & Venue > Foreign Defendants

HN34[] **In Personam Actions, Substantial Contacts**

Ownership of a United States patent, without more, cannot support the assertion of personal jurisdiction over a foreign patentee in any state besides the District of Columbia.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN35[] **In Personam Actions, Doing Business**

Mere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN36[] **In Personam Actions, Minimum Contacts**

A non-resident's contracting with a forum resident, without more, is insufficient to establish the requisite minimum contacts for specific or general jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Mergers & Acquisitions Law > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN37[] **In Personam Actions, Minimum Contacts**

A holding company's acquisition of a domestic entity may confer specific jurisdiction in actions related to the transaction, but they do not support general jurisdiction in the absence of additional contacts with the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN38[] **In Personam Actions, Substantial Contacts**

It is illogical to predicate general jurisdiction upon a defendant's employment of attorneys to effectuate transactions that fail ex proprio vigore to establish such jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN39[] **In Personam Actions, Doing Business**

Business visits and purchases within a forum, even if occurring at regular intervals, are not enough to support general jurisdiction over a defendant.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN40[] **Piercing the Corporate Veil, Alter Ego**

A court may exercise general jurisdiction over a foreign corporation if it possesses jurisdiction over a parent or subsidiary and the two companies operate de facto as a single, organic entity. The applicability of alter ego jurisdiction depends upon whether (1) the parent owns all or a significant majority of the subsidiary's stock; (2) commonality of officers or directors exists between the two corporations; (3) the corporate family possesses a unified marketing image, including common branding of products; (4) corporate insignias, trademarks, and logos are uniform across corporate boundaries; (5) corporate family members share employees; (6) the parent has integrated its sales and distribution systems with those of its subsidiaries; (7) the corporations exchange or share managerial or supervisory personnel; (8) the subsidiary performs business functions that would ordinarily be handled by a parent corporation; (9) the parent uses the subsidiary as a marketing division or as an exclusive distributor; and (10) the parent exercises control or provides instruction to the subsidiary's officers and directors. No single factor is dispositive, and the court may consider all relevant evidence to determine whether the parent exercises actual control over a subsidiary beyond that which is characteristic of a usual parent-subsidiary relationship.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Inadequate Capitalization

HN41[] **Piercing the Corporate Veil, Alter Ego**

Alter ego factors developed in the corporate veil-piercing context, such as gross undercapitalization and extensive parental control, are also relevant to the personal jurisdictional analysis.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN42[] **Piercing the Corporate Veil, Alter Ego**

A plaintiff may invoke alter ego jurisdiction against nonresident corporations upon a finding that either the "dominant" or "subservient" corporation does business within the forum.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN43[] Piercing the Corporate Veil, Alter Ego

Courts evaluate alter egos in the veil-piercing context by reference to factors such as undercapitalization of a subsidiary, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder. These factors also affect the alter ego jurisdictional analysis but do not preclude consideration of other indicia of corporate control.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN44[] Shareholder Duties & Liabilities, Piercing the Corporate Veil

The factors considered in deciding whether to pierce the corporate veil for liability purposes are similar to the factors considered in deciding whether to pierce the corporate veil in the jurisdictional context, but a court should address all relevant factors when resolving questions of jurisdiction. The court should examine all relevant factors that relate to the intimacy of the relationship between the parent and subsidiary.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Computer & Internet Law > Civil Actions > Jurisdiction > General Overview

HN45[] In Personam Actions, Doing Business

A website may support exercise of jurisdiction if a defendant intentionally interacts with the forum via the web site. Websites that passively furnish information do not confer jurisdiction over the defendant, whereas sites that allow users to purchase goods or services generally provide a jurisdictional anchor. A defendant's conscious choice to conduct business with residents of a forum state via its website is pivotal to this inquiry.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN46[] Piercing the Corporate Veil, Alter Ego

Alter ego jurisdiction does not arise merely because a parent corporation refers to its subsidiaries as corporate divisions.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN47[] Alter Ego, Corporate Formalities

Defendants cannot be subject to alter ego jurisdiction without additional evidence that they have beclouded corporate boundaries and that two or more affiliated entities are de facto one.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN48[] **Piercing the Corporate Veil, Alter Ego**

Alter ego jurisdiction does not attach merely because a parent corporation participates in its subsidiary's business.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN49[] **Civil Procedure, Discovery & Disclosure**

A plaintiff who fails to establish a prima facie case of personal jurisdiction may request a period of limited discovery for the purpose of obtaining further jurisdictional evidence. Courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is clearly frivolous. The plaintiffs must identify particular facts that demonstrate the likelihood of contacts sufficient to corral the defendants within the court's jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Civil Procedure > Discovery & Disclosure > General Overview

HN50[] **In Personam Actions, Doing Business**

General allegations that the defendants transact business within the forum do not entitle plaintiffs to jurisdictional discovery; the plaintiffs must produce evidence suggesting that discovery will bear fruit.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN51[] **Civil Procedure, Discovery & Disclosure**

Jurisdictional discovery is inappropriate if it constitutes a "fishing expedition" to procure evidence in support of a plaintiff's claim.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

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

HN52[] Civil Procedure, Discovery & Disclosure

A court weighing a jurisdictional discovery request must accept the plaintiff's allegations as true, and construe disputed facts in favor of the plaintiff. The court should generally permit jurisdictional discovery prior to dismissing a defendant for lack of personal jurisdiction.

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

HN53[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 12(b)(6) provides for the dismissal of complaints that fail to state a claim upon which relief can be granted.

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

Evidence > Inferences & Presumptions > Inferences

HN54[] Motions to Dismiss, Failure to State Claim

When ruling on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff. Although the court is generally limited in its review to the facts in the complaint, it may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case.

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

HN55[] Complaints, Requirements for Complaint

Federal notice and pleading rules require a complaint to give the defendant notice of what the claim is and the grounds upon which it rests. The plaintiff must present facts that, if true, demonstrate a plausible right to relief. *Fed. R. Civ. P. 8(a)* states that the complaint should include a short and plain statement of the claim showing that the pleader is entitled to relief. Plaintiffs are required to allege facts sufficient to raise a right to relief above the speculative level.

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

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

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

HN56[] Motions to Dismiss, Failure to State Claim

Courts should not dismiss a complaint for failure to state a claim if it contains enough factual matter (taken as true) to suggest a required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. Under this liberal pleading standard, courts should generally grant plaintiffs leave to amend their claims before dismissing a complaint that is merely deficient.

Antitrust & Trade Law > Sherman Act > Claims

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

HN57[] Sherman Act, Claims

15 U.S.C.S. § 1 of the Sherman Act proscribes contracts, combinations or conspiracies, in restraint of trade or commerce. *15 U.S.C.S. § 1*. A *§ 1* claim requires the plaintiff to demonstrate that the defendants engaged in unlawful, concerted activity that both produced anticompetitive effects in the relevant market and resulted in harm to the plaintiff.

Antitrust & Trade Law > Sherman Act > Claims

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

HN58[] Sherman Act, Claims

The existence of an agreement is an essential component of any *15 U.S.C.S. § 1* claim. A plaintiff must establish that the defendants possessed a "conscious commitment" to a common scheme contrived for the purpose of advancing an unlawful objective such as fixing prices.

Antitrust & Trade Law > Sherman Act > Claims

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

Evidence > Inferences & Presumptions > Inferences

HN59[] Sherman Act, Claims

At the pleading stage, a plaintiff's complaint under *15 U.S.C.S. § 1* of the Sherman Act must aver facts creating a plausible inference that the defendants entered an agreement to restrain trade. The plaintiff must raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

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

HN60[] Complaints, Requirements for Complaint

Sufficiency of a complaint depends upon the particular facts alleged and the context in which they appear. The complaint must, when evaluated macroscopically, raise a plausible right to relief and notify the defendants of the ground from which it arises.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN61[] Sherman Act, Claims

Mere averments of parallel conduct by the defendants are inadequate to state a 15 U.S.C.S. § 1 claim because such action may reflect either an anticompetitive agreement or independent, competitive activity. Rather, the plaintiff must allege a factual framework sufficient to nudge the claims across the line from conceivable to plausible. Any plaintiff may raise this inference of plausibility through allegations that contextually suggest an anticompetitive agreement.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

HN62[] Sherman Act, Claims

For purposes of a claim under 15 U.S.C.S. § 1 of the Sherman Act, various market characteristics raise an inference of plausibility when juxtaposed with parallel conduct. For example, a plaintiff may aver that the relevant market is ripe for collusion due to the presence of oligarchic sellers, diffuse buyers, prohibitive entry barriers, and standardized products. Allegations that demand is in decline, that the market features high fixed costs, or that competitors possess excess capacity may also implicate an agreement when joined with averments of anticompetitive or parallel conduct. The court should also consider whether the alleged collusion makes economic sense.

Antitrust & Trade Law > Sherman Act > Claims

HN63[] Sherman Act, Claims

For purposes of a claim under 15 U.S.C.S. § 1 of the Sherman Act, allegations of observed conduct--actual forbearance from competition for customers, parallel price increases, and excess production capacity--are placed among other factual allegations that plausibly suggest a preceding agreement.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN64[] Sherman Act, Claims

The Foreign Trade Antitrust Improvement Act of 1982 (FTAIA), 15 U.S.C.S. § 6a, does not foreclose consideration of defendants' conduct in a foreign country for purposes of Fed. R. Civ. P. 12(b)(6) motions to dismiss a claim under 15 U.S.C.S. § of the Sherman Act. The FTAIA places foreign anticompetitive conduct beyond the reach of the Sherman Act if it adversely affects only foreign markets. It does preclude a Sherman Act claim based upon foreign conduct that has a direct, substantial, and reasonably foreseeable effect on domestic commerce.

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

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

HN65[] Motions to Dismiss, Failure to State Claim

Unlike *Fed. R. Civ. P. 12(b)(2)* challenges, a *Rule 12(b)(6)* motion restricts a court's review to the face of the complaint and documents upon which it relies.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN66[] **Class Actions, Certification of Classes**

Courts generally address challenges to standing as threshold matters. In class actions, however, the U.S. Supreme Court has crafted an exception to this general rule: Courts may evaluate class certification issues before U.S. Const. art. III standing concerns if the former are logically antecedent to the latter.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN67[] **Class Members, Absent Members**

The Ortiz exception to the rule that challenges to standing are addressed as threshold matters appears to rest on the long-standing rule that, once a class is properly certified, statutory and U.S. Const. art. III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs. Accordingly, *Fed. R. Civ. P. 23* certification should be addressed first in those cases where it is the possibility of class certification that gives rise to the jurisdictional issue as to standing. Stated differently, the Ortiz exception treating class certification as the antecedent consideration does not apply if the standing issue would exist regardless of whether the named plaintiff filed his claim alone or as part of a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN68[] **Class Actions, Certification of Classes**

Ortiz allows a court to defer ruling on U.S. Const. art. III standing issues when they are circumscribed by the act of certifying a class.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN69[] **Private Actions, State Regulation**

New York law prohibits a plaintiff from maintaining a class action under any statutory claim that imposes a penalty or minimum recovery. N.Y. C.P.L.R. 901(b). The Donnelly Act imposes such penalties and cannot be advanced on behalf of a class. N.Y. Gen. Bus. Law § 340(5) provides for treble damages.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN70[] Regulated Practices, Price Fixing & Restraints of Trade

The Nevada Unfair Trade Practices Act proscribes anticompetitive conduct including price fixing and renders it unlawful to conduct any part of any such activity within the state. Nev. Rev. Stat. § 598A.060(1). Hence, the statute creates a remedy against an interstate conspiracy that produces harm in Nevada.

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

HN71[] Regulated Practices, Price Fixing & Restraints of Trade

See S.D. Codified Laws § 37-1-3.1.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN72[] Regulated Practices, Price Fixing & Restraints of Trade

The statutory language of S.D. Codified Laws § 37-1-3.1 is ambiguous as to whether it is a part of the conspiracy or a part of the trade or commerce that must be within the state. Courts have resolved this ambiguity by adopting the latter statutory interpretation. Therefore, a plaintiff must allege only that a defendant's conduct produced anticompetitive effects within South Dakota.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN73[] Regulated Practices, Price Fixing & Restraints of Trade

The Tennessee Trade Practices Act forbids all arrangements which tend to lessen full and free competition in the importation or sale of articles imported into the state or which tend to advance, reduce, or control the price of any such product or article. Tenn. Code Ann. § 47-25-101. Substantial effects of the defendant's allegedly anticompetitive conduct must be felt within the state.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN74[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Tennessee Trade Practices Act creates a claim against all anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers in Tennessee regardless of whether the goods arrive in consumers' homes exclusively through intrastate means.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN75[] **Regulated Practices, Price Fixing & Restraints of Trade**

The West Virginia Antitrust Act (WVAA) outlaws conspiracies in restraint of trade or commerce in the state. *W. Va. Code § 47-18-3(a)*. Substantive provisions of the WVAA must be interpreted consistently with federal law (per se antitrust rules apply, and courts are instructed to "harmonize" the WVAA with federal antitrust statutes), and federal courts have recognized that the Act applies to all anticompetitive conduct that produces in-state effects.

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

HN76[] **Regulated Practices, Price Fixing & Restraints of Trade**

The West Virginia Antitrust Act prohibits a conspiracy that restrains West Virginia trade or commerce, regardless of the locus of the conspiracy.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN77[] **Purchasers, Indirect Purchasers**

Although West Virginia looks to federal law when interpreting the West Virginia Antitrust Act (WVAA), the prohibition against indirect purchaser recovery announced in Illinois Brick does not apply to claims under the WVAA.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN78[] **Regulated Practices, Price Fixing & Restraints of Trade**

Like other states, Wisconsin prohibits antitrust conspiracies in restraint of trade or commerce. *Wis. Stat. § 133.03(1)*. A plaintiff may bring an antitrust claim arising from conduct outside the state's borders if it substantially affects the people of Wisconsin and has impacts in the state.

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

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

HN79[] Sherman Act, Scope

The consumer protection statutes of Arkansas, the District of Columbia, Kansas, Maine, New Mexico, and Rhode Island prohibit, inter alia, fraudulent or deceptive conduct. However, statutory prohibitions on consumer deception do not subsume conduct violative of the Sherman Act.

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

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

HN80[] Trade Practices & Unfair Competition, State Regulation

The Arkansas Deceptive Trade Practices Act (ADTPA) prohibits any "unconscionable" trade conduct as well as false or deceptive acts or practices in business commerce or trade. *Ark. Code Ann. § 4-88-107(a)(10)*. The Act does not define the extent of "unconscionable" conduct; however, the Supreme Court of Arkansas has concluded that use of the word "unconscionable" illustrates that a liberal construction of the ADTPA is appropriate.

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

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

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

HN81[] Regulated Practices, Price Fixing & Restraints of Trade

The Arkansas Deceptive Trade Practices Act reaches any action that shows no regard for conscience, affronting the sense of justice, decency, or reasonableness. Hence, courts have concluded that claims of price fixing are cognizable under the Act.

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

HN82[] Deceptive & Unfair Trade Practices, State Regulation

The District of Columbia Consumer Protection Procedures Act (DCCPPA) proscribes a litany of trade practices involving deception of consumers. *D.C. Code § 28-3904*. The Act's prohibitions are not exclusive, however, and the DCCPPA does not require a showing of concealment or deception to support a claim.

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

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

HN83[] Trade Practices & Unfair Competition, State Regulation

The District of Columbia Consumer Protection Procedures Act (DCCPPA) is a comprehensive statute designed to provide remedies for a broad spectrum of practices which injure consumers. Trade practices that violate other laws, including the common law, also fall within the purview of the DCCPPA. The DCCPPA is designed to assure that a just mechanism exists to remedy all improper trade practices.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

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

HN84[] **Sherman Act, Claims**

The District of Columbia Consumer Protection Procedures Act subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether the defendants have engaged in deceptive conduct.

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

HN85[] **Deceptive & Unfair Trade Practices, State Regulation**

See Kan. Stat. Ann. § 50-627(a).

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

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

HN86[] **Regulated Practices, Price Fixing & Restraints of Trade**

Despite the Kansas Consumer Protection Act's seemingly broad language, the Supreme Court of Kansas has distinguished between consumer harms redressable thereunder and pricing harms governed by the Kansas antitrust statute. The statute is therefore inapplicable to price-fixing claims.

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

HN87[] **Deceptive & Unfair Trade Practices, State Regulation**

The Kansas Consumer Protection Act is not designed to remedy the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain.

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

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

HN88[] **Trade Practices & Unfair Competition, State Regulation**

The Maine Unfair Trade Practices Act forbids unfair methods of competition as well as unfair or deceptive conduct of any trade. *Me Rev. Stat. Ann. tit. 5, § 207*. A business practice is "unfair" if the injury it produces is (1) substantial, (2) not outweighed by any countervailing benefits to consumers or competition that the practice produces, and (3) not reasonably avoidable by consumers. In pricing cases, the allegedly unfair practice must also induce the consumer to acquire something that he or she would not otherwise have purchased.

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

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

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

HN89[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Maine Unfair Trade Practices Act creates no remedy in a case involving collusive prices because higher prices cannot induce individuals to purchase something they would not otherwise purchase.

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

HN90[] **Deceptive & Unfair Trade Practices, State Regulation**

A change in consumer conduct forms the marrow of a Maine Unfair Trade Practices Act violation. Unfairness requires a detrimental change in consumer behavior as a result of confusion fomented by the defendant.

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

HN91[] **Deceptive & Unfair Trade Practices, State Regulation**

A pricing claim under the Maine Unfair Trade Practices Act requires proof that the defendant induced consumers to alter their behavior to their detriment.

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

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

HN92[] **Trade Practices & Unfair Competition, State Regulation**

The New Mexico Unfair Practices Act censures both unfair or deceptive and unconscionable trade practices. *N.M. Stat. § 57-12-3*. "Unconscionable trade practices" include all sales that either take advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree or result in a gross disparity between the value received by a person and the price paid. *N.M. Stat. § 57-12-2(E)*.

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

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

HN93[] Trade Practices & Unfair Competition, State Regulation

The New Mexico Unfair Practices Act is primarily remedial in nature, and courts construe its provisions broadly to facilitate this purpose.

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

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

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

HN94[] Regulated Practices, Price Fixing & Restraints of Trade

Federal courts generally permit New Mexico Unfair Practices Act (NMUPA) actions in price-fixing cases provided that the plaintiff alleges a "gross disparity" between the price paid for a product and the value received. Allegations that a plaintiff has paid approximately 30% more for a product as a result of price fixing are sufficient to plead a NMUPA claim, as are averments that a conspiracy produced significant artificial increases in product price.

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

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

HN95[] Trade Practices & Unfair Competition, State Regulation

The Rhode Island Unfair Trade Practice and Consumer Protection Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *R.I. Gen. Laws § 6-13.1-2*. The statute enumerates twenty methods of unfair or deceptive competition, including conduct that creates a likelihood of confusion or of misunderstanding. *R.I. Gen. Laws § 6-13.1-1(6)(xii)*.

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

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

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

HN96[] State Regulation, Claims

A plaintiff possesses standing to advance a Rhode Island Unfair Trade Practice and Consumer Protection Act claim if he or she purchases or leases goods or services primarily for personal, family or household purposes. *R.I. Gen. Laws § 6-13.1-5.2(a)*.

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

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

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

HN97[] **Regulated Practices, Price Fixing & Restraints of Trade**

The following factors determine whether a trade practice qualifies as "unfair" under the Rhode Island Unfair Trade Practice and Consumer Protection Act (RIUTPCPA): (1) whether the practice affronts public policy, as delineated by the common law, statutes, and other established concepts of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen). These factors encompass price-fixing injuries, and consumers subject to collusive pricing possess a cognizable claim under the RIUTPCPA.

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

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

HN98[] **Trade Practices & Unfair Competition, State Regulation**

The Rhode Island Unfair Trade Practice and Consumer Protection Act is intended to declare unlawful a broad variety of activities that are unfair or deceptive.

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

HN99[] **Trade Practices & Unfair Competition, State Regulation**

While the Rhode Island Unfair Trade Practice and Consumer Protection Act provides a statutory remedy for common law unfair competition claims, its reach is not limited to the common law.

Civil Procedure > Remedies > General Overview

HN100[] **Civil Procedure, Remedies**

Restitution remedies vary considerably from state to state.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN101[] **Private Actions, State Regulation**

The availability of relief in an antitrust case may depend upon whether a particular state has adopted an Illinois Brick repealer or whether it limits antitrust recovery to compensatory damages. Several courts presented with generic restitution claims have required plaintiffs to identify at the pleading stage those states under whose law they advance their claims.

Counsel: [1]** For Michael McNamara, on behalf of himself and all others similarly situated, Plaintiff: Christopher Lovell, Peggy J. Wedgworth, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Katherine Woodman, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Gregory P. Hansel, LEAD ATTORNEY, Preti, Flaherty, Beliveau, Pachios, & Haley, LLC, Portland, Me; Roger P. Poorman, Steven Dane Irwin, David V. Weicht, LEAD ATTORNEY, Leech Tishman Fuscaldo & Lampl, Pittsburgh, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Glenn Coffey, t/d/b/a Candy Man, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David V. Weicht, Roger P. Poorman, Steven Dane Irwin, LEAD ATTORNEYS, Leech Tishman Fuscaldo & Lampl, Pittsburgh, PA; Gregory P. Hansel, LEAD **[**2]** ATTORNEY, Preti, Flaherty, Beliveau, Pachios, & Haley, LLC, Portland, Me; Joseph C. Kohn, LEAD ATTORNEY, Kohn, Savett, Klein & Graf Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Douglas A. Abrahams, William E. Hoese, Kohn Swift & Graf, P.C., Philadelphia, PA; Joshua R. Carver, Randall B. Weill, PRO HAC VICE, Preti Flaherty Beliveau & Pachios LLP, Portland, ME.

For The Lorain Novelty Co., Inc., Individually and on behalf of a class of all those similarly situated Plaintiff: Allen D. Black, Gerard A. Dever, LEAD ATTORNEY, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Howard J. Sedran, LEAD ATTORNEY, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Joseph Goldberg, LEAD ATTORNEY, Freedman Boyd Hollander, Albuquerque, NM; Rees Griffiths, LEAD ATTORNEY, CGA Law Firm, York, PA; Ria C. Momblanco, Roberta D. Liebenberg, LEAD ATTORNEY, Fine, Kaplan and Black RPC, Philadelphia, PA; **[**3]** Simon B. Paris, LEAD ATTORNEY, Saltz, Mongeluzzi, Barrett & Bendesky, P.C., Philadelphia, PA; Thomas A. Muzilla, LEAD ATTORNEY, The Muzilla Law Firm LLP, Cleveland, OH; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; William D. Marvin, LEAD ATTORNEY, Cohen Placitella & Roth, P.C., Philadelphia, PA; Donald L Perelman, Fine, Kaplan and Black, RPC, Philadelphia, PA.

For Mandel Tobacco Company, Inc., on behalf of itself and all others similarly situated, Plaintiff: Adam J. Levitt, Fred T. Isquith, Mary J. Fait, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Lee C. Swartz, Stephen M. Greecher, Jr., LEAD ATTORNEY, Tucker, Arensberg, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Stephen L. LaFrance Pharmacy, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Dianne M. Nast, LEAD ATTORNEY, Roda & Nast, P.C., Lancaster, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Richard Miller, Marcia **[**4]** Miller, on behalf of themselves and all others similarly situated, Plaintiff: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Krishna B. Narine, LEAD ATTORNEY, Law Office of Krishna B. Narine, PC, Huntingdon Valley, PA; Rachel S. Black, Stephen D. Susman, LEAD ATTORNEY, Susman Godfrey, LLP - Seattle, Seattle, WA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Western Skier, Ltd., individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Warren Rubin, LEAD ATTORNEY, Law Offices Bernard M. Gross, P.C., Philadelphia, PA.

For CNS Confectionery Products, LLC, Winn Corporation, on behalf of themselves and all others similarly situated, Plaintiff: Bernard Persky, Gregory S. Asciolla, Morissa R. Falk, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Kevin P Roddy, LEAD ATTORNEY, Wilentz **[**5]** Goldman & Spitzer P.A., Woodbridge, NJ; Klari Neuwelt, LEAD ATTORNEY, Law Office of Klari Neuwelt, New York, NY; Mark S. Shane, LEAD ATTORNEY, Shane and White, LLC, Edison, NJ; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Akisa Matsuda, on behalf of herself and all others similarly situated, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Faucher LLP, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers &

Toll PLLC, Washington, DC; Kevin P Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer P.A., Woodbridge, NJ; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Eric Lense, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Kevin P Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer P.A., Woodbridge, NJ; Mark S. Goldman, LEAD ATTORNEY, Goldman Scarlato & Karon PC, Conchohocken, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Diane Chiger, on behalf of herself and all others similarly situated, Plaintiff: Aaron M. Sheanin, LEAD ATTORNEY, **[**6]** Girard Gibbs LLP, San Francisco, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth C. Pritzker, Girard Gibbs LLP, San Francisco, CA; Jonathan Shub, Seeger Weiss LLP, Philadelphia, PA.

For Stephen Snow, Comwest Industries Inc., Plaintiff: Benjamin F. Johns, LEAD ATTORNEY, Chimicles & Tikellis LLP, Haverford, PA; Bernard Persky, LEAD ATTORNEY, Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Gregory S. Asciolla, LEAD ATTORNEY, Morissa R. Falk, LEAD ATTORNEY Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Michael W. DeMarshall, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Eugene A. Spector, Jay S. Cohen, William G. Caldes, LEAD ATTORNEY, Spector Roseman Kodroff & Willis, P.C., Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For STLE Corporation, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & **[**7]** Toll PLLC, Washington, DC; Michael M. Buchman, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Webb's Candies, Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher J. Cormier, Seth R Gassman, LEAD ATTORNEYS, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Hilary K. Ratway, Michael D. Hausfeld, Robert G. Eisler, LEAD ATTORNEYS, Hausfeld LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For International Wholesale, Inc., United Customs Distribution, United Wholesale, on behalf of itself and all others similarly situated, Plaintiff: Beverly L Tse, Daniel Hume, David E Kovel, Peter S. Linden, LEAD ATTORNEYS, Kirby McInerney LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Robert Philipson, Individually and on behalf of all others similarly **[**8]** situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Kevin J. Kehner, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Manuel J. Dominguez, Berman DeValerio, Palm Beach Gardens, FL.

For Valos House of Candy, Original Fowler's Chocolate Co., Inc., Paula Wolner, Individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Stephanos Sgouros, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Timothy D Battin, Straus & Boies, LLP, Fairfax, VA.

For The Kroger Co., Safeway Inc., Walgreen Co., Hy-Vee, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Douglas H Patton, James T Almon, Richard Alan Arnold, Scott E Perwin, William **[**9]** J. Blechman, LEAD ATTORNEYS, Kenny Nachwalter, P.A., Miami, FL -; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Affiliated Foods, Inc., Plaintiff: Anthony J. Bolognese, Joshua H. Grabar, LEAD ATTORNEYS, Bolognese& Associates, LLC, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David P. Germaine, Joseph M. Vanek, LEAD ATTORNEY, VANEK VICKERS & MASINI PC, CHICAGO, IL; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Linda Nussbaum, Robert N. Kaplan, LEAD ATTORNEY, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Canteen Company of Utica-Rome, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter **[**10]** W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; W. Joseph Bruckner, Lockridge, Grindal & Nauen, Minneapolis, MN.

For Lori Ann Hongach, on behalf of herself and all others similarly situated, Esther Naomi Lieberman, Eugenia Miceli, on behalf of herself and all others similarly situated, Plaintiffs: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Rachel S. Black, Stephen D. Susman, LEAD ATTORNEYS, Susman Godfrey, LLP - Seattle, Seattle, WA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Brothers, Ltd., on behalf of itself and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; H. L. Montague, Jr., Ruthanne Gordon, Berger & Montague, P.C., Philadelphia, PA.

For PITCO Foods, Individually and on Behalf of a Class of All Those Similarly Situated, Daphne Matalene, Julia Isenhower, on behalf of herself and all others similarly situated, **[**11]** D Controls, Inc., on behalf of itself and all others similarly situated, Jonathan Benjamin, on behalf of himself and all others similarly situated, Adrianne Shienvold, on behalf of herself and all others similarly situated, Autry Greer & Sons, Inc., Tanya O. Butts, on behalf of themselves and all others similarly situated, Ben Lee Distributors, Inc., on behalf of itself and all others similarly situated, Jill Lavin, Daniel Klein on behalf of themselves and all others similarly situated, Marc Lavin, Ellen Widom, George Patterson on behalf of herself and all others similarly situated, Carmen Pellitteri, Dacia Lower, Molly Wagman individually and on behalf of all similarly situate, VME Distributors, Inc. individually and on behalf of a class of all those similarly situated, Cheryl Currie, Long Leaf Vending Inc. Individually and on behalf of a class of all those similarly situated, Northlake Pizza and Subs, LLC, Superior Office Snacks, Inc., Superior Office Snacks of Nebraska, Inc., Snacks for a Purpose, Inc., Honor Snack, Inc., Oasis Distributors, Inc., LLG Enterprises of SE Wisconsin, LLC d/b/a The Snack Store, on Behalf of Themselves and All Others Similarly Situated, Wendy M. Cresswell, **[**12]** Erin Goss, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Meijer, Inc., Meijer Distribution, Inc., Publix Super Markets, Inc., Plaintiff: Anthony J. Bolognese, Joshua H. Grabar, LEAD ATTORNEYS, Bolognese& Associates, LLC, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David P. Germaine, Joseph M. Vanek, LEAD ATTORNEYS, VANEK VICKERS & MASINI PC, CHICAGO, IL; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Linda Nussbaum, Robert N. Kaplan, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Thomas Rode, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell **[**13]** & Hippel LLP, Harrisburg, PA; Ronald J. Aranoff, Bernstein Liebhard & Lifshitz, LLP, New York, NY.

For CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Donald Webster, on behalf of himself and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joshua D. Snyder, Kohn Swift & Graf PC, Philadelphia, PA; Marc H. Edelson, Edelson & Associates, LLC, Doylestown, PA; Michael J. Boni, Theresa J. Henson, Boni & Zack LLC, Bala Cynwyd, PA.

For Giant Eagle, Inc., a Pennsylvania Corporation, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, **[**14]** PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bernard D. Marcus, Moira Cain-Mannix, Marcus & Shapira, Pittsburgh, PA.

For Debra L. Damaske, Shirley A. Dresen, John H. Brosius, Jane A. Balzer, Afrim Dzelili, on behalf of themselves and all others similarly situated, Craig Stephenson, Kevin Tierney, on behalf of himself and all others similarly situated, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Isabelle Dikland, on behalf of themselves and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth K. Tripodi, Richard M. Volin, Finkelstein Thomspon LLP, Washington, DC.

For Weaver Nut Company, on behalf of itself and all others similarly situated, Plaintiff: Beverly L **[**15]** Tse, Daniel Hume, David E Kovel, Peter S. Linden, LEAD ATTORNEYS, Kirby McInerney LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Seth E. Ellis, P.A., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Kevin B. Love, Criden & Love, P.A., South Miami, FL.

For Royal Enterprises Corporation, Plaintiff: Beverly L Tse, Daniel Hume, David E Kovel, Peter S. Linden, LEAD ATTORNEYS, Kirby McInerney LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Cindy Elan-Mangano, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Aaron M. McParlan, James **[**16]** S. Reece, Michael E. Jacobs, Richard M. Hagstrom, Zelle, Hofmann, Voelbel, Mason & Getter LLP, Minneapolis, MN.

For John Candido, on behalf of himself & all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Russell, Trump Alioto Trump & Prescott, LLP, San Francisco, CA.

For Marcy Linder, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann

Maxwell & Hippel LLP, Harrisburg, PA; Amber M. Nesbitt, Edward A. Wallace, Kenneth A. Wexler, Mark J. Tamblyn, Wexler Wallace LLP, Chicago, IL.

For NMJ Consultant Group, Inc., individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher J. Cormier, Seth R Gassman, LEAD ATTORNEYS, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Hilary K. Ratway, **[**17]** Michael D. Hausfeld, LEAD ATTORNEYS, Hausfeld LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA.

For Canteen Vending Company, individually and on behalf of a class of all those similarly situated, Plaintiff: Arthur N. Bailey, LEAD ATTORNEY, Arthur N. Bailey & Associates, Jamestown, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Tanya S Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Canteen Vending Company, individually and on behalf of a class of all those similarly situated, Plaintiff: Arthur N. Bailey, LEAD ATTORNEY, Arthur N. Bailey & Associates, Jamestown, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Tanya S Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Eugenia Miceli, on behalf of herself **[**18]** and all others similarly situated, Plaintiff: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Rachel S. Black, Stephen D. Susman, LEAD ATTORNEYS, Susman Godfrey, LLP - Seattle, Seattle, WA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Jones Vend and OCS Distributing, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bruce L. Simon, Pearson, Soter, Warshaw & Penny, LLP, San Francisco, CA; Jane Gowen Penny, Killian & Gephart, LLP, Harrisburg, PA.

For Russell Traub, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bonny E. Sweeney, Katherine A Morgan, Coughlin Stoia Geller Rudman & Robbins LLP, San Diego, CA.

For C.W. Brower, Inc., on behalf of itself and all others **[**19]** similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Clinton P Walker, Fred A Silva, Kathy L Monday, Roger M. Shrimp, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA.

For Treat America Limited, on behalf of itself and all others similarly situated, Plaintiff: Bernice Conn, LEAD ATTORNEY, PRO HAC VICE, Century Park East, Los Angeles, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph B. Smith, Michael C. Maher, Steven R. Maher, LEAD ATTORNEYS, The Maher Law Firm, Winter Park, FL; K. Craig Wildfang, Michael A. Geibelson, Roman M. Silberfeld, LEAD ATTORNEYS, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Thomas J. Undlin, LEAD ATTORNEY, PRO HAC VICE, LaSalle Plaza, Minneapolis, MN; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Christopher H. Casey, Joshua D. Wolson, Joseph U. Metz, Dilworth Paxson, Philadelphia, PA.

For T. Levy Associates, trading as Beautyland on behalf of itself and all others similarly situated, Plaintiff: **[**20]** Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Adam S. Levy, Donald E Haviland, Michael J. Lorusso, The Haviland Law Firm LLC, Philadelphia, PA.

For Judith Bishop, Eric Rodman Cohen, James Miles, Darla Jackson, David Levy, Frank Gerencser, Sarah Allder, Timothy Duffy, Korey James Christensen, Susan Jones, Abbie Soule, Stephanie Aceto, Donna Siler, Timothy Emmer, Sarina Vlock, Robert Allder, Michelle Bounderate, Amy K. Luminoso, Katherine Mary Ferlic, Mark Moynahan, Douglas Dillard Glenn, Monica Browne, Mike Carrels, Layna M. Rose, James Veneziano, Marlene Smith, Mike Davis, Arnie Enz, individually and on behalf of all others similarly situated, Plaintiff: Barrett C. Hester, Kevin J. Miller, Steven F. Benz, LEAD ATTORNEYS, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Walter W. Cohen, LEAD ATTORNEY, **[**21]** Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Food Lion, LLC, Hannaford Bros. Co., Kash N' Karry Food, Stores, Inc., individually and on behalf of a class of all those similarly situated, VME Distributors, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; R. Laurence Macon, LEAD ATTORNEY, Akin, Gump, Strauss, Hauer & Feld, Et al, San Antonio, TX; Richard L. Wyatt, Jr., Todd M. Stenerson, Torsten M. Kracht, LEAD ATTORNEYS, Hunton & Williams, Washington, DC; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Card & Party Mart II Ltd., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Edward S Hesano, Individually and on behalf of all other similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein **[**22]** Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Andrew J Morganti, Peter G Safirstein, Milberg LLP, New York, NY.

For Karin Jacobs, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Michael A. McShane, Audet & Partners, LLP, San Francisco, CA.

For Weis Markets, Inc., Individually and on behalf of a class of all those similarly, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Mark R. Cuker, Williams Cuker Berezofsky, Philadelphia, PA.

For Cyrus T.G., d/b/a Alta Cucina, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Gordon Ball, Ball & Scott, Knoxville, TN.

For Longs Drug Stores California, Inc., Plaintiff: **[**23]** Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Associated Grocers of Florida, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX. Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Lisa Blackwell, Kelsey French, Pernell Larsen, Linda K. Davis, Shirley A. Dresen, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Grocery Company, United **[**24]** Supermarkets, L.L.C., Plaintiff: Brian Wade McKay, Lawrence Andrew Gaydos, LEAD ATTORNEYS, Haynes and Boone - Dallas, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Direct Purchaser Plaintiffs, Plaintiff: Seth R Gassman, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY.

For Indirect Purchaser End User Plaintiffs, Plaintiff, Pro se.

For The Hershey Company, Defendant: Brian M. English, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; Jonathan D. Brightbill, Thomas D. Yannucci, LEAD ATTORNEYS, Kirkland & Ellis LLP, Washington, DC; Alan R. Boynton, Jr., David E. Lehman, Kimberly M. Colonna, McNees, Wallace & Nurick, Harrisburg, PA; Craig S. Primis, Kirkland & Ellis LLP, Washington, DC.

For Mars, Incorporated, Defendant: Brian J. McMahon, Frederick E. Blakelock, Guy V. Amoresano, Michael F. Quinn, Jennifer Mara, Thomas S. Brown, LEAD ATTORNEYS, Gibbons PC, Newark, NJ; David Marx, Jr., Stefan M. Meisner, McDermott Will & Emery LLP, Chicago, **[**25]** IL.

For Nestle U.S.A., Inc., Defendant: Joseph A. Ostoyich, LEAD ATTORNEY, Howrey & Simon, Washington, DC; Matthew M. Haar, Michael A. Finio, Emily H. Damron, LEAD ATTORNEYS, Saul Ewing, LLP, Harrisburg, PA; Peter E. Moll, Roxann E. Henry, LEAD ATTORNEYS, Howrey LLP, Washington, DC.

For Nestle S.A., Defendant: Roxann E. Henry, Howrey LLP, Washington, DC.

For Cadbury Adams Canada, Inc., Defendant: Anh P Le, Bridget E. Montgomery, Dennis P. Orr, Jennifer L. Eul, LEAD ATTORNEYS; Leah A. Ramos, LEAD ATTORNEY, Morrison & Forester LLP, New York, NY; Thomas M Mueller, LEAD ATTORNEY.

For Hershey Canada, Inc., Defendant: Craig S. Primis, Kirkland & Ellis LLP, Washington, DC.

For Mars Canada Inc., Defendant: Brian J. McMahon, Frederick E. Blakelock, Guy V. Amoresano, Michael F. Quinn, Thomas S. Brown, LEAD ATTORNEYS, Gibbons PC, Newark, NJ; Stefan M. Meisner, McDermott Will & Emery LLP, Chicago, IL.

For Nestle Canada Inc., Defendant: Roxann E. Henry, Howrey LLP, Washington, DC.

For Mars Snackfood US LLC, Defendant: Thomas S. Brown, Gibbons PC, Newark, NJ.

For Cadbury Holdings Ltd., Cadbury PLC, Defendant: Leah A. Ramos, LEAD ATTORNEY, Morrison & **[**26]** Forester LLP, New York, NY; Thomas M Mueller, LEAD ATTORNEY.

For Government of Canada, Defendant: Bradley H. Blower, John P. Relman, Katherine A. Gillespie, LEAD ATTORNEYS, PRO HAC VICE, Relman & Dane, PLLC, Washington, DC; Joseph K. Goldberg, Law Office of Joseph K. Goldberg, Harrisburg, PA.

Judges: CHRISTOPHER C. CONNER, United States District Judge.

Opinion by: CHRISTOPHER C. CONNER

Opinion

[*548] **MEMORANDUM**

This is a multidistrict antitrust matter brought under Section 1 of the Sherman Act, *15 U.S.C. § 1*, and various state antitrust and consumer protection statutes. Plaintiffs allege that defendants conspired to fix the prices of chocolate confectionary products in the United States. Defendants, who control approximately 75% of the American market for chocolate candy, allegedly entered pricing agreements, resulting in coordinated price increases on three distinct occasions between 2002 and 2007. Defendants argue that the amended complaints fail to raise a plausible inference of an agreement to fix prices as required by *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Defendants have filed motions to dismiss (Docs. 464, 469, 477) the complaints under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

Defendants **[**27]** Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A., and Nestle Canada have also filed motions to dismiss (Docs. 466, 471, 473, 474) under *Rule 12(b)(2)* for lack of *in personam* jurisdiction. These defendants contend that they do not sell chocolate candy in the United States, maintain no facilities inside the U.S., and have no pricing authority in the U.S. chocolate market.

For the reasons that follow, the *Rule 12(b)(2)* motions will be deferred during a period of jurisdictional discovery. The *Rule 12(b)(6)* motions filed by the remaining **[*549]** defendants will be denied except with respect to certain common law and consumer protection claims. The *Rule 12(b)(6)* motions filed by Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A. and Nestle Canada will be deferred until resolution of their jurisdictional challenges.

I. Factual Background [1]

Defendants are members of four multinational corporate families that produce chocolate confectionary products for markets around the globe. Plaintiffs **[**28]** allege that from December 2002 to April 2007 defendants conspired to fix prices in the American chocolate candy market, [2] as evidenced by three synchronized price increases that occurred during the early- and mid-2000s. In August 2008, three putative subclasses of plaintiffs and one group of individual plaintiffs filed consolidated amended complaints against all defendants.

A. Defendants' Respective Corporate Structures and Market Shares

Defendant The Hershey Company (hereinafter "Hershey Global") dominates the American chocolate confectionary market, supplying more than 40% of the chocolate candy sold in the U.S. (Doc. 418 P 19; Doc. 420 P 80; Doc. 448 P 31.) Defendant Hershey Canada, a wholly owned subsidiary of Hershey Global, distributes Hershey products in Canada. (Doc. 418 P 20; Doc. 420 P 50; Doc. 448 P 28.) Hershey Global has integrated its American and Canadian **[**29]** operations, and Hershey North America, a division of Hershey Global, oversees sales and marketing operations in both countries. (Doc. 418 P 20; Doc. 448 P 30.)

Defendant Mars, Inc. ("Mars Global") possesses a 26% share of the American chocolate candy market. (Doc. 418 P 22; Doc. 420 P 80; Doc. 448 P 38.) In the U.S. and Canada, Mars Global operates through two subsidiaries: defendants Mars Snackfood U.S. LLC ("Mars Snackfood") and Mars Canada, Inc. ("Mars Canada"). (Doc. 418 PP 23-24; Doc. 420 PP 53-54; Doc. 448 PP 36-38.) These subsidiaries collectively form Mars Global's North America division (Doc. 418 PP 23-24; Doc. 420 PP 53-54; Doc. 448 PP 36-38.)

Defendant Nestle S.A. is the world's largest food and beverage corporation and controls 8% of the American chocolate candy market. (Doc. 418 P 26; Doc. 420 P 80; Doc. 448 P 47.) Nestle S.A., based in Vevey, Switzerland, does not operate directly in either the United States or Canada. (Doc. 418 P 26; Doc. 420 P 56; Doc. 422 P 10; Doc. 448 P 42.) Rather, its subsidiaries, defendants Nestle U.S.A., Inc. ("Nestle U.S.A.") and Nestle Canada, Inc. ("Nestle Canada"), market and distribute Nestle products in the nations for which they are named. **[**30]** (Doc. 418 PP 27-28; Doc. 420 PP 57-58; Doc. 422 PP 9, 11; Doc. 448 PP 43-44.) Both Nestle U.S.A. and Nestle Canada are members of Nestle S.A.'s Zone Americas division. (Doc. 418 P 26; Doc. 448 P 46.)

---

[1] In accordance with the standard of review for motions to dismiss under *Rule 12(b)(2)* and *Rule 12(b)(6)*, the court will present the facts as alleged in the amended complaints. See infra Parts II.A, III.A.

[2] As used in this memorandum, "chocolate candy" and "chocolate confectionary products" refer to chocolate bars and other mass-produced chocolate confections manufactured and packaged for sale to retail consumers. Examples of these products include Nestle Crunch(R), Hershey's Kisses(R), M&M's(R), and Cadbury Creme Eggs(R).

Defendant Cadbury plc is also a titan in worldwide chocolate markets. Cadbury plc is the corporate parent of defendant **[*550]** Cadbury Holdings Ltd. ("Cadbury Holdings") and defendant Cadbury Adams Canada, Inc. ("Cadbury Canada"). (Doc. 418 PP 30-32; Doc. 420 PP 60-62; Doc. 422 P 13-14; Doc. 448 P 51-53.) Cadbury Canada produces and distributes Cadbury products in Canada. (Doc. 418 P 32; Doc. 420 P 62; Doc. 422 P 14; Doc. 448 P 53.) In the U.S., Hershey Global distributes Cadbury-branded products under license agreements with Cadbury Holdings and Cadbury plc. (Doc. 418 PP 30, 89; Doc. 420 PP 61, 82; Doc. 422 PP 13, 61; Doc. 448 PP 51, 107.g.) The amended complaints contain few other details about the role that Cadbury plc, Cadbury Holdings, and Cadbury Canada play in the American market.

B. Integration of the American and Canadian Markets for Chocolate Candy

Defendants collectively control approximately 75% of the chocolate candy market in the U.S. and 64% in Canada. (Doc. 418 P 52; Doc. 420 P 80; **[**31]** Doc. 422 P 35; Doc. 448 P 107.a.) Plaintiffs contend that these markets are tightly interwoven and consist of homogenous, interchangeable chocolate candy products. (Doc. 418 P 52; Doc. 420 P 80; Doc. 422 P 35; Doc. 448 P 107.a.) They bolster this assertion with trade statistics that allegedly demonstrate synergism between the markets. For example, in 2003 the United States imported approximately $ 1.8 billion in confectionary products, 40% of which consisted of chocolate candy. (Doc. 418 P 49.) According to the amended complaints, much of this chocolate originated in Canada, where defendants manufactured and packaged it for sale in the United States. (Doc. 418 PP 49, 53; Doc. 422 P 40; Doc. 448 P 107.h) The U.S. also ships chocolate products to Canada. American manufacturers purportedly supply approximately 45% of Canada's chocolate candy imports. (Doc. 420 P 90; Doc. 422 P 40.)

Defendants have allegedly integrated their American and Canadian operations. Plaintiffs assert that defendants have developed manufacturing and distribution systems designed to serve consumers across international borders. Defendants supply similar chocolate products to both markets. In addition, defendants **[**32]** have created North American divisions that oversee U.S. and Canadian operations. (Doc. 418 PP 82-83; Doc. 420 P 92; Doc. 422 PP 85-89; Doc. 448 P 107.b.)

According to the pleadings, Hershey Global has instituted a single corporate division to coordinate all North American sales and marketing, and the company aggregates operations in the United States, Canada, Mexico, and Brazil for purposes of its reporting obligations under the Securities Exchange Act of 1934. (Doc. 418 PP 83-84; Doc. 420 P 92; Doc. 422 P 85; Doc. 448 P 107.b.) Hershey allegedly groups these nations based upon "similar economic characteristics, and similar products and services, production processes, types of consumers, distribution methods, and the similar nature of the regulatory environment in each location." (Doc. 418 P 84.) Similarly, Mars Canada manufactures and packages chocolate candy products in Canada for sale in the United States. (Doc. 418 P 53; Doc. 420 P 53; Doc. 422 P 21; Doc. 448 PP 37, 39.) Either Mars Canada or another member of Mars Global's corporate family purportedly manages the sale of these products. (Doc. 418 P 22, 24, 53; Doc. 420 P 52-53; Doc. 422 P 20-21; Doc. 448 PP 37, 39.) Nestle S.A., **[**33]** Cadbury plc, and Cadbury Holdings likewise fuse the United States and Canada for purposes of corporate operations. Nestle's Zone Americas is the company's leading sales territory and includes the U.S., Canada, Mexico, and Central and South America. (Doc. 418 PP 86-87; Doc. 420 P 92; Doc. 422 P 88; Doc. 448 P 107.b.) **[*551]** And the president of Cadbury's Americas Confectionery division possesses ultimate responsibility for the daily management and operation of the Cadbury chocolate business in both the United States and Canada. (Doc. 418 PP 8687; Doc. 420 P 92; Doc. 422 P 87; Doc. 448 P 107.b.)

Licensing agreements among defendants further contribute to the coalescence of these markets. Cadbury Holdings and Hershey Global have executed asset purchase and trademark licensing agreements [3] under which Hershey

---

[3] Cadbury Holdings and Hershey Global have executed three separate agreements. Pursuant to an asset purchase agreement, dated July 22, 1988, Hershey Global's predecessor in interest purchased all assets owned by the then-existing U.S. division of the Cadbury business portfolio. (See Doc. 478 at 14.) Two trademark licensing agreements, both dated August 25, 1988, granted Hershey Global the exclusive right to sell Cadbury-branded products in the U.S. (See Doc. 478-4 at 24; Doc. 478-7 at 21.) The parties have submitted all three agreements, **[**35]** which span eleven separate docket entries. (See Docs. 478

possesses an exclusive license to manufacture and market Cadbury-branded products in the United States. (Doc. 418 PP 30, 89; Doc. 420 PP 61, 82; Doc. 422 PP 13, 61; Doc. 448 PP 51, 107.g.) Brands subject to the license include York Peppermint Patties TM, Mounds(R), and Almond Joy(R). (Doc. 418 P 30; Doc. 420 P 61; Doc. 422 P 13; Doc. 448 P 51.) Hershey also has a similar licensing arrangement **[**34]** for certain Nestle-branded products including Kit-Kat(R) and Rolo(R). (Doc. 418 P 90; Doc. 420 P 82; Doc. 422 P 62; Doc. 448 P 107.g.) Under the Hershey-Cadbury agreements, Hershey Global remits quarterly royalty payments to Cadbury plc and Cadbury Holdings, which may audit Hershey's accounting records, observe its manufacturing processes, and test its products for quality. (Doc. 478-6 at 3, 13-14; Doc. 478-8 at 10, 16-18; Doc. 418 PP 89-90; Doc. 420 P 84.) The agreements require personnel from both companies to meet on a quarterly basis to discuss marketing, promotion, and development of Cadbury-branded products. (Doc. 478-6 at 16; Doc. 478-8 at 18-19.)

In contrast to monolithic supply points, demand in the American and Canadian markets for chocolate candy is diffuse. (Doc. 418 P 55; Doc. 420 P 80; Doc. 422 P 36; Doc. 448 PP 65, 103.) Direct buyers include supermarkets, convenience stores, retail chains, and other wholesale customers, none of which possesses a dominant share of the demand market. (Doc. 418 P 55; Doc. 420 P 80; Doc. 422 P 36; Doc. 448 P 103.) These disparate purchasers form the markets' predominant distribution channels with no single buyer capable of exercising power over defendants' pricing structures. (Doc. 418 P 55; Doc. 420 P 80; Doc. 422 P 36; Doc. 448 P 104.)

Material to the antitrust claims, the supply market for chocolate candy features formidable entry barriers. (Doc. 418 P 56; Doc. 420 P 89; Doc. 422 P 42; Doc. 448 P 63.) Confectionery is a highly technical business, requiring significant capital outlay for manufacturing facilities, engineering expertise, and distribution channels **[**36]** to compete on a market-wide scale. (Doc. 418 P 56; Doc. 420 P 89; Doc. 422 P 42; Doc. 448 P 63.) New entrants must also invest considerable sums to promote new products and build brand loyalty among consumers presented with a wide selection of interchangeable goods. (Doc. 418 PP 55-57; Doc. 420 P 89; Doc. 422 PP 36-39; Doc. 448 P 64.) In contrast, an established market player can expand production at will. (Doc. 422 P 43; Doc. 448 P 66.) Market leaders, including defendants, typically operate at less than full capacity, **[*552]** giving them the ability to compete against one another by increasing output and by launching new products. (Doc. 422 P 43; Doc. 448 P 66.)

C. Price Increases in the U.S. Chocolate Confectionary Market

Plaintiffs contend that this cross-national market garrisoned within high entry barriers facilitated defendants' collusive pricing. From the mid-1990s until 2002, chocolate candy prices in the United States remained stable. (Doc. 418 P 59; Doc. 448 P 95.) None of the defendants implemented permanent price increases during this period because a unilateral increase would have caused a decline in sales as consumers purchased competitors' products at lower prices. (Doc. 448 P 95.) **[**37]** Hence, plaintiffs assert that no defendant could have raised prices without first confirming that other defendants would reciprocate the increase.

The first allegedly anticompetitive price jump occurred on December 9, 2002, when Mars instituted a 10.7% increase for its standard-size chocolate bars and a 22% increase on packages of six bars. (Doc. 418 P 60; Doc. 420 P 94.a; Doc. 422 P 45; Doc. 448 P 79.) Two days later, Hershey followed Mars's lead, boosting prices by 10.7% for standard-size bars and 7.6% for six-packs. [4] (Doc. 418 P 61; Doc. 420 P 94.a; Doc. 422 P 46; Doc. 448 P 80.) Another two days saw an upsurge of 10.3% for Nestle's standard-size bars. [5] (Doc. 418 P 62; Doc. 420 P 94.a; Doc. 422 P 47; Doc. 448 P 81.) Defendants allegedly reaped extensive financial benefits from this initial price swell despite stable costs and stagnating demand. For example, in July 2003 Hershey Global reported second-quarter net profits of $ 71.5 million, an increase of $ 8.4 million compared with the same period for 2002. (Doc. 418

through 478-11.) For ease of identification, the court will cite the agreements by referencing the document and page numbers assigned by the Electronic Case Filing system.

[4] Hershey simultaneously raised prices for king-size bars and ten-packs by 13.6% and 15.4%. (Doc. 418 P 61; Doc. 420 P 94.a; Doc. 422 P 46; Doc. 448 P 80.)

[5] Prices for other Nestle sizes also jumped, including a 14.5% increase on king-size bars and a 16.8% increase on ten-packs. (Doc. 418 P 62; Doc. 422 P 47; Doc. 448 P 81.)

PP 80-81; Doc. 420 P 102; Doc. 422 P 48; Doc. 448 P 98.) Representatives of Hershey Global publicly acknowledged that this growth in profits was attributable, in part, **[**38]** to the December 2002 price increase. (Doc. 418 P 80; Doc. 422 P 48; Doc. 448 P 98.)

Prices climbed again on November 19, 2004, when Mars announced increases of between 2.9% and 15.6% on variously sized bags of chocolate candy. (Doc. 418 P 65; Doc. 420 P 94.b; Doc. 422 P 49; Doc. 448 P 82.) The next month, Hershey promulgated a 5.5% rise in the price of standard-size bars, which Mars followed with an identical increase. (Doc. 418 PP 65-66; Doc. 420 P 94.b; Doc. 422 PP 49-50; Doc. 448 PP 83-84.) Hershey also raised prices for bags of chocolate candy between 2.5% and 7.6%. [6] (Doc. 418 P 66; Doc. 422 P 50; Doc. 448 P 84.) Prices for Nestle standard-size bars and bags of chocolate candy grew by 5.7% the next week. [7] (Doc. 418 P 67; Doc. 420 P 94.b; Doc. 422 P 51; Doc. 448 P 85.)

A third series of price increases commenced in the spring of 2007 with Mars again serving as bellwether. On March 23, 2007, Mars raised the prices of its **[*553]** standard-size and king-size bars by 5.3% and 4.5% respectively. (Doc. 418 P 69; Doc. 420 P 94.c; Doc. 422 P 53; Doc. 448 P 87.) Hershey joined Mars on April 4, raising standard-size bar prices by 5.2% and king-size bar prices by 4.5%. (Doc. 418 P 70; Doc. 420 P 94.c; Doc. 422 P 54; Doc. 448 P 88.) Nestle completed the series the following day with price hikes of 5.4% on standard-size chocolate bars and 4.6% on king-size bars and six-packs. [8] (Doc. 418 P 71; Doc. 420 P 94.c; Doc. 422 P 55; Doc. 448 P 89.)

Throughout the period of these increases, the cost of defendants' raw materials remained stable, benefitting from **[**40]** relative calm in commodity markets as well as defendants' investment in futures contracts as a hedge against price fluctuations. (Doc. 418 PP 59, 79; Doc. 420 P 97; Doc. 422 P 58; Doc. 448 P 91.) Energy costs also remained stable, (Doc. 418 P 79), but demand for chocolate candy products waned as consumers sought healthier snack options. (Doc. 418 PP 75, 80; Doc. 420 P 91; Doc. 422 P 57; Doc. 448 P 96.)

D. <u>Defendants' Pricing Conduct in the Canadian Market</u>

Plaintiffs contend that evidence of defendants' price-fixing agreements in the Canadian chocolate confectionary market corroborates the conspiracy that allegedly occurred in the United States. In July 2007, Canadian antitrust officials commenced an investigation into alleged price fixing by Cadbury Canada, Hershey Canada, Mars Canada, and Nestle Canada (hereinafter "the Canadian defendants"). The investigation purportedly revealed that Glenn Stevens ("Stevens"), president of non-defendant candy distributor ITWAL, Inc., provided the catalyst for a Canadian price-fixing agreement by transmitting several letters to senior managers of the Canadian defendants. (Doc. 418 P 100; Doc. 420 P 110.c; Doc. 422 P 82; Doc. 448 P 113.) The recipients **[**41]** included Bob Leonidas ("Leonidas"), president and chief executive officer of Nestle Canada, as well as executives of Cadbury Canada, Hershey Canada, and Mars Canada. (Doc. 418 P 100; Doc. 420 P 110.f; Doc. 422 P 82; Doc. 448 P 113.) The initial letter, entitled "TAKE ACTION NOW!!," proposed that defendants reduce trade spending, which is the practice of providing promotional discounts and rebates to consumers:

> At the 'end of the day' it is only the suppliers' control and discipline of the trade spending that can restore functionality in the marketplace. The problem is completely out of control on the part of the suppliers. I am being forced to reexamine how we operate in the market and I am not sure it would be in the best interests of [Cadbury Canada, Hershey Canada, Mars Canada, and Nestle Canada.]
>
> *I urge you to meet and take action* before this chocolate bar 'bubble bursts."

(Doc. 173, Ex. E P 5.7; [9] Doc. 418 P 100; Doc. 420 P 110.f; Doc. 422 P 83; Doc. 448 P 113 (emphasis added.)

---

[6] Hershey implemented price increases on other products at the same time: its king-size bars surged **[**39]** by 4.7%, its six-packs by 8.5%, and its variety packs by 5.5%. (Doc. 418 P 66; Doc. 420 P 94.b; Doc. 422 P 50; Doc. 448 P 84.)

[7] Nestle contemporaneously raised prices by 4.8% on its king-size bars and 7.7% on six-packs. (Doc. 418 P 67; Doc. 420 P 94.b; Doc. 422 P 51; Doc. 448 P 85.)

[8] Mars also raised prices for packages of Dove brands by 15% during the third round of increases. (Doc. 418 P 69; Doc. 422 P 53; Doc. 448 P 87.)

[*554] During the ensuing fifteen months, the Canadian defendants received more than twenty additional "Take Action Now" notices (hereinafter "TAN notices") from Stevens evidencing various facets of the alleged price-fixing conspiracy in the Canadian market. (Doc. 420 P 110.h-.o; Doc. 448 PP 115-16.) An April 2002 TAN notice reflects that the Canadian defendants instituted audit procedures and hired third-party investigators to curtail retail discounting and agreed to "immediate termination" of buyers that failed to adhere to their trade spending policies. (Doc. 173, Ex. E P 5.10.) TAN notices dated December 2002 document that the Canadian defendants had undertaken "concerted and committed efforts to clean up the dysfunctional retail trade spending" in the Canadian market by reducing or eliminating 2-for-99 [cent] **[**43]** and 3-for-99 [cent] promotions. (Doc. 173, Ex. E P 5.12.) During this time period, defendants' executives in the United States were purportedly aware of and condoned the price-control efforts in Canada. (Doc. 420 P 65; Doc. 448 P 107.c.)

In February 2004, Leonidas met with a senior executive (hereinafter "Cooperating Individual 1" or "CI-1") of a company (hereinafter "the cooperating party") that would later assist with the Canadian antitrust investigation. [10] (Doc. 420 P 109.a; Doc. 422 P 74; Doc. 448 P 121.) Leonidas and Cooperating Individual 1 discussed trends in trade spending and agreed that such expenditures should be further reduced. (Doc. 420 P 109.a; Doc. 422 P 74; Doc. 448 P 121.) The meeting caused CI-1 to believe that he and Leonidas shared a common perspective on trade spending, and CI-1 understood that he had "an open line to call Leonidas if there were any issues in the market, including trade spend [sic] practice." (Doc. 420 P 109.a; Doc. 422 P 74; Doc. 448 P 121 (all cited complaints quoting Doc. 173, Ex. D P 5.21)).

The Canadian defendants' pricing communications sharpened in June 2005, when Cooperating Individual 1 met with Leonidas at a trade association convention. Leonidas informed CI-1 that Nestle Canada "[took] pricing seriously," that the company planned to implement a price increase in the near future, and that Leonidas wanted CI-1 to "hear it from the top" of Nestle Canada's leadership. [11] (Doc. 418 P 101; Doc. 420 P 109.b; Doc. 448 P 123.) CI-1 reciprocated Leonidas's sentiment and believed that Leonidas would have concluded that the cooperating party would follow a price increase led by Nestle Canada. (Doc. 420 P 109.c; Doc. 448 P 123.)

Emails exchanged among employees of the cooperating party confirm that the Canadian defendants exchanged pricing information. The following is a verbatim excerpt of one of these emails:

> "At ITWAL I was informed by a reliable source that both Nestle and [Mars Canada] have been to customers hinting at 2005 price increases. No details or confirmation. I suggested that we would seriously consider appropriate actions once firm details known, and that I **[*555]** would be concerned about the other leading player not following Which my contact said they would inquire about. This is similar to info we had picked up a couple months ago. . . ."

(Doc. 420 P 109.b; Doc. 448 P 122 (all cited complaints quoting Doc. 173, Ex. D P 5.22)). CI-1 later received documentation reflecting Nestle Canada's plans to increase chocolate candy prices during 2005. (Doc. 420 PP 109.d-.h; Doc. 422 P 75; Doc. 448 PP 123-25.) The cooperating party announced a price increase on July 29, 2005

---

[9] Exhibits D and E to Docket Entry No. 173 are the sworn statements that Daniel Wilcock, an attorney for the Canadian Competition Bureau, prepared in furtherance of the Bureau's investigation into alleged price-fixing **[**42]** activities in Canada. Plaintiffs' amended complaints rely upon these statements to describe defendants' alleged price-fixing activities, and defendants do not dispute the authenticity of these documents. (Doc. 477 at 30 n.7.) The court may therefore consider them when ruling on the motions to dismiss. See *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997)*.

[10] The cooperating party is widely presumed to be Cadbury Canada, (see, e.g., Doc. 420 P 108), though the current record does not confirm its identity. **[**44]** The court has retained the anonymous descriptors utilized in Wilcock's sworn statements to identify the company and employees who participated in the Canadian antitrust investigation.

[11] Cooperating Individual 1 did not recall the precise words that Leonidas used during the encounter but informed Canadian antitrust authorities that Leonidas stated, "I want you to hear it from the top--I take my pricing seriously" or "We are going to take a price increase and I want you to hear it from the top" or language to similar effect. (Doc. 418 P 101; Doc. 420 P 109.c; **[**45]** Doc. 448 P 123.)

in accordance with Nestle Canada's proposed increase. (Doc. 420 P 109.i.) Following suit, Hershey Canada and Mars Canada announced increases before the end of 2005. (Doc. 420 P 109.j-.k.)

CI-1 also communicated with representatives **[**46]** of Hershey Canada and Hershey Global during the alleged Canadian price-fixing conspiracy. In early 2007, Hershey Global appointed Eric Lent ("Lent"), vice president of its American confectionery operations, to head Hershey Canada. (Doc. 173, Ex. D P 5.45.) Following his transfer, Humberto Alfonso ("Alfonso"), chief financial officer of Hershey Global, transmitted an email to CI-1 with Lent's new contact information. Alfonso's email read, in pertinent part, as follows:

> As we discussed, Hershey has recently appointed Eric Lent as Vice President and General Manager for the Canada business. In keeping with the good advice from 'The Godfather,' keep close to your competition, I am including contact info below in an effort to introduce you both. All kidding aside, I know Eric is looking forward to meeting you.

(Doc. 418 P 103; Doc. 420 P 109.t; Doc. 422 P 80; Doc. 448 P 132 (all complaints quoting Doc. 173, Ex. D P 5.45)). By late 2007, Lent had obtained or solicited pricing information from Leonidas and his counterparts at Mars Canada and the cooperating party. (Doc. 418 P 104; Doc. 420 P 109.v-.w; Doc. 422 P 80; Doc. 448 P 134.)

Plaintiffs contend that the Canadian defendants' alleged misconduct **[**47]** lends particular credence to their claims of price fixing in the American market. They assert that the fluidity between the two markets, the integration of defendants' Canadian and American corporate structures, and fusion of U.S. and Canadian manufacturing and distribution channels provided the means to implement an inter-market price-fixing conspiracy. Plaintiffs aver that all defendants regularly participate in trade associations and conferences and subscribe to industry publications, providing ready fora in which to exchange pricing information. (Doc. 418 P 48, 92-97; Doc. 420 P 77; Doc. 422 P 64, 90-91; Doc. 448 PP 102, 106, 120.)

E. Procedural History

A total of eighty-seven actions are currently affiliated with the above-captioned multidistrict litigation. The Judicial Panel on Multidistrict Litigation consolidated all pretrial matters in the Middle District of Pennsylvania on April 7, 2008 pursuant to *28 U.S.C. § 1407(a)*. (See Doc. 1.) Three putative subclasses and one group of individual plaintiffs filed amended complaints on August 13 and 14, 2008, and the instant motions to dismiss (Docs. 464, 466, 469, 471, 473, 474, 476) followed on September 29, 2008.

Cadbury plc, Cadbury **[**48]** Holdings, Mars Canada, Nestle S.A., and Nestle Canada move to dismiss the complaints for lack of personal jurisdiction. All defendants move for dismissal on the ground that the amended complaints fail to allege facts demonstrating a plausible right to relief under Twombly. The parties have fully briefed these issues, and the court received the benefit of approximately five **[*556]** hours of oral argument on January 16, 2009. [12]

II. Motions to Dismiss for Lack of Personal Jurisdiction

Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A., and Nestle Canada (hereinafter collectively "the *Rule 12(b)(2)* defendants") move for dismissal under *Rule 12(b)(2)* for lack of personal jurisdiction. These defendants contend that they performed no pricing activity in the U.S. giving rise to specific jurisdiction and that their contacts with the nation as a **[**49]** whole fail to confer general jurisdiction over them.

A. Standard of Review Applicable *Rule 12(b)(2)* Motions

HN1[] Motions to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, like those for failure to state a claim under *Rule 12(b)(6)*, require the court to accept as true the allegations of the

[12] The court commends counsel for the insightful advocacy contained in their briefs and displayed at oral argument. Counsels' written submissions thoroughly canvassed pertinent areas of law, and these materials clearly represent the collaborative work of many capable attorneys. The court expresses its appreciation to all counsel involved in these efforts.

pleadings and all reasonable inferences therefrom. *Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)*. However, unlike *Rule 12(b)(6)*, *Rule 12(b)(2)* does not limit the scope of the court's review to the face of the pleadings. See id.; *Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 & n.1 (3d Cir. 1992)*. Consideration of affidavits submitted by the parties is appropriate and, typically, necessary. *Patterson by Patterson v. FBI, 893 F.2d 595, 603-04 (3d Cir. 1990)*.

HN2[] Although plaintiffs bear the ultimate burden of proving personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the preliminary stages of litigation. *Mellon Bank (E.) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992)*. Rather, plaintiffs must merely allege sufficient facts to establish a prima facie case of jurisdiction over the person. Id. **[**50]** Once these allegations are contradicted by an opposing affidavit, however, plaintiffs must present similar evidence in support of personal jurisdiction. [13] *Carteret Sav. Bank, 954 F.2d at 142 & n.1, 146*; *Patterson, 893 F.2d at 603-04*. ***HN3***[] "[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's *Rule 12(b)(2)* motion to dismiss for lack of in personam jurisdiction. . . . Once the motion is made, plaintiff must respond with actual **[*557]** proofs, not mere allegations." *Patterson, 893 F. 2d at 604*. When plaintiff responds with affidavits or other evidence in support of its position, however, the court is bound to accept these representations and defer final determination as to the merits of the allegations until a pretrial hearing or the time of trial. *Carteret Sav. Bank, 954 F.2d at 142 n.1* (stating that the "plaintiff need only plead [a] prima facie case to survive the initial [*Rule 12(b)(2)*] motion, but must eventually establish jurisdiction by a preponderance of the evidence") (citing *Behagen v. Amateur Basketball Ass'n, 744 F.2d 731, 733 (10th Cir. 1984))*.

B. Discussion

HN5[] A federal court **[**52]** entertaining a suit must possess one of two forms of personal jurisdiction over each defendant. The first type of jurisdiction, known as specific jurisdiction, requires that the plaintiff's claim arise from the defendant's contacts with the forum in which the court sits. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*; *Telcordia Tech Inc. v. Telkom S.A., 458 F.3d 172, 177 (3d Cir. 2006)*. In contrast, the court may exercise general jurisdiction over a defendant who possesses systematic and continuous contacts with the forum regardless of whether the plaintiff's claim derives from the defendant's in-forum activities. *Helicopteros, 466 U.S. at 415 n.9*; *Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007)*. The court must determine whether to exercise either form of jurisdiction in light of the "relationship among the defendant, the forum, and the litigation." *Helicopteros, 466 U.S. at 414 (1984)* (quoting *Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977))*. ***HN6***[] When a statute such as the Sherman Act permits nationwide service of process, [14] the *Fifth Amendment Due Process Clause* guides the court's personal jurisdiction inquiry. *Max Daetwyler Corp v. R. Meyer, 762 F.2d 290, 295 (3d Cir. 1985)*; **[**53]** *Holland v. King Knob Coal Co., 87 F. Supp. 2d 433, 436 (W.D. Pa. 2000)*.

1. Specific Jurisdiction

---

[13] The court is aware of case law suggesting that plaintiff may not rely on the pleadings alone but **[**51]** must produce affidavits or other affirmative evidence to overcome a jurisdictional challenge under *Rule 12(b)(2)*. See, e.g., *Rodi v. S. New Eng. Sch. of Law, 255 F. Supp. 2d 346, 348 (D.N.J. 2003)*. However, this misstates plaintiff's burden. ***HN4***[] If the moving party fails to submit evidence contravening the allegations of the complaint, the court is bound to accept plaintiff's allegations regardless of whether plaintiff presents further evidence in support thereof. See *Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004)* (observing that, unless the court hears evidence on the jurisdictional issues, all allegations must be taken as true for purposes of assessing whether the plaintiff has established a prima facie case of jurisdiction); *Carteret Sav. Bank, 954 F.2d at 142 n.1* (stating that the "plaintiff need only plead [a] prima facie case to survive the initial [*Rule 12(b)(2)*] motion, but must eventually establish jurisdiction by a preponderance of the evidence"). In other words, although the burden of persuasion always lies with the non-moving party, the burden of production rests initially with the party moving for dismissal under *Rule 12(b)(2)*.

[14] ***HN7***[] Section 12 of the Clayton Act, *15 U.S.C. § 22*, authorizes nationwide service of process in antitrust cases, including those brought under *§ 1* of the Sherman Act.

HN8[] Specific jurisdiction allows the court to adjudicate claims related to defendants' contacts with the forum. HN9[] Three alternative theories allow a court to acquire specific jurisdiction over a defendant. First, under principles of purposeful availment, the court may exercise jurisdiction over a defendant that has directed its activities into a forum, thereby producing the alleged injury. Second, the stream-of-commerce theory provides jurisdiction over an out-of-forum defendant if plaintiff's in-forum injury arises from a product that defendant placed into channels of commerce. Third, the effects test announced in *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)*, confers jurisdiction over a defendant whose tortious conduct performed outside the forum produced effects within the forum. Plaintiffs argue that each theory supplies jurisdiction over the *Rule 12(b)(2)* defendants.

a. Purposeful Availment

HN10[] Under purposeful availment doctrine, a court may exercise **[**54]** specific jurisdiction if (1) the defendant purposefully directs its activities into a forum, (2) the case arises from those activities, and (3) the exercise of jurisdiction "comport[s] with 'fair play and substantial justice.'" *O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 317 (3d Cir. 2007)* (quoting *Burger [*558] King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (alteration in original)). The purposeful availment and relatedness inquiries are often described collectively as requiring "minimum contacts" between the defendant and the relevant forum. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451 (3d Cir. 2003)* (quoting *Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)* (plurality opinion))). If, as in the instant case, a federal statute authorizes nationwide service of process, [15] the court appraises the defendant's contacts with the United States as a whole. *In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004)*.

HN11[] The first component of the jurisdictional inquiry assays whether the defendant "availed[ed] himself of the privilege of conducting activities within the forum." *O'Connor, 496 F.3d at 317* (quoting *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)*); **[**55]** see also *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*. It requires the defendant to invoke the forum's laws by performing a volitional act directed toward the forum. *Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)* (plurality opinion); *Pinker, 292 F.3d at 370*.

Second, HN12[] the plaintiff's claim must arise from one of the defendant's forum-related activities. *Marten, 499 F.3d at 296* (internal quotation omitted). The inquiry ensures that the defendant's "jurisdictional exposure" remains proportionate to its in-forum activities. *O'Connor, 496 F.3d at 323*; *Leone v. Cataldo, 574 F. Supp. 2d 471, 480 (E.D. Pa. 2008)* ("[T]he cost of enjoying the benefits of a forum is specific jurisdiction."). The link between the defendant's action and the plaintiff's claim need not rise to the level of proximate causation, but the connection must be "intimate enough to keep the quid pro quo [between in-forum activity and jurisdictional exposure] proportional and personal jurisdiction reasonably foreseeable." *O'Connor, 496 F.3d at 323*; *Watiti v. Walden Univ., No. Civ.A. 07-4782, 2008 U.S. Dist. LEXIS 43217, 2008 WL 2280932, at *9 (D.N.J. May 30, 2008)*.

Third, HN13[] minimum contacts alone will not confer personal **[**56]** jurisdiction over the defendant. [16] The plaintiff must also establish that the exercise of jurisdiction harmonizes with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. At this stage of the analysis, the court evaluates the reasonableness of jurisdiction in light of a variety of interests, including burden that litigation places on the defendant, the forum's interest in the litigation, plaintiff's interest in obtaining convenient relief, the interest of the interstate judicial system in efficient resolution of controversies, and "the shared interests of the several States in furthering fundamental substantive social policies." *Pinker, 292 F.3d at 370* (quoting *Burger King, 471 U.S. at 477*). No single factor is dispositive of the jurisdictional analysis. *Burger King,*

[15] See supra note 14.

[16] HN14[] While minimum contacts alone are insufficient **[**57]** to support personal jurisdiction, a defendant that possesses minimum contacts "must make a compelling case that litigation in [the forum state] would be unreasonable and unfair" to prevent jurisdiction from attaching. *O'Connor, 496 F.3d at 325* (internal quotation omitted).

471 U.S. at 485 ("We . . . reject any talismanic jurisdictional formulas . . . ."); Mellon Bank, 960 F.2d at 1224-25. In federal question cases, when **[*559]** concerns of comity among the states are less pronounced, courts should consider the policies of the federal laws from which the dispute arises. Pinker, 292 F.3d at 370-71.

Turning to the case *sub judice*, the moving defendants challenge the court's personal jurisdiction over them and have supplied affidavits in support of their motions. Mars Canada attests that it is not registered to transact business in the United States, maintains no physical presence or employees here, sells no products in the U.S., and exercises no control over the prices of products sold by its American counterparts. (Doc. 472 PP 6-10.) Nestle S.A.'s contacts with the American chocolate market are similarly limited, (Doc. 479, Ex. A PP 5-11), as are those of Nestle Canada, (Doc. 479, Ex. B PP 5-12). Cadbury plc, as a holding company, does not sell chocolate products anywhere in the world, (Doc. 468 P 7), and neither Cadbury plc nor Cadbury Holdings maintain bank accounts, employees, manufacturing facilities, or distribution centers in the United States, (id. PP 18-26). Moreover, the licensing agreements between **[**58]** Cadbury Holdings and Hershey Global do not allow the Cadbury entities to control U.S. pricing or create an obligation to consult about the protocols used to price Cadbury-licensed products.

HN15[] Plaintiffs therefore incur the burden of rebutting defendants' asseverations "through sworn affidavits or other competent evidence." Patterson, 893 F.2d at 604-05. Plaintiffs, however, rely in large measure upon their amended complaints, which describe an integrated market between the United States and Canada and allege that defendants "sold and/or made available for purchase Chocolate Candy to purchasers in the United States." [17] (Doc 418 PP 24, 26, 28, 30-31; Doc. 420 PP 53, 56, 58, 60-61; Doc. 422 PP 10-11, 13, 15, 21; Doc. 448 PP 35, 37, 39, 42, 44, 51-52); see also supra Part I.B; (Doc. 520 at 40-41; Doc. 523 at 24-25). Plaintiffs may not repose upon their pleadings in this manner. Rather, they must counter defendants' affidavits with contrary evidence in support of purposeful availment jurisdiction. [18] Patterson, 893 F.2d at 604-05 **[*560]** ; Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996); Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 516 F. Supp. 2d 324, 336 (D. Del. 2007). **[**59]** The evidence propounded by plaintiffs does not establish a prima facie showing of purposeful availment jurisdiction over the Rule 12(b)(2) defendants.

First, plaintiffs offer evidence that Mars Canada and Nestle Canada manufactured products in Canada and then transferred them to their American counterparts, Mars Snackfood and Nestle U.S.A. (Doc. 472, Ex. A PP 10-11; Doc. 479, Ex. B PP 11-12.) These transactions, however, do not raise an inference that Mars Canada or Nestle Canada influenced the post-transfer pricing of the products. **[**61]** Their status as remote suppliers of chocolate confectionary products does not buttress the claims of alleged antitrust harm that occurred after the products left their dominion and control. [19] See, e.g., Ware v. Ball Plastic Container Corp., 432 F. Supp. 2d 434, 438 n.3 (D. Del.

---

[17] During oral argument, counsel for Nestle S.A., Nestle U.S.A., and Nestle Canada observed that the amended complaints muddle the jurisdictional inquiry by referring to parent and subsidiary corporations collectively as "Mars," "Nestle," and "Cadbury." (Doc. 571 at 32.) The court agrees. This pleading practice--while permissible under the Federal Rules of Civil Procedure--disadvantages plaintiffs when responding to the ***HN16***[] Rule 12(b)(2) motions, which require that plaintiffs establish personal jurisdiction as to *each particular* corporate defendant. See Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 101 (3d Cir. 2004) ("[T]he specific jurisdiction determination is both claim-specific, . . . and defendant-specific." (citations omitted)). Plaintiffs will be required to demonstrate that *each* of the moving defendants *individually* possesses sufficient contacts with the United States to warrant exercise of personal jurisdiction regardless of whether their corporate families, considered as a whole, possesses such contacts.

[18] In this regard, a Rule 12(b)(2) **[**60]** motion differs significantly from one under Rule 12(b)(6), which requires the court to adopt plaintiffs' allegations regardless of defendants' contrary evidence. See Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984); Eagle Computer Assocs. v. Chesapeake Software Servs., Inc., No. 99-CV-2583, 1999 U.S. Dist. LEXIS 17509, 1999 WL 1030441, at *1 (E.D. Pa. Nov. 12, 1999). The court thus credits plaintiffs' averments of fusion between the U.S. and Canadian chocolate markets for purposes of the Rule 12(b)(6) motions. The jurisdictional challenges, in contrast, require plaintiffs to rebut the Rule 12(b)(2) defendants' affidavits with evidence reflecting in-forum contacts. In the absence of such evidence, the court must espouse the facts described in defendants' evidentiary submissions. See supra Part II.A.

2006) (holding that the court lacked specific jurisdiction to hear a discrimination claim against the defendant, whose sole contact with the forum was the shipment of products into the state); Patent Incentives, Inc. v. Seiko Epson Corp., No. Civ.A. 88-1407, 1988 U.S. Dist. LEXIS 9933, 1988 WL 92460, at *5 (D.N.J. Sept. 6, 1988) (declining to exercise specific jurisdiction in a patent infringement action over a foreign manufacturer who sold its products to its U.S. subsidiary because the manufacturer's mere importation of products was unrelated to the plaintiff's claim). **HN17**[] A plaintiff cannot hold a manufacturer liable for a price-fixing harm occurring after the product left the manufacturer's hands absent a showing that the manufacturer retained control over product pricing. Plaintiffs have made no such showing here. Based upon the record before the court, Mars Canada and Nestle Canada's production and supply of chocolate candy into the **[**62]** United States bear no clear relationship to the price-fixing harms of which plaintiffs complain [20] and cannot support personal jurisdiction under purposeful availment theory. [21] See O'Connor, 496 F.3d at 323 **[*561]** (stating that **HN18**[] specific jurisdiction requires the plaintiff's injury to be related and proportional to the defendant's in-forum activities).

Second, plaintiffs rely upon the asset purchase and trademark licensing agreements with Hershey Global. The agreements require Hershey Global to remit periodic royalty payments based on formulae provided in the agreement. (Doc. 478-6 at 9-14; Doc. 478-8 at 12-18.) They also obligate the Cadbury entities to provide technical assistance with production and promotion of Cadbury brands, permit them to inspect Hershey Global facilities and products, and require them to approve changes to the trade dress of Cadbury-branded goods. (See Doc. 478-5 at 19-20, 25; Doc. 478-6 at 1-5; Doc. 478-8 at 4-5, 9-12.) The agreements do not allow Cadbury plc or Cadbury Holdings to influence prices for the licensed products, to consult with Hershey Global about price structures, to inspect the protocols that Hershey Global uses to establish prices, or to obtain or disclose any pricing information whatsoever. The agreements do not suggest that pricing information actually passes between Hershey Global and

---

[19] Many of the cases cited by the parties as applicable to the conduct of Mars Canada and Nestle Canada apply stream-of-commerce doctrine rather than a pure purposeful availment analysis. The present discussion addresses only purposeful availment and minimum contacts concerns. The stream-of-commerce doctrine is considered at infra Part II.B.1.b.

[20] This conclusion results from the paucity of record evidence about the product transfers. The record does not outline the distribution system by which Mars Canada and Nestle Canada move products into the U.S., nor does it explain the terms of the transactions. Such evidence is highly relevant to Mars Canada and Nestle Canada's participation in the American chocolate candy market and could demonstrate that these entities possess more extensive contacts with the U.S. than the current record reveals. The **[**63]** court will therefore grant plaintiff jurisdictional discovery to explore the precise contours of these transactions. See infra Part II.B.3.

[21] Plaintiffs rely upon MM Global Services v. The Dow Chemical Co., 404 F. Supp. 2d 425 (D. Conn. 2005) for the proposition that "manufacturing chocolate products sold throughout the United States [is] undoubtedly relevant to Plaintiffs' claims." (Doc. 523 at 26; see also Doc. 520 at 35-36; Doc. 521 at 33.) MM Global, however, is inapposite. In MM Global, the plaintiffs produced evidence that foreign defendants purchased products worth several million dollars from U.S. suppliers via American communication facilities and distribution networks. 404 F. Supp. 2d at 430-31. The defendants then fixed prices for these products in resale transactions conducted abroad and arbitrarily refused to accept orders from the plaintiffs. Id. at 431. The court concluded that the foreign defendants in-forum purchases "were part and parcel" of subsequent resales at anticompetitive price levels and provided appropriate grounds for purposeful availment jurisdiction. Id. at 435. In the present matter, by contrast, plaintiffs have produced no evidence that either Mars Canada **[**64]** or Nestle Canada participated in the anticompetitive sales underlying their claims. Rather, the record suggests that these defendants are remote suppliers who possess no U.S. pricing authority, and their absence from the allegedly suspect American pricing scheme places them beyond MM Global's reach.

Emerson Electric Co. v. Le Carbone Lorraine, S.A., No. Civ.A. 05-6042, 2008 U.S. Dist. LEXIS 72705, 2008 WL 4126602 (D.N.J. Aug. 27, 2008) is likewise unavailing to plaintiffs. In Emerson Electric, a foreign defendant moved to dismiss for lack of personal jurisdiction. The court denied the motion because the defendant allegedly exerted pricing control in the American market by dictating prices to its American subsidiaries and by acquiring an American corporation to eliminate market competition. 2008 U.S. Dist. LEXIS 72705, [WL] at *3-4. In the instant matters, plaintiffs allege no such conduct on the part of Mars Canada or Nestle Canada. A similar distinction exists with regard to In re Isostatic Graphite Antitrust Litig., No. 00-CV-1857, 2002 U.S. Dist. LEXIS 21656, 2002 WL 31421920, at *3 (E.D. Pa. Sept. 19, 2002) (concluding that exercise of personal jurisdiction over foreign defendants was proper because "[p]laintiffs have presented evidence which suggests that the allegedly **[**65]** anticompetitive actions of the American subsidiaries were directed, at least in part, by their foreign parent corporations").

the Cadbury entities, nor does the record evidence support such an inference. **[**66]** To the contrary, the agreements essentially reflect the disengagement of Cadbury entities from the American chocolate confectionary market. Exercise of specific jurisdiction based upon mere consultation clauses would be disproportionate to the in-forum activities and benefits contemplated by the agreements. *O'Connor, 496 F.3d at 323*.

Finally, plaintiffs have produced no evidence connecting Nestle S.A. to the alleged price-fixing harms in the United States. Plaintiffs broadly aver that Nestle S.A. made chocolate candy "available for purchase" to U.S. consumers, maintained "tightly interwoven" operations between the United States and Canada, and "participated in a conspiracy to fix prices in the United States." (Doc. 520 at 34.) These conclusory allegations are insufficient to establish personal jurisdiction over Nestle S.A. See, e.g., *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997)* (refusing to allow jurisdictional discovery because plaintiffs averments that defendant "transact[ed] business" in the relevant forum were insufficient to ascribe actual forum contacts to the defendants); *Patterson, 893 F.2d at 604*.

At oral argument, plaintiffs advocated **[**67]** for jurisdiction over Nestle S.A. based upon a license agreement under which Hershey Global manufactures and distributes **[*562]** Kit-Kat(R) and Rolo(R) in the United States using Nestle trademarks. (Doc. 571 at 111.) However, Nestle S.A. has proffered evidence that it is not party to this agreement. (Doc. 479, Ex. A P 11.) Based upon Hershey Global's filings with the Securities and Exchange Commission, it appears that an entity known as Societe des Produits Nestle S.A. ("Societe") owns the trademarks subject to the agreement. See Hershey Foods Corp., Annual Report (Form 10-K), at 11 (April 15, 1991) (reflecting that Hershey Global previously maintained the license agreement with Rowntree Mackintosh Confectionery Limited, which transferred it to Societe on January 1, 1990); see also The Hershey Co., Annual Report (Form 10-K), at 108 (February 20, 2009) (same), available at *http://idea.sec.gov/Archives/edgar/data/47111/000119312509033670/d10k.htm* (last visited Mar. 3, 2009). Societe is not a party to the above-captioned matters, and the record does not describe the relationship, if any, between Nestle S.A. and Societe. At present, the record is devoid of evidence that Nestle S.A. receives any **[**68]** financial benefit from the agreement. The limited information about the agreement therefore prevents it from serving as a basis for personal jurisdiction over Nestle S.A.

Plaintiff's have failed to "establish[] jurisdictional facts through sworn affidavits or other competent evidence" with respect to any of the *Rule 12(b)(2)* defendants. *Patterson, 893 F.2d at 604*; *Poole v. Sasson, 122 F. Supp. 2d 556, 557 (E.D. Pa. 2000)* (***HN19***[] "Although all allegations in the complaint are taken as true, a plaintiff may not solely rely on bare pleadings to satisfy his jurisdictional burden."). The court concludes that the current record does not establish a prima facie showing of personal jurisdiction under purposeful availment theory.

b. Stream-of-Commerce Theory

Plaintiffs invoke the stream-of-commerce theory against only Mars Canada. ***HN20***[] The theory, recognized by the Supreme Court in Asahi Metal Industry Co. v. Superior Court, generally allows a court to exercise personal jurisdiction over a defendant that directs its products into a forum. Application of Asahi, a plurality decision, is somewhat complicated in that it contains multiple perspectives on the theory. [22] Under the first perspective, articulated **[**69]** by Justice O'Connor, a defendant's isolated act of placing a product into the stream of commerce does not subject the defendant to personal jurisdiction. *Asahi, 480 U.S. at 112*. Rather, the defendant must engage in additional conduct that evidences a desire to participate in a market within the forum. *Id*. Examples of such conduct include designing a product for particular consumers, establishing a customer support network, retaining a sales agent, and marketing the product in the forum. Id. The second perspective from Asahi, presented by Justice Brennan, espouses a broader jurisdictional scope. Under this perspective, jurisdiction arises from the "regular and anticipated flow of products from manufacture to distribution to retail sale" regardless of whether the defendant otherwise directs activity at the forum. *Id. at 117*. The critical inquiry is whether the defendant possesses knowledge that the product will enter a particular forum, making litigation a foreseeable result of commerce. *Id*. Justice

[22] Asahi was decided by a vote of 4-4-1. The perspectives articulated by Justices O'Connor and Brennan represent the two pluralities. Justice Stevens joined neither plurality and posited a third jurisdictional analysis.

Stevens, discussing a third perspective, eschewed a direct correlation between defendant's awareness of a product's destination **[*563]** and purposeful availment of the forum's laws. *Id. at 122* (Stevens, **[**70]** J., concurring). Instead, a court's exercise of jurisdiction depends upon "the volume, the value, and the hazardous character of the components" that defendant places into the stream of commerce. *Id.*

The United States Court of Appeals for the Third Circuit has embraced an amalgamation of these perspectives, resulting in a holistic stream-of-commerce analysis adapted to the facts of each particular case. *Renner v. Lanard Toys Ltd., 33 F.3d 277, 282-83 (3d Cir. 1994)*. ***HN21***[] As a specific jurisdiction doctrine, however, the stream-of-commerce theory requires that plaintiff's claim arise out of the flow of defendant's products into the forum. See *Pennzoil Prods. Co. v. Colelli & Assocs., 149 F.3d 197, 201 (3d Cir. 1998)* (stating that specific jurisdiction requires a link between the defendant's activity directed in the forum and the plaintiff's harm); *Simeone ex rel. Estate of Albert Francis Simeone, Jr. v. Bombardier-Rotax GMBH, 360 F. Supp. 2d 665, 672 (E.D. Pa. 2005)* (declining **[**71]** to exercise jurisdiction under stream-of-commerce principles because no connection existed between the activities that the defendant directed toward the forum and the harm for which the plaintiff brought suit); see also *Ruiz de Molina v. Merritt & Furman Ins. Agency, 207 F.3d 1351, 1357 (11th Cir. 2000)* (***HN22***[] "The stream of commerce test for jurisdiction is met if the nonresident's product is purchased by or delivered to a consumer in the forum state, so long as the nonresidents's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there *for claims arising out of that conduct*." (emphasis added)); *Mason v. Mooney Aircraft Corp., No. 02-3323-CV-S, 2003 U.S. Dist. LEXIS 16977, 2003 WL 21244160, at *8 (W.D. Mo. May 8, 2003)* (***HN23***[] "The basic theory of the stream of commerce analysis is one of foreseeability: One who puts a product into the stream of commerce in such a fashion as to reasonably foresee its sale in a certain jurisdiction cannot complain of having to defend against claims in that jurisdiction arising out of the product's presence there."). ***HN24***[] Stream-of-commerce jurisdiction must also "comport[] with notions of fair plan and substantial justice." *Pennzoil, 149 F.3d at 205* **[**72]** ("[E]ven if a defendant has the requisite minimum contacts with the forum . . . , other factors may militate against exercising jurisdiction.").

HN25[] Originally developed in the products liability context, courts have extended the stream-of-commerce doctrine to a variety of cases in which plaintiff's claims are directly related to particular characteristics of defendant's product or to defendants' act of shipping the product into the forum. For example, courts have invoked the theory in patent infringement cases. See, e.g., *Horne v. Adolph Coors Co., 684 F.2d 255, 259-60 (3d Cir. 1982)* (applying the stream-of-commerce theory to a patent case because the defendant could anticipate plaintiff's claim, which related to an allegedly infringing product design); *Electro Med. Equip. Ltd. v. Hamilton Med. AG, No. Civ.A. 99-579, 1999 U.S. Dist. LEXIS 18483, 1999 WL 1073636, at *6 (E.D. Pa. Nov. 16, 1999)* (same). This court has applied stream-of-commerce theory to Lanham Act claims relating to false product labeling, *Hershey Pasta Group v. Vitelli-Elvea Co., 921 F. Supp. 1344, 1348-50 (M.D. Pa. 1996)*, and our sister court for the District of New Jersey has concluded that customizing a product for an in-forum purchaser provides **[**73]** stream-of-commerce jurisdiction over a breach-of-contract claim for alleged product defects, *Synergy, Inc. v. Manama Textile Mills, W.L.L., No. Civ.A. 06-4129, 2008 U.S. Dist. LEXIS 12791, at *31-42 (D.N.J.* ***[*564]*** *Feb. 20, 2008)*. However, ***HN26***[] plaintiffs have not cited and the court has not identified any antitrust case imposing jurisdiction upon a defendant that simply shipped products into a forum and lacked control over in-forum pricing. At least two courts have refused to apply the stream-of-commerce theory in this context. See, e.g., *Four B Corp. v. Ueno Fine Chems. Indus., 241 F. Supp. 2d 1258, 1265-66 (D. Kan. 2003)* (declining to apply stream-of-commerce theory in a price-fixing case because the defendant's mere insertion of products into channels of commerce was insufficient to create a relationship between the defendant and the in-forum price fixing); *Dee-K Enters. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1146-47 (E.D. Va. 1997)* (refusing to exercise stream-of-commerce jurisdiction over a defendant who shipped products into and attended periodic meetings in the U.S. but possessed no domestic pricing authority).

Based upon the present record, Mars Canada is beyond the court's stream-of-commerce **[**74]** jurisdiction because plaintiffs' claims lack a nexus with its placement of goods into conduits of commerce. Mars Canada's status as a fountainhead of chocolate products cannot support specific jurisdiction for purposes of a harm unrelated to its manufacture of goods. Defendants have presented sworn statements that Mars Canada neither sells chocolate confectionary products to U.S. consumers nor possesses pricing power in the American market. Plaintiffs have not confuted these assertions. The present record therefore does not establish a prima facie case of stream-of-commerce jurisdiction over Mars Canada. [23]

c. Effects Test of *Calder v. Jones*

HN27[] A plaintiff may predicate specific jurisdiction upon a defendant's activities outside of the relevant forum if the plaintiff suffered the effects of the conduct within the forum. See *Calder, 465 U.S. at 789-90*; *Imo Indus. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998)*. Often denominated the "Calder effects test" after the Supreme **[**75]** Court decision from which it derives, this form of specific jurisdiction requires the plaintiff to establish:

(1) The defendant committed an intentional tort;

(2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; [and]

(3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

Marten, 499 F.3d at 297 (quoting *Imo Indus., 155 F.3d at 265-66*). To satisfy the final element of the test, plaintiff must (a) demonstrate that "the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum" and (b) "point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." *Id. at 298* (quoting *Imo Indus., 155 F.3d at 265*). A plaintiff may rely upon the Calder effects test to acquire jurisdiction over a defendant in cases involving business torts, including price fixing. *In re Bulk [Extruded] Graphite Prods., No. Civ. 02-6030, 2007 U.S. Dist. LEXIS 54906, 2007 WL 2212713, at *6 (D.N.J. July 30, 2007)*; see also *Imo Indus., 155 F.3d at 265-66* **[**76]** (establishing a framework for application **[*565]** of the Calder test to business torts).

In the matter *sub judice*, plaintiffs contend that the Calder effects test confers personal jurisdiction over Mars Canada. Plaintiffs assert that Mars Canada committed an intentional antitrust tort with domestic effects. However, plaintiffs have not raised a prima facie evidentiary showing that the company directed its conduct at the United States. None of plaintiffs' evidence suggests that Mars Canada engaged in discussions--either domestic or foreign--regarding prices of American confectionary products. [24] Based upon the current evidentiary record, the inter-

---

[23] Plaintiffs apparently do not assert stream-of-commerce jurisdiction over Nestle Canada. Even if the court were to infer such an argument, the *ratio decidendi* set forth above applies with equal force to Nestle Canada.

[24] In re Bulk [Extruded] Graphite Products illustrates the evidentiary showing that a plaintiff must proffer to acquire jurisdiction under the Calder effects test. In Bulk [Extruded] Graphite, a foreign defendant moved to dismiss for lack of personal jurisdiction. Plaintiffs introduced deposition testimony confirming that the moving defendant **[**77]** had attended meetings concerning price fixing in foreign graphite markets. *Bulk [Extruded] Graphite, 2007 U.S. Dist. LEXIS 54906, 2007 WL 2212713 at *6*. During these meetings, a co-conspirator recommended that the defendant "establish contacts" with the co-conspirator's American company in order to exert upward pressure on U.S. prices. *2007 U.S. Dist. LEXIS 54906, [WL] at *7-8*. In furtherance of this recommendation, the defendant informed the co-conspirator that he desired to implement a global price-fixing scheme to prevent arbitrage across markets. *2007 U.S. Dist. LEXIS 54906, [WL] at *8-9*. The court concluded that although the co-conspirator "did not expressly state [that the defendant] acted to fix prices in the United States, [the co-conspirator] clearly did state that a conspiracy to fix prices in Europe must necessarily involve the fixing of prices in other markets, including the United States." *2007 U.S. Dist. LEXIS 54906, [WL] at *9*. Plaintiffs therefore marshaled "thin" evidence that the defendant "expressly directed acts in furtherance of price fixing in the United States." Id.

In the instant matter, plaintiffs' evidentiary proffer is more diaphanous than that provided in Bulk [Extruded] Graphite. Plaintiffs have not submitted evidentiary support for their contentions that the American and **[**78]** Canadian confectionary markets are interwoven or that arbitrage opportunities exist across international boundaries. Absent an evidentiary showing consistent with that advanced in Bulk [Extruded] Graphite, plaintiffs have failed to establish a prima facie case of *Calder* effects jurisdiction.

company shipment of products constitutes the only activity of Mars Canada that crosses the border. Standing alone, these shipments do not establish a basis for personal jurisdiction under the *Calder* effects test. [25]

2. General Jurisdiction

HN28[] General jurisdiction arises when the defendant possesses "continuous and systematic contacts with the forum." *Mellon Bank, 983 F.2d at 554* (internal quotation omitted). It empowers a court to hear any claim against a defendant regardless of the claim's relationship to the defendants' in-forum contacts. *Kehm Oil Co. v. Texaco, 537 F.3d 290, 300 (3d Cir. 2008)*; *Pinker, 292 F.3d at 368 n.1* (***HN29***[] "If general jurisdiction exists, the contacts between the defendant and the forum need not be specifically related to the underlying cause of action in order for an exercise of personal jurisdiction over the defendant to be proper."). ***HN30***[] A court may acquire general jurisdiction over a defendant under two alternative theories. First, a court may obtain jurisdiction over any defendant that **[**79]** exhibits systematic and continuous contacts with the forum. Second, a court, already imbued with general jurisdiction over a corporation, may obtain jurisdiction over an affiliated entity when the two companies have fully integrated their operations and function as a single, unified entity. The latter doctrine is frequently identified as alter ego jurisdiction.

[*566] a. Systematic and Continuous Contacts

HN31[] A defendant must possess "significantly more than mere minimum contacts" to support exercise of general jurisdiction; rather, the defendant's contacts with the forum must be systematic and continuous. [26] *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987)*. The court must evaluate the "nature and quality" of a defendant's contacts in light of factors such as whether the defendant sells products, maintains a sales staff, derives significant revenue from, or advertises in the forum. *Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1067 (M.D. Pa. 1993)* (quoting *Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 497-98 (M.D. Pa. 1992)*); accord *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 262 (3d Cir. 2000)*. Other activities favoring **[**80]** general jurisdiction include holding a business license, filing tax returns or administrative reports, owning land or personal property, purchasing products, or employing an agent in the forum. See *ClubCom, Inc. v. Captive Media, Inc., No. 02:07-cv-1462, 2009 U.S. Dist. LEXIS 7960, 2009 WL 249446, at *16 (W.D. Pa. Jan. 31, 2009)*; *Farina v. Nokia, 578 F. Supp. 2d 740, 750 (E.D. Pa. 2008)*.

In the instant matter, plaintiffs predicate general jurisdiction over Nestle S.A. upon the issuance of American **[**81]** Depository Receipts ("ADRs"), [27] ownership of U.S. patents, maintenance of a global website, participation in U.S. merger transactions, submission to the jurisdiction of U.S. courts, control over U.S. subsidiaries, and execution of the Societe-Hershey license agreement. None of these contacts alone confers general jurisdiction over Nestle S.A. See *BP Chems., 229 F.3d at 261, 263* (concluding that ***HN32***[] execution of a contract with a forum resident is alone insufficient to subject defendant to the court's jurisdiction); *Allen v. Russian Fed'n, 522 F. Supp. 2d 167, 195 (D.D.C. 2007)* (concluding that the ***HN33***[] issuance of ADRs does not support general jurisdiction without additional in-forum contacts); [28] *Telcordia Techs. v. Alcatel S.A., No. Civ.A. 04-874, 2005 U.S. Dist. LEXIS*

---

[25] Plaintiffs' briefs do not address Calder's applicability to Cadbury plc, Cadbury Holdings, or Nestle Canada.

[26] At oral argument, counsel sparred over the variety of adjectives used to describe the type of contacts that are prerequisite to an exercise of general jurisdiction, including *systematic, continuous, substantial, significant, extensive*, and *pervasive*. (Doc. 571 at 75-76, 91.) To allay lexical concerns, the court will confine its discussion to the analysis of *systematic* and *continuous* contacts upon which the Supreme Court predicated general jurisdiction in *Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952)*. The court notes that Helicopteros later reaffirmed "continuous and systematic" contacts as the standard for exercise of general jurisdiction. *466 U.S. at 414-15* & n.9 (quoting *Perkins, 342 U.S. at 438, 445)*.

[27] ADRs are investment devices that allow American investors to trade shares of foreign corporations in the same manner as those of domestic companies. ADRs are issued by intermediary banks that acquire **[**82]** securities from foreign corporations and repackage them as instruments that investors can freely trade on U.S. exchanges. See *Pinker, 292 F.3d at 367*.

10194, 2005 WL 1268061, at *4 (D. Del. 2005) (**HN34**[] "[O]wnership of a United States patent, **[*567]** without more, cannot support the assertion of personal jurisdiction over a foreign patentee in any state besides the District of Columbia." (citation omitted)). [29], [30]

On the present record, these activities when aggregated are also insufficient to confer general jurisdiction over Nestle S.A. The listing of ADRs, prosecution of patents, and investigation of corporate acquisitions do not implicate systematic, continuous business dealings in the United States. Nestle S.A. is not a party to the Societe-Hershey license agreement, and its website passively provides general information **[*568]** about the Nestle corporate family. It neither offers products for purchase nor solicits business in the United States. *In toto*, the company's

---

[28] Rejection of ADRs as the foundation for general jurisdiction is consistent with Pinker, which held only that ADRs, standing alone, may provide a basis for *specific* jurisdiction in a securities fraud case. See Pinker, 292 F.3d at 372-73. The Pinker court declined to address the relationship between ADRs and general jurisdiction, id. at 368 n.1. To be clear, the court considers Nestle S.A.'s ADRs relevant to the general jurisdiction analysis but not sufficient in isolation to bring Nestle S.A. before the court. See Allen, 522 F. Supp. 2d at 195; accord Newport Components, Inc. v. NEC Home Elecs. (U.S.A.), Inc. 671 F. Supp. 1525, 1540 (C.D. Cal. 1987) (relying upon ADRs as one of several contacts supporting general jurisdiction in a case decided prior to Pinker).

[29] Plaintiffs have cited no case in which a court invoked general jurisdiction over a holding company as the result of acquisitions or "due diligence" activity undertaken in the relevant forum, and the court will not announce such a rule in this case. See, e.g., Helicopteros, 466 U.S. at 418 **[**83]** ("**HN35**[] [M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."); BP Chems., 229 F.3d at 261, 263 (**HN36**[] "[A] non-resident's contracting with a forum resident, without more, is insufficient to establish the requisite minimum contacts" for specific or general jurisdiction.). **HN37**[] A holding company's acquisition of a domestic entity may confer specific jurisdiction in actions related to the transaction, but they do not support general jurisdiction in the absence of additional contacts with the forum. See, e.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 445, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952) (documenting activities sufficient to support exercise of general jurisdiction, such as maintaining files, conducting business correspondence, distributing checks, opening bank accounts, and implementing management decisions within the forum); cf. Telcordia Techs., 2005 U.S. Dist. LEXIS 10194, 2005 WL 1268061, at *7 ("[I]ncorporating a subsidiary in the United States does not give rise to jurisdiction unless the litigation is related to the act of incorporation . . . ."); compare Ross v. Altria Group, Inc., No. C 04-01453, 2004 U.S. Dist. LEXIS 18558, 2004 WL 2055712, at *4 (N.D. Cal. 2004) **[**84]** (declining to exercise general jurisdiction over a holding company that engaged in national advertising campaigns but conducted no operations in the forum and maintained no physical presence there); with Shepherd Inv. Int'l v. Verizon Commc'ns, Inc., 373 F. Supp. 2d 853, 864-67 (E.D. Wis. 2005) (subjecting a holding company to general jurisdiction based upon its solicitation of in-forum capital, direct mailings to shareholders, promotional activities, interactive website for the sale of stock, and business relationships with 140 in-forum banks).

The court also rejects plaintiffs' assertion that Nestle S.A.'s retention of counsel in the U.S. establishes general jurisdiction. Plaintiffs have identified several U.S. law firms hired by Nestle S.A. to undertake its acquisitions. (Doc. 520, Exs. 11-15.) However, **HN38**[] it is illogical to predicate general jurisdiction upon Nestle S.A.'s employment of attorneys to effectuate transactions that fail *ex proprio vigore* to establish such jurisdiction. A decision to the contrary would suggest that *any* retention of counsel could give rise to general jurisdiction, including hiring attorneys for purposes of litigation. The court does not suggest that the **[**85]** activities of a defendant's legal representatives in a forum are irrelevant. Indeed, a defendant's propensity for litigation may result in the conferrence of general jurisdiction. The cases *sub judice*, however, do not present such a scenario.

[30] Plaintiffs assert that general jurisdiction over Nestle S.A. is appropriate because Nestle S.A. has consented to submit disputes arising under a 1989 joint venture contract to the United States District Court for the District of Minnesota. (Doc. 520, Ex. 36 P 5(b)). Plaintiffs have identified no precedent in which a court predicated exercise of general jurisdiction upon such a fleeting contact with a forum. The court finds that this minimal contact is entitled to little weight in the analysis of general jurisdiction. See infra p. 41.

Sterling Merchandising, Inc. v. Nestle S.A., No. Civ. 06-1015, 2008 U.S. Dist. LEXIS 31938 (D.P.R. Apr. 15, 2008) is also unavailing to plaintiffs' jurisdictional quest. In Sterling Merchandising, Nestle S.A. mounted a jurisdictional defense against the plaintiff's claim that it monopolized the Puerto Rican ice cream market through various corporate acquisitions. The court determined that it possessed specific jurisdiction over Nestle **[**86]** S.A. and, consequently, did not address the issue of general jurisdiction. (Id. at 5, 15.)

actions depict little more than the predictable measures employed by a holding company to coordinate usual business among its subsidiaries.

Further, Nestle S.A. does not engage in any of the activities to which courts have traditionally looked to find general jurisdiction. It does not buy or sell products in the United States, it has no employees in the U.S., and it does not own property, advertise, or maintain bank accounts here. As a holding company, Nestle S.A. manufacturers no goods, it ships no products, and it maintains no sales or marketing **[**87]** force anywhere in the United States.

Telcordia Technologies, Inc. v. Alcatel, S.A. provides an apt analogy for Nestle S.A.'s in-forum conduct. In Telcordia, a patent infringement case, the plaintiff attempted to obtain general jurisdiction over a foreign holding company based upon its issuance of ADRs, ownership of U.S. patents, global website and corporate image, and incorporation of an American subsidiary. *2005 U.S. Dist. LEXIS 10194, 2005 WL 1268061 at *6*. The court rejected these contacts--both individually and collectively--as sufficient grounds for general jurisdiction. *2005 U.S. Dist. LEXIS 10194, [WL] at *7-8*. The company owned no property, consummated no business transactions, and engaged in no operations in the U.S., rendering general jurisdiction improper. *2005 U.S. Dist. LEXIS 10194, [WL] at *1, 8*. Like the foreign corporation in *Telcordia*, Nestle S.A. possesses no contacts that result in a systematic, continuous presence in the United States. The present record fails to support general jurisdiction over Nestle S.A. [31]

The remaining *Rule 12(b)(2)* defendants are also beyond the court's general jurisdiction. Plaintiffs predicate jurisdiction over Nestle Canada upon the products that it shipped into the United States. However, those transactions, collectively valued at approximately C$ 500,000, [32] involved specialized chocolate products and occurred on a sporadic basis. See, e.g., *Kimball v. Countrywide Merch. Servs., No. Civ.A. 04-3466, 2005 U.S. Dist. LEXIS 1817, 2005 WL 318752, at *3 (E.D. Pa. Feb. 8, 2005)* **[**89]** (concluding that five sporadic in-forum sales representing less than 1% of the defendant's annual sales failed to sustain general jurisdiction). Nestle Canada has shipped no products into the U.S. since 2007. In light of these limitations, and in the absence of additional product distribution, the present record does not support the exercise of general jurisdiction over Nestle Canada.

Plaintiffs seek to acquire general jurisdiction over Cadbury plc and Cadbury Holdings on substantially the same grounds advanced against Nestle S.A. Plaintiffs claim that the periodic business **[*569]** inspections, quality auditing procedures, and royalty payments required by the Cadbury-Hershey agreements permit the court to exercise general jurisdiction. However, these regular but infrequent business dealings are precisely the type of contacts that the Supreme Court rejected as a basis for general jurisdiction in *Helicopteros. 466 U.S. at 417-18* (holding that ***HN39***[] business visits and purchases within a forum, "even if occurring at regular intervals, are not enough" to support general jurisdiction over a defendant). Hence, the court finds this argument **[**90]** unavailing.

Finally, plaintiffs contend that the court may impose jurisdiction upon Mars Canada based upon bills of lading that document shipments of Mars Canada products through American ports and upon the inter-company transfer of Mars Canada products to Mars Snackfood. These bills of lading identify thirty-one different product shipments between February 26, 2007 and October 31, 2008. [33] Importantly, the shipments occurred over a twenty-month

---

[31] *In re Automotive Refinishing Paint Antitrust Litigation, No. 1426, 2002 U.S. Dist. LEXIS 15099, 2002 WL 31261330 (E.D. Pa. July 31, 2002)* and *Newport Components, 671 F. Supp. 1525*, cited by plaintiffs, do not dictate a contrary result. In both cases, the court concluded **[**88]** that plaintiffs had established a prima facie case of jurisdiction based upon systematic contacts with the United States, including extensive activity in furtherance of direct sales. See *Auto. Refinishing Paint, 2002 U.S. Dist. LEXIS 15099, 2002 WL 31261330, at *9* (allowing plaintiffs to engage in jurisdictional discovery after establishing that the foreign defendant moving for dismissal had directly sold products worth $ 1.5 billion to its U.S. subsidiary); *Newport Components, 671 F. Supp. at 1538-1540* (predicating general jurisdiction upon defendant's use of federal courts to assert legal claims, issuance of ADRs, in-forum advertising, and domestic television sales). As Nestle S.A. does not sell products, maintain personnel, or advertise in the U.S., these cases are factually dissimilar.

[32] The value of these exports is calculated in Canadian dollars.

[33] Plaintiffs submitted fifty-nine bills of lading, many of which appear to be duplicative.

period. Without additional evidence describing the nature and scope of these shipments, the court is unable to conclude that they qualify as systematic, continuous contacts with the United States sufficient to subject Mars Canada to general jurisdiction. See, e.g., *Aaron Ferer & Sons Co. v. Am. Compressed Steel Co., 564 F.2d 1206, 1209 (8th Cir. 1977)* (concluding that two bills of lading documenting shipments into a forum were insufficient to confer jurisdiction over defendant); *NII Brokerage, LLC v. Roadway Express, Inc., No. 07-5125, 2008 U.S. Dist. LEXIS 64784, 2008 WL 2810160, at *5-6 (D.N.J. July 18, 2008)* (same with respect to an unspecified number of bills of lading); cf. *Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990)* (declining to exercise general **[**91]** jurisdiction on the basis of forty-seven ports-of-call made by defendant's ships over a four-year period); *Conner v. Bouchard Transp. Co., No. 93-450, 1993 U.S. Dist. LEXIS 13786, 1993 WL 388274, at *3 (E.D. Pa. Sept. 30, 1993)* (refusing to exercise general jurisdiction over a defendant that owned thirty-six vessels that made one hundred ports-of-call in the forum over a five-year period). For example, the record does not indicate whether Mars Canada and Mars Snackfood perform these transfers pursuant to a contract for the sale of goods, as like-kind exchanges, or as accounting conventions for the purpose of relocating assets. Information about the frequency of the transfers, the products involved, and the resulting financial benefit, if any, to Mars Canada is also absent. At present, the record evidence is inadequate to establish that Mars Canada's in-forum activities occur on a systematic and continuous basis.

b. Alter Ego Jurisdiction

HN40[] A court may exercise general jurisdiction over a foreign corporation if it possesses jurisdiction over a parent or subsidiary and the two companies operate de facto as a single, organic entity. **[**92]** The applicability of alter ego jurisdiction depends upon whether

(1) the parent owns all or a significant majority of the subsidiary's stock,
(2) commonality of officers or directors exists between the two corporations,
(3) the corporate family possesses a unified marketing image, including common branding of products,
(4) corporate insignias, trademarks, and logos are uniform across corporate boundaries,
(5) corporate family members share employees,

[*570] (6) the parent has integrated its sales and distribution systems with those of its subsidiaries,
(7) the corporations exchange or share managerial or supervisory personnel,
(8) the subsidiary performs business functions that would ordinarily be handled by a parent corporation,

(9) the parent uses the subsidiary as a marketing division or as an exclusive distributor, and

(10) the parent exercises control or provides instruction to the subsidiary's officers and directors.

See *Simeone, 360 F. Supp. 2d at 675*; see also *Directory Dividends, Inc. v. SBC Commc'ns, Inc., No. 01-CV-1974, 2003 U.S. Dist. LEXIS 12214, 2003 WL 21961448, at *3 (E.D. Pa. July 2, 2003)*; accord *Genesis Bio. Pharms. v. Chiron Corp., 27 F. App'x 94, 98 (3d Cir. 2002)*. No single factor is dispositive, and the **[**93]** court may consider all relevant evidence to determine whether the parent exercises actual control over a subsidiary beyond that which is characteristic of a usual parent-subsidiary relationship. *Directory Dividends, 2003 U.S. Dist. LEXIS 12214, 2003 WL 21961448, at *3* ("The Court 'should examine *all relevant factors* that relate to the intimacy of the relationship between the parent and the subsidiary. . . ." (quoting *Arch v. Am. Tobacco Co., 984 F. Supp. 830, 837 (E.D. Pa. 1997)* (emphasis added))); see also *Action Mfg. Co. v. Simon Wrecking Co., 375 F. Supp. 2d 411, 421 n.13 (E.D. Pa. 2005)* (observing that ***HN41***[] alter ego factors developed in the corporate veil-piercing context, such as gross undercapitalization and extensive parental control, are also relevant to the jurisdictional analysis). [34] ***HN42***[] A

[34] ***HN43***[] Courts evaluate alter egos in the veil-piercing context by reference to factors such **[**94]** as undercapitalization of the subsidiary, "failure to observe corporate formalities, nonpayment of dividends, insolvency of [the] debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder." *Action Mfg., 375 F. Supp. 2d at 421-22*; see also *Pearson v. Component Tech. Corp., 247 F.3d 471, 484-85 (3d Cir. 2001)*. These factors also affect the alter ego jurisdictional analysis but do not preclude consideration of other indicia of corporate control. *Action Mfg.,*

plaintiff may invoke alter ego jurisdiction against "nonresident corporations upon a finding that *either* the 'dominant' or 'subservient' corporation does business" within the forum. Directory Dividends, 2003 U.S. Dist. LEXIS 12214, 2003 WL 21961448, at *3 (emphasis added) (quoting Aamco Automatic Transmissions, Inc. v. Tayloe, 368 F. Supp. 1283, 1300 (E.D. Pa. 1973)).

Plaintiffs contend **[**95]** that the court may exercise alter ego jurisdiction over the Rule 12(b)(2) defendants because their respective corporate families operate as integrated conglomerates with a single identity. Defendants' corporate parents own all of the outstanding stock of the subsidiaries, and each corporate family has cultivated a unified global image. Defendants websites, [35] annual reports, and corporate **[*571]** policy statements confirm that each corporate family operates in multi-national markets, promulgates international standards for product quality and employee conduct, and implements global marketing and sales strategies. In addition, Mars Canada and Nestle Canada participate in intra-family product distribution, and one Mars Global employee sits on Mars Canada's board of directors. (Doc. 472, Ex. A PP 10-11, 19; Doc. 479, Ex. B PP 11-12.)

This evidence does not construct a prima facie case of alter ego jurisdiction under the Simeone factors because it fails to demonstrate the corporate parents' actual control over the daily affairs of their subsidiaries. See, e.g., Toys "R" Us, 318 F.3d at 452 (stating that passive websites that provide information but do not solicit business will not confer general jurisdiction over an out-of-forum defendant); Action Mfg., 375 F. Supp. 2d at 423 (concluding that **HN46**[] alter ego jurisdiction does not arise merely because a parent corporation refers to its subsidiaries as corporate divisions). It is unclear whether defendants' subsidiaries develop market-specific plans for growth and product development independent of their parent corporations. The record does not reflect whether supervisory personnel flow freely among members of the corporate families, whether or the extent to which parent corporations control subsidiaries' budgets, or whether parent corporations oversee essential **[**98]** components of subsidiaries' businesses. [36] Alter ego jurisdiction requires evidence of such control. Simeone, 360 F. Supp. 2d at 676-77 (applying alter ego jurisdiction to a case in which the parent corporation supervised the subsidiary's management, possessed the power to fire the subsidiary's managers, controlled the subsidiary's budget, participated in decisions pertaining to the subsidiary's corporate structure, and regularly evaluated the subsidiary's operations against performance benchmarks), Directory Dividends, 2003 U.S. Dist. LEXIS 12214, 2003 WL 21941448, at *4-6

---

375 F. Supp. 2d at 421 n.13 (observing that **HN44**[] "the factors considered in deciding whether to pierce the corporate veil for liability purposes are similar to the factors considered in deciding whether to pierce the corporate veil in the jurisdictional context" but that a court should address "all relevant factors" when resolving questions of jurisdiction); Arch, 984 F. Supp. at 837 ("[The court] should examine all relevant factors that relate to the intimacy of the relationship between the parent and subsidiary.").

[35] Plaintiffs rely upon defendants' websites as a component of their jurisdictional arguments. **HN45**[] A website may support exercise of jurisdiction if the defendant "intentionally interacts with the forum . . . via the web site." Toys "R" Us, 318 F.3d at 452. Websites that passively furnish information do not confer jurisdiction over the defendant, whereas sites that allow **[**96]** users to purchase goods or services generally provide a jurisdictional anchor. Id. A defendant's "conscious choice to conduct business with residents of a forum state" via its website is pivotal to this inquiry. Id. (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126 (W.D. Pa. 1997)). The Rule 12(b)(2) defendants maintain centralized corporate websites that provide basic information about defendants' history, brands, and market development. They inform visitors of the current price of defendants' stock and ADRs, provide links to annual reports and press releases, and allow prospective employees both in the U.S. and abroad to search open positions and submit online applications. None of the websites offers products for sale. None of the websites allows visitors to purchase stock or ADRs online. Although the websites contain information about defendants' activities within the U.S., they are not customized for an American audience, and they treat the U.S. market no differently than other global markets. The court concludes that these websites are properly considered as a contact for purposes of general jurisdiction. However, the court also concludes that they are broad **[**97]** resources designed for an international audience. They do not reflect a particularized intent to conduct business with American residents and therefore receive relatively little weight in the jurisdictional analysis.

[36] Plaintiffs advance alter ego jurisdiction **[**99]** over Cadbury plc and Cadbury Holdings by virtue of alleged control over their American subsidiary, Cadbury Adams USA LLC, which is not a party to this matter. (Doc. 571 at 21-23.) Plaintiffs have identified no case law addressing whether a court may obtain alter ego jurisdiction over a holding company by virtue of its relationship with a non-party subsidiary. The court will defer consideration of this issue until completion of jurisdictional discovery. If plaintiffs wish to pursue this argument, counsel will be expected to address it in supplemental briefing.

(exercising alter ego jurisdiction over a parent of a corporate family that possessed a unified identity, featured numerous overlapping directorates, allowed free exchange of supervisory personnel, and in **[*572]** which the parents' officers established corporate policy for all family members). [37] ***HN47***[] Defendants cannot be subject to alter ego jurisdiction without additional evidence that they have beclouded corporate boundaries and that two or more affiliated entities are de facto one. At this juncture, plaintiffs have not established a prima facie case of personal jurisdiction against the *Rule 12(b)(2)* defendants.

3. Jurisdictional Discovery

HN49[] A plaintiff who fails to establish a prima facie case **[**101]** of personal jurisdiction may request a period of limited discovery for the purpose of obtaining further jurisdictional evidence. "[C]ourts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.'" *Toys "R" Us, 318 F.3d at 456* (quoting *Mass. Sch. of Law, 107 F.3d at 1042*). Plaintiffs must identify particular facts that demonstrate the likelihood of contacts sufficient to corral defendants within the court's jurisdiction. Id. ***HN50***[] General allegations that defendants transact business within the forum do not entitle plaintiffs to jurisdictional discovery; plaintiffs must produce evidence suggesting that discovery will bear fruit. *Brown v. AST Sports Sci., Inc., No. Civ.A. 02-1682, 2002 U.S. Dist. LEXIS 12294, 2002 WL 32345935, at *10 (E.D. Pa. June 28, 2002)* (citations omitted); see also *Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 47 F. App'x 73, 77 (3d Cir. 2000)* (observing that ***HN51***[] jurisdictional discovery is inappropriate if it constitutes a "fishing expedition" to procure evidence in support of the plaintiff's claim). ***HN52***[] A court weighing a jurisdictional discovery request must "accept the plaintiff's allegations as true, and . . . construe **[**102]** disputed facts in favor of plaintiff." *Toys "R" Us, 318 F.3d at 457*. The court should generally permit jurisdictional discovery prior to dismissing a defendant for lack of personal jurisdiction. See *In re Auto. Refinishing Paint Antitrust Litig., No. 1426, 2002 U.S. Dist. LEXIS 15099, 2002 WL 31261330, at *5 (E.D. Pa. July 31, 2002)*; *Molnlycke Health Care AB v. Dumex Med Surgical Prods., 64 F. Supp. 2d 448, 454 (E.D. Pa. 1999)*.

In the instant matter, plaintiffs have adduced sufficient evidence to warrant jurisdictional discovery against the *Rule 12(b)(2)* defendants. Mars Canada and Nestle Canada interacted with the American chocolate candy market by importing **[*573]** products into the United States. Cadbury plc and Cadbury Holdings periodically consult with Hershey Global in the U.S. under the trademark licensing agreements. The nature of Nestle S.A.'s relationship, if any, to the Societe--Hershey trademark licensing agreements is presently unknown. Although Nestle S.A. has engaged in merger activity, it is unclear whether and to what extent it has solicited capital, marketed securities, courted investors, or controlled acquisition subsidiaries in the United States. The present record contains faint silhouettes of these **[**103]** in-forum contacts but lacks a substantive portrait thereof. A period of discovery will enable plaintiffs to develop the lineaments of these relationships with the U.S. market. [38] Plaintiffs have filed a

---

[37] ***HN48***[] Alter ego jurisdiction does not attach merely because a parent corporation participates in its subsidiary's business. In Savin Corp. v. Heritage Copy Products, Inc., a parent corporation appointed six of the subsidiary's directors, five of which were officers or directors of the parent. *661 F. Supp. 463, 469 (M.D. Pa. 1987)*. One of the parent's officers conducted weekly business visits to the subsidiary's premises to oversee the parent's investment in the subsidiary, and the parent covered a portion of the subsidiary's operating costs. *Id. at 470*. The parent also consolidated the subsidiary's earnings in its financial statements **[**100]** (as required by the law of the country of its incorporation) and utilized the subsidiary's office space. *Id. at 471*. Despite this extensive interaction between two corporations, the court declined to assert alter ego jurisdiction. The court observed that the two entities engaged in different lines of business, maintained separate corporate books, did not implement common marketing strategy, and had complied with all legal formalities. Id. Moreover, the plaintiff failed to "convince the court that [the parent corporation] exercised the type of control over [the subsidiary's] day-to-day operations which would evidence an alter-ego relationship." *Id. at 470*.

Plaintiffs in the instant case have identified significantly fewer interactions between Nestle S.A., Mars Global, Cadbury Holdings, and Cadbury plc, and their respective subsidiaries. The annual reports, websites, and corporate value statements offered by plaintiffs do not describe the day-to-day operational relationship that exists among these corporations, and this evidentiary deficiency subverts plaintiffs' arguments in favor of alter ego jurisdiction.

[38] As a non-exclusive guide for 38 counsel, the court suggests exploration of the following issues:

motion for preliminary discovery (Doc. 458) accompanied by several proposed requests for production of documents (Doc. 458, Ex. A). The court will allow plaintiffs to serve these requests [39] and to take limited deposition testimony, [40] after which all parties will **[*574]** submit supplemental briefs on the personal jurisdiction motions. The court will issue a Case Management Order concurrently with this memorandum governing the parameters and deadlines for this period of jurisdictional discovery. [41]

III. Motions to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

---

. Do representatives of Hershey Global and Cadbury plc or Cadbury Holdings regularly confer as contemplated in the asset purchase and trademark agreements? If so, what information do they discuss?

. Which party to the Cadbury--Hershey agreements prosecutes and defends trademark infringement actions under the Lanham Act?

. What benefits, if any, does Nestle S.A. receive under the Societe--Hershey trademark **[**104]** license agreement?

. Have the *Rule 12(b)(2)* defendants filed any lawsuit(s) in any court in the United States?

. Do the *Rule 12(b)(2)* defendants transact business in the United States, e.g., by purchasing raw materials, retaining consultants, maintaining sales agents, or recruiting employees?

. Have the *Rule 12(b)(2)* defendants executed service contracts with U.S. companies, e.g., for shipment of their products, design or manufacture of machinery, or development of promotional materials?

. Did the *Rule 12(b)(2)* defendants increase or reduce the volume of products shipped into the United States during the putative class period. If so, what were the reasons for the change?

. What form of compensation do Mars Canada and Nestle Canada receive from the transfer of their products to Mars Snackfood and Nestle U.S.A.? Are the transfers booked as direct sales or in some other fashion?

. Does Nestle S.A. market securities, solicit capital, or entice investors in the United States in furtherance of its merger activity?

. Does Mars Canada possess autonomy to determine to whom it sells its products, i.e., does Mars Canada sell its products to non-Mars entities?

. Do Mars Canada and Nestle Canada exercise **[**105]** independent control over their marketing, sales, and distribution systems, or are they required to utilize systems that interconnect with other members of their corporate families?

The court emphasizes that these issues are only illustrative of those to which the court will turn when resolving the jurisdictional challenges. Plaintiffs may pursue additional areas of inquiry insofar as it elucidates the *Rule 12(b)(2)* defendants' contacts with the United States.

[39] *As currently worded*, several 39 of plaintiffs' requests exceed the scope of the jurisdictional issues implicated by the *Rule 12(b)(2)* motions. For example, Request No. 4 (pertaining to corporate officers' responsibilities), Request No. 7 (pertaining to sales data), Request No. 8 (pertaining to pricing letters and announcements), and Request No. 11 (pertaining to per-unit manufacturing and distribution costs) likely solicit information beyond the realm of personal jurisdiction. The court expects that the parties will meet and confer to tailor all jurisdictional discovery to the issues raised in this memorandum.

[40] The court will not impose specific limits on the aggregate number of depositions on jurisdictional issues. However, the **[**106]** court suggests that the parties attempt to address these issues predominantly through written discovery. Absent compelling circumstances, the court suggests a limit of two depositions per defendant.

[41] Defendant-intervenor Government of Canada initially opposed certain of these requests. (See Doc. 495 at 9-13.) All parties affected by the requested documents successfully negotiated a resolution of defendant-intervenor's objections and submitted a proposed order memorializing their agreement via facsimile on December 12, 2008. The court will incorporate this joint resolution into the Case Management Order that will govern jurisdictional discovery.

All defendants have moved to dismiss the amended complaints for failure to plead an antitrust claim. The court will defer the Rule 12(b)(2) defendants' challenges to the sufficiency of the complaints until it has resolved matters of personal jurisdiction. Hence, the following discussion of the Rule 12(b)(6) motions applies only to those defendants that do not contest personal jurisdiction. [42]

A. Standard of Review Applicable to Motions under Rule 12(b)(6)

HN53[] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). HN54[] When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept as true all [factual] allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007) (quoting Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)). Although the court is generally limited in its review to the facts in the complaint, it "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n. 2 (3d Cir. 1994); see also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

HN55[] Federal notice and pleading rules require the complaint to "give the defendant notice of what the . . . claim is and the grounds upon which it rests." **[**108]** Sershen v. Cholish, No. 3:07-CV-1011, 2007 U.S. Dist. LEXIS 79627, 2007 WL 3146357, at *4 (M.D. Pa. Oct. 26, 2007) (quoting Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)). The plaintiff must present facts that, if true, demonstrate a plausible right to relief. See FED. R. CIV. P. 8(a) (stating that the complaint should include "a short and plain statement of the claim showing that the pleader is entitled to relief"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (requiring plaintiffs to allege facts sufficient to "raise a right to relief above the speculative level"); Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007). Thus, HN56[] courts should not dismiss a complaint for failure to state a claim if it contains "enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Phillips v. County of Allegheny, 515 F.3d 224, 234 [*575] (3d Cir. 2008) (quoting Twombly, 550 U.S. at 556, 127 S. Ct. at 1965). Under this liberal pleading standard, courts should generally **[**109]** grant plaintiffs leave to amend their claims before dismissing a complaint that is merely deficient. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000).

B. Discussion

Defendants move to dismiss the amended complaints for failure to plead facts raising a plausible right to relief according to the standard set forth in the recent Supreme Court decision of Bell Atlantic Co. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In addition to the Twombly challenge, defendants asseverate that certain state law claims are not cognizable as a matter of substantive law. The court will address the Twombly defense before turning to state law issues.

1. Sherman Act Claims

HN57[] Section 1 of the Sherman Act proscribes "contract[s], combination[s] . . . or conspirac[ies], in restraint of trade or commerce." 15 U.S.C. § 1. A § 1 claim requires the plaintiff to demonstrate that the defendants engaged in unlawful, concerted activity that both produced anticompetitive effects in the relevant market and resulted in harm to the plaintiff. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760-61, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1232 (3d Cir. 1993); **[**110]** In re Pressure Sensitive Labelstock Antitrust Litig. (Labelstock I), 356 F. Supp. 2d 484, 489 (M.D. Pa. 2005). HN58[] The existence of an agreement is an essential component of any § 1 claim. In re Flat Glass Antitrust Litig., 385 F.3d

[42] These defendants 42 are Cadbury Canada, Hershey Global, Hershey Canada, **[**107]** Mars Global, Mars Snackfood, and Nestle U.S.A.

350, 356 (3d Cir. 2004). A plaintiff must establish that the defendants possessed a "conscious commitment" to a common scheme contrived for the purpose of advancing an unlawful objective such as fixing prices. Monsanto, 465 U.S. at 764.

HN59[] At the pleading stage, plaintiff's complaint must aver facts creating a plausible inference that defendants entered an agreement to restrain trade. Twombly, 550 U.S. at 555, 127 S. Ct. at 1965. The plaintiff must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id.; Phillips, 515 F.3d at 232. Specifically, HN60[] sufficiency of a complaint depends upon the particular facts alleged and the context in which they appear. The complaint must, when evaluated macroscopically, raise a plausible right to relief and notify the defendants of the ground from which it arises. Twombly, 550 U.S. at 553, 127 S. Ct. at 1964; Phillips, 515 F.3d at 232; see also FED. R. CIV. P. 8(a).

HN61[] Mere averments of parallel **[**111]** conduct by the defendants are inadequate to state a § 1 claim because such action may reflect either an anticompetitive agreement or independent, competitive activity. See Twombly, 550 U.S. at 556, 127 S. Ct. at 1966; In re OSB Antitrust Litig., No. 06-826, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *2 (E.D. Pa. Aug. 3, 2007). Rather, the plaintiff must allege a factual framework sufficient to "nudge[] th[e] claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570, 127 S. Ct. at 1974; Behrend v. Comcast Corp., 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007) (characterizing a Twombly complaint's primary deficiency as a lack of facts sufficient to raise an inference of collusive activity).

Any plaintiff may raise this inference of plausibility through allegations that contextually suggest an anticompetitive agreement. In re Flat Glass Antitrust Litigation delineates HN62[] various market **[*576]** characteristics that raise an inference of plausibility when juxtaposed with parallel conduct. See In re Pressure Sensitive Labelstock Antitrust Litig. (Labelstock II), 566 F. Supp. 2d 363, 371 (M.D. Pa. 2008).[43] For example, a plaintiff may aver that the relevant market is ripe for collusion due to the presence of oligarchic **[**112]** sellers, diffuse buyers, prohibitive entry barriers, and standardized products. See Flat Glass, 385 F.3d at 361; In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1115-16 (N.D. Cal. 2008); In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 901 (N.D. Cal. 2008). Allegations that demand is in decline, that the market features high fixed costs, or that competitors possess excess capacity may also implicate an agreement when joined with averments of anticompetitive or parallel conduct. See Flat Glass, 385 F.3d at 361-62; Labelstock II, 566 F. Supp. 2d at 372-73 & n.8; OSB, 2007 U.S. Dist. LEXIS 56573, 2007 WL 2253419, at *3-4. The court should also consider whether the alleged collusion makes economic sense. Petruzzi's Supermarkets, 998 F.2d at 1232 (expressing skepticism of alleged conspiracies that have no economic justification from the defendant's perspective); Labelstock I, 356 F. Supp. 2d at 493 & n.8.

In the case *sub judice*, plaintiffs have alleged that defendants engaged in three coordinated price increases between 2002 and 2007. Each installment featured uniform increases in prices for defendants' standard-size chocolate bars and nearly congruent escalations for other products. The amended complaints depict a mature chocolate market featuring dispersed buyers and concentrated sellers. Strong entry barriers surround the market in the form of high fixed costs, extensive expenditures associated with launching new products, and a steep curve in the acquisition of technical expertise. During the putative class period, the costs of energy and of defendants' key raw materials remained stable as a result of placid supply markets and the strategic hedge of futures contracts. In addition, defendants purportedly faced waning demand as a result of consumer trends favoring healthier snack options. The complaints depict a prototypical market susceptible to conspiratorial price-fixing. **[**114]** In re Flat Glass, 385 F.3d at 361.

---

[43] Although Flat Glass was decided in a summary judgment posture, this court has previously concluded that its circumstantial analysis of anticompetitive conduct is relevant to the plausibility analysis under Twombly. See Labelstock II, 566 F. Supp. 2d at 372-73 (HN63[] "[A]llegations **[**113]** of observed conduct--actual forbearance from competition for customers, parallel price increases, and excess production capacity--are placed among other factual allegations that plausibly suggest a preceding agreement.").

Defendants' alleged conduct in Canada enhances the plausibility of the alleged U.S. price-fixing conspiracy. [44] **[*577]** Both the U.S. and Canadian markets are structured in a similar manner, the Canadian defendants allegedly transport chocolate candy into the U.S., and defendants have developed integrated distribution systems that service both markets. [45] The Canadian defendants exchanged numerous pricing communications and raised Canadian prices concurrently with uniform price increases in the United States. Hershey Global facilitated communications among the Canadian defendants by providing Nestle Canada's Leonidas with contact information for Hershey Canada's Lent. The operational and structural similarities between the American and Canadian markets lend plausibility to plaintiffs' allegations of conspiratorial pricing agreements in the U.S. Moreover, defendants had ample opportunity to consult with one another about the U.S. and Canadian price increases. Sherman Act notwithstanding, the alleged anticompetitive activity also makes economic sense. In a saturated, declining market, defendants faced stagnant or decreasing demand with limited capacity for market **[**115]** growth. Plaintiffs' contention that defendants sought to increase revenue through non-competitive means is a plausible reaction to harsh market realities. The alleged price-fixing agreement would increase profits without branding and marketing expenditures, which are essential to capturing a competitor's market share. Therefore, it represents an economically sensible course of action.

These allegations satisfy *Twombly's* pleading standard. The motion to dismiss (Doc. 476) the Sherman Act claims under *Rule 12(b)(6)* will be denied with respect **[**117]** to defendants that have not filed a *Rule 12(b)(2)* motion. [46]

---

[44] ***HN64***[] The Foreign 44 Trade Antitrust Improvement Act of 1982 ("FTAIA"), *15 U.S.C. § 6a*, does not foreclose consideration of defendants' conduct in Canada for purposes of the *Rule 12(b)(6)* motions. The FTAIA places foreign anticompetitive conduct beyond the reach of the Sherman Act if it "adversely affect[s] *only* foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 161, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)* (emphasis added). It does preclude a Sherman Act claim based upon foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. *Id. at 161* (quoting *15 U.S.C. § 6a(1)*); *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), No. Civ.A. 05-1717, 2007 U.S. Dist. LEXIS 3407, 2007 WL 137152, at *11 (D. Del. Jan. 12, 2007)* (observing that the FTAIA does not prohibit inquiry into foreign conduct that is relevant **[**116]** to domestic claims.) Hence, the Act permits assessment of the Canadian conduct, which allegedly constitutes an integral component of the instant price-fixing scheme. See *Intel Corp., 2007 U.S. Dist. LEXIS 3407, 2007 WL 137152, at *11*; cf. *In re Aspartame Antitrust Litig., No. 2:06-CV-1732, 2008 U.S. Dist. LEXIS 109670, 2008 WL 2275531, at *3 (E.D. Pa. May 13, 2008)* (concluding that the FTAIA does not limit discovery requests directed abroad if they are related to an antitrust matter properly before a federal court).

[45] Of course, defendants contest the connectivity between the U.S. and Canadian chocolate confectionary markets and have produced evidence that the Canadian defendants do not interact with the U.S. See supra p. 23. ***HN65***[] Unlike *Rule 12(b)(2)* challenges, however, a *Rule 12(b)(6)* motion restricts the court's review to the face of the complaint and documents upon which it relies. See supra note 18; Part III.A. Accordingly, the court has considered only the facts contained in the amended complaints for purposes of the instant motions notwithstanding defendants evidence to the contrary.

[46] *In re Elevator Antitrust Litigation, 502 F.3d 47 (2d Cir. 2007)*, does not compel a contrary conclusion. The plaintiffs in Elevator alleged a price-fixing conspiracy in the U.S. market for elevators based upon evidence that defendants fixed prices in European markets. *Id. at 51-52*. As to the American market, plaintiffs advanced only conclusory allegations that defendants "(a) [p]articipated in meetings in the United States and Europe to discuss pricing and market divisions; (b) [a]greed to fix prices for elevators and services; (c) [r]igged bids for sales and maintenance; (d) [e]xchanged price quotes; (e) [a]llocated markets for sales and maintenance; (f) [c]ollusively required customers to enter long-term maintenance contracts; and (g) [c]ollectively took actions to drive independent repair companies out of business." *Id. at 51 n.5*. (internal quotation omitted). The court upheld dismissal of the plaintiff's allegations because "[a]llegations of anticompetitive wrongdoing in Europe--*absent any evidence of linkage between such foreign conduct and conduct here*--is merely to suggest . . . that if it happened there, it could **[**118]** have happened here." *Id. at 52* (emphasis added, internal quotation omitted). The court noted that the outcome may have differed had the plaintiffs alleged that the defendants engaged in global marketing, produced fungible products, monitored prices in other markets, or raised prices successfully in the United States. Id.

The instant complaints do not suffer from the same Twombly infirmities. They assert that defendants instituted three contemporaneous and nearly identical price increases and monitored pricing in both the United States and Canada. They describe a market ripe for collusion, punctuated by declining demand and product saturation. They also detail significant

[*578] 2. State Law Claims

Plaintiffs representing the putative subclasses of indirect end users (hereinafter "the IEU plaintiffs") and indirect purchasers for resale **[**119]** (hereinafter "the IPR plaintiffs") collectively advance claims under the antitrust and consumer protection statutes of twenty-five states and the District of Columbia. [47] These plaintiffs also advance common law claims for unjust enrichment. Defendants move to dismiss certain of these claims on the grounds that plaintiffs lack standing and that plaintiffs have failed to allege facts demonstrating a plausible right to relief. [48] The court will address these claims *seriatim*.

a. Standing to Assert Claims under the Statutes of States Where No Named Plaintiff Resides

Defendants move to dismiss the IEU and IPR plaintiffs' claims under the statutes of states **[**121]** in which no putative class representative either resides or does business. Defendants contend that the named plaintiffs lack Article III standing to assert state law claims when they suffered no antitrust injury within these states. [49]

[*579] A plaintiff possesses standing under Article III if the plaintiff has suffered an "injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (citations and internal **[**122]** quotations omitted). In the class action context, standing requires that the named plaintiff's injury be typical of the class members he or she seeks to represent. See *FED. R. CIV. P. 23(a)(3)*; *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 246 (D. Del. 2002)*. "[A] plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class." *Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 135 (3d Cir. 2000)*.

HN66[] Courts generally address challenges to standing as threshold matters. *Warth v. Seldin, 422 U.S. 490, 517-18, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 158 (3d Cir. 2007)*. In

---

interaction between similarly structured markets the U.S. and Canada, where authorities have identified strong evidence of price fixing. These allegations are sufficient to "nudge [plaintiffs'] claims across the line from conceivable to plausible," and render *Elevator* inapposite to defendants' motions. *Id. at 52* (quoting *Twombly, 550 U.S. at 570, 127 S. Ct. 1974*).

[47] The IEU plaintiffs advance antitrust claims under the laws of the following states: Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. (Doc. 420 PP 136-156.) They also allege claims under the following state consumer protection statutes: Arkansas, California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Nebraska, Nevada, New Mexico, New York, North Carolina, New Hampshire, Rhode Island, Vermont, and Wisconsin. (Id. PP 161-176.) The IPR plaintiffs maintain antitrust claims under the laws of Alabama, Arkansas, California, the District of Columbia, Florida, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. (Doc. 422 P 102.)

The **[**120]** IEU and IPR plaintiffs have withdrawn their claims under the antitrust statutes of Hawaii, *HAW. REV. STAT. §§ 480-1 to -24*, and New York, *N.Y. GEN. BUS. LAW §§ 340-47*. (Doc. 525 at 22 n.24; Doc. 526 at 1 nn.1-2.) The IEU plaintiffs have likewise withdrawn their claim under New Jersey law, *N.J. STAT ANN. §§ 56:9-1 to -19*, as have the IPR plaintiffs with respect to their claims under Illinois law, *740 ILL. COMP. STAT. §§ 10/1-/12*. (Id.) The court is cognizant of defendants' request for dismissal "with prejudice," (Doc. 540 at 3), but declines to foreclose reassertion of these claims given the vast potential for changes in the litigation landscape. Hence, the court will deny the motion to dismiss (Doc. 469) these claims as moot.

[48] Defendants request dismissal of the state antitrust claims on the same basis that they seek dismissal of the Sherman Act claim, which constitutes a prerequisite to liability under state law. The court's ruling with respect to Twombly renders this argument moot. See supra Part III.B.1.

[49] The putative class of IPR plaintiffs 49 currently possesses one named plaintiff that does business in Kansas. Defendants seek dismissal on standing grounds of all of the IPR plaintiffs' claims except those brought under Kansas law. The IPR plaintiffs propose to resolve defendants' objection by filing a second amended complaint that (1) describes the named plaintiff's business activities in Iowa and Nebraska and (2) adds parties from each of the other states whose law the IPR plaintiffs invoke. The court will permit the IPR plaintiffs to pursue a second amended complaint in accordance with the order accompanying this memorandum.

class actions, however, the Supreme Court has crafted an exception to this general rule: Courts may evaluate class certification issues before Article III standing concerns if the former are "logically antecedent" to the latter. *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* (quoting *Amchem Prods. v. Windsor, 521 U.S. 591, 612, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. Neither the Supreme Court nor the Third Circuit has described the precise circumstances under which class certification logically takes **[**123]** precedence over standing. However, our sister court for the District of New Jersey has considered it on several occasions and concluded that

> ***HN67***[] [t]he Ortiz exception appears "to rest on the long-standing rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Payton v. County of Kane, 308 F.3d 673, 680 (7th Cir. 2002)*. Accordingly, *Rule 23* certification should be addressed first in those cases where it is the possibility of class certification that gives rise to the jurisdictional issue as to standing. See *Ford v. NYLCare Health Plans of Gulf Coast, Inc., 301 F.3d 329, 333 n.2 (5th Cir. 2002)*. Stated differently, *the Ortiz exception treating class certification as the antecedent consideration does not apply if the standing issue would exist regardless of whether the named plaintiff filed his claim alone or as part of a class*. See id.

Clark v. McDonald's Corp., 213 F.R.D. 198, 204 (D.N.J. 2003) (emphasis added). As interpreted by ***HN68***[] Clark, Ortiz allows a court to defer ruling on Article III standing issues when they are circumscribed **[**124]** by the act of certifying a class. Id.; see also *Sheet Metal Workers' Nat'l Health Fund v. Amgen, Inc., No. Civ.A. 07-5395, 2008 U.S. Dist. LEXIS 62181, 2008 WL 3833577, at *9 (D.N.J. Aug. 13, 2008)*; *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002)*.

In the instant matter, the plaintiffs' capacity to represent individuals from other states depends upon obtaining class certification, and the standing issue would not exist but for their assertion of state law antitrust claims on behalf of class members in these states. See *Jabo's Pharm., Inc. v. Becton Dickinson & Co. (In re Hypodermic Prods. Antitrust Litig.), MDL No. 1730, 2007 U.S. Dist. LEXIS 47438, 2007 WL 1959225, at *15 (D.N.J. June 29, 2007)*. Therefore, the standing issues arise from the plaintiffs' attempts to represent the proposed class. Id. These class certification issues are "logically antecedent" to the standing concerns, and the court will defer ruling on the latter **[*580]** until class certification proceedings. *Ortiz, 527 U.S. at 831*; see also *Sheet Metal, 2008 U.S. Dist. LEXIS 62181, 2008 WL 3833577, at *9*; *Hypodermic Prods., 2007 U.S. Dist. LEXIS 47438, 2007 WL 1959225, at *15*; *Clark, 213 F.R.D. at 204-05*.

b. Claims under State Antitrust Statutes

Defendants move to dismiss the IPR and IEU plaintiffs' claims under the statutory and common law of New York. They also request **[**125]** dismissal of the IPR and IEU plaintiffs' claims under the antitrust statutes of Nevada, South Dakota, Tennessee, West Virginia, and Wisconsin. [50], [51] The court will address each of the state law claims respectively.

i. New York

---

[50] Defendants also challenge 50 the IPR plaintiffs' claims under these state statutes and under Alabama and Mississippi law. The IPR plaintiffs have not responded to defendants' challenge to their state antitrust claims. This omission appears to be an oversight resulting from the IPR plaintiffs' anticipation of a second amended complaint naming additional parties to cure the alleged standing defects. See supra Part III.B.2.a. Defendants' motion to dismiss the claims under Alabama and Mississippi antitrust statutes will be denied without prejudice to their right to renew the motion after the IPR plaintiffs have filed a second amended complaint. See supra note 49.

[51] Defendants move to dismiss claims brought by the IEU plaintiffs under the monopolization statutes of the District of Columbia, Michigan, and Minnesota. The IEU plaintiffs respond that their amended complaint erroneously cited these statutes. The motion will therefore be granted with respect to the monopolization **[**126]** claims, and the IEU plaintiffs may file a motion for leave to amend their complaint to rectify this deficiency.

Defendants move to dismiss the IPR plaintiffs' claim under New York's Donnelly Act, *N.Y. GEN. BUS. LAW § 340(6)*, and the IEU plaintiffs' claim for restraint of trade under New York common law. [52] ***HN69***[] New York law prohibits a plaintiff from maintaining a class action under any statutory claim that imposes a penalty or minimum recovery. *N.Y. C.P.L.R. 901(b)*. The Donnelly Act imposes such penalties and cannot be advanced on behalf of a class. *N.Y. GEN. BUS. LAW § 340(5)* (providing for treble damages); *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1017, 831 N.Y.S.2d 760 (N.Y. 2007)*. The Donnelly Act claim will be dismissed. Leave to amend will be denied as futile. *Grayson, 293 F.3d at 108*.

The IEU plaintiffs purport to assert a claim under the New York common law of restraint of trade. Plaintiffs have not identified any New York precedent supporting such a claim, i.e., independent of a statutory cause of action, and the court has found none. At least one New York **[**127]** district court has dismissed a similar claim for failure to "identify the distinct common law against restraints of trade" under which the plaintiffs wished to proceed. See *In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 2008 U.S. Dist. LEXIS 79764, 2008 WL 4531821, at *9 n.18 (S.D.N.Y. Oct. 9, 2008)*. The court will therefore dismiss the IEU plaintiffs' claim for restraint of trade under the common law of New York. Plaintiffs may pursue this claim in a second amended complaint upon a clear showing that it is cognizable under New York law.

ii. Interstate Conduct as a Basis for Claims under State Law

Defendants seek dismissal of the IEU and IPR plaintiffs' claims under the antitrust statutes of Nevada, South Dakota, Tennessee, West Virginia, and Wisconsin on the ground that these statutes apply only to intrastate commerce.

[*581] I. Nevada

HN70[] The Nevada Unfair Trade Practices Act ("NUTPA") proscribes anticompetitive conduct including price fixing and renders it "unlawful to conduct *any part* of any such activity" within the state. *NEV. REV. STAT. § 598A.060(1)* (emphasis added). Hence, the statute creates a remedy against an interstate conspiracy that produces harm in Nevada. See *In re Intel Corp. Microprocessor Antitrust Litig., 496 F. Supp. 2d 404, 413-14 (D. Del. 2007)*; **[**128]** *In re New Motor Vehicles Canadian Export Antitrust Litig. (NMV), 350 F. Supp. 2d 160, 171-172 (D. Me. 2004)*. In the instant matter, the IEU and IPR plaintiffs allege that the defendants engaged in a national price-fixing conspiracy that resulted in price increases in Nevada and elsewhere. The complaints therefore state a claim under the NUTPA.

II. South Dakota

The South Dakota antitrust statute states that ***HN71***[] "[a] contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful." *S.D. CODIFIED LAWS § 37-1-3.1*. ***HN72***[] "The statutory language is ambiguous as to whether it is a part of the conspiracy or a part of the trade or commerce that must be within the state." *NMV, 350 F. Supp. 2d at 172*; see also *Intel Corp., 496 F. Supp. 2d at 414*. Courts have resolved this ambiguity by adopting the latter statutory interpretation. *Intel Corp., 496 F. Supp. 2d at 414*; *NMV, 350 F. Supp. 2d at 172*. Therefore, a plaintiff must allege only that defendant's conduct produced anticompetitive effects within South Dakota. *NMV, 350 F. Supp. 2d at 172*. Here, plaintiffs state a claim under South Dakota law by alleging a national conspiracy **[**129]** that produced increased prices in South Dakota. [53]

---

[52] The IEU plaintiffs also advance a claim under *N.Y. GEN. BUS. LAW § 349*, which is not affected by the motion to dismiss (Doc. 469).

[53] *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation (DRAM I), 516 F. Supp. 2d 1072 (N.D. Cal. 2007)* is factually distinguishable. DRAM I dismissed a South Dakota claim because the plaintiffs alleged merely "that defendants'

III. Tennessee

HN73[] The Tennessee Trade Practices Act ("TTPA") forbids "[a]ll arrangements . . . which tend to lessen[] full and free competition in the importation **[**130]** or sale of articles imported into this state . . . or which tend to advance, reduce, or control the price . . . of any such product or article . . . ." *TENN. CODE ANN. § 47-25-101*. "[S]ubstantial effects" of the defendant's allegedly anticompetitive conduct must be felt within the state. See *Freeman Indus. v. Eastman Chem. Co., 172 S.W.3d 512, 523 (Tenn. 2005)*. HN74[] The TTPA creates a claim against all "anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers in Tennessee" regardless of whether the goods arrive in consumers' homes exclusively through intrastate means. *NMV, 350 F. Supp. 2d at 173* (quoting *Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *16 (Tenn. Ct. App. July 31, 2003))*. [54] In the context **[*582]** of Tennessee law, plaintiffs' allegations of a vast price-fixing conspiracy clearly articulate a viable state claim.

IV. West Virginia

HN75[] The West Virginia Antitrust Act ("WVAA") outlaws "conspirac[ies] in restraint of trade or commerce in this State." *W. VA. CODE § 47-18-3(a)*. Substantive provisions of the WVAA must be interpreted consistently with federal law, [55] *Kessel v. Monongalia County Gen. Hosp., 220 W. Va. 602, 648 S.E.2d 366, 381 (W. Va. 2007)* (applying per se antitrust rules and instructing courts to "harmonize" the WVAA with federal antitrust statutes), and federal courts have recognized that the Act applies to all anticompetitive conduct that produces in-state effects. *Intel Corp., 496 F. Supp. 2d at 414*; **[**132]** *NMV, 350 F. Supp. 2d at 175*; accord Buscher v. Abbott Labs., No. 94-C-755, slip op. at 2 (W. Va. Cir. Ct. Kanawha County Jan. 27, 1994) (HN76[] "[T]he Antitrust Act prohibits a conspiracy that restrains West Virginia trade or commerce, regardless of the locus of the conspiracy."). Accordingly, plaintiffs may advance a WVAA action.

V. Wisconsin

HN78[] Like other states, Wisconsin prohibits antitrust conspiracies "in restraint of trade or commerce." *WIS. STAT. § 133.03(1)*. A plaintiff may bring an antitrust claim arising from conduct outside the state's borders if it "'substantially affects' the people of Wisconsin and has impacts in th[e] state." *Meyers v. Bayer AG, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448, 451 (Wis. 2007)* (quoting *Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d*

---

activities had 'a substantial effect on the foreign and interstate commerce'" without describing the effects within South Dakota. *Id. at 1099*. In the instant matter, however, the IPR and IEU plaintiffs allege that defendants' sold products in South Dakota, (Doc. 420 PP 49-63, 76; 422 PP 9-23), that they suppressed competition in the Indirect Purchaser States, which include South Dakota, (Doc. 420 P 157; Doc. 422 P 107.a), and that they maintained prices at "noncompetitive levels throughout the United States and *in the Indirect Purchaser States*." (Doc. 422 P 107.b (emphasis added); see also Doc. 420 P 157). Plaintiffs have therefore alleged anticompetitive effects in South Dakota, and DRAM I does not require dismissal of the amended complaints.

[54] Defendants rely upon *Medison America, Inc. v. Preferred Medical Systems, 548 F. Supp. 2d 567 (W.D. Tenn. 2007)* for the proposition that "[b]are allegations that prices were raised as a result of conduct is insufficient to establish that Tennessee commerce was substantially affected." *Id. at 585*. **[**131]** In Medison America, plaintiff alleged that defendants made disparaging statements about plaintiff's financial stability and customer service, which reduced competition for plaintiff's products. Id. However, *Medison America* did not involve price fixing or Sherman Act claims, and plaintiff failed to establish that defendants engaged in any anticompetitive conduct that raised prices in Tennessee. Id. In contrast, the IEU and IPR plaintiffs have alleged price-maintenance conduct that elevated the cost of chocolate products in Tennessee and nationwide. See supra Part III.B.1. Plaintiffs' alleged injury is therefore cognizable under the TTPA.

[55] HN77[] Although West Virginia looks to federal law when interpreting the WVAA, the prohibition against indirect purchaser recovery announced in Illinois Brick does not apply to claims under the WVAA. See *California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1154 (N.D. Cal. 2007)*; *DRAM I, 516 F. Supp. 2d at 1097*; *NMV, 350 F. Supp. 2d at 173-75*.

224, 700 N.W.2d 139, 158 (Wis. 2005)). The IEU and IPR plaintiffs' allegations of a national price-fixing conspiracy adequately state a claim **[**133]** under this statute.

c. Sufficiency of Plaintiffs' Claims under State Consumer Protection Statutes

Defendants seek to dismiss the IEU plaintiffs' claims under the consumer protection laws of Arkansas, the District of Columbia, Kansas, Maine, New Mexico, and Rhode Island. [56]

[*583] i. Arkansas

HN80[] The Arkansas Deceptive Trade Practices Act ("ADTPA") prohibits any "unconscionable" trade conduct as well as "false[] **[**134]** or deceptive act[s] or practice[s] in business commerce or trade." *ARK. CODE ANN. § 4-88-107(a)(10)*. The Act does not define the extent of "unconscionable" conduct; however, the Supreme Court of Arkansas has concluded that use of "the word[] . . . 'unconscionable' . . . illustrates that a liberal construction of the [A]DTPA is appropriate." *State ex rel Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299, 302 (Ark. 1999)* (rejecting argument that the unconscionability provision of the ADTPA rendered the statute too broad to be enforced). [57] ***HN81***[] The statute reaches any action that "show[s] no regard for conscience[,] affronting the sense of justice, decency, or reasonableness." *NMV, 350 F. Supp. 2d at 178* (quoting BLACK'S LAW DICTIONARY 1561 (8th ed. 2004); see also *In re Dynamic Random Access Memory (DRAM) Antitrust Litig. (DRAM I), 516 F. Supp. 2d 1072, 1109 (N.D. Cal. 2007)* (adopting NMV's construction of the ADTPA). Hence, courts have concluded that claims of price fixing are cognizable under the Act. *DRAM I, 516 F. Supp. 2d at 1109* (permitting indirect purchaser claims to proceed under the ADTPA in a Sherman Act case); *NMV, 350 F. Supp. 2d at 178* (allowing indirect purchaser plaintiffs to maintain **[**135]** an ADTPA claim based upon an alleged conspiracy to keep Canadian-manufactured vehicles from entering the U.S. automobile market). The IEU plaintiffs will be permitted to advance an ADTPA claim.

ii. District of Columbia

HN82[] The District of Columbia Consumer Protection Procedures Act ("DCCPPA") proscribes a litany of trade practices involving deception of consumers. *D.C. CODE § 28-3904*. The Act's prohibitions are not exclusive, however, and the DCCPPA does not require a showing of concealment or deception to support a claim. *Dist. Cablevision Ltd. v. Bassin, 828 A.2d 714, 723 (D.C. 2003)* (allowing plaintiffs to maintain a DCCPPA claim associated with allegedly excessive late fees despite a lack of deception or fraud); see also *Calvetti v. Antcliff, 346 F. Supp. 2d 92, 103 (D.D.C. 2004)* (***HN83***[] "The [DCCPPA] . . . is a comprehensive statute designed to provide . . . remedies for a broad spectrum of practices which injure consumers." (quoting *Bassin, 828 A.2d at 722-23*)).

---

[56] ***HN79***[] All of these consumer protection statutes 56 prohibit, *inter alia*, fraudulent or deceptive conduct. However, statutory prohibitions on consumer deception do not subsume conduct violative of the Sherman Act. *NMV, 350 F. Supp. 2d at 177 n.22*; see also, e.g., *Intel Corp., 496 F. Supp. 2d at 417-18* (allowing consumer protection claims to proceed alongside antitrust allegations because plaintiffs alleged that defendant actively concealed incompatibilities between its products and those of its competitors). Consequently, the court will address each state consumer protection claim to determine: (1) whether anticompetitive conduct falls within the ambit of the statutory language or (2) whether the IEU plaintiffs have alleged those additional facts necessary to plead a cause of action thereunder.

[57] Bryant, which challenged an allegedly 57 usurious contract, applied contract law principles of unconscionability. *985 S.W.2d at 302* (stating that unconscionability in contract law requires analysis of "whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party was made aware of and comprehended the provision in question"). However, *Bryant* provides little guidance on the ADTPA outside of the contract arena. Federal courts addressing antitrust claims have therefore relied upon broader definitions of unconscionability. *DRAM I, 516 F. Supp. 2d at 1109*; *NMV, 350 F. Supp. 2d at 178*. Defendants contend that application of broad unconscionability principles is inappropriate under *In re Graphics Processing Units Antitrust Litigation (GPU), 527 F. Supp. 2d 1011 (N.D. Cal. 2007)*, which relied exclusively upon Bryant's contract law analysis. *Id. at 1029-30*. The court concludes that the broader views of *NMV* and *DRAM I* represent the most reasonable **[**136]** interpretation of the Arkansas statute in the antitrust context, particularly in light of Bryant's admonition that a "liberal construction of the [A]DPTA is appropriate." *Bryant, 985 S.W.2d at 302*.

"Trade practices that violate other laws, including the common law, also fall within the purview of the [DCCPPA]." Bassin, 828 A.2d at 723; Atwater v. D.C. Dep't of [*584] Consumer & Regulatory Affairs, 566 A.2d 462, 465 (D.C. 1989) [**137] (restating that the DCCPPA is designed to "assure that a just mechanism exists to remedy *all* improper trade practices." (quoting D.C. CODE § 28-3901(b)(1))). Hence,**HN84**[] the DCCPPA subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether defendants have engaged in deceptive conduct. See Osbourne v. Capital City Mortgage Corp., 727 A.2d 322, 326 (D.C. 1999); see also TFT-LCD, 586 F. Supp. 2d at 1126; NMV, 350 F. Supp. 2d at 183. For these reasons, defendants' motion to dismiss the DCCPPA is denied.

iii. Kansas

The Kansas Consumer Protection Act ("KCPA") provides that **HN85**[] "[n]o supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during or after the transaction." KAN. STAT. ANN. § 50-627(a). Defendants, as manufacturers and distributors of chocolate candy, qualify as "supplier[s]" within the meaning of the Act. Id. § 50-624(j). **HN86**[] Despite the KCPA's seemingly broad language, the Supreme Court of Kansas has distinguished between consumer harms redressable thereunder and pricing harms governed by the [**138] Kansas antitrust statute. Equitable Life Leasing Corp. v. Abbick, 243 Kan. 513, 516-17, 757 P.2d 304 (Kan. 1988) (holding that, while punitive damages were proper under ***antitrust law***, [58] the plaintiff could not recover them under the KCPA, which is designed to redress other forms of consumer harm); see also Maberry v. Said, No. 94-2416, 1996 U.S. Dist. LEXIS 4256, 1996 WL 157219, at *1 (D. Kan. Mar. 13, 1996) (stating that the purpose of the KCPA "is to encourage aggrieved consumers with small claims to file suit" (quoting Equitable Life, 757 P.2d at 307)). The statute is therefore inapplicable to price-fixing claims such as those at issue in the present case. See Schoenbaum v. E.I. DuPont De Nemours & Co., 517 F. Supp. 2d 1125, (E.D. Mo. 2007) (holding that the defendants' failure to inform consumers of collusive prices did not constitute a violation of the KCPA), vacated in part on other grounds, No. 4:05CV01108, 2007 U.S. Dist. LEXIS 82343, 2007 WL 3331291 (Nov. 6, 2007); Wille v. Sw. Bell Tele. Co., 219 Kan. 755, 549 P.2d 903, 907 (Kan. 1976) (concluding that **HN87**[] the KCPA is not designed to remedy "the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain"). Accordingly, the IEU plaintiffs' claim under the KCPA will be dismissed. [**139] Leave to amend will be denied as futile. Grayson, 293 F.3d at 108.

iv. Maine

HN88[] The Maine Unfair Trade Practices Act ("MUTPA") forbids "unfair methods of competition" as well as "unfair or deceptive . . . conduct of any trade." ME. REV. STAT. ANN. tit. 5, § 207. A business practice is "unfair" if the injury it produces is (1) "substantial," (2) not "outweighed by any countervailing benefits to consumers or competition that the practice produces," and (3) not reasonably avoidable by consumers. Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998) (quoting Suminski v. Me. Appliance Warehouse, Inc., 602 A.2d 1173, 1174 n.1 (Me. 1992)). In pricing cases, the allegedly unfair practice must also induce the consumer to acquire something that he or she would not otherwise have purchased. Id. **HN89**[] The MUTPA creates no remedy in a case [*585] involving collusive prices because higher prices cannot "induc[e individuals] to purchase something they would not otherwise [**140] purchase." [59] TFT-LCD, 586 F. Supp. 2d at

[58] Equitable Life compared the KCPA to the Kansas antitrust treble-damages statute, previously codified at KAN. STAT. ANN. § 50-801(b). In 2000, the statute was re-codified at KAN. STAT. ANN. § 50-161(b) without substantive change.

[59] In NMV, the United States District Court for the District of Maine concluded that Tungate's consumer inducement criterion applies exclusively to claims brought under the MUTPA's prohibition on "unfair or deceptive acts" but not to "[u]nfair methods of competition." NMV, 350 F. Supp. 2d at 187 n.40 (quoting ME. REV. STAT. ANN. tit. 5 § 207). The court declines to adopt NMV's construction of Tungate.

Although Tungate did not involve price fixing, it nevertheless provides a fitting analysis for cases involving collusive pricing. Tungate addressed the legality of artificially elevated prices resulting from sales commissions that the defendant added to a

1126; accord In re Graphics Processing United Antitrust Litig. (GPU), 527 F. Supp. 2d 1011, 1031 (N.D. Cal. 2007) ("[T]he *higher* prices plaintiffs allegedly paid . . . because of the price-fixing conspiracy could not have induced plaintiffs to purchase [the defendants' products]."). The motion to dismiss the IEU plaintiffs' claims under the MUTPA will therefore be granted. Leave to amend will be denied as futile. Grayson, 293 F.3d at 108.

v. New Mexico

HN92[] The New Mexico Unfair Practices Act ("NMUPA") censures both "unfair or deceptive" and "unconscionable trade practices." N.M. STAT. § 57-12-3. "Unconscionable trade practices" include all sales that either "take[] advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" or "result[] in a gross disparity between **[**143]** the value received by a person and the price paid." Id. § 57-12-2(E). **HN93**[] The NMUPA is primarily remedial in nature, and courts construe its provisions broadly to facilitate this purpose. State ex rel. Stratton v. Gurley Motor Co., 105 N.M. 803, 737 P.2d 1180, 1185 (N.M. 1987). **HN94**[] Federal courts generally permit NMUPA actions in price-fixing cases provided that the plaintiff alleges a "gross disparity" between the price paid for a product and the value received. See, e.g., TFT-LCD, 586 **[*586]** F. Supp. 2d at 1127; Intel Corp., 496 F. Supp. 2d at 418; NMV, 350 F. Supp. 2d at 196. Allegations that a plaintiff has paid approximately 30% more for a product as a result of price fixing are sufficient to plead a NMUPA claim, NMV, 350 F. Supp. 2d at 196, as are averments that a conspiracy produced "significant artificial increases in [product] price," TFT-LCD, 586 F. Supp. 2d at 1127. The IEU plaintiffs allege that they paid "artificially inflated prices for" chocolate candy products, (Doc. 420 P 4), that defendants stabilized prices at noncompetitive levels, (id. P 122.b), and that plaintiffs "paid more for [chocolate candy] products than they would have paid in the absence of [the alleged] antitrust violations," (id. P 197). **[**144]** These allegations adequately plead a claim under the NMUPA, and the motion to dismiss will be denied with respect to this claim. [60]

vi. Rhode Island

HN95[] The Rhode Island Unfair Trade Practice and Consumer Protection Act ("RIUTPCPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." R.I.

---

product's purchase price without disclosure. The court did **[**141]** not parse the statutory language in the manner suggested by NMV. Rather, it assessed whether consumers changed their behavior as a result of the defendant's pricing tactics. Tungate, 714 A.2d at 797 ("The higher price . . . does not operate to induce customers to purchase [products] they would not otherwise purchase if no commission were paid and prices were 20% lower. . . .").

The decisions cited by Tungate confirm that **HN90**[] a *change in consumer conduct* forms the marrow of a MUTPA violation. For example, Tungate relied upon Kazmaier v. Wooten, 761 F.2d 46 (1st Cir. 1985), in which the court applied Massachusetts's equivalent of the MUTPA. Kazmaier, 761 F.2d at 51; see also MASS. GEN LAW. ch. 93A § 2. Kazmaier determined that unfairness requires a detrimental change in consumer behavior as a result of confusion fomented by the defendant. Id. at 51 (concluding that customers suffered no unfairness when their "compulsion to buy or not buy[] would scarcely be altered by any mistake" resulting from the defendant's conduct). The remaining cases cited in Tungate conducted a similar analysis. See FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (affirming grant of **[**142]** a preliminary injunction against unfair trade practices in which customers were induced to purchase products through advertisements reflecting inaccurately low prices); Resort Car Rental Sys. v. FTC, 518 F.2d 962, 963 (9th Cir. 1975) (concluding that a defendant violated the Federal Trade Act by soliciting customers through a deceptively low price). **HN91**[] A pricing claim under the MUTPA therefore requires proof that the defendant induced consumers to alter their behavior to their detriment.

Except in unusual circumstances, higher prices do not induce consumers to purchase products. TFT-LCD, 586 F. Supp. 2d at 1126; GPU, 527 F. Supp. 2d at 1031. Accordingly, the court adopts the position of those tribunals that have dismissed MUTPA claims in price-fixing cases. See TFT-LCD, 586 F. Supp. 2d at 1126; GPU, 527 F. Supp. 2d at 1031.

[60] Defendants rely upon GPU, which dismissed claims under the consumer protection statutes of Arkansas, the District of Columbia, Kansas, and New Mexico on the ground that price fixing does not constitute unconscionable conduct. 527 F. Supp. 2d at 1030. GPU, however, failed to address the decisions of other federal courts that permitted price-fixing claims to proceed under the statutes of Arkansas, the District of Columbia, and New Mexico. See, e.g., DRAM I, 516 F. Supp. 2d at 1109; NMV, 350 F. Supp. 2d at 178, 183, 196. The court adopts the reasoning of the latter cases, which evince a compelling trend favorable to consumer protection claims in price-fixing actions.

GEN. LAWS § 6-13.1-2. The statute enumerates twenty methods of unfair or deceptive competition, including conduct that "creates a **[**145]** likelihood of confusion or of misunderstanding." Id. § 6-13.1-1(6)(xii). ***HN96***[] A plaintiff possesses standing to advance a RIUTPCPA claim if he or she "purchases or leases goods or services primarily for personal, family or household purposes." Id. § 6-13.1-5.2(a). ***HN97***[] The following factors determine whether a trade practice qualifies as "unfair" under the RIUTPCPA: (1) whether the practice affronts public policy, as delineated by the common law, statutes, and "other established concept[s] of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *Ames v. Oceanside Welding & Towing Co., 767 A.2d 677, 681 (R.I. 2001)* (quoting *FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972))*. These factors encompass price-fixing injuries, and consumers subject to collusive pricing possess a cognizable claim under the RIUTPCPA. See, e.g., *TFT-LCD, 586 F. Supp. 2d at 1129-30*; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig. (DRAM II), 536 F. Supp. 2d 1129, 1144-45 (N.D. Cal. 2008)* (observing that price fixing is "likely to offend public policy[,]" as reflected by statutes **[**146]** proscribing anticompetitive activity). [61]

[*587] In the instant matter, the IEU plaintiffs allege that defendants conspired to raise prices in Rhode Island (Doc. 420 P 174.c), that they issued misleading statements about the true reasons for these price increases, (id. P 174.e), and that they caused Rhode Island consumers to believe that prices for chocolate candy were the result of fair competition in an open marketplace, (id. P 174.f.) The IEU plaintiffs further allege that they purchased defendants' products for personal, family, or household use. (Id. P 174.g.) These allegations adequately plead a cause of action under the RIUTPCPA, and the motion to dismiss this claim will be denied. See, e.g., *DRAM II, 536 F. Supp. 2d at 1145* (refusing to dismiss RIUTPCPA claim because plaintiffs alleged that defendant "engaged in 'unfair or deceptive' acts" that "mis[led] or deceive[d]" consumers and resulted in injury to Rhode **[**148]** Island consumers).

d. Unjust Enrichment

Defendants lastly move to dismiss the IPR and IEU plaintiffs' claims for unjust enrichment. Neither complaint identifies the state jurisdictions upon whose law plaintiffs predicate these claims. [62] ***HN100***[] Restitution remedies vary considerably from state to state. See, e.g., *Powers v. Lycoming Engines, 245 F.R.D. 226, 231 (E.D. Pa. 2007)* (describing four discrete approaches to restitution claims); *Clay v. American Tobacco Co., 188 F.R.D. 483, 500-01 (N.D. Ill. 1999)* (recounting variations among states' common law of restitution). Moreover, ***HN101***[] the availability of relief in an antitrust case may depend upon whether a particular state has adopted an Illinois Brick repealer or whether it limits antitrust recovery to compensatory damages. Several courts presented with generic restitution claims have required plaintiffs to identify at the pleading stage those states under whose law they advance their claims. See, e.g., *TFT-LCD, 586 F. Supp. 2d at 1124*; *SRAM, 580 F. Supp. 2d at 910*; *DRAM II, 536*

---

[61] This conclusion resonates with *ERI Max Entertainment, Inc. v. Streisand, 690 A.2d 1351 (R.I. 1997)*, which defendants invoke in support of their motion to dismiss. ERI considered, *inter alia*, claims under the RIUTPCPA and for unfair competition under Rhode Island common law. The defendants misapprehend the holding in *ERI*. Addressing the unfair competition claim, the court held that "a finding of unfair competition must be predicated upon conduct . . . that reasonably tended to confuse and mislead the general public into purchasing [the defendant's] product when the actual intent of the purchaser was to buy the product of [another]." *Id. at 1354* (quoting *George v. George F. Berkander, Inc., 92 R.I. 426, 169 A.2d 370, 371 (1961))*. Contrary to the defendants' contention, the court imposed no similar restriction on claims under ***HN98***[] the RIUTPCPA, which is "intended to declare unlawful a broad variety of activities that are unfair or deceptive." *Park v. Ford Motor Co., 844 A.2d 687, 692 (R.I. 2004)*. Moreover, the restrictive language in ERI regarding unfair competition derives from George, which was decided approximately eight years before the enactment of the RIUTPCPA **[**147]** and addressed a common law unfair competition claim. *George, 169 A.2d at 371*. ***HN99***[] While the RIUTPCPA provides a statutory remedy for such claims, its reach is not limited to the common law, see *Park, 844 A.2d at 692*, and the IEU plaintiffs may invoke it as a basis for the instant claim, *DRAM II, 536 F. Supp. 2d at 1144-45*.

[62] To the extent plaintiffs 62 rely upon federal common law, Illinois Brick precludes the claim. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 744-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; *NMV, 350 F. Supp. 2d at 211*.

F. Supp. 2d at 1145 (concluding that plaintiffs' complaint was inconsistent with *Rule 8* pleading standards because it neglected to identify the states under whose law they brought **[**149]** their unjust enrichment claims).

The court finds logic in this approach and will therefore dismiss the unjust enrichment claims. The IPR and IEU plaintiffs will be permitted to pursue these claims in the form of a second amended complaint provided, however, that they clearly identify the state jurisdictions invoked therein.

IV. Conclusion

The *Rule 12(b)(2)* defendants' motions will be deferred during a period of jurisdictional discovery, which will be governed by a Case Management Order accompanying this memorandum. The remaining defendants' *Rule 12(b)(6)* motions will be denied except with respect to the claims **[*588]** under the New York Donnelly Act, the KCPA, the MUTPA, New York common law of restraint of trade, and unjust enrichment. Leave to amend the first three claims will be denied as futile. The IEU and IPR plaintiffs may move for leave to file a second amended complaint consistent with the limitations set forth in this memorandum.

An appropriate order follows.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United **[**150]** States District Judge

Dated: March 4, 2009

ORDER

AND NOW, this 4th day of March, 2009, upon consideration of the motions to dismiss (Docs. 464, 466, 469, 471, 473, 474, 476), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The motions to dismiss (Docs. 466, 471, 473, 474) pursuant to *Rule 12(b)(2)* filed by defendants Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A., and Nestle Canada are DEFERRED pending completion of jurisdictional discovery. Jurisdictional discovery shall be conducted in accordance with Case Management Order No. 9, issued simultaneously herewith.

2. The motion to dismiss (Doc. 469) the amended complaints of the indirect end users and the indirect purchasers for resale pursuant to *Rule 12(b)(6)* is GRANTED in part, DENIED in part, DENIED as moot in part, and DEFERRED in part as follows:

a. The motion is GRANTED in part, DENIED in part, and DENIED as moot in part as follows:

i. The motion is GRANTED with respect to the claims against defendants Cadbury Adams Canada, The Hershey Company, Hershey Canada, Mars, Mars Snackfood U.S., and Nestle U.S.A. under the following law:

I. *D.C. CODE § 28-4503*.

II. *MICSH. COMP. LAW § 443.773*.

III. **[**151]** *MINN. STAT. § 325D.52*.

IV. New York Donnelly Act, *N.Y. GEN. BUS. LAW § 340*.

V. Kansas Consumer Protection Act ("KCPA"), *KAN. STAT. ANN. §§ 50-623 to -643*.

VI. Maine Unfair Trade Practices Act ("MUTPA"), *ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214*.
VII. New York common law of restraint of trade.
VIII. The common law of unjust enrichment.

Leave to amend is denied as futile with respect to the claims identified in Clauses I-VI above. *Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002)*. Plaintiffs may request leave to file a second amended complaint alleging the claims identified in Clauses VII and VIII in accordance with Paragraph 5.
ii. The motion is DENIED as moot with respect to the claims against Cadbury Adams Canada, The Hershey Company, Hershey Canada, Mars, Mars Snackfood U.S., and Nestle U.S.A. under the following statutes:

I. *HAW. REV. STAT. §§ 480-1 to -24*.

II. *N.Y. GEN. BUS. LAW §§ 340-47*.

III. *N.J. STAT ANN. §§ 56:9-1 to -19*.

IV. *740 ILL. COMP. STAT. §§ 10/1-/12*.

iii. The motion is DENIED with respect to all other claims against Cadbury Adams Canada, The Hershey Company, Hershey Canada, **[*589]** Mars, Mars Snackfood U.S., and Nestle U.S.A.

b. The motion is DEFERRED with respect to **[**152]** Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A., and Nestle Canada pending a ruling on these defendants' motions to dismiss pursuant to *Rule 12(b)(2)*.

3. The motion to dismiss (Doc. 476) the amended complaints of the direct purchasers and individual plaintiffs pursuant to *Rule 12(b)(6)* is DENIED in part and DEFERRED in part as follows:
a. The motion is DENIED with respect to Cadbury Adams Canada, The Hershey Company, Hershey Canada, Mars, Mars Snackfood U.S., and Nestle U.S.A.

b. The motion is DEFERRED with respect to Cadbury plc, Cadbury Holdings, Mars Canada, Nestle S.A., and Nestle Canada pending a ruling on these defendants' motions to dismiss pursuant to *Rule 12(b)(2)*.

4. The supplemental motion to dismiss (Doc. 464) pursuant to *Rule 12(b)(6)* filed by Cadbury plc, Cadbury Holdings, and Cadbury Adams Canada is DENIED in part and DEFERRED in part as follows:
a. The motion is DENIED with respect to Cadbury Adams Canada.

b. The motion is DEFERRED with respect to Cadbury plc and Cadbury Holdings pending a ruling on these defendants' motions to dismiss pursuant to *Rule 12(b)(2)*.

5. Following complete disposition of the pending motions to dismiss, the indirect end users and indirect **[**153]** purchasers for resale may file a second amended complaint for the purposes of:
a. Adding parties who reside or transact business in states under whose law plaintiffs bring their claims.
b. Describing the business activities in Iowa and Nebraska of indirect purchaser for resale Treat America Limited.
c. Replacing the citations to state monopolization statutes in the indirect end users' current complaint with citations to statutes governing horizontal restraints.
d. Reinstating the indirect end users' claims under the New York common law of restraint of trade. Any motion requesting leave to reassert this claim shall identify legal authority supporting the claim.
e. Reinstating a claim for unjust enrichment. Any motion requesting leave to reassert this claim shall identify the jurisdiction under whose law the claim arises.

The second amended complaint shall be filed within fifteen (15) days after the court's ruling on the motions. In the absence of a second amended complaint, defendants shall be permitted to renew their motion to dismiss plaintiffs' claims under the state antitrust statutes of Alabama and Mississippi.

6. No discovery shall be taken in this above-captioned matter prior to complete **[**154]** disposition of the motions deferred hereunder unless authorized by Case Management Order No. 9.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United States District Judge

AVX Corp. v. Cabot Corp.

United States District Court for the District of Massachusetts

March 5, 2009, Decided

CIVIL ACTION NO. 04-10467-RGS

Reporter

600 F. Supp. 2d 286 *; 2009 U.S. Dist. LEXIS 18572 **; 2009-1 Trade Cas. (CCH) P76,545

AVX CORPORATION and AVX LIMITED v. CABOT CORPORATION

Prior History: *AVX Corp. v. Cabot Corp., 252 F.R.D. 70, 2008 U.S. Dist. LEXIS 58626 (D. Mass., 2008)*
Cabot Corp. v. AVX Corp., 448 Mass. 629, 863 N.E.2d 503, 2007 Mass. LEXIS 188 (2007)

Core Terms

powder, tantalum, nodular, flake, summary judgment, products, damages, buyer, tied product, non-flake, contends, tying arrangement, conditioned, antitrust, seller, anti trust law, Sherman Act, negotiation, coercive, patent, tie, tying product, five year, exploitation, long-term

LexisNexis® Headnotes

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

HN1[] **Tying Arrangements, Sherman Act Violations**

Section 1 (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, prohibits a seller from tying the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the tied product. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated. On the other hand, there is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one.

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

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

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

HN2[] **Tying Arrangements, Per Se Rule**

The United States Supreme Court had historically employed a per se test in antitrust cases, under which certain species of contract in restraint of trade were deemed unreasonable as a matter of law, among them tying arrangements. The Supreme Court largely eviscerated the per se test by overruling the long-standing presumption that a patent confers market power on a patentee that renders any tying of a secondary product with the patented product a per se antitrust violation. In a unanimous opinion, the Court held that a valid patent notwithstanding, a plaintiff must prove market power as an affirmative element of its case. In rejecting any presumption of market power, the Court expressed skepticism about the durability of the anti-tying rule itself, observing that the Court's strong historical disapproval of tying arrangements has substantially diminished.

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

HN3[] **Tying Arrangements, Sherman Act Violations**

To prove a tying claim, a plaintiff must produce evidence establishing each of four elements: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that constitutes a tying; (3) the entity accused of tying has such economic power in the relevant market over supply of the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

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

HN4[] **Tying Arrangements, Sherman Act Violations**

Under doctrine developed by the United States Supreme Court, the question whether products are distinct turns not on their functional relation, but rather on the nature of the demand in the market. The Court held that advertising space in a morning newspaper was the same product as advertising space in the evening edition of the same newspaper as advertisers had no reason to distinguish between morning and afternoon readers. By contrast, in another case, the Court observed that servicing and related parts can constitute distinct products if there is sufficient consumer demand so that it is efficient for a firm to provide them separately. Market power is the power to force a purchaser to do something that he would not do in a competitive market.

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

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

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

HN5[] **Tying Arrangements, Per Se Rule**

On a motion for summary judgment, though facts are to be viewed in the light most favorable to the non-moving party, it is incumbent on the nonmovant to present specific facts to show that there is a genuine issue for trial. It is not enough to rest on mere allegations in opposing a properly supported motion for summary judgment. Whether a plaintiff's alleged facts comprise a per se claim in antitrust cases is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment.

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

HN6[] Tying Arrangements, Sherman Act Violations

A victim of an illegal tying arrangement might well be a perfectly willing participant in the transaction, either because it prizes the tying product highly, or because it has a concomitant desire to acquire the tied product. It is the harm to competition that the antitrust laws seek to avert, not harms to individual market participants. That point is only confirmed by the cases that hold that even if the buyer is totally indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, a tying agreement may work significant restraints on competition in the tied product. Again, the focus is on the impact on the market from the illegal tie, not on the attitude of the putative customer. The ineluctable conclusion from the clear law is that because the buyer's state of mind is irrelevant, a plaintiff need not establish coercion to succeed with its per se tying claim.

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

HN7[] Tying Arrangements, Sherman Act Violations

The defining element of a tying claim is exploitation by the seller of its market position. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is violated.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN8[] Supporting Materials, Affidavits

When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.

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

HN9[] Standing, Requirements

A plaintiff must show injury in its business or property by reason of anything forbidden in the antitrust laws in order to have standing as a plaintiff. It is proper to indulge private antitrust plaintiffs only to the extent there is evidence on the record from which a trier of fact could make a just and reasonable inference regarding the amount of damages. If the plaintiff's proffered evidence permits no more than pure speculation and guesswork then the damage evidence is insufficient as a matter of law. An antitrust plaintiff has the burden of proof and damages cannot be speculative.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN10[] Standing, Requirements

A plaintiff may not recover damages merely by showing a violation of the Sherman Act; *15 U.S.C.S. § 1 et seq.*, rather, the plaintiff must also make some showing of actual injury attributable to something the antitrust laws were designed to prevent.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

HN11[] **Disclosure, Mandatory Disclosures**

Fed. R. Civ. P. 37(c)(1) provides that a party that without substantial justification fails to disclose information required by *Fed. R. Civ. P. 26(a)*, shall not, unless such failure is harmless, be permitted to use as evidence at a trial, any information not so disclosed. The required sanction in the ordinary case is mandatory preclusion.

Counsel: [1]** For AVX Limited, Plaintiff: Tish L Berard, Hearts on Fire Company, LLC, Boston, MA.

For AVX Corporation, Plaintiff: Joseph S. Bodoff, Bodoff & Associates, P.C., Boston, MA.

For Cabot Corporation, Defendant: Brian A. Davis, Robert S. Frank, Jr., Julie C. Rising, Choate, Hall &Stewart, Boston, MA.

For AVX Limited, Plaintiff: Richard A. Goren, Richard P. O'Neil, Ryan D. Sullivan, Bodoff & Associates, Boston, MA.

For Cabot Corporation, Defendant: Terrence Michael Schwab, Tarlow, Breed, Hart & Rodgers PC, Boston, MA.

For AVX Limited, Plaintiff: Evan Slavittm, Bodoff & Associates, Boston, MA.

Judges: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Stearns

Opinion

[*287] MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

STEARNS, D.J.

This case will (hopefully) bring down the final curtain in this long-running lawsuit brought by plaintiffs AVX Corporation and AVX Limited (collectively AVX) against defendant Cabot Corporation (Cabot). The case arose out of a five-year agreement (the Supply Agreement) that committed AVX to purchase minimum quantities of "flake" and "non-flake" (or "nodular") tantalum powders from Cabot. [1] The Supply Agreement expired on December 31, 2005.

Over the years, AVX has sought to prosecute its claims in both the state and federal courts without great success. See, e.g., *Cabot Corp. v. AVX Corp., 448 Mass. 629, 863 N.E.2d 503 (2007)*; *AVX Corp. v. Cabot Corp., 424 F.3d 28 (1st Cir. 2005)*. All but one of AVX's claims have been pruned or weeded out over time by state and federal

[1] Tantalum is a rare, very hard, **[**2]** and highly corrosion-resistant metal. It occurs naturally in the mineral tantalite. The chemical inertness of tantalum makes it a valuable substance for laboratory equipment. It is almost completely immune from chemical attack at temperatures below 150[degree]C, and is permeable only by hydrofluoric acid, acidic solutions containing the fluoride ion, and free sulphur trioxide. The element has a melting point exceeded only by tungsten and rhenium. Tantalum's main use is in the manufacture of electrolytic capacitors.

decisions. Cabot now moves for entry of summary judgment on AVX's remaining claim, which alleges a violation by Cabot of the "anti-tying" prohibition of the Sherman Act, *15 U.S.C. §§ 1* and *14*. AVX, for its part, moves for partial summary judgment, contending that three of the four elements of its tying claim are undisputed.

To sum up Cabot's arguments: Cabot contends **[**3]** that AVX's last, best, and only chance has less to do with the antitrust laws than with buyer's remorse. From Cabot's perspective, AVX entered after arms-length negotiations into a long-term contract for the purchase of tantalum, a contract which over time lost its lustre when the market price for tantalum declined (contrary to AVX's expectations). According to Cabot, AVX is trying to win back in court what it lost fairly at the bargaining table. Additionally, Cabot contends that AVX is unable to show that anything Cabot did caused an "injury in [AVX's] business or property (in an antitrust sense)." See *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 815 (1st Cir. 1988)*. Accordingly, Cabot moves for summary judgment.

To understand AVX's cross-motion: One must begin with the elements of a "tying" claim. ***HN1***[] "*Section 1* of the Sherman Act prohibits a seller from 'tying' the sale of one product to the purchase of a second product if the seller thereby avoids competition on the merits of the 'tied' product." See *Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo, Inc., 96 F.3d 10, 17 (1st Cir. 1996)*.

> **[*288]** [T]he essential characteristic of an invalid tying arrangement lies **[**4]** in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id., quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. On the other hand, "[t]here is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one." 10 Phillip E. Areeda et al., ***Antitrust Law*** P 1752b, at 280 (1996).

HN2[] The United States Supreme Court had historically employed a per se test in antitrust cases, under which certain species of contract in restraint of trade were deemed unreasonable as a matter of law, among them tying arrangements. See *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994)*. In *Illinois Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*, however, the Supreme Court largely eviscerated the per se test by overruling the longstanding **[**5]** presumption that a patent confers market power on a patentee that renders any "tying" of a secondary product with the patented product a per se antitrust violation. In a unanimous opinion by Justice Stevens, the Court held that a valid patent notwithstanding, a plaintiff must prove market power as an affirmative element of its case. In rejecting any presumption of market power, Justice Stevens expressed skepticism about the durability of the anti-tying rule itself, observing that the Court's "strong [historical] disapproval of tying arrangements has substantially diminished." *Id. at 35*. [2] See *Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 593-594 (7th Cir. 2008)* (noting that the Supreme Court has not discarded the tying rule but has modified it to require proof that the seller has power in the market for the tying product); Rachel Krevans & Daniel P. Muino, Restoring the Balance: The Supreme Court Joins the Patent Reform Movement, *9 Sedona Conf. J. 15 (Fall 2008)* (characterizing the Illinois Tool Works decision as being influenced by the "congressional judgment reflected in the 1988 amendment [to the patent code]" that "tying arrangements involving patented products should not **[**6]** be deemed per se antitrust violations . . ."). See also Gabriel Feldman, The Misuse of the Less Restrictive Alternative Inquiry in the Rule of Reason Analysis, *58 Am. U. L. Rev. 561, 578 (2009)* ("The per se test is applied with less rigidity in tying cases, as proof of the tying agreement leads only to a rebuttable presumption of illegality.").

[2] The skepticism is echoed in the academic literature. See William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, *2007 Colum. Bus. L. Rev. 1, 35*; William E. Kovacic, The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy, 36 Wayne L. Rev. 1413, 1437-1439, 1445-1451 (1990)

HN3[] To prove a tying claim, a plaintiff must produce evidence establishing each of four elements: "(1) the tying and the tied products [here Cabot's nodular and flake tantalum powders] are actually two distinct products; [3] (2) there is an agreement or condition, express or implied, that **[*289]** constitutes a tying; (3) the entity accused of tying [Cabot] has such economic power in the relevant market over supply of the tying product to distort consumers' choices with respect **[**7]** to the tied product; [4] and (4) the tie forecloses a substantial amount of commerce in the market for the tied product." *Data Gen. Corp., 36 F.3d at 1178-1179*. With respect to the first, third, and fourth elements, AVX contends that it is undisputed that flake tantalum powder and non-flake (nodular) tantalum powder are "distinct products"; that Cabot in 2001 had dominant "market power" over flake tantalum powder and used its position to tie or "condition AVX's purchase of the flake powders on its purchase of non-flake [tantalum] powders"; and that the tie affected "a substantial amount of commerce." AVX asks the court to enter judgment as a matter of law with respect to these elements of its Sherman Act claim. Complaint PP 1, 33-41.

DISCUSSION

HN5[] Though facts are to be viewed in the light most favorable to the non-moving party, it is incumbent on the nonmovant to present specific facts to show that there is a genuine issue for trial. It is not enough to "rest on mere allegations" in opposing a properly supported motion for summary judgment. See *Borschow, 96 F.3d at 14* (approving a grant of summary judgment in a tying case). "Whether a plaintiff's alleged facts comprise a per se claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment." See *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*, citing *Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 50-51 (1st Cir. 1998)*.

The **[**9]** court will begin with Cabot's arguments as they are dispositive. Cabot contends that AVX has produced no evidence that Cabot coercively tied AVX's purchases of flake tantalum powder to the purchase of non-flake or nodular tantalum powder. Cabot argues that AVX has shown no more than: (1) that AVX was in the market for all types of tantalum powder; and (2) that Cabot would only sell tantalum products (separately or collectively) pursuant to multi-year contracts. When AVX's *Rule 30(b)(6)* deponent, Vice-President of Worldwide Tantalum Products Peter Collis, was asked to explain the thrust of AVX's Complaint, he replied that Cabot had "coerced" AVX into signing a binding, multi-year tantalum purchase contract instead of the shorter-term contract that had been contemplated in the parties' "letters of intent." [5] Cabot for its part contends that during the contract negotiations, "AVX consistently pressed for the opportunity to purchase *more* nodular powder, *more* flake powder, and *more* KTaF." [6] Cabot's Memorandum in Support **[*290]** of Summary Judgment at 3 (emphasis in original).

[3] *HN4*[] Under doctrine developed by the Supreme Court in Jefferson Parish, the question whether products are distinct turns not on their functional relation, but rather on the nature of the demand in the market. In *Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*, the Court held that advertising space in a morning newspaper was the same product as advertising space in the evening edition of the same newspaper as advertisers had no reason to distinguish **[**8]** between morning and afternoon readers. By contrast, in *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, the Court observed that servicing and related parts can constitute distinct products if there is "sufficient consumer demand so that it is efficient for a firm to provide them separately."

[4] Market power is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, 466 U.S. at 14*.

[5] See Collis Dep. at 27-28 (set out *infra*).

[6] KTaF is the industry's name for semi-refined tantalum ore. AVX alleges that KTaF **[**10]** is one of the "tied" products in this case. See AVX Statement of Facts (SOF) PP 7, 21 and 34. As will be explained, AVX is barred from asserting any claim based on the purchase of KTaF.

> AVX's President and Chief Executive Officer, who was directly involved in the negotiation of the Supply Agreement in the summer and fall of 2000, has testified under oath that AVX actually desired to purchase more, not less, nodular powder from Cabot at the time the parties entered into that Agreement, and AVX's desire for more nodular powder is confirmed in the Agreement itself; and regardless of the true nature of its claim in this action, AVX cannot prove that it suffered actual injury as a result of Cabot's purported violation of federal antitrust laws. In fact, AVX has produced no evidence that it suffered any harm whatsoever on account of Cabot's alleged misconduct.

Cabot's Opposition to AVX's Motion for Partial Summary Judgment at 6. [7] Cabot argues that on the undisputed facts, the parties' negotiation of a long-term purchase of products cannot constitute a per se tying arrangement as a matter of law. [8]

In response, AVX maintains that to defeat Cabot's motion, all it need show

> is an act of conditioning the purchase of one product on the purchase of another, not whether the plaintiff is coerced into buying the product or whether it wanted the product. The focus of an illegal tie is on actions of the defendant and the consequent harm to competition, not the harm to the plaintiff itself. As this Court so aptly stated in its earlier decision in this case:
>
> > ***HN6***[] A "victim" of an illegal tying arrangement might well be a perfectly willing participant in the transaction, either because it prizes the tying product highly, or because it has a concomitant desire to acquire the tied product. It is the harm **[**12]** to competition that the antitrust laws seek to avert -- not harms to individual market participants.
>
> This point is only confirmed by the cases that hold that even if the buyer is totally indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, a tying agreement may work significant restraints on competition in the tied product. *Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*; *Key Enters. of Delaware, Inc. v. Venice Hosp., 919 F.2d 1550, 1560 (11th Cir. 1990)*. Again, the focus is on the impact on the market from the illegal tie, not on the attitude of the putative customer. Accordingly, AVX could have been reluctant, neutral, or willing to buy nodular from Cabot; if Cabot conditioned the purchase of nodular on the purchase of flake, this element would be satisfied. The ineluctable conclusion from the clear law is that because the buyer's state of mind is irrelevant, a plaintiff need not establish **[*291]** coercion to succeed with its per se tying claim.

AVX Opposition Memorandum at 5-6.

The error in AVX's argument is not in its premise that the state of mind of the purchaser is usually **[**13]** irrelevant in analyzing the market impact of a tying claim, but in its assumption that a refusal to sell products (singly or in tandem) on anything but a long-term basis constitutes "tying" for purposes of the Sherman Act. The teaching of Illinois Tool, as echoed by the First Circuit in Borschow and Data General, is that ***HN7***[] the defining element of a tying claim is exploitation by the seller of its market position. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Illinois Tool, 547 U.S. at 34-35*, quoting *Jefferson Parish, 466 U.S. at 12*. See *Borschow, 96 F.3d at 17* (same). See also *Data General, 36 F.3d at 1156* (The court found "insufficient proof of a tying agreement to withstand summary judgment" where there was no evidence of exploitation and "no explicit tying condition in any written agreement.").

---

[7] Cabot has produced undisputed evidence that AVX negotiated for an increase in the amount of **[**11]** nodular powder to be purchased from Cabot after the Supply Agreement was signed. See Docket No. 112-7 at 2; Gilbertson Dep. at 86-87, 164-166; Collis Dep. at 25-26.

[8] In the alternative, Cabot contends that AVX's claim is barred by the doctrine of claim preclusion or res judicata because "it is exactly the same claim that AVX previously litigated against Cabot, and lost, in the Massachusetts state courts." Cabot's Memorandum in Support of Summary Judgment at 2-3. See also *Cabot Corp., 448 Mass. at 646*.

Here, **[**14]** AVX offers no evidence that Cabot had a sufficiently dominant market position to "force" it into a multi-year purchase agreement for a product that it did not want. AVX only says that it might have purchased less nodular product in some years, or that its European subsidiaries might have purchased tantalum supplies during other years from Cabot competitors like Showa, Starck, or Ningxia "at substantially less cost." [9] AVX Memorandum at 6 n.5. This speculation falls far short of proof that Cabot exploited a market position over the flake tantalum market "to distort consumer choice with respect to the tied [non-flake] product."

AVX's only counter-argument is its insistence that the parties' contract serves as independent verification that Cabot "conditioned," that is, would not sell, flake powder to AVX unless it agreed to purchase nodular powder. [10] AVX relies on Section 2 of the Supply Agreement, which states that "Buyer shall purchase . . . the minimum purchase quantity . . . of each Product described on Appendix A." AVX contends that this "clear" language, **[**15]** as interpreted by its witness-employees, Kurt Cummings, Peter Collis, and John Chapple (AVX's Purchasing Manager), supports its "conditioning" argument.

The testimony does not bear out AVX's contention. Cummings **[**16]** and Collis testified only that Cabot refused to sell AVX tantalum, **[*292]** whether flake or non-flake (or both), unless AVX agreed to a long-term contract. On December 5, 2007, Collis during a *Rule 30(b)(6)* deposition directed to (among other topics), the "products or terms that AVX alleges it was forced to accept on account of 'Cabot's coercive strategies' as referenced in Paragraph 30 of [its] Complaint," testified as follows.

> DAVIS: Okay. Going back to [the Complaint] and Jury Demand at Paragraph 1, Mr. Collis, what are the non-flake powders that AVX claims that Cabot conditioned AVX's purchase of flake powders upon?
> COLLIS: Actually the nodular powders and the fact that we had to take a five year contract for these materials.
> DAVIS: Looking back please at [the Supply Agreement], which are the nodular powders that AVX did not wish to purchase from Cabot as of the time that this contract was executed?
> GOREN: Objection.
> DAVIS: You can respond.
> COLLIS: There is the nodular on Biddeford, the nodular under Europe. There's wire under Biddeford, wire under Europe and KTaF for the extent of the five year contract.
>
> MR. DAVIS: So I want to understand this correctly. Are you saying that AVX did not wish **[**17]** to purchase, as of the time that it entered into this supply agreement with Cabot, it did not wish to purchase any nodular powder from Cabot?
> COLLIS: We didn't wish to purchase -- enter into an agreement to purchase materials for five years.
> DAVIS: Putting aside the five year length of the contract, were there any nodular products that are listed on . . . the Supply Agreement that AVX actually wished to purchase from Cabot as of the time that this supply agreement was actually signed? Independent of the five year length of the contract.
> COLLIS: Yes. Yes.
> DAVIS: Which ones did AVX actually wish to purchase?
> COLLIS: We wished to purchase the ones that we had in the Letter of Intent at the time that we had the original agreement.
> * * *

---

[9] In making this argument, AVX is forced to acknowledge that alternative suppliers of tantalum products were available in the market.

[10] In its briefing, AVX states that the product over which Cabot is alleged to have market power is "flake" tantalum powder (which is designated as the "tying product"). The products that are associated with that product are the "tied products," in this case, "nonflake products, nodular powder and KTaF." AVX Opposition Memorandum at 4 n.3. Cabot counters that AVX's "belated attempt" to include semi-refined tantalum ore or KTaF as a tied product must fail as the Complaint references non-flake *powders*, which cannot include raw materials such as KTaF. Moreover, Cabot notes that AVX's economic expert Dr. Steven Schwartz testified in a February 2008 deposition that he "no longer makes the assertion that [AVX's] purchases of flake were conditioned on [its] purchases of KTaF." Schwartz Dep. at 50. The injection of KTaF at this stage of the litigation is illustrative of a distressing habit of AVX's counsel to attempt by stealth to recapture positions lost by AVX in previous skirmishes.

DAVIS: Is it fair to say that it's AVX's position that its complaint in this case is that it was forced by Cabot to sign a contract for years beyond 2001?
COLLIS: Yes.
DAVIS: Is there more to AVX's complaint in this action other than it was forced by Cabot, allegedly, to sign a contract or a binding contract for delivery of products beyond the calendar year 2001?
COLLIS: No.

Collis's testimony concerning the nature of AVX's claim was confirmed by Cummings, AVX's Chief **[**18]** Financial Officer, at his *Rule 30(b)(6)* deposition on December 12, 2007. He was asked to identify the "coercive strategies" exerted by Cabot that are alleged in Paragraph 30 of AVX's Complaint. Cummings testified as follows.

Q. And what were Cabot's coercive strategies, to your understanding?
A. I believe they surrounded the conditions under which the Supply Agreement was negotiated.
Q. They surrounded? Is that the word you just used?
A. Urn-hum.
Q. Surrounded with what?
A. Two issues. One, we had an existing supply agreement which Cabot indicated they would not honor.
Q. You are referring to the letter of intent?

A. Yes. And we were told that we would not get material unless we entered **[*293]** into a long-term supply agreement.
Q. And that is the coercive strategies you believe this is referring to?
A. Yes.
Q. What other coercive strategies are you aware of that Cabot engaged in during the negotiation of the 2001 Supply Agreement?
A. I think that covers it.

Cummings Dep. at 17-18.

Chapple, in a subsequent affidavit, states that it was his understanding that if AVX did not enter into a five-year supply contract for both flake and non-flake products, it would not get any flake for 2001. Chapple Aff. P 22. **[**19]** [11] Cabot asserts that the Chapple Affidavit should not be considered by the court as it is "inconsistent with the testimony of the same witness at his deposition" about a meeting between Chapple and Cabot's Hugh Tyler at Heathrow Airport in August of 2000. AVX asserts (somewhat ingenuously) that the affidavit does not contradict, but rather "amplifies upon" Chapple's earlier testimony. AVX Reply at 4. The court agrees that the affidavit is improper. See *Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994)* ***HN8***[] ("'When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.'" (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure § 2726 at 30-31 (2d ed. 1994))). Perhaps more to the point, Chapple's carefully crafted affidavit concedes (albeit in a more weasling fashion than his testimony) that he was told that Cabot would not provide any product to AVX in 2001 unless it entered into a five-year, minimum purchase contract for the products it wanted.

There is one remaining dispositive issue. ***HN9***[] AVX must show "injury in [its] business or property by reason of anything forbidden in the antitrust laws" in order to have standing as a plaintiff. See *Wells, 850 F.2d at 815*. See also *Borschow, 96 F.3d at 17* (finding that plaintiff failed to adduce evidence that it was injured by defendant's alleged anti-competitive acts). In Wells, the First Circuit cautioned that "it is proper to indulge private antitrust plaintiffs only to the extent there is evidence on the record from which a trier of fact could make a 'just and reasonable inference' regarding the amount of damages. If the plaintiff's proffered evidence permits no more than 'pure speculation and guesswork' then the damage evidence is **[**21]** insufficient as a matter of law." *Wells, 850*

[11] "AVX did **[**20]** not want to commit to purchase from Cabot any fixed amounts of tantalum products for each 2002, 2003, 2004 and 2005 at fixed prices. . . . [O]nce as a condition of getting the flake products AVX accepted Cabot's requirement of a five year take or pay contract for both flake and non-flake products the negotiations were limited to the quantities to be purchased over the five years and the prices to be paid." AVX Response to Cabot's Statement of Facts at 13.

F.2d at 816, quoting Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946). See also Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1151 (10th Cir. 2002) (An "antitrust plaintiff has the burden of proof and damages cannot be speculative.").

AVX here has offered no reliable evidence of damages. [12] See Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572-573, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990) **HN10**[] ("We have held that a plaintiff may not recover damages merely by showing a violation of **[*294]** the Act; rather, the plaintiff must also 'make some showing of actual injury attributable to something the antitrust laws were designed to prevent.'" (quoting Perkins v. Standard Oil Co., 395 U.S. 642, 648, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969))). AVX's dilemma is one of its own making. Despite repeated accommodations by the court, including granting of numerous extensions of the scheduling order (four in all), AVX failed (or was unable) to produce expert testimony identifying any actual damages. [13] The extensions culminated on July 10, 2007, with the margin order that "[n]o further extensions will be granted." Nonetheless, because of a death in the family of plaintiff's counsel, the court again extended the **[**22]** expert deadline, setting December 15, 2007, as the date for AVX's submission of its expert report. [14]

On October **[**23]** 18, 2007, the court allowed AVX's motion to substitute a new expert, Steven Schwartz, in lieu of a prior expert who, because of medical issues, was unable to travel to view AVX's manufacturing facility in the United Kingdom. Cabot vehemently opposed the motion, contending that AVX should be bound by the prior expert's affidavit testimony. The court allowed AVX's motion. AVX submitted Schwartz's expert report on December 15, 2007. Schwartz's report, however, did not contain a calculation of AVX's damages. [15] Cabot served its expert report on January 15, 2008, noting the absence of any damages evidence. On February 8, 2008, AVX filed a motion seeking leave to file a substitute expert report. In doing so, AVX admitted that Schwartz's report was "incomplete." [16] The court denied the motion as untimely. It did allow AVX to file an addendum limited to issues raised by additional discovery allowed by the court in a separate order on February 15, 2008.

---

[12] The Supply Agreement terminated in 2005. AVX is not seeking injunctive relief. See Complaint at 9.

[13] See Nilavar v. Mercy Health System-Western Ohio, 244 Fed. Appx. 690, 2007 WL 2264439,* 2 (6th Cir. Aug. 7, 2007) (affirming the district court's finding on a motion for summary judgment that "plaintiff's claims failed as a result of his failure to have expert testimony on the geographic market and . . . he could not [therefore] show an antitrust injury."); Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 490 (7th Cir. 2002) ("The physical copper market is complicated, but not so complicated that one cannot estimate to a reasonable degree of accuracy the amount of damage a party has sustained. It is certainly acceptable through expert economic testimony to make a reasonable estimation of actual damages through probability and inferences.").

[14] The extended dates were set out on the court docket as December 15, 2007 - AVX's expert report deadline; January 15, 2008 - Cabot's expert report deadline; March 1, 2008 - completion of expert discovery; and March 31, 2008 - filing of dispositive motions.

[15] See Gregory J. Werden, Economic Evidence on the Existence of Collusion: Reconciling ***Antitrust Law*** with Oligopoly Theory, 71 Antitrust L.J. 719, 789 (2004) ("The role of the expert economist in antitrust cases is to apply microeconomic theory **[**24]** to the messy facts of a case.").

[16] At a deposition held on February 19, 2008, Schwartz testified as follows:

> Q. But you didn't issue any opinions regarding damages in the expert report that you submitted back in December, correct?
>
> A. That is correct.
>
> Q. And you hadn't been asked to at that point in time, correct?
>
> A. That is correct.

See Schwartz Dep. at 201-202.

Finally, AVX failed to provide timely substantive answers to Cabot's damages interrogatories or to otherwise respond when asked to identify its damages claim. [17] **[*295]** As a consequence, Magistrate Judge Bowler (to whom the ongoing discovery disputes had been referred) allowed Cabot's motion to strike AVX's answers to the damages interrogatories. [18] See *AVX Corp. v. Cabot Corp., 251 F.R.D. 70 (D. Mass. 2008)*. In her opinion (which was adopted by this court), Magistrate Judge Bowler did allow that "AVX may file a motion for leave to file, see L.R. 7.1(b)(3), a revised answer to the damages interrogatory based only on the information recently obtained from Cabot in March and April 2008." No revised damage calculation was ever offered by AVX. As AVX is unable to demonstrate that it has in fact suffered quantifiable damages as the result of **[**25]** any conduct attributable to Cabot, Cabot's motion for summary judgment will be granted on this ground as well.

ORDER

Based on the foregoing reasons, Cabot's Motion for Summary Judgment is ALLOWED. The Clerk will enter judgment for Cabot and close the case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

End of Document

---

[17] On December 5, 2007, as previously noted, Cabot took the *Rule 30(b)(6)* deposition of AVX's Peter Collis. One of the topics of the Collis deposition was damages: "Any damages that AVX claims to have sustained on account of the conduct alleged in the Complaint, including but not limited to the complete nature and amount of such damages, and the precise means by which AVX calculated such damages." Collis was unable to articulate any method of calculating damages. When asked if he had any understanding of the monetary value of AVX's alleged damages, Collis stated that AVX had "monitored the market price of material and compared that with what we ended up paying in the contract when we used the material as against what the market price was at the time, and passed that to our expert." When asked how he would calculate AVX's damages he responded that "we've left that with our expert to come up with that calculation."

[18] ***HN11***[] *Federal Rule of Civil Procedure 37(c)(1)* provides that "a party that without substantial justification fails to disclose information required by ***Rule 26(a)*** . . . shall **[**26]** not, unless such failure is harmless, be permitted to use evidence at a trial . . . any . . . information not so disclosed." "The required sanction in the ordinary case is mandatory preclusion." *Klonoski v. Mahlab, 156 F.3d 255, 269 (1st Cir. 1998)* (discussing failure to disclose letters written by the plaintiff's wife to her sister). See also *Pena-Crespo v. Commonwealth of Puerto Rico, 408 F.3d 10, 13 (1st Cir. 2005)* ("'[E]xclusion of evidence is a standard sanction for a violation of the duty of disclosure under ***Rule 26(a)***.'"); *Salgado by Salgado v. Gen. Motors Corp., 150 F.3d 735, 742 (7th Cir. 1998)* ("The sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of ***Rule 26(a)*** was either justified or harmless.").

Bruce Foods Corp. v. SK Foods, LP

United States District Court for the Eastern District of California

March 11, 2009, Decided; March 12, 2009, Filed

No. 2:09-cv-00027-MCE-EFB; No. 2:08-cv-03017-MCE-EFB; No. 2:08-cv-03074-MCE-EFB; No. 2:09-cv-00208-MCE-EFB; No. 2:09-cv-00442-MCE-EFB

Reporter
2009 U.S. Dist. LEXIS 147787 *

BRUCE FOODS CORPORATION, on behalf of itself and all others similarly situated, Plaintiff, v. SK FOODS, LP; INGOMAR PACKING COMPANY, LLC, LOS GATOS TOMATO PRODUCTS, INTRAMARK USA, INC. AND RANDALL LEE RAHAL, Defendants.FOUR IN ONE COMPANY, INC, on behalf of itself and all others similarly situated, Plaintiff, v. SK Foods, L.P., INGOMAR PACKING COMPANY, LOS GATOS TOMATO PRODUCTS, RANDALL RAHAL, INTRAMARK USA, INCORPORATED, Defendants.DIVERSIFIED FOODS AND SEASONINGS, individually and on behalf of all others similarly situated, Plaintiff, v. SK FOODS L.P., INTRAMARK USA, INC., and RANDALL LEE RAHAL, Defendants.THE MORNING STAR PACKING COMPANY, a California limited partnership; LIBERTY PACKING COMPANY, LLC, a California limited liability company; and THE MORNING STAR COMPANY, a California corporation, Plaintiffs, v. SK FOODS, L.P., a California limited partnership; SCOTT SALYER, an individual; RANDALL RAHAL, an individual, INTRAMARK USA, INC., a New Jersey corporation; and DOES 1 through 50, inclusive, Defendants.CLIFFSTAR CORPORATION, on behalf of itself and all others similarly situated, Plaintiff, v. SK FOODS, LP, INGOMAR PACKING COMPANY, LLC, LOS GATOS TOMATO PRODUCTS, INTRAMARK USA, INC., and RANDALL LEE RAHAL, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Four in One Co. v. SK Foods, L.P., 2009 U.S. Dist. LEXIS 28657 (E.D. Cal., Mar. 19, 2009)*

Motion granted by, Dismissed by *Four In One Co. v. SK Foods, L.P., 2021 U.S. Dist. LEXIS 189606 (E.D. Cal., Sept. 30, 2021)*

Core Terms

consolidation, purposes, cases, pretrial, tomato, class action, discovery, Products, lawsuits, anticompetitive conduct, common questions of law, early stage, inappropriate, duplication, adjudicate, coordinate, enumerated, processed, ordering, oppose, join

Counsel: **[*1]** For Bruce Foods Corporation, Plaintiff (2:09cv27): Allan Steyer, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; Arthur N. Bailey, Christopher L. Lebsock, Michael P. Lehmann, LEAD ATTORNEYS, Hausfeld LLP, San Francisco, CA USA; Bruce L. Simon, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny, San Francisco, CA USA; Clinton Paul Walker, LEAD ATTORNEY, Roger M. Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason, LLP, San Francisco, CA USA; Guido Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA USA; Hilary K. Ratway, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC USA; Jon T. King, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA USA; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA USA.

For Cliffstar Corporation, Plaintiff (2:09cv27): Bruce L. Simon, Pearson, Simon, Warshaw & Penny, San Francisco, CA USA.

For Sk Foods LP, Defendant (2:09cv27): Jonathan E. Swartz, Paul Robert Griffin, LEAD ATTORNEYS, Winston and Strawn LLP, San Francisco, CA USA; Robert Bernard Pringle, LEAD ATTORNEY, Winston and Strawn (SF), San Francisco, CA USA; Brian P. Maschler, **[*2]** Gordon and Rees LLP, Embarcadero Center West 275 Battery Street Suite 2000, San Francisco, CA USA; Edward Raymond Fitzgerald, Gordon & Rees LLP, San Francisco, CA USA; Tad Anthony Devlin, Kaufman Dolowich & Voluck, LLP, San Francisco, CA USA.

For Ingomar Packing Company, Llc, Defendant (2:09cv27): Stephen Ara Zovickian, LEAD ATTORNEY, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Los Gatos Tomato Products, Defendant (2:09cv27): George A. Nicoud, Gibson, Dunn & Crutcher, LLP, San Francisco, CA USA.

For Intramark USA, Inc., Randall Lee Rahal, Defendants (2:09cv27): David Warren Dratman, Attorney at Law, Sacramento, CA USA.

For Bradley D. Sharp, Chapter 7 Trustee For SK Foods, LP, Trustee (2:09cv27): Gregory C. Nuti, LEAD ATTORNEY, Nuti Hart LLP, Oakland, CA USA.

For Morning Star Packing Company, Neutral (2:09cv27): Alex James Kachmar, Jr, Weintraub Genshlea Chediak Tobin & Tobin, Sacramento, CA USA.

For Diversified Foods And Seasonings, Inc., Neutral (2:09cv27): Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann and Bernstein, San Francisco, CA USA; Joseph R. Saveri, LEAD ATTORNEY, Joseph Saveri Law Firm, Inc., San Francisco, CA USA.

For L'Ottavo Ristorante, et Al., Neutra (2:09cv27): **[*3]** Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA USA.

For Four in One Company, Inc., Cliffstar Corporation, Plaintiffs (2:08cv3017): Arthur N. Bailey, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Donald A. Ecklund, PHV, LEAD ATTORNEY, PRO HAC VICE, Carella Byrne Bain Gilfillan Cecchi Stewart & Olstein, Roseland, NJ USA; James E. Cecchi, PHV, LEAD ATTORNEY, PRO HAC VICE, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart and Olstein, Roseland, NJ USA; Joey Dean Horton, LEAD ATTORNEY, Quinn Emanuel Urquhart and Sullivan LLP, Los Angeles, CA USA; Ronald J. Aranoff, PHV, LEAD ATTORNEY, PRO HAC VICE, Wollmuth Maher & Deutsch LLP, New York, NY USA; Stanley D. Bernstein, PHV, Stephanie M. Beige, PHV, LEAD ATTORNEY, PRO HAC VICE, Bernstein Liebhard, LLP, New York, NY USA; Steig D. Olson, PHV, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY USA; Stephen R. Neuwirth, PHV, LEAD ATTORNEY, PRO HAC VICE, Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York, NY USA; Dana Statsky Smith, PHV, Tania T. Taveras, PHV, PRO HAC VICE, Bernstein Liebhard LLP, New York, NY USA.

For Sk Foods, L.P., Defendant (2:08cv3017): Paul Robert Griffin, LEAD ATTORNEY, **[*4]** Winston & Strawn LLP, San Francisco, CA USA; Robert Bernard Pringle, LEAD ATTORNEY, Winston and Strawn (SF), San Francisco, CA USA; Brian P. Maschler, Gordon and Rees LLP, San Francisco, CA USA; Jonathan E. Swartz, Winston and Strawn LLP, San Francisco, CA USA.

For Ingomar Packing Company, Defendant (2:08cv3017): Colin West, LEAD ATTORNEY, Morgan Lewis and Bockius LLP, San Francisco, CA USA; David Carter Beach, Coblentz Patch Duffy & Bass LLP, San Francisco, CA USA; Stephen Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Los Gatos Tomato Products, Defendant (2:08cv3017): George A. Nicoud, LEAD ATTORNEY, Gibson, Dunn & Crutcher, LLP, San Francisco, CA USA; Stephen Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Randall Rahal, Intramark USA, Inc., Defendants (2:08cv3017): David Warren Dratman, Attorney at Law, Sacramento, CA USA.

For Scott Salyer, Defendant (2:08cv3017): Malcolm S. Segal, LEAD ATTORNEY, Segal & Associates, PC, Sacramento, CA USA; James P. Mayo, Universal & Shannon, LLP, Roseville, CA USA.

For Stuart Woolf, Defendant (2:08cv3017): William Silas Farmer, LEAD ATTORNEY, Farmer Brownstein Jaeger LLP, San Francisco, CA USA; Stephen **[*5]** Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Greg Pruett, Defendant (2:08cv3017): Miles Ehrlich, LEAD ATTORNEY, Ramsey & Ehrlich, LLP, Berkeley, CA USA; Stephen Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Bradley D. Sharp, Chapter 11 Trustee For SK Foods, LP, Defendant (2:08cv3017): Gregory C. Nuti, LEAD ATTORNEY, Nuti Hart LLP, Oakland, CA USA; Kevin W. Coleman, LEAD ATTORNEY, Nuti Hart, LLP, Oakland, CA USA.

For United States of America, Intervenor (2:08cv3017): Sean C. Flynn, LEAD ATTORNEY, United States Attorney's Office, Sacramento, Sacramento, CA USA.

For U.S. Department of Justice, Antitrust Division, Intervenor (2:08cv3017): Tai Snow Milder, LEAD ATTORNEY, Office of the Attorney General, San Francisco, CA USA; Anna Tryon Pletcher, O'melveny & Myers LLP, San Francisco, CA USA; Richard B. Cohen, Department of Justice/Antitrust Division, San Francisco, CA USA.

For US Attorney General For The Eastern District of California Intervenor, Bruce Foods Corporation, Neutral (2:08cv3017): Alexandra S. Bernay, Carmen Anthony Medici, LEAD ATTORNEYS, Robbins Geller Rudman & Dowd LLP, San Diego, Ca; Christopher L. Lebsock, LEAD ATTORNEY, Hausfeld **[*6]** Llp, San Francisco, CA USA; Craig C. Corbitt, LEAD ATTORNEY, Zelle Hofmann Voelbel & Mason, LLP, San Francisco, CA USA; Hilary K. Ratway, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC USA; Kimberly Ann Kralowec, LEAD ATTORNEY, Kralowec Law, P.C., San Francisco, CA USA; Lucas E. Gilmore, LEAD ATTORNEY, Bernstein Litowitz Berger & Grossmann LLP, San Diego, CA USA; Roger M. Schrimp, LEAD ATTORNEY, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA USA; Arthur N. Bailey, Hausfeld LLP, San Francisco, CA USA; Bonny E. Sweeney, Coughlin Stoia Geller Rudman and Robbins LLP, San Diego, CA USA; Clinton Paul Walker, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA; Henry A. Cirillo, Smith Dollar PC, Santa Rosa, CA USA; Holly Joy Stirling, Steyer Lowenthal Boodrookas Alvarez & Smith, LLP, San Francisco, CA USA.

For Diversified Foods And Seasonings, Inc., individually and on behalf of others similarly situated, Neutral (2:08cv3017): Arthur N. Bailey, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann and Bernstein, San Francisco, CA USA; **[*7]** Joseph R. Saveri, LEAD ATTORNEY, Joseph Saveri Law Firm, Inc., San Francisco, CA USA.

For Leona's Pizzeria, Inc., Neutral (2:08cv3017): Jon S. Allin, California Department of Justice, Sacramento, CA USA.

For Morning Star Packing Company, Neutral (2:08cv3017): Alex James Kachmar, Jr, Weintraub Genshlea Chediak Tobin & Tobin, Sacramento, CA USA.

For L'Ottavo Ristorante, et Al., Neutral (2:08cv3017): Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA USA.

For Diversified Foods And Seasonings, Inc., Plaintiff (2:08cv3074): Andrew Kingsdale, LEAD ATTORNEY, San Francisco, CA USA; Arthur N. Bailey, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Austin B. Cohen, PHV, LEAD ATTORNEY, PRO HAC VICE, Levin Fishbein Sedran and Berman, Philadelphia, PA USA; Brendan P. Glackin, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, Llp, San Francisco, CA USA; Eric B. Fastiff, LEAD ATTORNEY, Lieff Cabraser Heimann and Bernstein, San Francisco, CA USA; Howard J. Sedran, PHV, LEAD ATTORNEY, PRO HAC VICE, Levin Fishbein Sedran & Berman, Philadelphia, PA USA; Joseph R. Saveri, LEAD ATTORNEY, Joseph Saveri Law Firm, Inc., San Francisco, CA USA; Robert A. Kutcher, PHV, LEAD ATTORNEY, PRO **[*8]** HAC VICE, Chopin Wagar Richard & Kutcher LLP, Metairie, La; Charles C. Sweedler, PHV, PRO HAC VICE, Levin Fishbein Sedran and Berman, Philadelphia, PA USA; Kenneth C. Mennemeier, Jr., Mennemeier Glassman LLP, Sacramento, CA USA.

For Cliffstar Corporation, Plaintiff (2:08cv3074): Bruce L. Simon, Pearson, Simon, Warshaw & Penny, San Francisco, CA USA.

For Sk Foods LP, Defendant (2:08cv3074): Paul Robert Griffin, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA USA; Robert Bernard Pringle, LEAD ATTORNEY, Winston and Strawn (SF), San Francisco, CA USA; Jonathan E. Swartz, Winston and Strawn LLP, San Francisco, CA USA;

For Intramark USA, Inc., Randall Lee Rahal, Defendants (2:08cv3074): David Warren Dratman, Attorney at Law, Sacramento, CA USA.

For Bradley D. Sharp, Chapter 11 Trustee For SK Foods, LP, Trustee (2:08cv3074): Gregory C. Nuti, LEAD ATTORNEY, Nuti Hart LLP, Oakland, CA USA.

For Bruce Foods Corporation, Neutral (2:08cv3074): Roger M. Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA.

For Ingomar Packing Company, Neutral (2:08cv3074): Stephen Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Morning Star Packing Company, Neutral (2:08cv3074): **[*9]** Alex James Kachmar, Jr, Weintraub Genshlea Chediak Tobin & Tobin, Sacramento, CA USA.

For L'Ottavo Ristorante, et Al., Neutral (2:08cv3074): Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA USA.

For Morning Star Packing Company, L.P., a California Limited Partnership, Liberty Packing Company, Llc, a California Limited Liability Company, California Fruit & Tomato Kitchens, Llc, a California Limited Liability Company, Morning Star Company, a California Corporation, Plaintiffs (2:09cv208): Alex James Kachmar, Jr, LEAD ATTORNEY, Weintraub Genshlea Chediak Tobin & Tobin, Sacramento, CA USA; Dale C. Campbell, LEAD ATTORNEY, Weintraub Tobin Chediak Coleman Grodin, Sacramento, CA USA; William Scott Cameron, King & Spalding, Sacramento, CA USA.

For Cliffstar Corporation, Plaintiff (2:09cv208): Bruce L. Simon, Pearson, Simon, Warshaw & Penny, San Francisco, CA USA.

For Sk Foods, L.P., a California Limited Partnership, Defendant (2:09cv208): Kathryn N. Richter, LEAD ATTORNEY, Richter ADR, LLC, Lafayette, CA USA; Patrick Martin Ryan, Bartko, Zankel, Bunzel & Miller, San Francisco, CA USA.

For Scott Salyer, Defendant (2:09cv208): Malcolm S. Segal, LEAD ATTORNEY, Segal & Associates, **[*10]** PC, Sacramento, CA USA; James P. Mayo, Universal & Shannon, LLP, Roseville, CA USA.

For Randall Rahal, Intramark USA, Inc., a New Jersey Corporation, Defendants (2:09cv208): Christopher D. Adams, PHV, PRO HAC VICE, Law Office of Christopher D. Adams, LLC, Holmdel, NJ USA; David Warren Dratman, Attorney at Law, Sacramento, CA USA; Rebekah R. Conroy, PHV, PRO HAC VICE, Walder Hayden and Brogan, P.A., Roseland, NJ USA.

For Bruce Foods Corporation, Defendant (2:09cv208): Roger M. Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA.

For Ingomar Packing Company, Defendant (2:09cv208): Colin West, LEAD ATTORNEY, Morgan Lewis and Bockius LLP, San Francisco, CA USA; Sujal Jayendra Shah, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, San Francisco, CA USA; David Carter Beach, Coblentz Patch Duffy & Bass LLP, San Francisco, CA USA; Kyle Matthew Zipes, Bingham Mccutchen LLP, San Francisco, CA USA; Stephen Ara Zovickian, Morgan Lewis & Bockius, LLP, San Francisco, CA USA.

For Diversified Foods And Seasonings, Inc., Defendant (2:09cv208): Andrew Kingsdale, San Francisco, CA USA; Brendan P. Glackin, Lieff, Cabraser, Heimann & Bernstein, Llp, San Francisco, CA USA; Eric B. Fastiff, Lieff **[*11]** Cabraser Heimann and Bernstein, San Francisco, CA USA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA USA.

For L'Ottavo Ristorante, et Al., Defendant (2:09cv208): Jeff S. Westerman, Westerman Law Corp, Los Angeles, CA USA.

For Bradley D. Sharp, Defendant (2:09cv208): Kathryn N. Richter, LEAD ATTORNEY, Richter ADR, LLC, Lafayette, CA USA.

For Greg Pruett, Defendant (2:09cv208): Sujal Jayendra Shah, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP, San Francisco, CA USA; Miles Ehrlich, Ramsey & Ehrlich, LLP, Berkeley, CA USA.

For Los Gatos Tomato Products, Defendant (2:09cv208): Charles Ralph Jaeger, William Silas Farmer, LEAD ATTORNEYS, Farmer Brownstein Jaeger LLP, San Francisco, CA USA; George A. Nicoud, Gibson, Dunn & Crutcher, LLP, San Francisco, CA USA.

For Stuart Woolf, Defendant (2:09cv208): Charles Ralph Jaeger, William Silas Farmer, LEAD ATTORNEYS, Farmer Brownstein Jaeger LLP, San Francisco, CA USA.

For Bradley D. Sharp, Trustee (2:09cv208): Kathryn N. Richter, LEAD ATTORNEY, Richter ADR, LLC, Lafayette, CA USA.

For United States of America, Intervenor (2:09cv208): Anna Tryon Pletcher, LEAD ATTORNEY, O'melveny & Myers LLP, San Francisco, CA USA; Matthew Dean Segal, LEAD **[*12]** ATTORNEY, U.S. Attorney's Office, Sacramento, CA USA; Tai Snow Milder, LEAD ATTORNEY, Office of the Attorney General, San Francisco, CA USA; Barbara J. Nelson, United States Department of Justice, Antitrust Division, San Francisco, CA USA; Lara Meredith Kroop, GOVT, US Department of Justice, Antitrust Division, San Francisco, CA USA; Richard B. Cohen, Department of Justice/Antitrust Division, San Francisco, CA USA; Sean C. Flynn, United States Attorney's Office, Sacramento, Sacramento, CA USA.

For Cliffstar Corporation, Plaintiff (2:09cv442): Arthur N. Bailey, LEAD ATTORNEY, Hausfeld LLP, San Francisco, CA USA; Bruce L. Simon, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny, San Francisco, CA USA; Clifford Harris Pearson, LEAD ATTORNEY, Pearson, Simon, Warshaw and Penny, LLP, Sherman Oaks, CA USA.

For Bradley D. Sharp, Chapter 7 Trustee For SK Foods, LP, Defendant (2:09cv442): Gregory C. Nuti, LEAD ATTORNEY, Nuti Hart LLP, Oakland, CA USA.

For Bruce Foods Corporation, Neutral (2:09cv442): Roger M. Schrimp, Damrell Nelson Schrimp Pallios Pacher & Silva, Modesto, CA USA.

For Diversified Foods, Neutral (2:09cv442): Joseph R. Saveri, LEAD ATTORNEY, Joseph Saveri Law Firm, Inc., San Francisco, **[*13]** CA USA.

For L'Ottavo Ristorante, et Al., Neutral (2:09cv442): Jeff S. Westerman, LEAD ATTORNEY, Westerman Law Corp, Los Angeles, CA USA.

Judges: MORRISON C. ENGLAND, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: MORRISON C. ENGLAND, JR.

Opinion

ORDER

Counsel for Plaintiff Bruce Foods Corporation and Plaintiff Cliffstar Corporation[1] have filed a Motion requesting that the Court enter an order consolidating the above numbered and entitled lawsuits, pursuant to *Federal Rule of Civil Procedure 42(a)*,[2] into a single action. Plaintiff Four In One Company, Inc. joined in said Plaintiffs' request, and

---

[1] Cliffstar Corporation, whose lawsuit was filed on February 13, 2009, was not a party to the original Motion filed on behalf of Bruce Foods on or about January 23, 2009. The Reply Memorandum dated February 26, 2009, however, requests that the Cliffstar action, which has since been related to the other actions enumerated above, be included within the instant Motion to Consolidate.

Plaintiff Diversified Foods expressed its consent to consolidation for pretrial purposes, only. Defendants SK Foods, Ingomar Packing Company and Los Gatos Tomato Products have also filed statements indicating that they do not oppose limited pretrial consolidation at this stage of the litigation. Plaintiffs Morning Star Packing Company, et al., however, oppose consolidation on grounds that the other four lawsuits purport to be class actions instituted on behalf of purchasers of tomato products, whereas the Morning Star Plaintiffs sue Defendants as direct competitors claiming to be harmed by Defendants' alleged unlawful business practices in that capacity. The Morning **[*14]** Star Plaintiffs therefore claim that their issues differ from those of the class action Plaintiffs, and points to potential prejudice in the form of jury confusion should the actions be consolidated.

Factually, all five cases stem from alleged violations of ***antitrust law*** that arise from claimed anticompetitive conduct by numerous common defendants involved in the processed tomato products market. This Court has already determined that the cases are related in the sense that they involve similar questions of fact and of law.

"If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trail any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay. *Fed. R. Civ. P. 42(a)*. As long as actions involve the requisite common questions of law or fact, a court has broad discretion to consolidate in whole or in part cases pending within the same district. *Investors Research Co. v. United States District Court for the Central District of California, 877 F.2d 777 (9th Cir. 1989)*. Consolidation of appropriate cases not only enhances judicial efficiency by avoiding unnecessary duplication of evidence and procedures, but also guards against the risk of inconsistent adjudications. See *E.E.O.C. v. HBE Corp., 135 F.3d 543, 550-51 (8th Cir. 1998)*.

Here, it is uncontroverted **[*15]** that all five actions arise from the same Department of Justice investigation into anticompetitive conduct within the processed tomato industry. Consolidation may be proper in instances where numerous lawsuits arise from the same common nucleus of operative facts. See Team Enterprises, LLC v. Western Investment Real Estate Trust, 2008 WL 4712759, * 1-2 (E.D. Cal., Oct. 23, 2009) (consolidation appropriate where actions presented similar factual issues).

The Court must nonetheless weigh considerations of judicial convenience in this regard against any potential for delay, confusion and/or prejudice caused by consolidation. *Southwest Marine, Inc. v. AAA Machine Shop, Inc., 720 F. Supp. 805, 807 (N.D. Cal. 1989)*.

Given the factual dissimilarities between the Morning Star complaint and the four proposed class actions, as well as the additional claims pursued by Morning Star (including claims under both the Robinson-Patman Act and California statutory and common law), the Court agrees that consolidation of the Morning Star action with the other cases is inappropriate. Given those distinctions, prejudice could result from consolidation, both given the unique attributes of class action litigation not shared by the Morning Star allegations, and the fact consolidation could ultimately prove to be confusing to the trier of fact. Consequently the Motion to Consolidate is denied to the extent **[*16]** it encompasses Morning Star. Counsel for Morning Star are nonetheless directed to coordinate common discovery with the class action litigants to the extent that such coordination eliminates duplicative discovery proceedings.

With regard to the class action complaints, the parties on both sides agree that consolidation for pretrial purposes is indicated. The only disagreement concerns the question of whether or not consolidation for all purposes, including trial, should be ordered at this juncture.

As indicated above, Defendants SK Foods, Ingomar Packing Company and Los Gatos Tomato Products all advocate for only pre-trial consolidation, arguing that at this early stage of litigation consolidation for trial purposes could be premature. See, e.g., *Newmark v. Turner Broadcasting Network, 226 F. Supp. 2d 1215, 1223 n.8 (C.D. Cal. 2002)* (ordering consolidation of cases in early stages of litigation for discovery and pretrial purposes but reserving "for another day the issue of whether these actions should be consolidated for trial"); Schwarzer, et al.,

---

[2] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure, unless otherwise noted.

Federal Civil Procedure Before Trial, Chapter 16-C, § 16-156 (actions are sometimes consolidated only for pretrial purposes and not for trial).

Because consolidation for all purposes may be inappropriate should discovery reveal circumstances **[*17]** making a joint trial unfeasible, and because in the view of the Court there is no downside for deferring any final decision on complete consolidation until more complete information is obtained, the Court need not adjudicate at this time whether complete consolidation should be ordered.

Given the foregoing, then, Plaintiffs' Motion to Consolidate is GRANTED in part and DENIED in part.[3] The following cases are hereby consolidated, for pretrial purposes only:

1. Four in One Company, Inc. v. SK Foods, et al., Case No. 2:08-cv-03017-MCE-EFB;

2. Diversified Foods and Seasonings, Inc. v. SK Foods, et al., Case No. 2:08-03074-MCE-EFB;

3. Bruce Foods Corporation v. SK Foods, et al., Case No. 2:09-cv-00148-MCE-EFB; and

4. Cliffstar Corporation v. SK Foods, et al., Case No. 2:09-cv-00442-MCE-EFB.

Plaintiffs' Motion is DENIED, without prejudice to being renewed at a later time, to the extent it seeks consolidation for all purposes of the cases enumerated above. Finally, Plaintiffs' Motion to Consolidate is DENIED with respect to consolidation of said cases with The Morning Packing Co., et al., v. SK Foods, et al., Case No. 2:09-cv-00208-MCE-EFB.

Any scheduling orders entered in the actions enumerated **[*18]** as 1 through 4 in the preceding paragraph are vacated. Counsel in said cases are directed to submit a Joint Status Report not later than the earlier of sixty (60) days following the date of this Order, or sixty (60) days after a consolidated amended complaint is filed, should counsel choose to do so within the sixty (60) day period following the date of this Order.

IT IS SO ORDERED.

Dated: March 11, 2009

/s/ Morrison C. England, Jr.

MORRISON C. ENGLAND, JR.

UNITED STATES DISTRICT JUDGE

End of Document

[3] Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefing. E.D. Local Rule 78-230(h).

Parker v. Viacom Int'l, Inc.

United States District Court for the Eastern District of Pennsylvania

March 11, 2009, Decided; March 16, 2009, Filed

CIVIL ACTION NO. 08-3630

Reporter
605 F. Supp. 2d 659 *; 2009 U.S. Dist. LEXIS 20643 **

GORDON ROY PARKER, Plaintiff, v. VIACOM INTERNATIONAL, INC. et al., Defendants.

Core Terms

Lanham Act, false designation, alleges, seduction, Housing, pivot, contends, internet, advertising, plaintiffs', reasons, false advertising, violations, injuries, lack standing, use of a term, misleading, television, videotapes, Antitrust

LexisNexis® Headnotes

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

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

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept, as true, all allegations in the complaint and all reasonable inferences that can be drawn therefrom and view them in the light most favorable to the non-moving party. The court need not, however, credit either bald assertions or legal conclusions in a complaint when deciding a motion to dismiss. The factual allegations must be enough to raise the right to relief above the speculative level. Viewing the complaint in this manner, a court must dismiss a complaint if it fails to state a claim upon which relief can be granted.

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN2[] **Pro Se Litigants, Pleading Standards**

In cases involving pro se litigants, a court must liberally construe a pro se plaintiff's pleadings.

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

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

HN3[] **Federal Unfair Competition Law, False Advertising**

To have standing to assert a false and misleading advertising claim under the Lanham Act, a plaintiff must show that he has a reasonable interest to be protected against false advertising. The United States Court of Appeals for the Third Circuit has identified the following factors to consider in the determination of whether a plaintiff has a "reasonable interest": (a) the nature of the plaintiff's alleged injury; (b) the directness or indirectness of the asserted injury; (c) the proximity or remoteness of the party to the alleged injurious conduct; (d) the speculativeness of the damages claim; and (e) the risk of duplicative damages or complexity in apportioning claims.

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN4[] **Justiciability, Standing**

Standing consists of both constitutional and prudential components. Constitutional standing is derived from the U.S. Const. art. III case and controversy requirement and mandates that a plaintiff demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. Prudential standing is a set of judge-made rules which limit access to the federal courts to those litigants whose grievances fall within the zone of interests protected or regulated by the statutory provision invoked in the suit.

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

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

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

HN5[] **False Advertising, Elements of False Advertising**

Where plaintiffs allege a loss of sales at the retail level because of alleged false advertising, but do not allege an impact on the ability to compete, the harm alleged is not the type of injury that the Lanham Act seeks to prevent. The remoteness of the allegedly injurious conduct weighs against the right to sue where the defendant's conduct does not directly relate to the plaintiffs' alleged harm.

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

HN6[] **Federal Unfair Competition Law, Lanham Act**

The United States Court of Appeals for the Third Circuit has found that recognizing the right of all potentially injured parties in a distribution chain to assert standing under the Lanham Act will subject a defendant to multiple liability for the same conduct and will result in administratively complex damages proceedings.

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

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

HN7[] **Federal Unfair Competition Law, False Advertising**

The United States Court of Appeals for the Third Circuit has held that consumers whose purchases were influenced by false advertising lacked standing to sue under the Lanham Act where the defendants' conduct was not directly related to the consumers' injuries.

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

HN8[] **False Designation of Origin, Elements of False Designation of Origin**

To state a claim for false designation of origin under the Lanham Act, a plaintiff must show: (1) the defendant uses a false designation of origin; (2) that such use of a false designation occurs in interstate commerce in connection with goods and services; (3) that such false designation is likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval of the plaintiff's goods or services by another person; and (4) that the plaintiff has been, or is likely to be, damaged.

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

HN9[] **Federal Unfair Competition Law, False Designation of Origin**

For Lanham Act purposes, the phrase "origin of goods" is incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain. The United States Supreme Court has held that the "origin of goods" is the actual, tangible videotapes produced by a defendant, and not the ideas or concepts within those videotapes.

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

HN10[] **Federal Unfair Competition Law, False Designation of Origin**

The United States District Court for the Eastern District of Pennsylvania has held that, for Lanham Act purposes, a false designation of origin does not arise when a defendant publishes a textile book containing a plaintiff's copyrighted photographs. The court has found that the "origin of goods" is the actual book that the defendant compiled, rather than the plaintiff's photographs contained within it.

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

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

A Lanham Act claim for false designation of origin presupposes that the plaintiff has used the designation of origin in issue to identify the plaintiff's own goods or services.

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

HN12[] **False Designation of Origin, Elements of False Designation of Origin**

A Lanham Act false designation of origin claim fails when a plaintiff does not assert that the false designation is likely to cause confusion, mistake, or deception as to the origin of the plaintiff's goods.

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

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

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

HN13[] **False Advertising, Elements of False Advertising**

See *15 U.S.C.S. § 1125(a)(1)(B)*.

Business & Corporate Compliance > ... > Contractual Relations & Housing > Fair Housing Rights > Enforcement Actions

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Prohibited Conduct

HN14[] **Fair Housing Rights, Enforcement Actions**

Under the Fair Housing Act (FHA), *42 U.S.C.S. §§ 3601-3631*, discrimination is the sale or rental of housing is prohibited on the basis of race, color, religion, sex, familial status, or national origin. To assert a violation under the FHA, a plaintiff must show: (1) he is the victim of a discriminatory housing practice; (2) that makes unavailable or denies housing on account of a protected classification. *42 U.S.C.S. § 3604(a)*.

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

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

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN15[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act makes it unlawful to monopolize, or conspire to monopolize, interstate or international commerce. *15 U.S.C.S. § 2*. Liability under *§ 2* requires: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To support an inference of monopoly power, a plaintiff must allege that a firm has a dominant share in a relevant market and that significant entry barriers protect that market. Barriers may include such factors as regulatory requirements, high capital costs, or technological obstacles that prevent new competition from entering a market in response to a monopolist's supra-competitive prices. Anti-competitive conduct is defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Importantly, conduct that merely harms competitors, while not harming the competitive process itself, is not anti-competitive.

Counsel: **[**1]** GORDON ROY PARKER, doing business as SNODGRASS PUBLISHING GROUP, Plaintiff, Pro se, PHILADELPHIA, PA.

For VIACOM INTERNATIONAL, INC. d/b/a "VH-1" or "VH1", Defendant: JEANETTE MELENDEZ BEAD, LEAD ATTORNEY, LEVINE SULLIVAN KOCH & SCHULZ, L.L.P., WASHINGTON, DC.

Judges: EDUARDO C. ROBRENO, UNITED STATES DISTRICT JUDGE.

Opinion by: EDUARDO C. ROBRENO

Opinion

[*662] MEMORANDUM

EDUARDO C. ROBRENO, J.

Defendant Viacom International Inc. filed the instant motion to dismiss (doc. no. 4), arguing that Plaintiff failed to state a claim upon which relief can be granted. For the reasons that follow, Defendant's motion to dismiss will be granted. [1]

I. BACKGROUND

Pro se Plaintiff Gordon Roy Parker, an individual who currently residing in Pennsylvania, brings the instant action against Defendants, Viacom International Inc., Venusian Arts Corp. (hereinafter "VAC"), and Erik "Mystery" Von Markovik. Defendant Viacom International Inc. is a Delaware corporation with its principal **[**2]** place of business in New York, and the network on which the reality show, "The Pickup Artist" (hereinafter "TPUA") aired. Defendant Venusian Arts Corporation is headquartered in California, and provides information and live seminars on "dating" related advice. Defendant Von Markovic is an owner/ officer of Defendant VAC.

Defendant Viacom's reality television program, TPUA, debuted on August 5, 2007. [2] Plaintiff alleges violations of the Lanham Act, Fair Housing Act, and ***Antitrust law*** stemming from this television program. Specifically, Plaintiff's complaint contains five clusters of allegations:

1. *Misleading advertising under the Lanham Act*. This assertion is premised upon three misrepresentations: (a) Defendant Viacom lied about whether certain women in a dance club scene were paid actors; (b) one scene in a strip club was **[**3]** "completely fake;" and (c) Defendant Viacom overstated the social awkwardness of male contestants.

2. *False designations of origin under the Lanham Act*. Plaintiff contends that he is in the business of providing "seduction" advice to members of the public. In connection with this venture, Plaintiff authored a book entitled, "29 Reasons Not to Be a Nice Guy." Plaintiff asserts that he has "first use trademark" to the use of the term 'pivot,' as used in his book, in commerce related to "seduction" advice. Plaintiff contends that Defendants' use of the term constitutes false designations of the origin under the Lanham Act.

---

[1] As an alternative argument, Defendant contends that Plaintiff's complaint should be dismissed for violations of *Federal Rule of Civil Procedure Rule 8(a)*. Because the Court grants Defendant's Motion to Dismiss, the Court need not address Defendant's alternative argument.

[2] TPUA is an elimination-style reality show. Defendant Von Markovik instructs socially awkward male contestants how to meet women and challenges them to test their new skills on camera in various outings to clubs and bars. One contestant is eliminated in each episode; at the end of the season the remaining competitor is awarded the title of "Master Pick-Up Artist."

3. *Fair Housing Act violations*. Plaintiff alleges that Defendant Von Markovik posted disparaging messages about Plaintiff on the Internet and attempted to harass Plaintiff, "in the hope" that Plaintiff would move out of his residence and thereafter lose his internet access.

4. *Antitrust violations*. Plaintiff contends that Defendant Von Markovik won a battle among the seduction gurus and is now "abus[ing] their majority relevant market share."

[*663] 5. *Tortious Interference*. Plaintiff alleges that Defendants tortiously interfered with Plaintiff's housing contract.

II. DEFENDANT'S **[**4]** MOTION TO DISMISS

A. *Legal Standard - Pro Se Litigant*

HN1[] In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209, 216 (3d Cir. 2007)* (quotation omitted). The Court need not, however, "credit either bald assertions or legal conclusions in a complaint when deciding a motion to dismiss." *Id*. (quotation omitted). The "'[f]actual allegations must be enough to raise the right to relief above the speculative level.'" *Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 & n.3 (2007))*. Viewing the complaint in this manner, the Court must dismiss the complaint if it fails to state a claim upon which relief can be granted. ***HN2***[] In cases involving pro se litigants, the Court must "liberally construe" Plaintiff's pleadings. *Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003)*. [3]

B. *Analysis*

Defendant Viacom International Inc. filed the instant motion to dismiss, or in the alternative, motion for a more definite statement (doc. no. 4). Defendant addresses each of Plaintiff's claims in turn. Plaintiff has filed **[**6]** a response in opposition to this motion (doc. no. 7).

1. *False and Misleading Advertising Claim under the Lanham Act*

Defendant contends that Plaintiff's false and misleading advertising claims fail under the Lanham Act for three reasons: (1) Plaintiff lacks standing to bring a false and misleading advertising claim under this Act; (2) the alleged false statements at issue do not constitute commercial advertising or promotion; and (3) Plaintiff's alleged injuries are wholly speculative.

HN3[] To have standing [4] to assert a false and misleading advertising claim under **[*664]** the Lanham act, a plaintiff must show that he "has a reasonable interest to be protected against false advertising." *Thorn v. Reliance*

---

[3] Defendant points out that Plaintiff is a "serial litigator" who has brought a **[**5]** number of actions in the Eastern District of Pennsylvania. *See e.g., Parker v. Yahoo!, Inc*., No. 07-2757 (E.D. Pa) (alleging claims for copyright infringement, breach of contract, and negligence against Yahoo! and Microsoft arising from cached copies of plaintiff's USENET postings); *Parker v. Learn the Skills Corp*., No. 06-229 (D. Del.) (alleging antitrust and Lanham Act claims); *Parker v. Trustees of Univ. of Pennsylvania*, No. 05-4874 (E.D. Pa.) (alleging employment discrimination); *Parker v. Learn the Skills Corp*., No. 05-2752 (E.D. Pa.) (alleging antitrust and related claims); *Parker v. Google, Inc*., No. 04-3918 (E.D. Pa.) (alleging copyright infringement and Lanham Act claims against Google and 50,000 "John Doe" defendants); *Parker v. Learn the Skills Corp*., No. 03-6936 (E.D. Pa.) (alleging antitrust); *Parker v. Doe*, No. 02-7215 (E.D. Pa.) (alleging defamation); *Parker v. Univ. of Pennsylvania*, No. 02-567 (E.D. Pa.) (alleging employment discrimination).

[4] ***HN4***[] Standing consists of both constitutional and prudential components. Constitutional standing is derived from the Article III case and controversy requirement and mandates that a plaintiff "demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)*. In contrast, prudential standing is a set of judge made

Van Co., 736 F.2d 929, 933 (3d Cir. 1984). The Third Circuit identified the following factors to consider in the determination of whether Plaintiff has a "reasonable interest": (a) nature of plaintiff's alleged injury; (b) directness or indirectness of asserted injury; (c) the proximity or remoteness of the party to the alleged injurious conduct; (d) the speculativeness of the damages claim; and (e) the risk of duplicative damages or complexity in apportioning claims. Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233 (3d Cir. 1998) **[**7]** (citing Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 540, 542, 543, 544, 103 S. Ct. 897, 74 L. Ed. 2d 723)).

In *Conte*, the Third Circuit affirmed the district court's dismissal of plaintiffs' complaint, concluding that plaintiffs lacked standing to sue under the Lanham Act. Id. at 224. The plaintiffs in *Conte*, a nationwide class of retail sellers of motor oil, alleged violations of the Lanham Act caused by the false advertising of defendant, a company manufacturing **[**8]** Slick 50, a Teflon-based engine lubricant. [5] Plaintiffs contended that defendant's false advertising statements increased Slick 50 sales and decreased sales of competing products sold by plaintiffs. *Id*.

In deciding that plaintiffs lacked standing under the Lanham Act, the Third Circuit applied the above articulated factors to determine if plaintiffs had a "reasonable interest to be protected against false advertising." First, the court analyzed the nature of plaintiffs' injuries and noted that plaintiffs alleged a commercial interest but not a *competitive harm.* Id. at 234. Specifically, **HN5**[] the plaintiffs alleged a loss of sales at the retail level because of alleged false advertising, but did not allege an impact on the ability to compete; accordingly, the harm alleged was not the type of injury that the Lanham Act sought to prevent. Id. at 234-35. Second, the court found that the remoteness of the allegedly injurious conduct weighed against the plaintiffs' right to sue because the defendant's conduct did not directly **[**9]** relate to plaintiffs' alleged harm. Id. at 235. [6] Third, the court noted that the plaintiffs' injuries, "if not speculative, were certainly avoidable," because the plaintiffs could have adjusted their Slick 50 stock to fit the "artificially-increased popularity" of the product. *Id*. Finally, **HN6**[] the court found that recognizing the right of all potentially injured parties in the distribution chain to assert standing under the Lanham Act would subject the defendant to multiple liability for the same conduct and would result in administratively complex damages proceedings. *Id*. [7]

[*665] Similarly, here, Defendant argues that Plaintiff lacks standing to assert a cause of action in the instant matter. As previously detailed, Plaintiff alleges that Defendant committed three instances of false advertising: (a) Viacom lied about whether certain women in a dance club scene were paid actors; (b) a certain scene in a strip club was "completely fake;" and (c) Viacom overstated the social awkwardness of male contestants. Even assuming that these instances do in fact constitute false advertising, applying the factors articulated by the Third Circuit in Conte, Plaintiff has failed to establish standing to sue under the Lanham Act for several **[**11]** reasons.

---

rules which limit access to the federal courts to those litigants whose grievances fall within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Id*. Here, prudential standing is at issue.

[5] Specifically, in defendant's advertising material it stated, "one quart of Slick 50 substitutes for one quart of regular motor oil at the time of an oil change." Id. at 224.

[6] In reaching this conclusion, the court compared its decision in Serbin v. Ziebart Int'l Corp., 11 F.3d 1163 (3d Cir. 1993), where it held that the plaintiffs lacked standing to sue under the Lanham Act. In *Serbin*, **HN7**[] the Third Circuit held that plaintiff consumers whose purchases were influenced by false advertising lacked standing to sue under the Lanham Act because defendants' conduct was not directly related to plaintiffs' injuries. Id. at 1177. In *Conte* the Third Circuit commented that although the plaintiffs in *Serbin* ultimately lacked standing to sue, the *Conte* plaintiffs' injuries were even further attenuated **[**10]** from the *Conte* defendant's conduct than was the *Serbin* plaintiffs' injuries in comparison to the *Serbin* defendants' conduct. 165 F.3d at 235.

[7] The Third Circuit went on to state, "If every retailer had a cause of action for false adverting regardless of the amount in controversy, regardless of any impact on the retailer's ability to compete, regardless of any impact on the retailer's good will or reputation, and regardless of the remote nature of the injury suffered, the impact on the federal courts could be significant." Conte, 165 F.3d at 235.

First, similar to the insufficient commercial interest alleged by the *Conte* plaintiffs, here, Plaintiff alleges commercial interest in the "seduction education" industry, but fails to allege the required competitive harm caused by Defendant's actions. Second, like the remoteness of the alleged harmful conduct to the plaintiff's injuries in *Conte*, Plaintiff's injuries are remote as he has failed to state a direct connection between Defendants' false statements and his injuries. Finally, allowing Plaintiff to establish Lanham Act standing on these facts would raise the same administrative concerns expressed by the Third Circuit in *Conte*, as Defendants would face multiple liability for the same conduct. Accordingly, because Plaintiff lacks standing to assert this claim under the Lanham Act, his claim on this ground is dismissed.

2. *False Designation of Origin Claim*

Plaintiff argues that Defendant Viacom's unattributed use of the word "pivot" constitutes a claim for false designation of origin under the Lanham Act. According to Plaintiff, the term "pivot" describes a seduction technique, "a true 'gaming' tactic," that "any man can implement . . . with relatively equal effectiveness." **[**12]** Pl's Compl. at P 47. Plaintiff contends that he "debuted and defined both the term 'pivot' and the underlying concepts behind the theory in his 1999 book '29 Reasons Not to Be a Nice Guy.'" *Id*. at P 46. Defendant argues that Plaintiff has failed to allege the essential elements of a false designation of origin claim under the Lanham Act.

HN8[] To state a claim for false designation of origin under the Lanham Act, a plaintiff must show: (1) defendant "uses a false designation of origin;" (2) "[t]hat such use of a false designation occurs in interstate commerce in connection with goods and services;" (3) "[t]hat such false designation is likely to cause confusion, mistake or deception as to origin, sponsorship, or approval of [plaintiff's] goods or services by another person;" and (4) "[t]hat [plaintiff] has been or is likely to be damaged." *AT&T v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1428 (3d Cir. 1994)*. Plaintiff has failed to state any of the essential elements of this action.

First, the "false designation of origin" element is unsatisfied because Defendant is the producer or "origin of" TPUA, the good or service in question. Pursuant to Supreme Court precedent ***HN9***[] "the phrase 'origin **[**13]** of goods' is . . . incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody or contain." *Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003)*. In *Dastar*, the defendant allegedly copied content from plaintiffs' television series and repackaged the content as videotapes **[*666]** that it sold on its own. *Id*. The plaintiffs asserted that the sale of the videotapes, without proper credit to the television series, violated the false designation of origin prong. The Court held that because the "origin of goods" was the actual, *tangible* videotapes produced, and not the ideas or concepts within the videotapes, the plaintiffs' claim failed the "origin of goods" prong.

This principle was applied in *Schiffer Publ'g, Ltd. v. Chronicle Books, LLC, 350 F. Supp. 2d 613, 618 (E.D. Pa. 2004)*. In *Schiffer Publ'g*,***HN10***[] the court held that false designation of origin did not arise where the defendant published a textile book containing plaintiff's copyrighted photographs. *Id*. Determinative to the court's decision, the court found that the "origin of goods" at issue was the *actual book* that defendant publishers compiled, rather than the plaintiff's **[**14]** photographs contained within. *Id*.

Like the videotapes in *Dastar* and the textile book in *Schiffer Pub'g*, the "origin of the goods or services" at issue in the instant matter is Defendant's production of TPUA. Just as the plaintiff's television series in *Dastar*, and the plaintiff's photographs in *Schiffer Pub'g*, were component parts of the good or service at issue, Plaintiff's term "pivot" is a component part of TPUA, but not the "origin of good or service" itself. Accordingly, because Defendant's production of TPUA is the "origin of the good" at issue, rather than Plaintiff's term "pivot," Plaintiff failed to satisfy the false designation of origin element.

Second, the facts viewed in the light most favorable to Plaintiff do not satisfy the requirement that the party asserting copyright violation has "a valid and legally protectable mark." *Louis Vuitton Malletier & Oakley Inc. v. Veit, 211 F. Supp. 2d 567, 580 (E.D. Pa. 2002)*. Notably, ***HN11***[] a claim for false designation of origin presupposes the plaintiff has used the designation of origin in issue to identify the plaintiff's *own goods or services. A.J. Canfield Co. v. Honickman, 808 F.2d 291, 296 (3d Cir. 1986)*.

Here, Plaintiff alleges that **[**15]** he "has a 'first use trademark' to the use of the term 'pivot' in commerce related to seduction-advice, but then notes that the work has acquired a secondary meaning as applied to seduction. (Pl.'s Compl. at P 56 and 48). Importantly, Plaintiff does not allege that the secondary meaning in the industry is a mark to identify himself as the source of any goods or services that he manufactures or provides. Plaintiff's allegations undermine Plaintiff's conclusory claim that he has used the term as a trademark or that the term has acquired a secondary meaning.

Finally, even if the Court were to conclude that Plaintiff's use of the term "pivot" constituted a designation of origin, Plaintiff's ***HN12***[] claim still fails because Plaintiff did not assert that the false designation is "likely to cause confusion, mistake, or deception" as to the origin of Plaintiff's goods.

In *Parker v. Google, Inc*., Plaintiff brought a claim under the same theory which was rejected by the Third Circuit. *242 Fed. Appx. 833, 838*. There, Plaintiff also alleged that defendant Google republished "Ray FAQ," a website which contained defamatory comments about him. *Id*. Plaintiff asserted that Google users searching for Plaintiff's **[**16]** site would find "Ray FAQ" and believe that Plaintiff created the site. *Id*. However, because Plaintiff failed to allege a likelihood of confusion with respect to the origin of his seduction website, the Third Circuit held that dismissal of the claim was appropriate. *Id*. As in *Parker*, Plaintiff in the instant matter **[*667]** failed to allege how Defendant's use of the term "pivot" created any confusion to the origin of this term. Accordingly, Plaintiff's claim on this ground is dismissed. [8]

3. *Fair Housing Act Violations*

Defendant avers that Plaintiff has failed to state a claim for a violation of the Fair Housing Act. Plaintiff contends that Defendant Von Markovik, posted an internet link and exhibit which implied Plaintiff was mentally ill, disclosed his home address, and encouraged third parties to contact authorities about him. Because of these alleged **[**18]** internet posts, Plaintiff contends that Defendant aimed to "force him to move, in the hope Plaintiff would lose his internet access." (Pl.'s Compl. at P 134).

HN14[] Under the Fair Housing Act, discrimination is the sale or rental of housing is prohibited on the basis of race, color, religion, sex, familial status, or national origin. *42 U.S.C §§ 3601-3631*. To assert a violation under the Fair Housing Act, plaintiff must show: (1) he is the "victim of a discriminatory housing practice;" (2) "that make[s] unavailable or den[ies]' housing" on account of a protected classification. *42 U.S.C. § 3604(a)*. Here, Plaintiff has made no such claim. Rather Plaintiff describes Defendants' behavior as harassment, designed to make him lose access to the Internet.

4. *Antitrust Violations*

Plaintiff alleges that the migration of the "seduction community" from a newsgroup on USENET to a website owned by Learn the Skills Corporation caused Defendant Von Markovik to win the "mini war" among the gurus for the favor

---

[8] In addition, Plaintiff brought a disparagement claim under the Lanham Act. In relevant part, the Lanham Act provides, ***HN13***[] "[a]ny person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device . . . or false or misleading representation of fact which . . . in commercial advertising or promotion misrepresents the nature, characteristics, qualities, or geographic origin of . . . another person's goods, services or commercial activities, shall be liable in a civil action. . ." *Parker, 242 Fed. Appx. 833, 838-39 (3d Cir. 2007)* (quoting *15 U.S.C. § 1125(a)(1)(B)*).

Plaintiff alleges that Defendant Von Markovik directed non-party Derek Trust to post a comment **[**17]** and a link to a compressed or "zipped" document on the TPUA website. Pl's Compl. at § 114. The comment read: "Ray's books are free . . . he can't even give [them] away. He has to piggyback his garbage e-books on affiliate orders for The Game." *Id*.

In a previous case, Plaintiff raised a trade disparagement claim under the Lanham Act, citing disparaging statements about his seduction services. *Parker, 242 Fed. Appx. at 839*. Because Plaintiff did not purport that such statements were made in the context of commercial advertising or promotion, the Third Circuit upheld the District Court's dismissal of this claim. *Id.* Similarly, in the instant case, Plaintiff failed to assert that the alleged disparaging statement identified a proposed commercial transaction, and thus failed to state a disparagement claim under the Lanham Act.

of non-party Neil Strauss, which purportedly "shifted the balance of power in the community" to Defendant Von Markovik. Plaintiff also alleges that Defendants Von Markovik and VAC created an "affiliate **[**19]** program," through which Plaintiff asserts they "abused their majority relevant market share." [9]

Section 2 **HN15**[] of the Sherman Act makes it unlawful to monopolize, or conspire to monopolize interstate or international commerce. 15 U.S.C. § 2. Liability under Section 2 requires, "(1) the possession of monopoly power in the relevant **[*668]** market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); Schuylkill Energy Resources v. Pennsylvania Power & Light Co., 113 F.3d 405, 412-413 (3d Cir. 1997). To support an inference of monopoly power, a plaintiff must allege that a firm has a dominant share in a relevant market, and that significant "entry barriers" protect that market. Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005). Barriers may include such factors as "regulatory requirements, high capital costs, or technological obstacles that prevent new competition from entering a market in response to a monopolist's supracompetitive **[**20]** prices." Parker v. Learn the Skills Corp., 530 F. Supp. 2d 661, 677 (D. Del. 2008) (citing United States v. Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34, 51 (D.C. Cir. 2001)).

Anti-competitive conduct is defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. LePage's Inc. v. 3M, 324 F.3d 141, 169 (3d Cir. 2003). Importantly, conduct that merely harms competitors, while not harming the competitive process itself, is not anti-competitive. Parker, 530 F. Supp. 2d at 677 (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)).

Plaintiff brought a similar antitrust claim, premised upon market share abuse, which was rejected by the District of Delaware. Parker, 530 F. Supp. 2d at 661. In *Parker*, Plaintiff alleged that defendants created a market for seduction products and specifically prohibited anyone from dealing with him. *Id*. Specifically, Plaintiff alleged that defendants posted derogatory and hostile comments about him on USENET, instructed internet users to use software to avoid messages and information generated by plaintiff, and invited readers interested in seduction to visit a private message board hosted **[**21]** by defendant. Id. 669. Finding that Plaintiff failed to state an antitrust claim, the court held that although defendants' conduct may have harmed Plaintiff, it did not harm the competitive process as a whole. Id. at 677.

In the instant case, Plaintiff makes a virtually indistinguishable argument. Specifically, Plaintiff contends that Defendants attempted restrict the flow of information in the seduction industry, so as to divert internet traffic from Plaintiff's website. [10] Just as in Parker, here, Plaintiff alleges personal harm, but does not allege harm to the competitive process as a whole. Accordingly, for the reasons set forth in *Parker*, Plaintiff's claim on this ground is dismissed.

5. *Tortious Interference*

Plaintiff alleges that Defendants tortiously interfered with his housing contract. The Court is without jurisdiction over this claim for two reasons. First, Plaintiff's complaint is predicated upon federal question jurisdiction. Because Plaintiff's claims based on federal questions are dismissed, the Court will decline to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiff's tortious interference claims. Second, to the extent that the Court could **[**22]** exercise diversity **[*669]** jurisdiction over this claim, Plaintiff has failed to allege jurisdiction on this basis, or plead the necessary amount in controversy and citizenship requirements. Accordingly, because the Court does not have jurisdiction over this claim, Plaintiff's tortious interference claim is dismissed.

An appropriate order follows.

---

[9] Notably, Plaintiff did not name Viacom in this count.

[10] Plaintiff contends that Defendant Von Markovik created fastseduction.com, an alleged "seduction portal." Plaintiff asserts that Defendants used this site to restrict advertising in the seduction industry, and impair Plaintiff's access to the market.

ORDER

AND NOW, this **11th** day of **March 2009**, upon consideration of Defendant's Motion to Dismiss (doc. no. 4) and response thereto (doc. no. 7), it is hereby **ORDERED** that Defendant's Motion to Dismiss is **GRANTED**;

IT IS FURTHER ORDERED that as to Plaintiff's Counts I., II., III., IV., and V., Plaintiff's claims are dismissed on the merits. As to Plaintiff's Count VI, Plaintiff's claim is dismissed for lack of jurisdiction;

IT IS FURTHER ORDERED that the case shall be marked **CLOSED**.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno

EDUARDO C. ROBRENO, J.

[Warrior Sports, Inc. v. NCAA]

United States District Court for the Eastern District of Michigan, Southern Division

March 11, 2009, Decided; March 11, 2009, Filed

Case No. 08-14812

Reporter

2009 U.S. Dist. LEXIS 25700 *; 2009-1 Trade Cas. (CCH) P76,552; 2009 WL 646633

WARRIOR SPORTS, INC., and ATHLETE'S CONNECTION, INC., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Subsequent History: Affirmed by *Warrior Sports, Inc. v. NCAA, 2010 U.S. App. LEXIS 17650 (6th Cir.) (6th Cir. Mich., 2010)*

Prior History: *Warrior Sports, Inc. v. NCAA, 2009 U.S. Dist. LEXIS 7717 (E.D. Mich., Jan. 30, 2009)*

Core Terms

rule change, Sports, lacrosse, sticks, Sherman Act, measurements, competitors, heads, lacrosse stick, athletics, front, manufacturers, Pleadings, antitrust, effective, promise, intercollegiate, dimensions, fails

Counsel: **[*1]** For Warrior Sports, Incorporated, Athlete's Connection, Plaintiffs: Charles N. Ash, Jr., LEAD ATTORNEY, Warner, Norcross & Judd, Grand Rapids, MI; Jacob Joseph Sadler - NOT ADMITTED, Warner Norcross & Judd LLP (Grand Rapids), Grand Rapids, MI; Michael G. Brady, William R. Jansen, Warner, Norcross, Southfield, MI.

For National Collegiate Athletic Association, Defendant: David R. Grand, LEAD ATTORNEY, Gregory L. Curtner, Kimberly K. Kefalas, Robert J. Wierenga, Miller, Canfield, Ann Arbor, MI.

Judges: HON. MARIANNE O. BATTANI, UNITED STATES DISTRICT JUDGE.

Opinion by: MARIANNE O. BATTANI

Opinion

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Before the Court is Defendant the National Collegiate Athletic Association's ("NCAA") Motion for Judgment on the Pleadings. (Doc. 7). Plaintiffs Warrior Sports and Athlete's Connection filed a complaint alleging that the NCAA's act of changing the rules regarding the type of lacrosse sticks that are permitted in collegiate play gave rise to claims of (1) a federal ***antitrust law*** violation, (2) tortious interference with business relationships and expectancies, and (3) promissory estoppel. (Doc. 1). For the reasons that follow, the Court **[*2] GRANTS** the NCAA's Motion for Judgment on the Pleadings.

II. STATEMENT OF FACTS

This is a motion for judgment on the pleadings under *Federal Rule of Civil Procedure 12(c)*. Accordingly, because the Court, in deciding such a motion, must take all of the opposing party's well-pleaded allegations as true, the following facts are taken from Plaintiffs' complaint. See *Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 526 (6th Cir. 2006)*.

This is a case involving the NCAA's rules regarding the lacrosse stick heads that may be used in collegiate play. Plaintiffs allege that these rules are particularly influential because they not only govern the sticks that may be used in collegiate lacrosse, but they are also adopted by most of the sports' governing bodies, such as the National Federation of High School Sports.

Before September 2006, the NCAA had used the same rules regarding the allowable dimensions of lacrosse stick heads for 30 years. Manufacturers, including Warrior Sports, were able to submit their sticks to the NCAA to obtain confirmation that their sticks complied with the lacrosse rules, and Warrior Sports specifically notes that it did so in 2000. The pre-September 2006 rule only required **[*3]** that lacrosse heads be at least 6.5" at their widest point and 10" from top to bottom. In September 2006, the NCAA rules committee changed the rules ("2006 Rule Change"), effective January 1, 2009, as follows:

Measurement from throat of crosse	**Minimum distance between narrowest point on the crosse**
1.25"	2.75" (all measurements)
3"	3.25" (all measurements)
5"	4.25" front and 3.5" back
The widest point	6.5" front and 6" back

The NCAA claimed that it was changing the dimensions of the lacrosse stick head in order to promote free dislodgment of the ball during play. This rule would have rendered the vast majority of all current men's lacrosse heads illegal, including 14 of Warrior Sports' 15 lacrosse heads. Warrior Sports initiated a lawsuit over this rule change, but it subsequently withdrew the suit when the NCAA agreed to reconsider the 2006 rule change.

In September 2007, the NCAA rules committee adopted the following rules ("2007 Rule Change"), to be effective January 1, 2010:

Measurement from throat of crosse	**Minimum distance between narrowest point on the crosse**
1.25"	3" (all measurements)
3"	3" (all measurements)
5"4" front and 3.5" back	
The widest point	6.5" front and 6" back

This rule also would have **[*4]** rendered almost all current lacrosse heads illegal and, in particular, would have rendered all of Warrior Sports' heads illegal. In addition, the aforementioned specifications tracked designs patented by Warrior Sports. The NCAA claims that it discovered these patents after it adopted the 2007 Rule Change. Accordingly, the NCAA asked Warrior Sports whether it would be willing to license its intellectual property rights to other lacrosse manufacturers in connection with the 2007 Rule Change. The NCAA also asked to know the terms under which Warrior Sports would grant such licensing rights. Plaintiffs allege that this letter was an implicit threat that the NCAA would change the rules again to Warrior Sports detriment if Warrior Sports did not cooperate. Warrior Sports responded by claiming that it was inappropriate for the NCAA to be brokering deals between it and its competitors. Warrior Sports went on to indicate that it could not make a decision to license its intellectual property rights in the abstract because it made those decisions on a case-by-case basis.

The NCAA subsequently implemented the following rule change in February 2008 ("2008 Rule Change"), to be effective January **[*5]** 1, 2010:

Measurement from throat of crosse	**Minimum distance between narrowest point on the crosse**
1.25"	3" (all measurements)
3"	3" (all measurements)
5"	3.5" - 4" front and 3.5" back
The widest point	6" - 6.5" front and 6" back

This rule also would render all of Warrior Sports current lacrosse stick heads illegal. Plaintiffs claim that the NCAA enacted this rule in collusion with Warrior Sports' competitors. Plaintiffs allege that the rule changes by the NCAA will significantly inhibit competition and innovation in the lacrosse head market. In addition, Plaintiffs contend that the rule change will force lacrosse manufacturers to scrap their inventory, accept return of products from retailers, and retool their manufacturing process to produce new sticks.

III. STANDARD OF REVIEW

This Court will grant a *Rule 12(c)* motion for judgment on the pleadings "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Rawe, 462 F.3d at 526* (citation omitted). In reviewing such a motion, the Court construes the complaint in the light most favorable to the plaintiffs, accepts the complaint's factual allegations as true, and determines whether the plaintiffs **[*6]** can prove no set of facts in support of their claims that would entitle them to relief. Id.

IV. ANALYSIS

1. Antitrust Claims

The NCAA argues that Plaintiffs' antitrust claims fail because the lacrosse stick head rules are not commercial in nature and, therefore, not subject to antitrust scrutiny.

Section 1 of the Sherman Act states, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The Sixth Circuit has held that the actions of the NCAA are subject to the Sherman Act when the actions are "commercial in nature." *Worldwide Basketball & Sport Tours, Inc. v. NCAA (Worldwide Basketball), 388 F.3d 955, 958 (6th Cir. 2004)*. For example, in NCAA v. Board of Regents of Univ. of Okla., the Supreme Court held that the NCAA's restriction of the number of televised football games violated the Sherman Act. *468 U.S. 85, 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. The Court also noted, however, "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate **[*7]** athletics." *Id. at 117*. The court went on to distinguish the restriction on television broadcasts, which was at issue in that case, from, among other things, the "rules defining the conditions of the contest." Id. Likewise, in Worldwide Basketball, the Sixth Circuit held that an NCAA rule limiting the number of preseason tournaments that a school's basketball team could participate in was commercial in nature because the rule "has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters." *388 F.3d at 959*.

The Sixth Circuit also recently reaffirmed this principle when it held that the NCAA's imposition of sanctions, which made it difficult for a coach to obtain employment with NCAA schools, as a result of the coach's violation of NCAA recruiting and academic rules, did not constitute an antitrust violation. *Bassett v. NCAA, 528 F.3d 426, 429 (6th Cir. 2008)*. In that case, the Sixth Circuit indicated that it agreed with the district court's conclusion that the NCAA's enforcement of the rules at issue was not commercial activity because the rules "were **[*8]** intended to ensure fair competition in intercollegiate athletics." *Id. at 433*.

In order to establish a violation of the Sherman Act, a plaintiff must prove that the defendant unreasonably restrained trade in a relevant market. *NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)*. The reasonableness of a trade restraint is assessed using either a "*per se* rule" or a "rule of reason." Id. In this case, Warrior Sports does not contend that the *per se* rule applies. (See doc. 13 at 12). The rule of reason uses a burden-shifting framework that requires the court to analyze the history of the restraint and the restraint's effect on competition. See *NHL Players' Ass'n, 325 F.3d at 718*.

> First, the plaintiff must establish that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitive injuries. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must show that any legitimate objectives **[*9]** can be achieved in a substantially less restrictive manner.

Id. (quotation and citations omitted).

The NCAA's rule regarding the type of lacrosse equipment that may be used during play appears not to be subject to antitrust scrutiny, in and of itself, because, it is not "commercial in nature." *Worldwide Basketball, 388 F.3d at 958*. In particular, the rule does not directly relate to the NCAA's commercial or business activities. See *Bassett, 528 F.3d at 429*. As such, the rule is only directed towards increasing the quality of play in college lacrosse and, thereby, enhancing interest in intercollegiate lacrosse. See *Board of Regents of Univ. of Okla., 468 U.S. at 117* (stating that most of the NCAA's regulations are a "justifiable means of fostering competition among amateur athletic teams, [which] enhance[s] public interest in intercollegiate athletics."); *Bassett, 528 F.3d at 429* (holding that the NCAA's enforcement of rules that were intended to insure fair competition in intercollegiate athletics was not commercial activity).

This case is analogous to Adidas America, Inc. v. NCAA, where the district court found that a NCAA bylaw prohibiting manufacturer's logos that were larger than **[*10]** a specified size was noncommercial. *40 F.Supp.2d 1275, 1286 (D.Kan. 1999)*. The court first stated that the bylaw had noncommercial purposes and objectives. Id. The court went on to find that the bylaw did not confer any direct economic benefit upon the NCAA because, even though the bylaw did not restrict "NCAA Football" logos, there was no evidence that the NCAA was a competitor in the sports apparel market. Id.

Like the rule in *Adidas America, Inc.*, the rule relating to lacrosse stick heads has a noncommercial purpose--to promote free dislodgment of the ball. In addition, Plaintiffs do not allege that the NCAA is a competitor in the lacrosse stick market or that the rule at issue in this case confers any commercial benefit upon the NCAA. Accordingly, because the rule, in and of itself, is not commercial in nature, it is not inherently subject to challenge under the Sherman Act. See *Worldwide Basketball, 388 F.3d at 958*.

In this case, however, Plaintiffs allege that the 2008 Rule Change was enacted in collusion with Warrior Sports' competitors. Accepting this allegation as true, the 2008 Rule Change would be commercial in nature because Warrior Sports' competitors presumably sought to **[*11]** enact the rule in order to benefit commercially. To violate the Sherman Act, however, the 2008 Rule Change also must restrain trade or commerce. See *15 U.S.C. § 1*. As will be shown, the 2008 Rule Change does not constitute such a restraint.

Plaintiffs allege that only the 2008 Rule Change was enacted in collusion with Warrior Sports' competitors. The only way the 2008 Rule Change differed from the 2007 Rule Change was that it reduced the minimum dimension for the front of the stick head. Therefore, any stick that was permitted under the 2007 Rule Change is still permitted under the 2008 Rule Change. Furthermore, some sticks that were not previously permitted under the 2007 Rule Change will now be permitted under the 2008 Rule Change's reduced minimum dimensions. As such, the 2008 Rule Change does not violate the Sherman Act because it does not restrict trade or commerce. See *15 U.S.C. § 1*. Thus, Plaintiffs' Sherman Act claim fails due to the fact that the 2006 and 2007 Rule Changes were not subject to the Sherman Act, and the 2008 Rule Change does not restrict trade or commerce.

2. Tortious Interference claim

The elements of the tort of interference with an advantageous business relationship **[*12]** are (1) a valid business relationship or expectancy (2) known to the defendant who (3) engaged in intentional conduct (4) causing the disruption or termination of that relationship or expectancy resulting in (5) damages. *Ass'n Research & Dev. Corp. v. CNA Fin. Corp., 123 Mich. App. 162, 169, 333 N.W.2d 206 (Mich. Ct. App. 1983)*; *N. Plumbing & Heating, Inc. v. Henderson Bros., Inc., 83 Mich. App. 84, 93, 268 N.W.2d 296 (1978)*. In order to make out such a claim, a plaintiff must show either an act that is *per se* unlawful or a lawful act done with a malicious and unlawful purpose. *CMI Int'l, Inc. v. Intermet Int'l Corp., 251 Mich. App. 125, 131, 649 N.W.2d 808 (Mich. Ct. App. 2002)* (quotation omitted).

Although Plaintiffs allege that the NCAA colluded with Warrior Sports' competitors in adopting the 2008 Rule Change, Plaintiffs' allegations do not show that the adoption of the 2008 Rule Change was done with a malicious and unlawful purpose, because the only effect of the 2008 Rule Change was to increase the number of sticks that would be allowed under the NCAA's rules. Furthermore, as Plaintiffs do not allege that the NCAA adopted either the 2006 or 2007 Rule Changes in collusion with Warrior Sports' competitors, Plaintiffs' allegations **[*13]** also do not show that these rule changes were adopted with a malicious and unlawful purpose. Accordingly, Plaintiffs' tortious interference claim fails. See *id*.

3. Promissory Estoppel

The NCAA argues that Warrior Sports' claim fails because it has not alleged that the NCAA promised not to change the lacrosse stick dimension rules.

The elements of a promissory estoppel claim are:

(1) a promise,

(2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of promisee,

(3) which in fact produced reliance or forbearance of that nature, and

(4) in circumstances such that the promise must be enforced if injustice is to be avoided.

Ardt v. Titan Ins. Co., 233 Mich. App. 685, 692, 593 N.W.2d 215 (Mich. Ct. App. 1999).

Warrior Sports claims that the NCAA's act of allowing manufacturers to submit equipment for review constitutes a promise that approved equipment will be legal for play. This claim fails because the NCAA's act of reviewing proposed lacrosse sticks is, at most, a promise that approved sticks complied with the rules in effect at that time. The NCAA was not promising never to change its rules in a way that would make a previously approved stick **[*14]** illegal. Therefore, Warrior Sports' promissory estoppel claim fails. See id.

V. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment on the Pleadings is **GRANTED**.

/s/ Marianne O. Battani

MARIANNE O. BATTANI

UNITED STATES DISTRICT JUDGE

DATED: March 11, 2009

End of Document

Fairfax County Water Auth. v. City of Falls Church

Circuit Court of Fairfax County, Virginia

March 13, 2009, Decided

CL 2008-16114

Reporter
78 Va. Cir. 177 *; 2009 Va. Cir. LEXIS 17 **

Fairfax County Water Authority v. City of Falls Church.

Subsequent History: Findings of fact/conclusions of law at, Judgment entered by Fairfax County Water Auth. v. City of Falls Church, 2010 Va. Cir. LEXIS 10 (Va. Cir. Ct., Jan. 6, 2010)

Core Terms

residents, connect, demurrer, anticompetitive, expectancy, authorizes, developer, water service, limits, Antitrust, municipal, provide water, Monopolization, waterworks, locality, argues, service area, water line, geographic, parties

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN1[] **Defenses, Demurrers & Objections, Demurrers**

A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. The court must accept as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts. Even though a motion for judgment or a bill of complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

The state action doctrine applies principles of federalism to exempt state actions from liability under the federal antitrust laws. The Virginia Supreme Court has never applied the doctrine to claims made under state law.

Governments > Local Governments > Duties & Powers

HN3[] **Local Governments, Duties & Powers**

See Va. Code Ann. § 15.2-2109.

Governments > Local Governments > Duties & Powers

HN4[] Local Governments, Duties & Powers

See *Va. Code Ann. § 15.2-2111*.

Governments > Local Governments > Duties & Powers

HN5[] Local Governments, Duties & Powers

See *Va. Code Ann. § 15.2-2112*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN6[] Defenses, Demurrers & Objections, Demurrers

When a complaint is drafted so that a defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer.

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

HN7[] Intentional Interference, Elements

The elements of a claim for tortious interference with a business expectancy are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Governments > Local Governments > Ordinances & Regulations

HN8[] Local Governments, Ordinances & Regulations

When the primary purpose of a legislative act is to raise revenue, the act is a tax, regardless of the name applied to it. A municipal ordinance setting a fee for refuse collection and disposal is not an invalid revenue-generating device solely because the fee set by the ordinance generates a surplus. The relevant inquiry is whether there is a reasonable correlation between the benefit conferred and the cost exacted by the ordinance.

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

HN9[] Legislation, Interpretation

Whether an act is a "valid fee" or an "impermissible tax" does not depend on the label the parties apply to it. The analysis depends not only on the immediate cost of providing services, but may also may involve the retirement of debt incurred to build related infrastructure, and provision for future costs. The entire analysis is further affected by judicial deference for reasonable political and legislative judgments.

Headnotes/Summary

Headnotes

The state action doctrine applies principles of federalism in order to exempt state actions from liability under the federal antitrust laws, but it does not immunize a municipality from liability under the Virginia Antitrust Act.

A municipality may operate a waterworks outside its geographic limits without regard to anticompetitive effects only by agreement of the locality within whose geographic limits they are operating.

When the primary purpose of a legislative act is to raise revenue, the act is a tax, regardless of the name applied to it.

Counsel: **[**1]** Stuart Raphael, Esq., Hunton & Williams LLP, McLean, Virginia.

John E. Foster, Esq., City Attorney, Office of the City Attorney, Falls Church, Virginia.

Alexander Thomas, Esq., Reed Smith LLP, Falls Church, Virginia.

Judges: Jonathan C. Thacher.

Opinion by: Jonathan C. Thacher

Opinion

[*177] This matter came before the Court on the City's demurrer to the Water Authority's amended complaint. Having considered the pleadings and the written and oral arguments of counsel, the demurrer is overruled.

SUMMARY OF FACTS AS ALLEGED IN THE COMPLAINT

This is a dispute over municipal water service in the northeastern part of Fairfax County. In 1959 the parties entered into a thirty year agreement identifying exclusive service areas for provision of public water. The agreement permitted the City to provide water services for residents and businesses outside the City of Falls Church. The agreement established an exclusive service area for the City in the area of the County lying south and east of a line running (very roughly) north-northeast from the City of Fairfax to the Potomac, and lying to the north of a line running east from the **[*178]** City of Fairfax to Arlington County. [1] While the agreement was in effect the City developed a public water **[**2]** supply system capable of serving the entire area.

The agreement expired in 1989 and has not been renewed. Both parties currently provide water to businesses and residents in the area, although the Water Authority is not yet capable of providing water for the entire area. In addition to being the City's competitor, the Water Authority is also in some places its customer. The City runs its water service on a for-profit basis, and charges about twice the rate charged by the Water Authority. The City regularly transfers large profits from the water service into their general fund and uses the funds to provide other

[1] See Exhibit 1 to the complaint.

services to the residents of the City. Although they are not currently doing to, in the past they have charged County residents a higher rate than the rate they charge their own residents. They reserve the right to do so again in the future. About ninety percent of the City's customers are residents of Fairfax County, rather than of the City of Falls Church.

In an area known as the "Halstead Development", the location of the City's water lines interferes with construction of residential units. The developer wants to move the City's water lines, **[**3]** bearing the cost itself, and ensuring no adverse effect on service. Municipal authorities routinely consent to having their easements moved in the interests of permitting additional development so long as it does not interfere with services and is done at no cost to them.

The City has refused to allow the move unless the developer promises to connect the development exclusively to the City's water system. The developer would rather connect to the Water Authority's system because doing so permits them to pay less for the service. The Water Authority stands to lose about $ 7 million in assorted service fees and charges if the developer is forced to connect to the City's system. In addition to refusing to cooperate with reasonable requests to relocate water lines unless the developer agrees to forgo service from the Water Authority, the City has told citizens and businesses in the area that it has the exclusive right to provide water to them and has threatened them with civil or criminal sanctions if they attempt to connect to the Water Authority's system.

Although the Halstead development is the center of the instant dispute, the same issues will arise again and again as the Water Authority **[**4]** offers services to residents and businesses in the City's old exclusive service area. The City has no legal basis to threaten people with civil or criminal sanctions if they connect to the Water Authority's system, and has no valid reason to refuse to cooperate with the routine relocation of existing easements and water **[*179]** lines. The only reason they are doing so is to force residents and businesses to connect to their water system rather than the cheaper Water Authority system, resulting in a continuing stream of revenue for their general fund and lower taxes for the residents of the City.

Counts I & II of the complaint allege monopolization and attempted monopolization, in violation of the Virginia Antitrust Act. Count III was dismissed without prejudice by order of February 27, 2009. Count IV alleges tortious interference with a business expectancy. Count V alleges that the City's current practice of overcharging for municipal water service and transferring the profit to their general fund to subsidize other services in the City of Falls Church constitutes an unconstitutional extra-territorial tax.

The Water Authority seeks an injunction to prevent the City from threatening people and **[**5]** from using its existing easements as a weapon to force people to connect to its system. They further seek about $ 21 million in damages, and a judgment that the City's current practice of overcharging for water and transferring the profit into their general fund amounts to an unconstitutional extraterritorial tax. The City demurs to all counts.

ANALYSIS

HN1[] A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. The Court must accept as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts. *Glazebrook v. Bd. of Supervisors, 266 Va. 550, 554, 587 S.E.2d 589 (2003)*. "[E]ven though a motion for judgment or a bill of complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer." *CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 9 Va. Law Rep. 1421 (1993)*.

Counts I & II: Monopolization and Attempted Monopolization, Under the Virginia Antitrust Act

The City's primary argument is that the state action doctrine precludes liability for the conduct alleged here. The Court has examined the **[**6]** authorities cited by both sides, and holds that the state action doctrine does not immunize the City from liability under the Virginia Antitrust Act. The Court further holds that nothing in the statutory provisions cited by the parties authorizes the City to engage in anti-competitive behavior in the provision of municipal utility services in a neighboring municipality, without first obtaining the consent of the neighboring municipality.

[*180] As a preliminary matter, the Water Authority seeks relief under the Virginia Antitrust Act, rather than similar federal statutes. ***HN2***[] The state action doctrine applies principles of federalism to exempt state actions from liability under the *federal* antitrust laws. *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. Although honorable and esteemed courts cited by both parties have applied the federal doctrine to claims raised under state antitrust laws, the Virginia Supreme Court has never applied the doctrine to claims made under state law, and this Court declines to do so here. [2] Instead, the proper question is whether the City's actions are "authorized, regulated or approved…by a statute of this Commonwealth…" *Virginia Code §59.1-9.4(b)*.

The City argues that *Virginia Code §§15.2-2109* and *15.2-2111* provide authority to engage in anticompetitive conduct. The relevant portions of those sections provide:

> *Va. Code §15.2-2109*:
>
> ***HN3***[] Any locality may…acquire or otherwise obtain control of or…establish, maintain, operate, extend and enlarge: waterworks… and other public utilities within or outside the limits of the locality and may acquire within or outside its limits…whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending or enlarging waterworks…and other public **[**8]** utilities, and the rights-of-way, rails, pipes, poles, conduits or wires connected therewith, or any of the fixtures or appurtenances thereof. As required by *subsection C of § 15.2-1800*, this section expressly authorizes a county to acquire real property for a public use outside its boundaries.
>
> *Va. Code §15.2-2111*:
>
> ***HN4***[] Any locality may exercise its powers to regulate…water service notwithstanding any anticompetitive effect. Such regulation may include the establishment of an exclusive service area for any…water system, including a **[*181]** system owned or operated by the locality, the fixing of rates or charges for any…water service, and the prohibition, restriction or regulation of competition between entities providing…water service.

The City argues that *§15.2-2109* authorizes them to acquire and operate waterworks outside its limits, and that *§15.2-2111* authorizes them to regulate water service notwithstanding any anticompetitive effect. Ergo, they are authorized to operate a waterworks outside their limits notwithstanding any anticompetitive effect.

The Water Authority argues first that the provisions are distinct, and that the extraterritorial authority granted by *§15.2-2109* does not appear in *§15.2-2111*. **[**9]** They further argue that construing the two provisions as the City does renders other sections of the statute irrelevant, most notably *§15.2-2112*.

> *Virginia Code §15.2-2112*:
>
> ***HN5***[] Any two or more localities…may enter into agreements or contracts that create one or more exclusive service areas for the provision of…water service, that fix the rates or charges for any …water service provided separately or jointly by such entities, and that restrict or eliminate competition between or among such entities and any other public entity for the provision of sewage or water service.

---

[2] Along with a host of foreign **[**7]** authority, the City cites *Command Force Sec. v. City of Portsmouth, 968 F. Supp. 1069, 1074 (E.D. Va. 1997)* (citing ***Reasor v. Norfolk, 606 F. Supp. 788, 799 (E.D. Va. 1984))***; and *Hillman Flying Service, Inc. v. Roanoke, 652 F. Supp. 1142 (W.D. Va. 1987)*; as Virginia authority that the state action doctrine applies to claims made under the Virginia Antitrust Act. The City appears to misread these cases, which involve claims under both state and federal ***antitrust law***, but to the extent that the cases do hold that the state action doctrine applies to claims raised under the Virginia Antitrust Act, this Court declines to follow them.

The Water Authority argues that if the Legislature intended to authorize the City to operate waterworks outside their geographic limits without regard to anticompetitive effect, the Legislature would not have enacted *§ 15.2-2112*, authorizing localities to enter agreements permitting one another to do exactly that. Instead they argue that the statute should be construed to permit the City to operate waterworks outside its geographic limits without regard to anticompetitive effect only by agreement of the locality within whose geographic limits they are operating. Because the 1959 agreement to that effect expired, and has not **[**10]** been renewed, the City's anticompetitive acts are not authorized by statute.

The Court finds the Water Authority's construction to be the reasonable one. It recognizes and respects each local government's right to exercise the authority granted them by the statute within their own geographic limits. It also strives to avoid wasteful and costly legal conflicts between local governments. In addition, the City's construction leads to significant difficulties in application. If the code sections the City cites authorize the City to monopolize water service in neighboring Fairfax County, what precludes **[*182]** the City from monopolizing water service in Norfolk, or Richmond, or Bristol? This Court cannot recognize such a sweeping claim of authority without a clearer statement of intent from the legislature, or additional guidance from the Virginia Supreme Court.

The City next argues that even if their actions are not authorized by statute, the demurrer must be sustained because the Water Authority has not properly pled an antitrust violation. That argument fails because the complaint pleads particular facts such that the City cannot mistake the nature of the claim. ***HN6***[] When a complaint is drafted so **[**11]** that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer. *CaterCorp, 246 Va. at 24*. The City's remaining arguments fail because they all rest on the assumption that the City's conduct is authorized by statute. That assumption is not true for the reasons already stated. The demurrer to Counts I and II is overruled.

Count IV: Tortious Interference With a Business Expectancy

HN7[] The elements of a claim for tortious interference with a business expectancy are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Chaves v. Johnson, 230 Va. 112, 120, 335 S.E.2d 97 (1985)*. The City's argument focuses on the first and third elements.

The City attacks the complaint's allegation of a valid business expectancy on the grounds that the development was contingent on the City agreeing to the relocation of its water lines. Any expectation by the Water Authority **[**12]** that the City would agree to permit the relocation is unreasonable because the City stands to gain nothing by offering its agreement. The Water Authority's expectation is even more unreasonable knowing that the City views any expansion of service by the Water Authority as a financial threat, and that the City has told developers that it is "looking to protect its service boundaries." [3] Finally, the expectation is unreasonable because the Water Authority knows that "the City has the right to provide water service without regard to its anticompetitive effects."

The City goes on to argue that even if a valid expectancy existed, the Water Authority cannot show any breach of the agreement between the developer and the Water Authority. There is no breach because the developer **[*183]** still has the ability to build on the site. They need merely redesign the development to build around the City's easements, and they can connect to whatever water supply they wish.

The City's arguments fail for three reasons. First, many of their arguments rest explicitly on the erroneous assumption that the Virginia Code authorizes them to act outside their geographic limits without regard **[**13]** to anticompetitive effect. Second, the allegation that the developer must either breach its agreement with the City or build significantly fewer units is a sufficient allegation of breach, and of damages. Finally, the arguments related to the validity of the Water Authority's expectations rest on the Authority's knowledge of the City's naked threat to use

[3] Defendant's Memorandum at 16.

any means at its disposal to "protect their service boundaries." This argument appears to be entirely without merit because the City's alleged means include improper means, such as falsely threatening with criminal and civil sanctions those residents who wish to connect to the Water Authority's service; and misrepresenting to residents that the City has the exclusive right to provide water service. The demurrer to Count IV is overruled.

Count V: Unconstitutionality of the City's Rates and Fees

HN8[] When the primary purpose of a legislative act is to raise revenue, the act is a tax, regardless of the name applied to it. *Marshall v. Northern Va. Transp. Authority, 275 Va. 419, 431, 657 S.E.2d 71 (2008)*. "[A] municipal ordinance setting a fee for refuse collection and disposal is not an invalid revenue-generating device solely because the fee **[**14]** set by the ordinance generates a surplus. The relevant inquiry…is whether there is a reasonable correlation between the benefit conferred and the cost exacted by the ordinance." *Mountain View Partnership v. Clifton Forge, 256 Va. 304, 312, 504 S.E.2d 371 (1998)*. [4]

The City argues that the fees charged to Fairfax County residents for water services cannot be a tax, because they are in the nature of a contractual obligation and residents are under no legal obligation to hook up to or accept the services. In fact they point out that the Water Authority contends that residents are under no obligation to connect to the City's service and are free to choose the Water Authority's service. In addition, the Virginia Supreme Court has repeatedly upheld public utility service fees against constitutional **[*184]** challenges. The Water Authority counters that in Fairfax **[**15]** County residents and businesses are required by law to connect to a public water system if one is available, that in some areas of the county the City's service is the only one available, and that the City's fees far exceed the cost of providing the service.

While this area of the law appears to have a number of uncertainties, it is clear that *HN9*[] whether an act is a "valid fee" or an "impermissible tax" does not depend on the label the parties apply to it. *Marshall, 275 Va. at 419*. The analysis depends not only on the immediate cost of providing services, but may also may involve the retirement of debt incurred to build related infrastructure, and provision for future costs. The entire analysis is further affected by judicial deference for reasonable political and legislative judgments. *See, Mountain View Partnership, 256 Va. at 304*.

None of these factors can be properly assessed on demurrer. If, as alleged, Fairfax County residents are required by law to use the City's service, and if the City overcharges residents of Fairfax County to subsidize the cost of providing other services to residents of Falls Church, this Court cannot say as a matter of law that their conduct is immune from **[**16]** constitutional challenge. The demurrer to Count V is overruled.

CONCLUSION

The demurrer is overruled in its entirety.

/s/ Jonathan C. Thacher

Jonathan C. Thacher

End of Document

---

[4] The Water Authority cites a number of cases that address regulatory license fees rather than service fees. *See, e.g. County Bd. Of Supv'rs v. Am. Trailer Co., 193 Va. 72, 68 S.E.2d 115 (1951)*, *City of Va. Beach v. Va. Rest Ass'n, 231 Va. 130, 341 S.E.2d 198 (1986)*. While these cases are informative, they do not appear to be controlling here.

FTC v. CCC Holdings Inc.

United States District Court for the District of Columbia

March 18, 2009, Decided; March 18, 2009, Filed

Civil Action No. 08-2043 (RMC)

Reporter

605 F. Supp. 2d 26 *; 2009 U.S. Dist. LEXIS 21784 **; 2009-1 Trade Cas. (CCH) P76,544

FEDERAL TRADE COMMISSION, Plaintiff, v. CCC HOLDINGS INC., et al., Defendants.

Subsequent History: Counsel Corrected May 11, 2009

Prior History: FTC v. CCC Holdings Inc., 2009 U.S. Dist. LEXIS 134316 (D.D.C., Jan. 30, 2009)

Core Terms

Estimatics, merger, products, customers, redacted, insurance company, repair, FTC, database, prices, markets, software, barriers, coordination, facilities, effects, total loss, valuations, insurers, costs, firms, competitors, estimating, merging, predict, concentration, market share, entrants, calculations, switching

Counsel: **[**1]** For FEDERAL TRADE COMMISSION, Plaintiff: J. Robert Robertson, Casey Richard Triggs, LEAD ATTORNEYS, Kyle D. Andeer, Sean D. Hughto, Victoria Lynn Lippincott, Abigail Slater, Angelike Andrinopoulos Mina, Catharine Mary Moscatelli, David Morris, Donald Robinson Gordon, Eric Matthew Sprague, Kyle E. Chadwick, Michael Anthony Franchak, Sebastian Lorigo, Steven Wilensky, FEDERAL TRADE COMMISSION, Washington, DC.; Eric D. Edmondson, Kenneth H. Abbe, FEDERAL TRADE COMMISSION, San Francisco, CA;

For CCC HOLDINGS INC., Defendant: John A. Herfort, LEAD ATTORNEY, Richard L. Falek, Stacey A. Mahoney, PRO HAC VICE, GIBSON, DUNN & CRUTCHER, L.L.P., New York, NY; Michael L. Denger, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, LLP, Washington, DC.

For AURORA EQUITY PARTNERS, III L.P., Defendant: Richard G. Parker, LEAD ATTORNEY, Darren Scott Tucker, Katrina M. Robson, PRO HAC VICE, O'MELVENY & MYERS LLP, Washington, DC; Andrew J. Frackman, Mark S. Germann, PRO HAC VICE, Michael E. Antalics, O'MELVENY & MYERS, LLP, New York, NY.

For SOLERA HOLDINGS, INC., AUDATEX, Interested Parties: Arman Y. Oruc, LEAD ATTORNEY, SIMPSON THACHER & BARLETT, LLP, Washington, DC; Aimee H. Goldstein, John C. Briody, **[**2]** Timothy J. Cornell, PRO HAC VICE, SIMPSON, THACHER & BARTLETT, New York, NY.

Judges: ROSEMARY M. COLLYER, United States District Judge.

Opinion by: ROSEMARY M. COLLYER

Opinion

[*30] MEMORANDUM OPINION

[1]

American drivers make nearly twenty-five million automobile insurance claims each year and insurers, in turn, spend an estimated $ 100 billion annually to cover those claims. Most insurers and automotive repair shops use specialized computer software to estimate the cost of repair or the value of replacement in the event of a total loss. These software systems play a critical role in the automotive repair industry. CCC Information Services, Inc. ("CCC") and Mitchell International, Inc. ("Mitchell") are two of the largest **[**3]** companies in these markets. Audatex North America, Inc. ("Audatex"), formerly ADP Claims Services Group, is the one other significant competitor for sales of partial loss estimating and total loss valuation software. [2]

CCC is a wholly owned subsidiary of CCC Holdings Inc. ("CCC Holdings"), a for-profit corporation, existing and doing business under the laws of Delaware, and headquartered in Chicago, Illinois. CCC Holdings is principally owned by Investcorp, S.A. ("Investcorp"), a private equity firm with more than $ 15 billion under management, and funded primarily by investors in Saudi Arabia. The majority owner of Mitchell is Aurora Equity Partners III, L.P. ("Aurora"), a private equity firm based in Los Angeles, California, which has approximately $ 2 billion of assets.

On April 2, 2008, Defendants CCC Holdings and Aurora entered into a Restructuring Agreement ("Restructuring Agreement") which contemplates a $ 1.4 billion "merger of equals" between CCC and Mitchell to be effected no later than March 31, 2009. PX 786. [3] The Federal Trade Commission ("FTC" **[**4]** or "Commission"), through its Bureau of Competition, seeks to preliminarily enjoin the pending transaction, positing that a 3-to-2 merger in the partial loss and total loss software markets would obviously and substantially harm competition. The Court finds the evidence more complicated and uncertain. Nonetheless, because the FTC has "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals," *FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 714-15 (D.C. Cir. 2001)* (internal quotations omitted); *see also FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)* (Brown, J.); *id. at 1042* (Tatel, J., concurring), the Court will issue the requested injunction.

I. [**5] PROCEDURAL HISTORY

On November 25, 2008, the FTC found that it had "reason to believe" that the **[*31]** proposed merger would violate the antitrust laws, specifically Section 7 of the Clayton Act, *15 U.S.C. § 18*, and issued an administrative complaint challenging the proposed merger. At the same time, the Commission, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. § 53(b)*, and Section 16 of the Clayton Act, *15 U.S.C. § 26*, authorized the Bureau of Competition to file the instant Complaint to petition the Court for a temporary restraining order and a preliminary injunction to preserve the status quo pending an administrative adjudication before the FTC; that trial is scheduled to commence no later than March 31, 2009, and the FTC has committed to rendering a final opinion within 90 days of an initial decision by the Administrative Law Judge. *See* FTC Press Release (Nov. 25, 2008). The merging parties suggest they will abandon the merger if an injunction issues, in part because financing would be too difficult to maintain during the administrative process. The Court held a total of nine days of evidentiary hearings and legal argument. The parties submitted **[**6]** approximately 15 boxes of documentary evidence, including documents obtained through discovery and deposition and FTC Investigation Hearing ("IH")

---

[1] This Memorandum Opinion was provided to the parties in final form on March 9, 2009, but public release was delayed to ensure that no confidential business information that had been submitted under seal was being released. Based on input from Defendants and certain interested third parties, some competitively sensitive information has been redacted and other minor adjustments have been made to the opinion. The phrase "[Text redacted]" has been inserted to signify where text has been redacted from the opinion.

[2] Audatex is a subsidiary of Solera Holdings, Inc. ("Solera"), a publicly-traded holding company based in San Diego, California.

[3] Technically, Mitchell's holding company would be merged into CCCM Parent (DE), Inc., a Delaware corporation, which, through a series of pass-through entities, would be held primarily by Investcorp and Aurora, as well as by the managing shareholders of CCC Holdings and Mitchell, and a mezzanine fund established by Goldman Sachs. PX786-018-019.

transcripts, as well as nearly 300 pages of findings of fact and two rounds of highly refined and informative legal briefing.

II. FACTS

There are millions of accidents each year on roads across the United States. If the drivers in those accidents are insured, they file an insurance claim. This leads to an assessment of the extent of the damage to the automobile and an estimate of the cost of parts and labor needed to effect repairs, or if too expensive, replace the vehicle.

A. The Products

1. Estimatics

Costs for repair of damaged vehicles, or partial loss claims, account for well over $ 30 billion in insurance claims payments annually. *See* PX 256-003 (CCC). [4] Performing partial loss estimations was once a manual process. The appraiser or claims adjuster would rely on information from published sources and perform the calculations either by hand or with a desk calculator. PX 1020 P 27 (Hayes Prelim. Report). Today, all major automobile insurers and the vast majority of the approximately 45,000 repair facilities subscribe to one or more estimating **[**7]** software products ("Estimatics"). PX 514-013, 015 (Mitchell); PX 531-001 (Mitchell); *see also* PX 6 P 3 (Mello Decl., Anderson Behel Body Shop); PX 10 P 2 (Dorn Decl., Dorn's Body & Paint). These products are much faster than manual calculations, permit analysis of more kinds of information, and are considered more reliable, consistent, and accurate. *See, e.g.*, PX 14 P 4 (Brandt Decl., Hartford Fire Ins. Co. ("The Hartford")); PX 13 P 3 (Hall Decl., GMAC); PX 20 PP 3-4 (Rollins Decl., Safeco Ins. Cos. ("Safeco")); PX 28 P 3 (Wilson Decl., The Hanover Ins. Group, Inc. ("Hanover")); PX 27 P 3 (Danford Decl., Ohio Mutual Ins. Group ("Ohio Mutual")); PX 11 P 3 (Brown Decl., Erie Ins. **[*32]** Group ("Erie")); PX 30 P 4 (Starnes Decl., State Farm Mutual Auto. Ins. Co. ("State Farm")). Estimatics products consist of three main components: (1) a spreadsheet that tracks the line items that are a part of a vehicle repair estimate, (2) the database from which parts and labor costs are pulled, and (3) the software that calculates the total cost of repair, taking into consideration overlap times (such as the need to remove a bumper only once to perform two repairs behind or to the bumper). PX 1020 P 12 (Hayes Prelim. Report) **[**8]** (citing Ramamurthy IH Tr. (7/22/08) at 198-200).

There are presently five companies in the United States that sell Estimatics: CCC, Mitchell, Audatex, Web-Est LLC ("Web-Est"), and Applied Computer Resources, but the three major competitors in the Estimatics market today are CCC, Audatex and Mitchell, which collectively hold the lion's share of the market -- approximately 99% [5] -- thus earning the nickname, the "Big Three." *See* PX 1020, Exs. 2-3 (Hayes Prelim. Report); *see also* PX 1028-004 (Web-Est). [6] There are two types of Estimatics products: **[**9]** communicating and non-communicating products. Communicating Estimatics tools are used by insurance companies and repair facilities that are part of a direct repair program ("DRP"), whereas non-communicating estimating tools are used by low-end repair facilities that are not

---

[4] Citations to the trial record are in the following form: references to Plaintiff's exhibits--"PX __ ([Company])"; references to Defendants' exhibits--"DX __ ([Company])"; references to the preliminary injunction hearing transcript--"[Name], Tr. ([Date]) at [page]:[line] ([Company])"; references to the FTC IH transcripts--"[Name] IH Tr. at [page] ([Company])"; references to deposition designations--"[Name] Dep. at [page] ([Company])"; references to Plaintiff's Findings of Fact--"PFF P [__]"; references to Defendants' Findings of Fact--"DFF P [__]". Citations may deviate from these formats as necessary to protect commercially sensitive information.

[5] Unless otherwise indicated, market shares approximate 2007 data, and are not current.

[6] Audatex also has a substantial global footprint, operating in approximately fifty-one countries across six continents. Including its international operations, Audatex is **[**10]** the largest Estimatics company in the world, and is twice the size of its nearest competitor. *See* PX 89-013 (Audatex).

part of a DRP. A DRP is a network of strategic alliances between an insurance company and the repair facilities with which it frequently does business. Communicating products allow insurance companies and DRP repair facilities to instantaneously relay information about the status of partial loss claims through specialized communication links, while non-communicating products do not have this capacity. *See* PX 1020 P 12 (Hayes Prelim. Report); DX 644, App. 2 P 7 (Ordover Coordinated Interaction Report). CCC, Mitchell and Audatex primarily sell communicating Estimatics products. Web-Est and Applied Computer Resources currently sell only non-communicating products.

CCC's core communicating Estimatics offering is called Pathways, but it also offers a low-end, non-communicating tool called Comp-Est which it markets to the independent repair facility segment. PX 86-008, 056 (CCC). [7] To procure the parts and labor data for its Estimatics product, CCC obtained an exclusive license to the Hearst Business Publishing, Inc. "Motor" database in 1998. PX 25 P 22 (Carr Decl., Motor Information Systems ("Motor")). [Text redacted.]. Mitchell's communicating Estimatics product is UltraMate, although it also sells a low-end product called Repairmate. PX 680-004-005 (Aurora). Audatex's Estimatics product is called Audatex Estimating. Unlike CCC, both Audatex and Mitchell have their own proprietary databases, which were developed over many years.

The Estimatics providers generally charge their customers on a per user basis. Currently, the predominant medium for Estimatics software installation is a CD or DVD; monthly software updates must be sent to clients and re-installed on their systems. Web-Est, **[**11]** however, offers a **[*33]** Web-based non-communicating Estimatics product. [8] Seidel, Tr. (1/22 p.m.) at 165:18-22, 167:7-8 (Web-Est). It currently licenses Mitchell's database under restrictive conditions which prohibit it from selling to the top fifty insurance companies, from selling communicating Estimatics products to insurance companies or repair facilities, and from integrating with other third-party service providers, such as parts locators, salvage, and other providers. *See* DX 59 (Mitchell-Web-Est License Agreement); Seidel, Tr. (1/22 p.m.) at 173:24-174:13 (Web-Est). This restrictive license effectively precludes Web-Est from selling to most insurance companies and DRP repair facilities.

2. TLV

Some accidents may prove to be so costly that the insurer will declare the automobile a total loss because the estimated cost of repair approaches or exceeds the vehicle's value. In such situations, the insurance company will calculate the replacement cost of the automobile, as it existed before the accident, based on model, make, upgrades, condition, mileage, etc., and pay the policyholder the vehicle's replacement **[**12]** cost. [9] As with estimating repair costs, the total loss valuation process was once done only by hand. Today there are several different methodologies and tools for insurance companies to calculate total loss. One option is the "book" providers -- NADA Appraisal Guides ("NADA"), the Kelley Blue Book, the Red Book, and the Black Book (collectively "the Books") -- whose reports are based on local or regional values. Brungger IH Tr. at 121-22 (Mitchell); Linder IH Tr. at 43, 46 (Mitchell); Marushka IH Tr. at 18, 29-30 (CCC). These products are available in hard copy and many are available electronically; the electronic versions are updated more frequently than the printed Books. A number of insurance companies perform some or even most of their total loss valuations in-house using a combination of the Books and market research conducted by internal staff in order to obtain a more accurate and localized valuation than the Books can provide alone. Most insurers, however, use total loss software systems ("TLV") which contain comprehensive databases of vehicle sales information that is regularly compiled from numerous sources and hundreds of localities. *See* PX 680-007-010 (Aurora); PX 86-008 **[**13]** (CCC). The TLV software products provided by CCC, Mitchell and Audatex account for more than 90% of all total loss valuations. PX 513-016 (Mitchell); PX 548-007 (Mitchell). Other providers of total loss services include AutoBid and Vehicle Valuation Services ("VVS"). VVS is a software product that is used mostly for specialty vehicles such as commercial trucks

---

[7] CCC acquired Comp-Est in 2003. PX 86-013 (CCC).

[8] Audatex also has begun offering a web-based product. *See* DX 225-33-35 (Audatex).

[9] Insurers will usually replace the damaged vehicle if the cost of repair approaches around 65 to 75% of the vehicles's value. Brungger IH Tr. at 118 (Mitchell).

and classic cars, and for a limited number of non-specialty vehicles as an accommodation to existing clients. *See* PX 401 PP 3, 5 (Blitstein Decl., VVS).

Until recently, CCC and Audatex were the only providers of TLV. However, Mitchell successfully entered the TLV market in 2005 after two previous failed attempts. CCC's TLV product is called ValueScope Salvage Solutions. PX 256-039, 046 (CCC). Mitchell's TLV product is called WorkCenter Total Loss, and Audatex's product is called Autosource.

B. Marketplace Dynamics

In addition to Estimatics and TLV, CCC, Mitchell and Audatex sell a number **[*34]** of other automotive damage products, including workflow management products, business **[**14]** intelligence products, and repair facility or shop management software. DX 82 (CCC); PX 560-031 (Mitchell). [10] Mitchell also sells an auto injury estimating, or "medical" product; it is the only of the Big Three companies that offers a medical product. *See* PX560-031-032 (Mitchell). Insurance companies often purchase a suite of products from one vendor. These "bundles" usually include a core Estimatics product and several add-on products, such as digital imaging, shop management, aftermarket parts data, workflow, and total loss valuation. Conway, Tr. (1/9) at 92:1-18 (Audatex); *see also* PX 680-007-008, 010 (Mitchell); PX 86-008-009 (CCC); PX 244-062 (CCC); PX 763 (Mitchell). Contracts for DRP repair facilities also often consist of bundles, including the base Estimatics product and a variety of add-ons. Conway, Tr. (1/9) at 111:9-13 (Audatex); DX 47 (Mitchell); DX 98 (CCC). Independent repair facilities tend to purchase only the core estimating product.

The buyers of Estimatics are insurance companies and auto **[**15]** repair facilities, while only insurance companies buy TLV products. Repair facilities account for about 60% of Estimatics revenues, while insurers account for the other 40%. *See* PX 1020, Ex. 2 (Hayes Prelim. Report). Insurers negotiate longer term contracts with Estimatics and TLV systems suppliers -- generally two to five years. Sun, Tr. (1/9) at 96:16-20 (Mitchell). In a typical year, approximately 100 insurance company accounts come up for renewal. Brungger IH Tr. at 185-86 (Mitchell). These contracts can cost anywhere from a few thousand dollars per year for a small insurer to several million dollars per year for a large insurer. Conway, Tr. (1/9) at 94:22-95:4 (Audatex); DX 13 P 69 (Hayes Prelim. Report); *see, e.g.*, DX 252-4, 53 (five-year, multimillion dollar contract with CCC). Most of these insurance contracts are obtained through a secret bidding process whereby the insurance company submits a request for proposal ("RFP") to the bidders in which it seeks information on the bidder's proposed prices and product bundle options. RFPs are usually accompanied by a non-disclosure agreement, Sun, Tr. (1/9) at 51-52, 46-47 (Mitchell); Brandt, Tr. (1/8 a.m.) at 23 (The Hartford), and **[**16]** therefore are not supposed to be shared with the bidder's competitors. Repair facility contracts are also intended to be confidential. *See, e.g.*, Cheskis, Tr. (1/23 a.m.) at 16:5-7, 17:21-23 (Gerber Collision & Glass ("Gerber")); Sun, Tr. (1/9) at 53:24-54:10 (Mitchell); Ramamurthy, Tr. (1/22 a.m.) at 108:19-109:25 (CCC); Conway, Tr. (1/12 a.m.) at 39:8-13 (Audatex).

Despite a highly concentrated supplier base and low growth rates in the industry, PX 543-005 (Mitchell); PX 574-002 (Mitchell), these markets are highly competitive today. Brandt, Tr. (1/8 a.m.) at 17:23-18:2, 18:6-7 (The Hartford); Cheskis, Tr. (1/23 a.m.) at 10:12-23 (Gerber); Aquila Dep. at 15 (Audatex); FTC's Pre-Trial Br. at 3; Ordover, Tr. (1/23 a.m.) at 76:20-77:8. Although insurance company and repair facility contracts are confidential, the Estimatics and TLV vendors expend significant resources in order to obtain "competitive intelligence" about each other's pricing, and compete vigorously for customers. Sun, Tr. (1/8 p.m.) at 53-58, 92-93 (Mitchell). The FTC fears that a merger of CCC and Mitchell will destroy **[*35]** the delicate balance that has sustained healthy competition despite the small number of competitors **[**17]** in these markets; hence this lawsuit.

III. APPLICABLE LAW

---

[10] These "add-on" products are 10 sold by a large number of companies in addition to CCC, Mitchell and Audatex, and the merger is not challenged by the FTC based on these products.

Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. The Supreme Court has explained that Section 7 "deals in probabilities, not certainties." United States v. Gen. Dynamics Corp., 415 U.S. 486, 505, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); United States v. El Paso Natural Gas Co., 376 U.S. 651, 658, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964). Thus, to establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a "sufficiently probable and imminent" result of the merger or acquisition. United States v. Marine Bancorp., 418 U.S. 602, 623 n.22, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974) (quoting United States v. Continental Can Co., 378 U.S. 441, 458, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)).

When the FTC has "reason to believe" that the consummation of a merger will violate the antitrust laws, it may seek a preliminary injunction to prevent the merger until the agency has had an opportunity **[**18]** to adjudicate the merger's legality in an administrative proceeding. 15 U.S.C. § 53(b). Section 13(b) of the FTC Act "provides for the grant of a preliminary injunction where such action would be in the public interest." Heinz at 714; *see* 15 U.S.C. § 53(b). In enacting Section 13(b), Congress "'demonstrated its concern that injunctive relief be broadly available to the FTC.'" Heinz, 246 F.3d at 714 (quoting FTC v. Exxon Corp., 205 U.S. App. D.C. 208, 636 F.2d 1336, 1343 (D.C. Cir. 1980)); H.R. Rep. No., 93-624, at 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2417, 2533; *see also Whole Foods, 548 F.3d at 1042 (Brown, J.)* ("the FTC -- an expert agency acting on the public's behalf -- should be able to obtain injunctive relief more readily than private parties."). Thus, the FTC "is not required to prove, nor is the court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act" in order for a preliminary injunction to be issued. FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997) (citations omitted). Rather, the FTC "need only show that there is a 'reasonable probability' that the acquisition may substantially lessen competition." Id. at 1072.

Section 13(b) authorizes **[**19]** a court to issue a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). The Court must balance these considerations on a sliding scale. Heinz, 246 F.3d at 714; FTC v. Elders Grain, Inc., 868 F.2d 901, 903 (7th Cir. 1989); *see also Whole Foods, 548 F.3d at 1035* (Brown, J.). Thus, "[a] greater likelihood of the FTC's success will militate for a preliminary injunction unless particularly strong equities favor the merging parties." *Whole Foods, 548 F.3d at 1035* (Brown, J.).

The equities will often weigh in favor of the FTC because "'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting" Section 13(b). *Id*. (quoting Heinz, 246 F.3d at 726). If the FTC meets its burden of showing that it is likely to succeed on the merits, it "creates a presumption in favor of preliminary injunctive **[*36]** relief," *id*., which the merging parties may rebut by showing that, contrary to traditional antitrust theory, the public equities weigh in favor of the merger. *See Whole Foods, 548 F.3d at 1035* (Brown, J.); **[**20]** *see also* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 160 (D.D.C. 2004); *cf.* Heinz, 246 F.3d at 727 n.25 (noting that private equities are afforded little weight in Section 13(b) cases). If the merging parties are able to make such a showing, the FTC is required to show a greater likelihood of success on the merits. *Whole Foods, 548 F.3d at 1035 (Brown, J.)* (citing FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1087 (D.C. Cir. 1981)).

IV. ANALYSIS

A. Likelihood of Success on the Merits

The burden of showing likelihood of success on the merits is met if the Commission has "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." Heinz, 246 F.3d at 714-15 (internal citations omitted); *see also Whole Foods, 548 F.3d at 1035* (Brown, J); *id. at 1042*

(Tatel, J., concurring). At the same time, the Court may not "simply rubber-stamp an injunction whenever the FTC provides some threshold evidence; it must 'exercise independent judgment' about the questions § 53 commits to it." *Whole Foods, 548 F.3d at 1035* (Brown, J.) **[**21]** (citing Weyerhaeuser, 665 F.2d at 1082). [11]

In United States v. Baker Hughes Inc., 285 U.S. App. D.C. 222, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the D.C. Circuit adopted an analytical approach to Section 7 cases which has been followed **[**22]** in subsequent Section 13(b) cases. *See, e.g.,* Heinz, 246 F.3d at 715; Arch Coal, 329 F. Supp. 2d at 116. First, to meet its initial burden, the government must show that the proposed merger would lead to "undue concentration in the market for a particular product in a particular geographic area." Baker Hughes, 908 F.2d at 982. Such a showing creates a "'presumption' that the merger will substantially lessen competition." *Id*. Upon such a showing, the burden shifts to the defendants to rebut the presumption with evidence that "'shows that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." Heinz, 246 F.3d at 715 (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)) (alterations in original). If the defendants succeed in rebutting the presumption that the merger will lessen competition, "'the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.'" Heinz, 246 **[*37]** F.3d at 715 (quoting Baker Hughes, 908 F.2d at 983).

The Supreme Court has cautioned, however, **[**23]** that while "statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are . . . the primary index of market power[,] . . . only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of [a] merger." Brown Shoe, 370 U.S. at 322 n.38. In order to adequately address these factors, "the merging parties are entitled to oppose a [Section 13(b)] preliminary injunction with their own evidence, and that evidence may force the FTC to respond with a more substantial showing" of the merger's probable anticompetitive effects. *Whole Foods, 548 F.3d at 1035 (Brown, J.)*. In the end, "antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future." Arch Coal, 329 F. Supp. 2d at 116-17; *see also* Brown Shoe, 370 U.S. at 322 n.38. Thus, an analysis of the likely competitive effects of a merger requires determinations of (1) the relevant product market, (2) the relevant geographic market, and (3) the transaction's **[**24]** probable effect on competition in those markets. *See* Marine Bancorp., 418 U.S. at 618-23; Gen. Dynamics, 415 U.S. at 510-11; *see also* Arch Coal, 329 F. Supp. 2d at 117.

1. Prima Facie Case

A *prima facie* Section 7 case "rests on defining a market and showing undue concentration in that market." *Whole Foods, 548 F.3d at 1036 (Brown, J.)* (citing Baker Hughes, 908 F.2d at 982-83). Courts generally begin their analysis of a Section 7 case by defining the relevant market. *See, e.g.,* Marine Bancorp., 418 U.S. at 618-23; FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000). *But see Whole Foods, 548 F.3d at 1036 (Brown, J.)* (noting that "this analytical structure does not exhaust the possible ways to prove a § 7 violation" (citing El Paso Natural Gas Co., 376 U.S. at 660)). A relevant market has two components: (1) the relevant product market and (2) the relevant geographic market. The "relevant product market" identifies the product and services with which the defendants' products compete. The "relevant geographic market" identifies the geographic area in which the

---

[11] Defendants take issue with the FTC's interpretation of the "serious, substantial" question standard set forth in *Heinz* and *Whole Foods*, asserting: "[Y]ou can talk about substantial questions, doubtful questions, whatever. . . . [W]hat those cases say [is that] it simply means nothing other than likelihood of success on the merits." Parker, Tr. (2/17 p.m.) at 41:24-42:3 (Mitchell). While Defendants' statement is literally true, precedents irrefutably teach that in this context "likelihood of success on the merits" has a less substantial meaning than in other preliminary injunction cases. Heinz not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law. The analysis of likelihood of success "measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed" in proving that the effect of a merger "*may* be to substantially lessen competition or tend to create a monopoly." Heinz, 246 F.3d at 714 (emphasis added).

defendants compete in marketing their products or services. The FTC bears the burden of proof and persuasion in defining **[**25]** the relevant market. *Arch Coal, 329 F. Supp. 2d at 119*.

Once the relevant market is defined, the court can determine market concentration. The standard measure for market concentration is the Herfindahl-Hirschmann Index ("HHI"). *See* *Heinz, 246 F.3d at 716*. Under the Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines, a market with a post-merger HHI above 1800 is considered "highly concentrated," and mergers that increase the HHI in such a market by more than 100 points "are presumed . . . likely to create or enhance market power or facilitate its exercise." *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (1992), *as revised* (1997) ("Merger Guidelines") § 1.51. Although the Merger Guidelines are not binding on the Court, they provide a "useful illustration of the application of the HHI." *FTC v. PPG Indus., Inc., 255 U.S. App. D.C. 69, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986)*. Moreover, the D.C. Circuit explained in *Heinz* that a **[*38]** merger to duopoly which increased the premerger HHI of 4,775 by 510 points "create[d], by a wide margin, a presumption that the merger w[ould] lessen competition" in the relevant market. *Heinz, 246 F.3d at 716*.

a. *Relevant Product [26] Markets***

In determining relevant product markets, courts have traditionally considered two factors: "[1] the reasonable interchangeability of use and [2] the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. In other words, the question is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *Staples, 970 F. Supp. at 1074* (internal quotations omitted). Relevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other. *Arch Coal, 329 F. Supp. 2d at 119*.

If consumers can substitute the use of one product for another, those products will be deemed "functionally interchangeable." *Id.; see also* *Staples, 970 F. Supp. at 1074* (finding that office supplies sold by an "office superstore" like Staples are functionally interchangeable with office supplies sold at "mass merchandisers" like Wal-Mart). Courts generally will include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the **[**27]** same market. *See, e.g., United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988)* (even though beet sugars and high-fructose corn sugars were functionally interchangeable, they did not belong to the same product market because government price support for beet sugars meant that prices for corn sugars could be raised substantially without feeling the competitive impact of beet sugar prices). Crosselasticity of demand refers to the "'responsiveness of the sales of one product to price changes of the other.'" *Staples, 970 F. Supp. at 1074* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*). However, courts should "exclude any . . . product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. [12]

Courts have relied on several "practical indicia" as aids in identifying the relevant product market, including: industry or public recognition of a submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe, 370 U.S. at 325*; *see also* *Arch Coal, 329 F. Supp. 2d at 120*. These indicia can be applied to augment the analyses of interchangeablity and cross-elasticity of demand.

1. *Estimatics Market*

---

[12] The Merger Guidelines provide an analytical tool for determining interchangeability and cross-elasticity of demand. The Merger Guidelines define a product market as "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would **[**28]** impose at least a 'small but significant and nontransitory' increase in price (SSNIP)." Merger Guidelines § 1.11. In most contexts, the Merger Guidelines consider a price increase of 5% to constitute a SSNIP. *Id*.

Defendants do not dispute the FTC's contention that Estimatics is so far superior to the paper-based systems that their **[*39]** customers would not return to the old methods even if Estimatics prices increased substantially. *See, e.g*., PX 6 P 2 (Mello Decl.); PX 7 P 4 (Kostakis Decl., Angelo's Auto Body); PX 20 P 4 (Rollins Decl.); PX 27 P 3 (Danford Decl.); PX 11 P 3 (Brown Decl.). Thus, Defendants concede that the core Estimatics software **[**29]** product is a relevant product market. *See* Ordover, Tr. (1/23) at 204:20-25. [13]

2. *TLV Market*

Although the Defendants do not dispute the FTC's market definition for Estimatics, they disagree with its definition of the total loss valuation market. The FTC defines the relevant total loss valuation market to include only TLV sold in the United States by CCC, Mitchell and Audatex. PX 1020 P 48 (Hayes Prelim. Report); *see also* Hayes, Tr. (1/12 a.m.) at 84:12-22. The Defendants argue that the FTC has not met its initial burden of showing a properly defined product market because it fails to include other sources of total loss valuations that insurance companies currently use or to account for the fact that some insurance companies perform their total loss valuations in-house rather than using TLV products.

Defendants have demonstrated that insurers of auto physical damage currently use a variety of solutions to perform total loss valuations. In addition to the total loss software sold by **[**31]** CCC, Mitchell and Audatex, some insurance companies use the Books to perform some or most of their total loss valuations in-house. Brandt, Tr. (1/8 a.m.) at 47:5-9 (The Hartford); Dibble, Tr. (1/23 a.m.) at 38:23-39:18 (Infinity Ins. Co.). In fact, some of the largest auto insurers in the country rely on the Books for most of their total loss needs. *See* DX 49 (Mitchell); DX 50 (Mitchell). For instance, CCC's CEO, Githesh Ramamurthy, testified that, of the 700,000 total loss claims that [text redacted] processes each year, it calculates roughly 500,000 in-house using NADA. Ramamurthy, Tr. (1/22 a.m.) at 97:4-8 (CCC); *see also* Brandt, Tr. (1/8 a.m.) at 47:5-10 (The Hartford) (Progressive Insurance Company ("Progressive") uses NADA to calculate roughly 75% of its total loss claims). [14] Those insurance companies that **[*40]** perform some of their valuations internally may consult other data sources as well, such as Autotrader, or conduct their own research by contacting salvage yards and auto dealerships. *See, e.g*., Dibble, Tr. (1/23 a.m.) at 39:8-13 (Infinity Ins. Co.). Defendants point to these shifts between products as evidence of a single market between Estimatics and the Books. *See* IIB Phillip **[**32]** Areeda *et al.,* ***Antitrust Law*** P 562a, at 371 (3d ed. 2007) ("[A]ctual shifts between two products in response to -- or even without -- changes in their relative prices indicate a single market.").

---

[13] An argument could be made that the Estimatics 13 market should be further subdivided into communicating and non-communicating Estimatics platforms. *Cf*. Ordover, Tr. (1/23 p.m.) at 205:11-14 ("I did not reach an ultimate conclusion of whether these two are in the same market [for repair facilities] although obviously, people can move back and forth between communicating and non-communicating Estimatics systems"). Communication is required to work with the major insurance companies as part of a repair shop network, so all insurance companies and virtually all DRP repair facilities must use communicating products. *See* PX 1020 P 12 (Hayes Prelim. Report); DX 644, App. 2 P 7 (Ordover Coordinate Interaction Report). There also is a considerable cost differential between communicating and non-communicating Estimatics products. *See* PX 760 (Applied Computer Resources has two non-communicating Estimatics products that retail for $ 99 per month and $ 135 per month); PX 173 (CCC's "Competitive Comparison Chart"); PX 1407 (CCC). Nonetheless, while communicating Estimatics products may make up a relevant sub-market, **[**30]** that analysis is unnecessary here as it would only further limit the product market definition and minimally enhance the market concentration in the relevant market to a legally insignificant degree. The Court therefore will define the relevant market to include all Estimatics products.

[14] State Farm, Allstate Insurance ("Allstate") and Progressive, three of the largest auto insurers in the country, as well as American Family, Hanover, Cincinnati Insurance, Country Insurance, Kentucky Farm Bureau, Mississippi Farm Bureau, Assurant Specialty Property ("Assurant"), and Infinity Insurance Company use the Books to perform some or most of their total loss valuations in-house. Stanton Dep. at 18-19, 23, 26-28, 33, 38-39, 45, 50-51 (NADA); Dibble, Tr. (1/23 a.m.) at 39:8-18 (Infinity Ins. Co.); Licause Dep. at 73 (Assurant); Marushka Dep. at 29, 33-34 (CCC); DX 52 at FTC-PA-000004 (listing approved guide sources in Pennsylvania as Red Book, CCC, NADA, Audatex, Autobid, and Mitchell); Conway, Tr. (1/12 a.m.) at 64:1-9 (Audatex) (American Family uses Books for some of its total loss); Brandt, Tr. (1/8 a.m.) at 47:12-22 (The Hartford uses Book data for some of its total loss needs); Hall, Tr. (1/8 a.m.) at 87:11-14, 99:1-6 (GMAC used Books in North Carolina until it was able to negotiate **[**33]** a flat rate with Mitchell that was less expensive).

This evidence is factually unchallenged by the FTC but the agency contends that it does not have the force Defendants would imply, given that over 90% of all total loss claims are calculated using TLV sold by one of the three major competitors. PX 513-016 (Mitchell); PX 548-007 (Mitchell). [15] According to the FTC, there is sufficient evidence in the record to conclude that the TLV products sold by CCC, Mitchell and Audatex represent a separate product market from other total loss valuation methods.

Dr. John Hayes, an economics expert testifying for the FTC, conducted a critical loss analysis to determine whether a hypothetical monopolist could profitably impose a SSNIP in the TLV market, an approach described in the Merger Guidelines. PX 1020 PP 26, 42-48 (Hayes Prelim. Report). [16] Through his analysis, Dr. Hayes concluded that TLV software constitutes a relevant product market. *Id*. P 48. Dr. Hayes was aware that some insurance companies use the Books to conduct valuations, but he admitted that he did not know how pervasively internal valuations are used or how insurance companies produce internal valuations. Hayes, Tr. (1/21 p.m.) at 156:24-157:18. Thus, when calculating total loss market shares, Dr. Hayes did not include valuations that were performed internally. *Id*. at 149:22-150:8.

Although Defendants' expert, Dr. Janusz Ordover, did not reach a conclusion as to whether the Books are or are not part of the same market as TLV, Ordover, Tr. **[*41]** (1/23 p.m.) at 205:18-22, a critical failure to support Defendants' challenge to the FTC's market definition for TLV, the Defendants discredit Dr. Hayes's conclusions, arguing that his critical loss analysis is flawed because he incorrectly assumed that insurance companies lack the economies of scale to perform total loss valuations in-house. Hayes, Tr. (1/21 p.m.) at 150:14:151:4, 153:2-154:20, 157:2-158:17. The evidence is clear that CCC lost a large insurance company as a customer when that company decided to do most of its total loss calculations in-house using NADA. DX 86. "[C]ourts have generally recognized that when a customer can replace the services of [an external product] with an internally-created [ ] **[**36]** system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." *United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, at 193, 186 (D.D.C. 2001)* (quoting *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 48 (D.D.C. 1998))* (alterations in original) (internal quotations omitted); *accord* Merger Guidelines § 1.31 (vertically integrated firms are included in the market "to the extent that such inclusion accurately reflects their competitive significance in the relevant market prior to the merger").

Notwithstanding this gap in Dr. Hayes's analysis, the real-world evidence shows that Books and TLV are not part of the same product market. *See* *Arch Coal, 329 F. Supp. 2d at 116* ("[A]nti-trust theory and speculation cannot trump facts."). The Book vendors do not consider themselves to be in competition with CCC, Mitchell, and Audatex. PX 17 PP 7-13 (Stanton Decl., NADA); PX 19 P 5 (Fournier Decl., Automobile Red Book); PX 29 P 8 (Cross Decl., Nat'l Auto Research). In fact, CCC and Mitchell offer access to NADA as an add-on to their TLV products. PX 241-023 (CCC); PX 643-011 (Mitchell). Most insurance companies do not **[**37]** view the Books as an adequate substitute for TLV products. *See* PX 664-005 (Mitchell); Brown Dep. at 90-90 (Erie); *see also* Hall, Tr. (1/8 a.m.) at 79:15-17, 81:2-4 (GMAC); Danford Dep. at 58 (Ohio Mutual only uses Books for commercial and recreational vehicles that are not in the TLV databases); PX 11 P 7 (Brown Decl.). In fact, the majority of insurers who were contacted by the FTC stated that they would not switch from TLV products to the Books even if facing a price increase of 10% or more.

---

[15] Mitchell argued in closing argument that 15 it thinks the nine insurers who do some in-house total loss valuations account for about 20% of the total loss claims market, and that the FTC failed to include those in-house valuations in its HHI calculations. Prior to closing argument, however, there seemed to be a consensus that the Books consumed about 10% of the total loss valuation market. *See* PX 548-007 (Mitchell) (chart showing that "book values" account for 10% of all total loss claims). This figure must include internal calculations performed by insurance companies because only insurance companies (and independent appraisers to some **[**34]** extent) handle total loss claims, with or without TLV software. *See* Hayes, Tr. (1/12 p.m.) at 130:25-131:1.

[16] Critical loss analysis is a standard tool used by economists to study potentially relevant markets. The analysis is based on the assumption that if the price of a product were increased, some customers would not purchase the product, and if enough customers would not purchase the product, **[**35]** the price increase would not be profitable. PX 1020 P 42 (Hayes Prelim. Report). For the purpose of market delineation, Dr. Hayes was interested in whether or not a hypothetical monopolist over all TLV software could profitably impose a SSNIP on one or more of the products included in the candidate market. *Id*. P 44.

See, e.g., Adamson Dep. at 31-32, 40-41 (EMC Ins. Co.); PX 20 P 14 (Rollins Decl.) ("In the event of a 10% price increase in total loss valuation products, Safeco would not be likely to switch to using NADA, Kell[e]y, or other 'book' products for total loss estimates. The book products are only guides, which do not provide a local market evaluation of comparable vehicles."). Similarly, almost none of the Defendants' internal documents refer to the Books when describing the competitive landscape. [17] To the extent that the Books are mentioned, they are referred to as "ancillary databases." PX 643-011 (Mitchell document containing a competitive analysis between CCC, Mitchell **[*42]** and Audatex, and referring **[**38]** to NADA and other Books as "ancillary databases"). [18]

The market participants view TLV as separate from the Books for good reason. The evidence reveals that the Books simply are not as accurate, detailed, or up-to-date as TLV. CCC, Mitchell and Audatex use a consistent methodology across all vehicles that includes recent sales of comparable vehicles. PX 1964-009-010 (CCC); PX 1958-034-036 (Mitchell). Their methodology accounts for, among other factors, year, make, model, body style, engine, mileage, upgrades, condition, and includes numerous databases. PX 1964-006, 010 (CCC's TLV product "equates to a vehicle database of approximately 64,00 [sic] unique vehicles, which is substantially more than Red Book and Kelley Blue Book"). CCC's TLV database is "compiled by surveying over 4,400 car dealerships in more than 350 markets twice each month and through 1,800 publications." PX 99-020 (CCC). Mitchell's database contains over [text redacted] million electronic records including the Power Information Network (PIN) **[**40]** data received from JD Power and Associates. PX 643-011 (Mitchell); PX 541-024 (Mitchell). The valuation methodologies used by the Books include subjective data and do not account for all of the vehicle's options, mileage, or condition as precisely as TLV programs. Hall, Tr. (1/8 a.m.) at 79:18-80:8, 80:19-81:8 (GMAC); PX 1964-006, 010 (CCC). For instance, NADA uses wholesale and retail data sets and manipulates that information using analytical modeling and judgment by its editorial staff to estimate vehicle value. PX 17 P 3 (Stanton Decl.); PX 260-001 (CCC); PX1964-016 (CCC Valuescope Methodology & Settlement Tips). Thus, TLV has substantially different valuation methodologies than the Books. *See* Brown Shoe, 370 U.S. at 325 (peculiar characteristics of the product indicate separate product markets).

In addition, TLV provides valuations in local markets, while the Books provide only regional data that are rarely localized. See PX 20 P 14 (Rollins Decl.); PX 11 P 7 (Brown Decl.); PX 28 P 11 (Wilson Decl.) (stating that "pricing information in guidebooks . . . does . . . not contain the same level of specificity as local market comparables."); PX 1964-010 (CCC) ("Where NADA will have **[**41]** one region covering seven states, CCC will segment each state into an average of eight local markets."); PX 17 P 9 (Stanton Decl.); PX 256-048 (CCC). Furthermore, TLV systems' calculations are said to comply with applicable state regulations of each state, PX 81-038 (CCC Response to [text redacted] RFP); PX 116-039 (CCC Response to [text redacted] RFP); PX117-044, 051 (CCC Response to [text redacted] RFP), whereas the Books do not.

Nor does CCC, Mitchell, or Audatex price TLV against the Books. TLV costs approximately $ [text redacted] per estimate, PX 548-007, whereas the Books charge about 5-35 cents per use. Stanton Dep. at 101-03 (NADA); PX 19 P 2 (Fournier Decl.). Of course, "products competing against one another in a differentiated product market may have widely different prices." *United States v. Oracle Corp.,* ***[*43]*** *331 F. Supp. 2d 1098, 1121 (N.D. Cal. 2004)*. [19]

---

[17] *See* PX 1412-020 (pie graph showing 2007 market share data for total loss which refers only to Audatex, Mitchell and CCC); PX 99-022 (CCC); PX 107-018 (CCC); PX 204-002 (CCC); PX 214-002 (CCC); PX 515-036 (Mitchell) (noting the holders of the key insurance accounts for estimating, TLV and DRP shops); PX 583-041 (Mitchell); PX 513-012 (Mitchell); PX513-016 (Mitchell document referring only to CCC and Audatex as competitors); PX 643-008 (Mitchell pricing strategy); PX 629-002 (Aurora) ("Mitchell competes primarily against only two other companies, Audatex and CCC Information Services."). *But see* PX 677 (Mitchell) (Why Use Total Logic Versus NADA); DX 86 (CCC's competitive loss of [text redacted] to NADA); PX 1964-009 (CCC) ("CCC Versus Guidebook Value").

[18] The Court notes the apt warning that "separate markets are not indicated by documents within A firms that are preoccupied with other A firms. After all, a given producer of A cannot charge more than other A firms and thus may focus entirely on them even though a hypothetical monopolist of product A firms would focus entirely on the price of a close substitute B." IIB Areeda, *supra*, **[**39]** P 562a, at 372. If the FTC were relying solely on Defendants' documents, that evidence might be insufficient. However, various other industry participants from all sides share the view that TLV and the Books are not interchangeable.

If part of the same product market, the Books and the Defendants' TLV products are undoubtedly differentiated products. The variance in price therefore may not be surprising. [20] However, there is no evidence to suggest that the price of TLV is sensitive in any way to changes in pricing by Book vendors, or vice-versa. *Cf*. **[**42]** PX643-008 (Mitchell) (setting pricing strategy by reference to CCC and Audatex only). In addition, there is scant evidence of any direct competition between TLV and the Books.

In sum, the practical indicia -- particularly industry recognition of a separate market; TLV's peculiar characteristics including especially accurate, up-to-date valuations, speed, reliance and defensibility, and ability to interface with estimating products; and sensitivity to price changes only against other TLV products -- support the conclusion that TLV software products **[**43]** represent a relevant product market.

Despite this analysis, the fact remains that some of the largest insurance companies in the country perform a significant percentage of their total loss valuations in-house using the Books and that some others use the Books or other valuation methods for a small percentage of their total loss claims, rather that TLV. What this demonstrates, at best, is that some of the largest insurance companies in the country have the resources and scale to perform most of their total loss valuations in-house profitably in lieu of using TLV, and that a few middle tier insurance companies use the Books to supplement TLV software, but not that the Books constitute a viable substitute for TLV for the vast majority of insurers. [21] When TLV software is used to calculate 90% of the total loss claims made in this country, and the majority of the remaining 10% includes the largest insurers that do most of their calculations in-house, it is clear that the computer-based TLV products provided by these three suppliers constitute a relevant product market. The Books are, in the main, a complementary product and not a competitive product.

In any event, the FTC is not "required to settle on a market definition at this preliminary stage," *Whole Foods, 548 F.3d at 1036 (Brown, J.)*, and inclusion of the Books in the market would have an insignificant **[*44]** effect on the market shares because over **[**45]** 90% of total loss claims are calculated using TLV. PX 513-016 (Mitchell) (chart showing that CCC, Audatex and Mitchell were used to evaluate a combined 90% of all total loss claims made in 2007, while NADA and "other" products were used for approximately 10% of valuations); PX 548-007 (Mitchell) (table showing that book valuations are used for approximately 10% of all total loss claims while TLV software is used for 90% of claims). Even including the Books and other valuation methods, the combined CCC/Mitchell would still have over a 50% share of the broader total loss valuation product market. *See* PX 513-016 (Mitchell). The corresponding HHIs likewise would still establish a strong *prima facie* case for the FTC. *Cf. Arch Coal, 329 F. Supp.*

---

[19] A "differentiated product 'market' is a market in which sellers compete along more dimensions than price." *Oracle, 331 F. Supp. 2d at 1121*.

[20] The Defendants note that Book values are not the final word on total loss valuations; they are simply an input. Insurance companies incur additional costs by employing their own personnel and software to refine the Book valuations with more data points. Stanton Dep. at 26-27 (NADA); Dibble, Tr. (1/23 a.m.) at 38:23-40:4 (Infinity Ins. Co.). Thus, the true "cost" of using the Books is greater than would appear; how much this real cost approaches the pricing of a TLV product is not admitted in the record.

[21] *Cf. United States v. Grinnell Corp., 384 U.S. 563, 574, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* **[**44]** ("Defendants earnestly urge that despite these differences [between the central station service and substitute alarm systems], they face competition from these other modes of protection. They seem to us seriously to overstate the degree of competition, but we recognize that . . . they 'do not have unfettered power to control the price of their services . . . due to the fringe competition of other alarm or watchmen services.' What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do.") (quoting *United States v. Grinnell Corp., 236 F.Supp. 244, 254 (D.R.I. 1964))*; *accord* ***Whole Foods, 548 F.3d at 1038*** (Brown, J.). *But see United States v. Engelhard Corp., 126 F.3d 1302, 1306 (11th Cir. 1997)* ("[I]t is possible for only a few customers who switch to alternatives to make the price increase unprofitable.").

2d at 158 (concluding that the HHI increase of 49 to 2,103 was "far from compelling," and thus the *prima facie* case was "fairly weak."). [22]

b. *The Geographic Market*

Unlike some other Section 7 cases, the geographic market is not contested here. The relevant geographic market **[**46]** for both products in this case is the United States. Audatex competes in many foreign countries; CCC and Mitchell currently compete only in the United States. More significantly, although software products can be designed, manufactured and sold almost anywhere, the databases for Estimatics and TLV sold in the United States must contain data that apply to vehicles driven in the U.S., wherever manufactured. Hayes, Tr. (1/12 p.m.) at 131:2-10. Similar auto physical damage products sold outside the United States that rely on a database of foreign vehicles cannot provide partial loss and total loss valuations for most vehicles driven in this country. PX 1020 P 50 (Hayes Prelim. Report).

c. *Market Concentration*

Market share and concentration statistics can establish a presumption of harm and shift the burden of proof to Defendants to demonstrate that the presumption does not accurately reflect a merger's likely effects on competition in the relevant market(s). *Baker Hughes, 731 F. Supp. at 11-12*.

1. *Concentration in the Estimatics Market*

There are five competitors in the Estimatics market: CCC, Audatex, Mitchell, Web-Est, which sells the software product WebEst, and Applied Computer Resources, **[**47]** which sells the software product Crash-writeR. Of these, CCC, Mitchell and Audatex dominate the market. Ramamurthy IH Tr. at 157-158 (CCC); PX 1028-004, 017 (Web-Est); Ramamurthy, Tr. (1/22 a.m.) at 40:20-41:7, 74:1-10 (CCC). Defendants' expert, Dr. Ordover, agreed that CCC, Mitchell, and Audatex are the only three competitors for insurance customers in the Estimatics segment and that neither Web-Est nor Applied Computer Resources provides any services to insurers. Ordover, Tr. (1/23 p.m.) at 205:1-7. The Big Three are currently the only competitors for DRP repair facilities as well. PX 4 P 5 (Daly Decl.); PX 27 PP 4, 7 (Danford Decl.); PX 11 P 4 (Brown Decl.); PX 25 P 15 (Carr Decl.); PX 20 P 5 (Rollins Decl.); Kostakis Dep. at 18 (Angelo's Auto Body Shop). At this point in time, Web-Est and Applied Computer Resources offer only non-communicating Estimatics products to low-end repair facilities that are not part of a DRP. Web-Est and Applied Computer Resources together have a tiny fraction of the Estimatics market -- **[*45]** approximately 1% combined [23] -- and they currently do not compete to any meaningful extent with CCC, Mitchell and Audatex. Removing Web-Est and Applied Computer Resources **[**48]** from the market share data would have "almost no bearing" on the Estimatics market concentration calculations. Hayes, Tr. (1/12 p.m.) at 124:24-125:5. This is no surprise considering that the contract between Web-Est and Mitchell precludes Web-Est from offering communicating Estimatics to insurance companies or DRP facilities and from selling any Estimatics to the top 50 insurance companies. *See* DX 59 (Mitchell-Web-Est License Agreement); Seidel, Tr. (1/22 p.m.) at 173:24-174:13.

In 2007, CCC had approximately a 48% share of the revenue in the Estimatics market, Audatex had a 30% share of the market, and Mitchell had a 21% share. PX 1020-039, Ex. 2 (Hayes Prelim. Report); *see also* Hayes, Tr. (1/12 p.m.) at 120:15-122:10. Thus, the combined CCC/Mitchell would hold almost a 70% market share, and would be more than twice the size of Audatex North America. PX 1020 P 49, Ex. 2 (Hayes Prelim. Report). The merger would increase the HHI in Estimatics from approximately 3,650 to 5,685 -- an increase of 2,035 points. *Id*. P 60. The post-merger HHI would therefore be higher than it **[**49]** was in *Heinz*, which "create[d], by a wide margin, a presumption that the merger w[ould] lessen competition." *Heinz, 246 F.3d at 716*; *see also* *FTC v. H.J. Heinz, Co., 116 F. Supp. 2d 190, 195-96 (D.D.C. 2000)* (merger would have given the new company approximately 32% of the market and increased HHI by 510 to 5,285).

---

[22] If each of the Book vendors were included in the TLV market as separate suppliers, the merger would still produce an HHI delta well above 100. *See* Merger Guidelines § 1.51(c).

[23] Hayes, Tr. (1/12 Tr. p.m.) at 122:4-23 10; PX 1020, Ex. 2 (Hayes Prelim. Report); *see also* PX 543-011 (Mitchell).

Because insurance companies and repair facilities operate in different, albeit intertwined sub-markets, it also is useful to break down the numbers between insurance companies and repair facilities. In the repair facility segment, CCC's Estimatics market share as of 2007 was approximately 55.7%, Audatex had a 25.2% share, and Mitchell came in third with an 18.1% share. PX 1020-040, Ex. 3 (Hayes Prelim. Report); *see also* Tr., Hayes (1/12 p.m.) at 136:3-137:9; Ramamurthy, Tr. (1/22 a.m.) at 63:19-25. Web-Est and Applied Computer Resources each had an approximate 0.5% share. If the merger is consummated, the combined CCC/Mitchell would hold approximately a 73.8% share of the Estimatics market for repair facilities. *See* PX1020, Ex. 3 (Hayes Prelim. Report). With respect to the insurance company segment, Audatex led with a 38.5% market share, CCC held a 35.0% market share, and **[**50]** Mitchell came in third at 26.5%. *Id*. Post-merger, CCC/Mitchell would hold a 61.5% share of the insurance segment of the Estimatics market. *See id*.

2. *Concentration in the TLV Market*

The only providers of total loss software systems are CCC, Audatex and Mitchell. *But see* PX 534-005 (Mitchell) (listing three main competitors in total loss valuation segment as CCC, Audatex and Auto-Bid). In 2007, CCC held approximately 60.7% of the TLV market, followed by Audatex with an approximate 34.8% share, and Mitchell at third with only a 4.5% share. PX 1020, Ex. 4 (Hayes Prelim. Report); Hayes, Tr. (1/12 p.m.) at 128:8-23, 129:8-13; *see also* PX 514-019-020 (Mitchell) (pie graph projecting CCC with 51%, Audatex with 42% and Mitchell with 7% of the TLV market in 2008). A combined CCC/Mitchell would hold about a 65% market share. Hayes, Tr. (1/12 p.m.) at 128:13-23 (Dr. Hayes); PX 1020, Ex. 4 **[*46]** (Hayes Prelim. Report); *see also* PX 514-019 (Mitchell). The pre-merger HHI in this market currently exceeds 4,900. The merger would result in an HHI of 5,460, with a 545 delta, Hayes, Tr. (1/12 p.m.) at 128:24-129:7; PX 1020 P 64 (Hayes Prelim. Report), creating the presumption that the merger would lessen competition. **[**51]** *Heinz, 246 F.3d at 716*.

3. *Merger to Duopoly*

The FTC repeatedly proclaimed that this transaction represents a "merger to duopoly," that is, a 3-to-2 merger, as if that settles the question. It asserts that the Estimatics and TLV markets really consist only of the Big Three -- CCC, Mitchell, and Audatex. Defendants reject the notion that the descriptive term "duopoly" accurately depicts the post-merger competitive landscape because "Web-Est and a host of other new entrants offer innovative products that can transform the Estimatics market," and [text redacted]. Defs.' Post-Trial Brief at 25. The Court concludes that the accuracy of this descriptor has minimal significance to the analysis here.

The FTC relies heavily on *Heinz* for the proposition that a "merger to duopoly" is destined for a preliminary injunction because "no court has ever approved a merger to duopoly under similar circumstances." *246 F.3d at 717*. The FTC overlooks the significance of the phrase "under similar circumstances" in *Heinz, id*., and thus over-reads the case. Instead of making a generalized holding relevant to all 3-to-2 company mergers, the Court of Appeals focused on the nature of the baby food market at issue **[**52]** in *Heinz*, in which high barriers to entry and total transparency in pricing underscored the risk of coordination. While pricing is not completely secret in the instant markets, the characteristics of Estimatics and TLV are worlds apart from baby food. For starters, the software products are complex, the price quotes to insurers are confidential, and the products are usually sold in complex bundles that may include both Estimatics and TLV or just one of these, as well as various other software products. What is clear from this preliminary record is that this situation is not *Heinz*. The question, therefore, is not simply whether this merger would constitute a "merger-to-duopoly," but rather, whether the presumption of anticompetitive effects holds up, for preliminary relief, given the way these markets operate in fact.

As defense counsel admitted at the inception of this case, the HHIs in these markets are "very, very, high." Scheduling Conf. at 10-11. Because of the high market concentrations and HHIs in the pre- and post-merger Estimatics and TLV markets, the FTC has established a strong *prima facie* case that a merger between CCC and Mitchell would violate *Section 7* of the Clayton Act. **[**53]** *See* *Heinz, 246 F.3d at 716*. But that is just the beginning of the inquiry.

2. Rebuttal Arguments

Upon the showing of a *prima facie* case, the burden shifts to Defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in these markets or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. The courts have not established a clear standard that the merging parties must meet in order to rebut a *prima facie* case, other than to advise that "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully," Baker **[*47]** Hughes, 908 F.2d at 991. [24] Even in cases where the FTC has made a strong *prima facie* showing:

> [i]mposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant **[**54]** to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories.

Id. at 992. With these words of caution in mind, the Court turns to the Defendants' arguments.

a. *Barriers to Entry*

Defendants' first point of rebuttal is that both the Estimatics and TLV markets will lack significant barriers to entry after the proposed merger, and that existing competitors are "poised for future expansion." Id. at 988-89. A variety of factors, including the absence of significant entry barriers in the relevant market, can rebut a *prima facie* case. Id. at 984, 987 ("The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis."); *see also* Heinz, 246 F.3d at 717 n.13 ("Barriers **[**55]** to entry are important in evaluating whether market concentration statistics accurately reflect the pre- and likely post-merger competitive picture."). "Ease of entry is the ability of other firms to respond to collusive pricing practices by entering to compete in the market." Cardinal Health, 12 F. Supp. 2d at 54-55. Even in highly concentrated markets, if there is sufficient ease of entry, others might enter to compete and undercut the likely anti-competitive effects of a merger. *Id*. In other words, entry is one way in which post-merger pricing practices can be forced back down to competitive levels. *Id*.; *see also* Baker Hughes, 908 F.2d at 987 ("In the absence of significant barriers, a company probably cannot maintain a supracompetitive pricing for any length of time."); Merger Guidelines, § 3.0 ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."). "Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market **[**56]** or existing firms expanding into new regions of the market." Cardinal Health, 12 F. Supp. 2d at 55.

According to the Merger Guidelines, entry or expansion must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" that otherwise may be likely to result from a merger that significantly enhances market concentration. Merger Guidelines § 3.0; *see also* FTC v. Chi. Bridge & Iron Co., 534 F.3d 410, 427-29 (5th Cir. 2008); United States v. Visa USA, Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (entry must be "timely, likely, and [of a] sufficient scale to deter or counteract any anticompetitive restraints").

1. *History of Entry in the Estimatics and TLV Markets*

"The history of entry into the relevant market is a central factor in assessing the **[*48]** likelihood of entry in the future." Cardinal Health, 12 F. Supp. 2d at 56 (citing Merger Guidelines § 3.1); *see also* Baker Hughes, 908 F.2d at 988; United States v. Waste Mgmt., Inc., 743 F.2d 976, 982 (2d Cir. 1984); United States v. Tote, 768 F. Supp. 1064, 1076 (D. Del. 1991). The FTC argues that history has proven entry into the Estimatics and TLV markets to be very difficult. The **[**57]** Defendants disagree.

---

[24] *Baker Hughes* expressly rejected the FTC's theory 24 that "defendants can rebut a prima facie case *only by a clear showing that entry into the market by competitors would be quick and effective*," and instead accepted the district court's conclusion that "the acquisition was not likely to substantially lessen competition." 908 F.2d at 983 (emphasis added).

With respect to Estimatics, the FTC contends that Audatex was the last successful entrant with its own database, and that was over thirty years ago. Defendants counter that there have been several recent examples of successful new Estimatics vendors:

. Comp-Est--Founded in 1990 and grew to more than 5,000 customers by the time it was purchased by CCC in 2003 (which still offers the product today to low-end repair shops);

. Focus Write, LLC ("Focus Write")--Started in 2005 by the founder of Comp-Est and quickly grew to 1,500 customers but then floundered due to management issues;

. Web-Est--Founded in March 2008; has already doubled its customer base; and

. Applied Computer Resources--Began offering Crash-writeR in 1993; currently has 600 customers and sells four products to the automotive repair industry.

This evidence of supposed past successes fails to carry much water. Whatever brief success Comp-Est enjoyed, it has disappeared as a competitor through its purchase by CCC in 2003. PX 86-013 (CCC). [25] In 2008, Eric Seidel, a former investor in Focus Write, became the founder and CEO of Web-Est, and purchased the assets of Focus Write in an effort to recoup his investment. **[**58]** Web-Est and Applied Computer Resources are the only two recent entrants who are still in the market, and they held collectively less than a 1% share of the Estimatics market in 2007. For contrast, Crash-writeR is used by fewer than 600 repair facilities whereas CCC's communicating Estimatics product, Pathways, is used by more than 16,000. PX 406; PX 99-018 (CCC). Thus, even a "successful" commercial entry may not be sufficiently successful to affect the analysis here.

The history of successful entrants is additionally clouded by the fact that the companies identified by the Defendants compete(d) only in the "low end market," that is, the small, independent repair facilities that are not part of any DRP and that have traditionally been underserved or ignored by CCC, Mitchell, and Audatex. *See* PX 759 (Applied Computer Resources & Mitchell e-mail correspondence). These independent repair facilities do not require connectivity to insurers or the other add-on features offered by the large vendors and demanded by larger customers. *See id*. This distinction is reflected in the relative prices: Crash-writeR retails for $ 135 per month, PX 760, while Pathways lists at about **[**59]** [text redacted] per month, PX 1407 (CCC).

Moreover, the last decade has seen a decrease in the number of Estimatics providers. In the 1990s, there were almost a dozen companies offering some form of Estimatics, including Dupont and Sherwin Williams. Carr Dep. at 20-21 (Motor). By the end of the 1990s, the only remaining Estimatics providers were CCC, Mitchell, Audatex, and Comp-Est. *Id*. at 20. The former competitors have either exited the market or been acquired by **[*49]** CCC, Mitchell, or Audatex. PX 25 P 18 (Carr Decl.).

In the TLV market, Mitchell successfully entered the market in 2005, obtaining over a 4% share of the market by 2008, but that success followed two failed attempts, ten years of effort, and millions of dollars of investment. PX 1020 P 99 (Hayes Prelim. Report). Additionally, Mitchell already had a large share of the Estimatics market. It could capitalize on its strong reputation and relationship with insurance companies, as well as its ability to offer connectivity between its Estimatics product and its new TLV product, in order to gain significant shares of the TLV market. There is no evidence that a firm without an Estimatics product has ever successfully entered the TLV **[**60]** market. This history suggests that barriers to entry in these markets are significant.

2. *Defendants' Reliance on Historic Barriers to Entry*

Defendants have touted the historic barriers to entry into the Estimatics and TLV markets. Mitchell advertised the barriers to entry in countless financing and internal documents over the past few years. For instance, in a 2006 memorandum analyzing whether to purchase Mitchell, Aurora's analysts stated that:

[Text redacted.]

---

[25] [Text redacted.]

PX 629-001, 004 (Aurora) (emphasis added). [26] Aurora identified a "variety of significant barriers to entry": a proprietary auto physical damage database; a unique auto injury (medical) database; a large installed customer base; a small, low-growth industry with few primary competitors; and specialized regulatory knowledge of an editorial staff comprising [text redacted] professionals. PX 629-001-002. Separately, Aurora praised the "medium to high" switching costs from one of the Big Three to another and the "stable" competition between Mitchell, Audatex and CCC who have competed against each other for "a number of years." PX 629-004. Mitchell itself has repeatedly cited the "significant barriers to entry" in its financing documents. **[**61]** *See, e.g.*, PX 607-014 (Rating Agency Presentation) ("[s]ignificant barriers to entry through unique combination of data, software, communications and relationships"); Sun, Tr. (1/8 p.m.) at 42:12-17 (Mitchell); PX 583-027-028 (Mar. 2007 Confidential Info. Mem. for Senior Secured Credit Facilities) (citing customer network and experience, the Mitchell database, medical database, and high switching costs as significant barriers to entry); PX 560-027 (July 2004 Confidential Info. Memo. for Senior Secured Credit Facilities). Nor was this recitation of barriers saved only for external financiers. In Aurora's 2007 "Annual Meeting Presentation" to its investors after the acquisition of Mitchell, Aurora listed several "Significant Barriers to Entry" in Mitchell's businesses, including its "Customer Network and Experience," "The Mitchell Database," and customers' "High Switching Costs." PX 691-049 (Aurora).

Likewise, CCC and its private equity owner, Investcorp, have repeatedly noted high barriers to entry in these markets. Upon completing the acquisition of CCC, Investcorp issued a press release in which its Chief Operating Officer stated that "[t]his market . . . has high barriers to entry." PX 1401-001. CCC and Investcorp also told rating agencies that there **[*50]** are high barriers to entry in these markets. *See* PX 161-011 (Draft Rating Agency Presentation) ("Key rating considerations [include] [v]ery high barriers to entry with two primary competitors"). [27] According to CCC/Investcorp, the "likelihood" of a new entrant into Estimatics is "very low" because of:

. high overall satisfaction with CCC customers, no customer demand for change
. Fragmented market: CCC penetrated in over 20,000 body shops
. Dual network effect with both insurers and body shops
. CCC software involves over a decade of trials and is built on complex algorithms
. Source data on labor for autobody shops difficult to compile.

PX 161-023. CCC/Investcorp described the likelihood of a new entrant into TLV as "low" because:

. CCC Total Loss product is based on **[**63]** bi-monthly surveys of approximately 4,000 dealerships and 2,000 publications
. Differentiated product that is a critical component to insurer decision making
. Generating accurate, up-to-date valuations requires significant resources
. Database built on inspected "steel": unique in the industry
. Some states allow usage of book rates, which eliminates arguments with policyholders/claimants; however, most insurance customers will pay for the most accurate valuation
. Mitchell reportedly building product to compete with CCC and [Audatex], although no evidence that product would be a robust alternative. [28]

PX 161-023. *See also* PX 1420-024 (CCC) ([text redacted]). Audatex documents concur. PX 585-047 (Audatex).

---

[26] Defendants argue that statements 26 such as these are of little value because the industry representatives who made them are not antitrust lawyers and did not mean that there were entry barriers in an "antitrust sense." The Court recognizes the caution but, even discounting the statements **[**62]** as puffery, finds that they are supported by the preliminary record.

[27] CCC's CEO, Mr. Ramamurthy, expressed concern that this draft presentation may not accurately reflect the final version of its rating agency presentation because the document was initially drafted by a number of young financial analysts who are not familiar with the auto physical damage industry. To the extent that CCC failed to provide a final version of the presentation to the FTC in discovery, it was appropriate for the agency to rely on statements in the draft. Furthermore, considering **[**64]** the overwhelming number of references to barriers in other documents, it seems highly unlikely that the final version omitted any reference to "high barriers to entry."

[28] CCC obviously underestimated Mitchell's ability to penetrate the TLV market, although its unique situation would not readily transfer to another new entrant.

3. *Technical Barriers*

In addition to this historical evidence of Defendants capitalizing on barriers to entry, the very nature of the products in question illustrate why this has been the case. Estimatics products consist of a parts and labor database, and software that interacts with the database to calculate the total cost of repair. PX 1020 P 12 (Hayes Prelim. Report) (citing Ramamurthy IH Tr. (7/22/08) at 198-200). The difficulty and cost of developing and maintaining an entirely new parts and labor database that is accepted by the market would be significant barriers to new entrants. *See, e.g.*, PX 691-049 (Aurora); PX 161-023 (CCC). Such a database would need to cover at least 95% of all automobiles in the U.S. market, PX 28 P 5 (Wilson Decl.), and include parts data on all major makes and models of vehicles sold in North America, including "historical information **[**65]** for many years." PX 25 P 12 **[*51]** (Carr Decl.). [29] The database also would need to have comprehensive information on labor times and costs, which would involve an enormous number of expert-supervised time studies. PX 25 P 13 (Carr Decl.). Furthermore, customer feedback on the parts and labor information is developed over a period of years. Linder IH Tr. at 62 (Mitchell); PX 25 PP 9, 12 (Carr Decl.) ("there likely would be a high error rate . . . because [the entrant's database] would not benefit from corrections . . . accumulated over time based on customer feedback"). Thus, to create a credible database, a new entrant would need to regularly perform "highly resource-intensive tasks" such as "data revisions and time studies," PX 7 P 6 (Kostakis Decl.), by using parts data from the original equipment manufacturers, and continually update and refine its data. PX P 5 (Brown Decl.). [30]

Mitchell spends over $ [text redacted] million annually, and Audatex $ [text redacted] million annually, just to maintain, update, and refine their databases. Brungger IH Tr. at 93 (Mitchell); PX 516-003 (Mitchell). CCC pays $ [text redacted] million annually for exclusive use of the Motor database. PX 86-234 (CCC). It would take a number of years, untold thousands of man-hours, and millions of dollars of investment to create and maintain a competitive parts and labor database. *See, e.g.*, PX 573-009 (Mitchell's database "is unique and would require significant capital and development time to replicate"). *But see* PX 25 PP 14-15, 20 (Carr Decl.) (total sunk costs for building the Motor database was only about $ [text redacted] million). No firm has done so successfully since the mid-1990s.

Defendants argue, however, that this is a phantom barrier because new entrants will not be required to develop a new database **[**67]** after the merger. CCC has agreed that, upon consummation of the merger, it will relinquish its exclusive rights to license Hearst's Motor database, allowing any competitor or entrant the opportunity to obtain immediate access to a comprehensive, fully updated database of parts and services. Ramamurthy, Tr. (1/22 a.m.) at 90-91, 91-92:8; DX 218 (CCC Letter to Motor). Defendants argue that the renewed open access to the Motor database is likely to generate additional new entry. The use of "existing" or "idle facilities" can facilitate entry into a market. *FTC v. Occidental Petroleum Corp., No. 86-900, 1986 U.S. Dist. LEXIS 26138, at *21 (D.D.C. Apr. 29, 1986)* (reasoning that the presence of idle factories for the production of polyvinyl chloride resin -- a thermoplastic resin derived from the chemicals ethylene and chlorine -- could reduce barriers to entry because "[f]irms can enter the market through means other than *de novo* plant construction in considerably less time than it would take to build an entirely new facility"). Here, access to the Motor database certainly could make the Estimatics market more appealing to potential entrants.

However, economic realities may prevent a new **[**68]** entrant from pursuing a license to use the Motor database. CCC currently **[*52]** pays $ [text redacted] million per year for its exclusive license of the Motor database. PX 86-234 (CCC). While a new entrant might be expected to pay significantly less for a non-exclusive license, that negotiated price remains unknown and unknowable. A price that approached the $ [text redacted] million range that Mitchell and Audatex spend annually to maintain their databases may be prohibitively expensive for new entrants who also must offer lower prices to attract customers. Because this is a low-growth industry with few new

---

[29] For instance, the Motor database contains over 3 million unique parts. PX 25 P 6 (Carr Decl.). Mitchell's database has "over 7.6 million part descriptions, 2.2 million labor times, 128,000 vehicle configurations, 139,000 graphics and detailed parts information for vehicles up to 20 years old." PX 573-009 (Mitchell); **[**66]** *see also* PX 574-001.

[30] Mitchell, Motor, and Audatex each use labor times developed from their own propietary time studies. PX 578-025 (Mitchell); PX 25 P 8 (Carr Decl.); PX 1000-006 (Audatex) ("Forty years of experience, backed by time and labor studies"); PX 585-017 (Audatex).

customers, *see* PX 574-002 (Mitchell), new entrants would have to win business from incumbents to generate sufficient revenues to remain a going concern for any length of time. It is unclear whether they could do so profitably, or if the projected profits would be sufficient to entice new entrants, given the market power that would be held by CCC/Mitchell and Audatex. *See* Merger Guidelines § 3.3 (entry considered "likely" if it would be profitable at pre-merger prices, and if such prices could be secured by the entrant). Notably, no potential new entrant has contacted Motor about the availability **[**69]** of its database since the merger was announced in April 2008. PX 25 P 20 (Carr Decl.).

[Text redacted.]. *Id*. P 22 (Carr Decl.). [31]

Despite these hurdles, it cannot be gainsaid that the release of the Motor database would significantly reduce the most critical barrier to entry in Estimatics. However, access to acomplete and respected Estimatics database appears to be only one of many related barriers to entry.

As with Estimatics, a database for TLV also requires the compilation and integration of millions of data points collected from thousands of sources. For example, Audatex's database draws on "approximately 110 million vehicle records" per year, and contains data from over 11,000 dealerships and over 3,500 other local market resources. PX 534-019; *see also* PX 1943-007, 009; PX 688-075. CCC has a "vehicle database of approximately 64,00 [sic] unique vehicles." PX 1964-010 (CCC). Both CCC's and Mitchell's TLV products include vehicle history reports by Vehicle Identification Number (VIN) to verify the condition of the vehicle. PX 81-032-036 (CCC Response to [text redacted] RFP); PX 116-035-038 (CCC Response to [text redacted] RFP); PX 643-011 (Mitchell). Thus, development **[**70]** of a TLV database poses similar challenges to those relating to creation of an Estimatics database.

Besides the database, the second main component of Estimatics and TLV products is the software that computes repair estimates or, in the case of TLV, vehicle valuations. With respect to Estimatics, development of complex, customizable, and integrated software is another significant barrier to entry. Firms must design custom interfaces that support specific communication protocols. *See* PX 25 P 18 (Carr Decl.); *see also* Carr Dep. at 23 (Motor) (features and functionalities of Estimatics software are important to customers). CCC's Estimatics software "involves over a decade of trials and is built on complex algorithms." PX 204-006. It can communicate via the Internet or a private network, PX 81-006 ([text redacted] RFP), and offers a patented "Compare" feature that automatically alerts users when alternative parts are available. PX 81-019 (CCC). CCC began developing its Pathways product in 1993-94, but did not roll it out until 1996 even though it did not have to create its own database. Dickens IH Tr. at 115-117 (CCC). Despite advances in computer technology, it is projected that developing **[**71]** new Estimatics software **[*53]** would take one to two years. Lindner IH Tr. at 147:12-14 (Mitchell); *accord* PX 680-093-094 (Aurora); Lukens Dep. at 95-97 (APU Solutions, Inc. ("APU")) (Mitchell executive told an APU executive that the combined Mitchell-CCC platform would take 3-5 years to complete). [32] Focus Write developed a software interface over a period of about 18 months, PX 610-001, but its software "logic" was considerably improved once Focus Write was given access to Mitchell's software. PX 545-003 (2006 Focus Write Letter).

Similarly, TLV software is also powered by complex algorithms that interact with the database and drive the TLV system. Sun IH Tr. at 59-60 (Mitchell); Sun, Tr. (1/8 p.m.) at 47:199-48:19 (Mitchell) (to penetrate the TLV market, Mitchell partnered with J.D. Power, its source for the core database and development of algorithms for the software). In a combined effort, VVS and CCC spent eighteen to nineteen months developing a TLV software product for commercial trucks alone. Blitstein Dep. at 18-19 (VVS). CCC financed and provided **[**72]** the computer programs for the project. *Id*. at 17-18.

---

[31] [Text redacted.]

[32] APU is a technology provider for the alternative parts-supply industry that recently entered into a strategic relationship with Audatex.

Although small repair facilities can use and perhaps may even prefer a basic Estimatics tool without all of the add-on programs, insurance companies and DRP repair facilities, which constitute the overwhelming majority of the market, require communicating products that offer connectivity between the insurance company and the repair facility. For these customers, the Estimatics product must be able to communicate the status of partial loss claims through the Internet or other specialized communication links. *See* PX 1020 P 12 (Hayes Prelim. Report); *see also* PX 81-006 (CCC's Estimatics product can communicate via the Internet or a private network). In addition, because many customers, particularly insurance companies, prefer to purchase their auto physical damage and TLV products in bundles from one vendor, [33] successful vendors must be able to offer a full portfolio of products. *See* PX 25 P 18 (Carr Decl.). [34] This point is demonstrated by the business practices of the three major competitors: In addition to the core estimating products, the bundles offered by CCC, Mitchell and Audatex may include digital imaging, shop management, **[**73]** aftermarket parts data, workflow, audit tools, and total loss valuation, among others; they also may offer free or cut-rate training on the use of the products as well as variable pricing based on frequency of use or contract duration. Conway, Tr. (1/9) at 92:1-18 (Audatex); PX 680-007-008, 010 (Mitchell); PX 86-008-009 (CCC); PX 244-062 (CCC's Response to [text redacted] **[*54]** RFP). Without a full suite of products to offer, a new firm would face enormous difficulties in challenging the established companies for business from insurance companies and DRPs.

Indeed, partially as a result of product integration and connectivity between repair facilities and insurance companies, CCC has achieved "[d]eep integration with customers [that] supports a 95% retention rate." PX 99-011 (CCC). This "stickiness" affects both insurance companies and repair facilities because if an insurance company is unwilling to switch, the repair shops that are part of its DRP typically will not switch either. This is because insurance companies either "mandate" that members of its DRP use the same Estimatics product used in-house or recommend (issue a "soft mandate") that they use the same product. PX 531-002 ("Insurance DRP Mandates continue to drive market."); PX554-036 (Mitchell). Thus, relationships with large insurance carriers are an important dynamic in the industry because such relationships are:

> the leading **[**75]** driver of revenue as carriers are not only the estimatics vendors' largest customers in terms of direct revenue, but also generate secondary revenue streams through repair shops that are affiliated with the insurance carriers' DRP programs. These insurance carrier relationships are generally longstanding and difficult to break once established as the switching costs associated with retooling internal systems and forcing system turnover at the repair shop level are steep. In addition, the service provided by estimatics vendors are critical to the operation of insurance carriers' claims resolution process and any disruption would have negative ramifications for the carrier's operations.

PX 585-047 (Audatex). [35]

Additionally, "integrated services, technological infrastructure in place, and longterm customer contracts all contribute **[**76]** to prohibitively high switching costs," PX 583-028 (Mitchell), thus making it difficult for a new entrant to gain market share from an incumbent vendor. *See* PX 543-016 (Mitchell). Furthermore, "[s]witching vendors is a long, difficult process, often taking as much as 12 to 18 months to fully transition to a new provider."

---

[33] *See* PX 11 P 4 (Brown Decl.) ([text redacted]); PX 27 P 5 (Danforth Decl.) ([text redacted]); *see also* PX 686-013 (Ohio Casualty Ins. Co. ("Ohio Casualty") RFP); Brandt, Tr. (1/8 a.m.) at 20:18-21:3 ([text redacted]).

[34] *See, e.g.*, Burklin Dep. at 80-81 ([text redacted]); Brungger IH Tr. at 161-162, 158-159 ([text redacted]); PX 535-022 (Mitchell's TLV product was regarded as a "Killer Product [that] Closes [a] Big Portfolio Gap"); Hayes, Tr. (1/12 p.m.) at 134:14-135:10; PX 401 P 12 (Blitstein Decl.) ("[T]he inclusion of an automobile partial loss estimating system is widely regarded among customers as a necessary feature when considering **[**74]** the purchase of an automobile total loss valuation product."); PX 534-005 (Mitchell) (Kelley Blue Book and NADA cannot enter TLV market segment because they "do not have the base estimatics business to leverage (as does CCC, [Audatex] and Mitchell)"); PX 71-004 (CCC's total loss functionality will not be optimized unless it is paired with CCC's Estimatics).

[35] The current state of the marketplace for Estimatics products is as described. However, there is evidence that the insurance industry is moving towards open standards, by which the insurer would no longer mandate what software its DRP repair facilities use (potentially opening up the repair shop market considerably). *See* Ramamurthy, Tr. (1/22 a.m.) at 94:19-24 (CCC).

PX 585-029 (Audatex); PX 574-003, 016 (Mitchell) (A customer switching vendors "would be forced to retrain its employees, which can take as long as 3-4 days per employee for an insurance carrier, and make a significant capital expenditure to switch out [the] embedded technological infrastructure"). These disincentives to switching have resulted in an incumbent winning percentage of close to 90%. PX 574-003 (Mitchell); PX 629-003 (Mitchell); Conway, Tr. (1/9) at 121:4-5 (Audatex); Ramamurthy Dep. at 47 (CCC); Hayes, Tr. (1/12 p.m.) at 161:25-162:11. *See also* PX 668-021 (Mitchell) ("Particularly among Top 25, Core Vendors are entrenched -- switching rare").

Furthermore, on this preliminary record, it appears that reputation, scale, and relationships also serve as lesser barriers to entry. The significance of reputational barriers to entry in antitrust analysis is a somewhat **[**77]** unsettled question. *See Tote, 768 F. Supp. at 1075*. Reputation can be a considerable barrier to entry where customers and suppliers emphasize the importance **[*55]** of reputation and expertise. *See Chi. Bridge, 534 F.3d at 437-38 & n.17* (while "general reputation" alone is not an effective barrier to entry, reputation for "industry-specific traits" of expertise and experience was considered significant in the storage tank-building industry); *Cardinal Health, 12 F. Supp. 2d at 57* (reasoning that the strength of reputation of the merging companies over smaller companies in the pharmaceutical wholesale market served as barriers to growth of smaller competitors); *Tote, 768 F. Supp. at 1075* (stating that the lack of a record of demonstrated performance served as a significant barrier to entry in the totalisator market, an industry that creates systems that support a common form of wagering at racetracks). *But see Waste Mgmt., 743 F.2d at 984* ("[W]e fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition."); *United States v. Consol. Foods Corp., 455 F. Supp. 108, 119 (E.D. Pa. 1978)* ("Particularly in selling **[**78]** to institutional customers brand names are not significant.").

The record illustrates that reputation for experience and scale are legitimate barriers to entry in the Estimatics and TLV markets. As a precondition to bidding, most insurance companies require multiple years of audited financial statements showing financial stability, and multiple references from other Estimatics customers. PX 94-016 (CCC Response to [text redacted] RFP); PX 95 at 5 (CCC Response to [text redacted] RFP); PX 687-07, 026, 027 ([text redacted] RFP); PX 118-065-066, 067 (CCC Response to [text redacted] RFP); PX 116-008 (CCC Response to [text redacted] RFP); PX 117-004, 005, 028 (CCC Response to [text redacted] RFP); PX 686-006 ([text redacted] RFP). Insurance customers demand a "strong [s]hop footprint . . .[,] a proven management team that is dedicated to customer service . . .[, and] a proven Estimatics product with a clear roadmap for future enhancement and options." PX204-007 (Audatex). Scale is important in this industry, in part, because a vendor has to be large enough to afford the continuous research and development necessary to be competitive in Estimatics and TLV. Sun Dep. at 101 (Mitchell); *see* ***[**79]*** *also* Daly Dep. at 76-77 (Allstate) ("I would suspect that some of these smaller companies simply didn't have the track record or resources to the extent that we felt comfortable partnering with them on such a . . . significant initiative and product."). In addition, insurance customers place great importance on extensive customer support capabilities and may require Estimatics suppliers to affirm that they have a single point of contact available 24 hours a day, seven days a week. *See, e.g.*, PX 118-009 (CCC Response to [text redacted] RFP).

On these factors, the Big Three have an enormous advantage. CCC, Mitchell, and Audatex are enormous companies in comparison to their remaining competitors, much less a new entrant. Mitchell has over 1,400 employees, Sun Dep. at 17 (Mitchell), of which [text redacted] to [text redacted] are dedicated to insurance customer support, Sun, Tr. (1/9) at 75:4-8 (Mitchell). It has [text redacted] to [text redacted] people across the country in its collision sales department, Sun Dep. at 39, and an editorial staff of [text redacted] to maintain its database, PX 572-026 (Mitchell). Mitchell has a technical assistance center staffed from 5 a.m. to 5 p.m. and **[**80]** offers the option of emergency technical assistance 24 hours a day, seven days a week. PX 1958-043 (Mitchell's Response to [text redacted] RFP); *see also* PX 681-003 ([text redacted]). CCC has over 834 full-time employees, including 225 product development personnel, and 36 client consultants who are scattered throughout the **[*56]** country and are responsible for training, customer service, and technical support. *See* PX 94-012, 019 (CCC Response to [text redacted] RFP). CCC also has over 120 field employees able to service insurance customers, PX 95-022 (CCC Response to [text redacted] RFP), 65 account managers and field support personnel covering all 50 states in its Insurance Services Division, and 60 representatives in its Automotive Services Group. PX 116-004 (CCC Response to [text redacted] RFP).

In terms of experience, Mitchell's Executive Vice President for Auto Physical Damage, Marc Brungger, has been with the Company for 20 years. PX 691-046 (Aurora). "Mitchell also has an editorial staff with an average of over 17 years of industry experience." PX 573-009 (Mitchell). CCC's management team has an "[a]verage of 10+ years of industry and company experience." PX 99-011 (CCC Lenders' Presentation). **[**81]** In addition, given the number of individuals who have defected to a competitor and the relative dearth of novices in this industry, *see, e.g.*, Conway, Tr. (1/9 a.m.) at 91:21-92:24 (Conway worked at Mitchell before moving to Audatex); PX562-33 (Tony Aquila was employed by Mitchell before leaving for Audatex); DX 30-8 (Eric Seidel was a former investor in Focus Write), the evidence suggests that there are a limited number of people who have significant experience on the seller side of this industry.

Relationships also play a significant role in insurance companies' and repair facilities' choice of vendor. CCC, Audatex and Mitchell have a large head start over the recent and potential new entrants in establishing customer relationships. Through its 60 year history of providing estimating solutions, Mitchell has established an extensive network of thousands of insurance staff and collision repair facility users that would be difficult to replicate. *See* PX 573-009 ("Mitchell has a long-standing and deep relationship with over [text redacted] insurance companies and over [text redacted] collision body shops through its 60 year history."). Likewise, "CCC has a highly diversified, stable customer **[**82]** base" and "strong, long-term customer relationships with a 95% customer retention rate." PX 99-011, 007 (CCC).

Finally, the return on investment in the Estimatics and TLV markets may make entry of new firms unlikely. The cost of creating the software (and potentially a database) are up-front sunk costs. The ability of new entrants to recoup those costs may be limited by factors that define these markets: (1) Estimatics and TLV markets are "**very** mature with not a lot of room for growth," PX 543-005 (Mitchell) (emphasis in original); (2) customers do not frequently switch firms, PX 618-027 (Mitchell); PX 161-007, 011 (CCC); PX 543-016 (Mitchell); PX 574-003 (Mitchell); PX 583-026 (Mitchell); and (3) insurance companies enter long-term contracts for Estimatics and TLV, so only about a third of insurers are even available for bid in a given year, PX 583-026 (Mitchell). These factors led Mitchell to conclude that the "small revenue opportunity" in Estimatics "should deter any potential new competitor from making the considerable capital investment it would require to develop the database and communications infrastructure necessary to compete in this space." PX 629-002 (Mitchell). Further **[**83]** consolidation of these markets is likely to make potential new entrants even more wary.

4. *Web-Est: The "Fix" To Barriers to Entry?*

Defendants rely heavily on the potential future of Web-Est to counter the FTC's case on barriers to entry. Web-Est was formed in March 2008 with Mitchell's financial backing around the same time CCC and Mitchell announced the merger; **[*57]** Mitchell holds a [text redacted] % interest in Web-Est. Seidel, Tr. (1/22 p.m.) at 173:11-15 (Web-Est). Web-Est now offers a Web-based non-communicating estimating product to low-end repair facilities. Seidel, Tr. (1/22 p.m.) at 165:18-22, 167:7-8 (Web-Est). [36] It does not currently participate in the TLV market. Web-Est's Estimatics system is based, in part, on a license permitting it to use Mitchell's parts database, but the license agreement contains a restrictive covenant that prohibits Web-Est from selling to the top fifty insurance companies, from selling communicating Estimatics products to insurance companies or repair facilities, and from integrating with other third-party service providers, such as parts locators, salvage, and other providers. *See* DX 59; Seidel, Tr. (1/22 p.m.) at 173:24-174:13 (Web-Est).

Facing FTC resistence to the merger, Mitchell followed suit to CCC's release of its exclusive hold on the Motor database. Mitchell and Web-Est have entered into a new licensing agreement which will become effective as soon as the merger closes. Seidel, Tr. (1/22 p.m.) at 175:20-23, 177:12-19 (Web-Est); DX 423 (Mitchell). Pursuant to the new agreement, Mitchell will remove virtually all of the restrictions on Web-Est's rights to sell to insurance companies and repair facilities. Seidel, Tr. (1/22 p.m.) at 175:20-25 (Web-Est); DX 423 (Mitchell).

[Text redacted.]

---

[36] [Text **[**84]** redacted.]

The new license agreement also resets the clock on Web-Est's initial five year license to the Mitchell database, and gives Web-Est an option to renew for an additional five years. Seidel, Tr. (1/22 p.m.) at 175:9-14 (Web-Est); DX 423 (Mitchell). Web-Est also will be permitted to use other databases if it wishes, and can integrate with other vendors' products. *Id*. Furthermore, if the merger closes, Mitchell will relinquish its equity in Web-Est as well as its purchase option for Web-Est. *Id*.; Sun Tr. (1/9 p.m.) at 65:11-25 (Mitchell).

[Text redacted.]

The ability and willingness of current competitors to expand their foothold **[**85]** in the market and/or reposition greatly reduces the anticompetitive effects of a merger, and is essentially equivalent to new entry. *See* *Arch Coal, 329 F. Supp. 2d at 148* ("Defendants have shown that the post-merger fringe capacity in the [market] would be more than sufficient to absorb any increase in demand caused by any production lag coordinated by the 'big three' producers . . . ."). Defendants argue that the release of these restrictions will shatter the only major barrier to entry, will enable Web-Est to expand its business to new heights, and will usher in a new era of dynamic competition in these markets. They offer numerous points of evidence in support of their conclusion.

Defendants contend that Web-Est's web-based product will make it a "game changer" in the industry. Seidel, Tr. (1/22 p.m.) at 193:11-21 (Web-Est). They argue that Audatex's experiences in the U.S. market confirm that the concept of web-based products is gaining ground in the auto physical damages industry. Cheskis, Tr. (1/23 a.m.) at 11:3-23 (Gerber uses Audatex's web-based product in sixteen facilities in the United States); DX 225-33-35 (Audatex [text redacted]). Additionally, Web-Est already has a communicating **[**86]** Estimatics product embedded in its non-communicating product which it can turn on almost immediately, Seidel, Tr. (1/22 p.m.) at 176:1-3, 186:19-187:3 (Web-Est); is in the process of developing [text redacted], *id*. at 188:10-189:12, thus eliminating **[*58]** the barrier of product portfolio in Estimatics and TLV.

Defendants suggest that these plans have already begun to reap significant rewards. Since its formation last spring, Web-Est has more than doubled its initial customer base; it now sells Estimatics to about 11% of its addressable market. *Id*. at 165:23-25, 174:14-21. [37] Looking forward, Eric Seidel plans an aggressive price-cutting strategy and forecasts sales to DRPs and insurers within the first year and annual revenues of $ 14.6 million within five years. DX 30 at 6-7, 50 (Web-Est Oct. 2008 Business Plan). Mr. Seidel expects to add 5,000 customers within five years, including three insurance carriers within the next year. *Id*. at 5, 28.

[Text redacted.]

Although Defendants acknowledge **[**87]** that Web-Est is not nearly as large as Audatex, CCC or Mitchell, they assert that Web-Est does not plan "to go out and try to replicate a CCC, a Mitchell, Audatex," because they are "brick and mortar" Estimatics firms. *Id*. at 193:11-21. Defendants argue that Web-Est believes it will become the Estimatics industry's version of Netflix which upended Blockbuster and revolutionized the movie rental business. *Id*. at 193:22-194:19.

Mr. Seidel, who testified at the preliminary injunction hearing, is an impressive man and the Court has no doubt that he has the entrepreneurship, experience, and drive that bode well for Web-Est's future. Then again, of course, Mr. Seidel is whole-heartedly behind the proposed merger because it would free his hands to compete as he wishes. Nonetheless, the Court cannot ignore that Web-Est is a ten to twelve person company with current projected annual revenues of $ [text redacted] million (assuming the merger is effected). *Id*. at 218:14-19; PX 1003-006-007, 033 (Web-Est). It will be an ant to an elephant, compared to a post-merger CCC/Mitchell, at $ 450 million in revenues and over 2,000 employees. *See* PX 529-006 (transaction valued at approximately $ 1.4 billion **[**88]** and CCC/Mitchell expects to earn $ 460 million in annual sales at inception); *see also* Seidel, Tr. (1/22 p.m.) at 205:3-6 ([text redacted]). Assuming that web-based products will succeed (society is increasingly using the web, including the courts for electronic case filing), insurance companies will still demand customer support services and suppliers still will need large sales forces to woo them. The growth curve to take Web-Est from where it is now to where it

---

[37] Due to the current restrictions of the Mitchell license, Web-Est currently is limited to pursuing a market of approximately [text redacted] small shops. Seidel, Tr. (1/22 p.m.) at 174:14-17 (Web-Est).

would need to be to compete with CCC/Mitchell seriously enough to cause price competition is extraordinarily steep and inevitably long. That journey is made more difficult by the fact that Mitchell will no longer lend its expertise to Web-Est, nor will it hire out its staff to Web-Est. Sun, Tr. (1/8 p.m.) at 13:5-9 (Mitchell).

Moreover, CCC, Mitchell and Audatex have been refining their Estimatics software for over a decade. *See* PX 204-006 (CCC). In discussing whether entry is "sufficient," the Merger Guidelines suggest that:

> where the concern is unilateral price elevation as a result of a merger between producers of differentiated products, entry, in order to be sufficient, must involve a product so close to the products of **[**89]** the merging firms that the merged firm will be unable to internalize enough of the sales loss due to the price rise, rendering the price increase unprofitable.

[*59] Merger Guidelines § 3.4. From this record, it is simply unknown how many insurance companies and DRP repair facilities will find Web-Est's communicating Estimatics product to be up to par, or at what pace.

And, Web-Est cannot be considered a truly independent actor because Mitchell will continue to be so involved in its business. In order to be accepted, "curative divestitures" must be made to a new competitor that is "in fact . . . a willing, *independent* competitor capable of effective production in the . . . market." *White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir. 1986)* (emphasis added). Mitchell's counsel has similarly observed that it is a "problem" to allow "continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior." Richard G. Parker & David A. Balto, Evolving Approach to Merger Remedies, Antitrust Report (May 2000), *available at http://www.ftc.gov/speeches/other/remedies.shtm* **[**90]** (citing FTC, *A Study of the Comm'n's Divestiture Process* (1999), *available at http://www.ftc.gov/os/1999/08/divestiture.pdf*). Although Mitchell will relinquish its financial interests in Web-Est upon consummation of the merger, Web-Est will continue to license Mitchell's database for at least five years, with a continuing option for five more.

[Text redacted.]

At its rosiest, Web-Est's most optimistic financial projection predicts annual revenues of approximately $ [text redacted] million by 2013 (of which $ [text redacted] million would come from insurance companies). PX 1003-033 (Web-Est); Seidel, Tr. (1/22 p.m.) at 198:19-23, 202:25-205:2 (Web-Est). This is admirable growth. By contrast, however, in 2007, Mitchell had $ [text redacted] million in total revenue and an EBITDA [38] of $ [text redacted] million. PX 530-004 (Mitchell). CCC had $ [text redacted] million in total revenue and an EBITDA of $ [text redacted] million. *Id*.; PX 86-034 (CCC) (also estimating Solera's global revenues in 2007 at $ [text redacted] million). A merged CCC/Mitchell would be even bigger. According to the Merger Guidelines, entry is "timely" if it can be achieved "within two years from initial planning to **[**91]** significant market impact." Merger Guidelines § 3.2. ("significant market impact" means "significant impact on price in the relevant market"). While two years may be a short time frame by which to judge successful entry in this industry, even within five years, Web-Est hopes to make hardly a splash compared to Mitchell's current market share. Whatever Web-Est's plans and aspirations for the future may be, it is very unlikely to be able to compete effectively, *i.e*., affect pricing, within five years or even soon thereafter. *See In re Chi. Bridge & Iron Co., 138 F.T.C. 1024, 1071 (2005)* ("the mere fact that new entrants and fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition").

5. *Predictive Analytics*

Predictive analytics, an internal method of calculating future estimates based on an insurance company's own empirical data, Marushka Dep. at 14-15 (CCC), may supplant the Estimatics software sold by CCC, Mitchell and Audatex one day, and the Defendants hint that it may be sooner rather than later when they suggest that the merger **[**92]** of two outdated platforms cannot hurt anyone. It is acknowledged by **[*60]** CCC, however, that there is "nothing in production . . . that we've actually seen" that might replace today's Estimatics. Ramamurthy IH

---

[38] Earnings Before Interest, Taxes, Depreciation and Amortization.

Tr. at 203:13-19 (CCC). CCC's General Manager, Insurance Services Group, stated that no insurance company currently uses predictive analytics to calculate partial loss estimates and he does not know whether predictive analytics are allowed under insurance regulations. Marushka Dep. at 15 (CCC). In other words, while "there has been talk about . . . it," Ramamurthy IH Tr. at 203 (CCC), no insurance companies have implemented it. *See* Marushka Dep. at 15. The Court finds this evidence of new entry too speculative to rely upon. [39]

b. *Coordinated Effects*

Merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and **[**93]** achieve profits above competitive levels." *Heinz, 246 F.3d at 715* (citing *PPG Indus., 798 F.2d at 1503*). The theory follows that, absent extraordinary circumstances, a merger that results in an increase in concentration above certain levels "raise[s] a likelihood of 'interdependent anticompetitive conduct.'" *PPG Indus., 798 F.2d at 1503* (quoting *Gen. Dynamics, 415 U.S. at 497*); *see also* *FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991)* (high concentration makes it "easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level"); *Elders Grain, 868 F.2d at 905*. Successful coordinated interaction entails "[1] reaching terms of coordination [2] that are profitable to the firms involved and [3] an ability to detect and punish deviations that would undermine the coordinated interaction." Merger Guidelines § 2.1. Whether a merger will make coordinated interaction more likely depends "on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms." *Id*. Because the FTC has established a *prima facie* case, the burden is **[**94]** on the Defendants to demonstrate "structural barriers," unique to this industry, that are sufficient to defeat the "ordinary presumption of collusion" that attaches to a merger in a highly concentrated market. *Heinz, 246 F.3d at 725*.

"The combination of a concentrated market and barriers to entry is a recipe for price coordination." *Id. at 724*. Yet, despite the high HHI numbers currently displayed in these markets, by all accounts, Estimatics and TLV are highly competitive markets today and there is no evidence of past coordination. Danford Dep. at 120 (Ohio Mutual); Brandt, Tr. (1/8 a.m.) at 17:23-18:7 (The Hartford); Cheskis, Tr. (1/23 a.m.) at 10:12-23 (Gerber); Aquila Dep. at 15 (Audatex); Conway, Tr. (1/9) at 169:10-21 (Audatex). *Compare with* *Elders Grain, 868 F.2d at 905* ("there is a history of efforts to fix prices in the industry"); *Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1388 (7th Cir. 1986)* ("there is a tradition . . . of cooperation between competing hospitals in Chattanooga"). "While proof of prior cooperative behavior is relevant, it is not a necessary element of likely future coordination in violation of *Section 7*." *Arch Coal, 329 F. Supp. 2d at 116*. But Defendants do **[**95]** not rest there. Rather, they argue that these markets provide a perfect example of the HHI's failure to measure anticompetitive effects because, despite their high concentration, "[t]he undisputed **[*61]** market realities here present a perfect storm of factors that impede coordination." Defs.' Post-Trial Brief at 16. According to Defendants, those factors include: (1) product heterogeneity; (2) lack of price transparency; (3) complexity and lack of standardization with respect to pricing and products; (4) firm heterogeneity; (5) large, infrequent contracts; (6) high fixed costs relative to variable costs; and (7) the presence of sophisticated buyers. *See* Ordover, Tr. (1/23 a.m.) at 90:1-92:5.

1. *Characteristics of the Products and Competitors*

"[R]eaching terms of coordination may be limited or impeded by product heterogeneity." Merger Guidelines § 2.11; *see also, e.g.,* *Hosp. Corp. of Am., 807 F.2d at 1390*. "Estimatics software is differentiated along a number of important dimensions," including "accuracy and coverage of the underlying data for parts and estimated labor times, perceived differences in the ease of use of the competing products, and the quality and timeliness of technical support **[**96]** services." PX 1020 P 71 (Hayes Prelim. Report). Dr. Ordover opined that on a scale of zero to ten, these products are closer to a ten in terms of heterogeneity. Ordover, Tr. (1/23 a.m.) at 85:2-11. Insurance companies demand customized Estimatics and TLV products tailored to fit their individual needs. Ramamurthy, Tr.

[39] With the movement towards web-based platforms well underway, *see* DX 225-33-35 (Audatex), and the potential emergence of predictive analytics in the not too distant future, the FTC may be chasing yesterday's technology, when all is said and done.

(1/22 a.m.) at 99:8-100:2 (CCC). Some insurers even require that bidders commit to spending $ 500,000 to $ 600,000 per year to develop software unique to that customer. *Id*.

In addition to product heterogeneity, coordination may be impeded by a lack of "standardization of pricing or product variables on which firms could compete." Merger Guidelines § 2.11. The base Estimatics product is often sold in highly customized bundles that include other auto physical repair products and various add-on products to suit the particular requirements of the customer, thus resulting in significant product variability. Ramamurthy, Tr. (1/22 a.m.) at 88:3-7 (CCC); Conway, Tr. (1/9) at 93:24-95:5 (Audatex) ("With the number of products that [Audatex] offer[s] [to insurers], you could come up with thousands of different combinations of those products."); *id*. at 111:9-13 ("On the [repair] **[**97]** shop side with the number of different add on products," Audatex could offer "hundreds" of different bundles). Along with the base estimating product, the bundles can be comprised of any number or combination of other products and add-ons, as well as varying levels of installation support, customer service, training and integration. Rollins Dep. at 17 (Safeco); Kostakis Dep. 36, 37-39 (Angelo's Auto Body Shop); *see also* DX 98 (CCC Price Sheet); DX 47 (Mitchell's August 2007 price list for repair facilities is thirty-one pages long, consisting of almost 400 product and pricing options). These customized bundles have highly complex and varying pricing metrics including flat fees for the entire bundle, individual product pricing, and almost everything in between. *See, e.g*., DX 243-10-21 (CCC Pathways Services Agreement).

Defendants also assert that the likelihood of coordination in these markets is further diminished by the heterogeneity exhibited among the firms in these markets. "[R]eaching terms of coordination may be limited or impeded by firm heterogeneity, for example, . . . the production of another product that tends to be used together with the relevant product." Merger Guidelines **[**98]** § 2.11. Defendants argue that because the sale of add-ons and other products in conjunction with Estimatics and TLV is an increasingly important area of focus and source of revenue growth, "the merged firm's unique interest **[*62]** in enhancing sales of such related offerings further impedes any interest in coordinated interaction." Defs.' Post-Trial Brief at 20. They point to Mitchell's unique medical bill-review services as an example. *See* PX 583-027-028 (Mitchell); PX560-031-032 (Mitchell).

While Defendants' arguments do have force, particularly with regard to the insurance industry, their points are weakened by their own admissions that there is a "minimum differentiation in offerings," PX 1420-007 (CCC); *see also* PX 253-010 (CCC). "Generally speaking there are . . . three or four [bundles] that are purchased consistently from one insurance company to the next in most all of the bids." Conway, Tr. (1/9) at 94:9-11 (Audatex). The "standard package" includes the basic estimating system, the imaging systems, an aftermarket products tool and communication. *Id*. at 94:12-18. While it is true that Mitchell is the only one of the Big Three firms that offers a medical bill-review product, with limited **[**99]** other exceptions, CCC, Mitchell and Audatex have essentially the same suite of product offerings and add-ons, and are therefore unable to separate themselves from the pack on a consistent basis through unique sets of products. *See* PX 1420-007 (CCC document showing the different add-ons in Estimatics) ([text redacted]); PX 253-010 (CCC) (noting that [text redacted]). *But see* PX 550-022 (Mitchell) ("Continue to look for points of differentiation"); *see also* Carr Dep. at 23 (Motor).

2. *Dynamics of the Marketplace*

In addition to product and firm heterogeneity and variability, Defendants argue that the unique marketplace dynamics make coordination unlikely. First, Defendants assert that the lack of pricing transparency for Estimatics and TLV is a significant impediment to coordination. "Reaching terms of coordination may be limited or impeded . . . by firms having substantially incomplete information about the conditions and prospects of their rivals' businesses," Merger Guidelines § 2.11, and the ability to detect deviations from the terms of coordination is limited "if **[**100]** key information about specific transactions or individual price or output levels is [not] available routinely to competitors." *Id*. § 2.12. *See also* *Oracle, 331 F. Supp. 2d at 1166* ("Without homogeneity [of product offerings] or transparency [in pricing], the market conditions are not conducive to coordinated effects, either tacit or express."). The bidding process for insurance companies is conducted on a confidential basis, and bids are usually accompanied by a non-disclosure agreement. Sun, Tr. (1/9) at 46:22-47:4 (Mitchell); Brandt, Tr. (1/8 a.m.) at 23:19-22 (The Hartford). Though these competitors go to great lengths to obtain "intelligence" about each other's pricing, Sun, Tr. (1/8 p.m.) at 55:13-58:21 (Mitchell); Sun, Tr. (1/9) at 75:20-77:5 (Mitchell), and the record contains instances where one vendor has obtained partial bids, price lists, or other pricing information about their competitors, *e.g*., PX 85-059 (CCC); PX 506 (Mitchell on Audatex pricing); PX 623 (Mitchell), PX 696 (Mitchell); PX 713 (Mitchell on Audatex pricing); PX 714 (Mitchell on Audatex pricing); PX 715 (Mitchell on CCC pricing); PX 716 (Mitchell on CCC pricing), pricing for insurance company contracts is **[**101]** not "routinely available." [40] Furthermore, many times when CCC, Audatex or Mitchell obtain **[*63]** so-called competitive information on pricing, the information is either misleading or simply false (presumably to force a lower bid). *See, e.g*., DX 425-1 ([text redacted]); Conway, Tr. (1/12 a.m.) at 28:14-19 (Audatex "expect[s]" that customers have provided inaccurate information on occasion with the hopes of driving down Audatex's prices).

The FTC contends that CCC, Mitchell and Audatex obtain a substantial amount of information after a bidding process, which they can use to set future prices. *See* Sun, Tr. (1/8 p.m.) at 55:6-9 (Mitchell); *see also* PX 172-002 (CCC e-mail); PX 598-001 (Mitchell [text redacted]); PX 179-003 (CCC). Given the degree of product variability in the industry, past pricing information may be suggestive but not necessarily helpful for the next bid, particularly a bid for the same insurer because contracts with insurance companies can last from two to five years, during which time prices have **[**102]** been shown to alter significantly. *See* *Arch Coal, 329 F. Supp. 2d at 141* ("It is true that industry publications make some market information available among producers. However, the information published in those sources is limited, imperfect, and largely unreliable and untimely.").

Pricing is not as obscure in the repair facility segment. Like insurance company bids, repair facility contracts are confidential. *See, e.g*., Sun, Tr. (1/9) at 53:19-54:10 (Mitchell); Ramamurthy, Tr. (1/22 a.m.) at 108:23-25 (CCC); Conway, Tr. (1/12 a.m.) at 39:8-17 (Audatex). Repair facility contracts also often consist of bundled products, including the base Estimatics product and a variety of add-ons. Conway, Tr. (1/9) at 111:9-113:2 (Audatex). However, despite confidential repair facility contracts and product bundling, Estimatics pricing for the repair shop segment is "transparent." Seidel, Tr. (1/22 p.m.) at 227:9-14, 226:2-24 (Web-Est) (stating that it is possible to get the price points of the Big Three's Estimatics products by calling up shops and asking what they are paying); *see also, e.g*., PX 179-003 (CCC); PX 173 (CCC [text redacted]); PX 742-008 (Mitchell began a matching program in December **[**103]** of 2008 in which it offered to match CCC and Audatex on the condition that Mitchell had the "competitive quote faxed in").

Likewise, TLV prices are more transparent than Estimatics prices for insurance companies. Because TLV is sold on a per valuation basis, there is only one price to track. *See* PX 172-002 (CCC e-mail) ("Mitchell is already in [the] door with estimating and is offering total loss @ $ [text redacted]"); PX 722 (Mitchell e-mail) (Mitchell agreed on $ [text redacted] per valuation for a certain insurer "in part because CCC came in at $ [text redacted]."). However, TLV prices are becoming less transparent as vendors turn increasingly toward the "one throat to choke concept," *i.e*., bundling, whereby they purchase Estimatics, TLV and add-ons from a single source. *See* PX 543-019-020 (Mitchell); PX 550-025 (Mitchell); PX 1432-003 (CCC); PX 1402 (CCC web-page promoting the CCC One total repair platform). Even when TLV is sold separately, these three companies still have differing price metrics based on a variety of factors including, *inter alia*, the relationship with the customer and the size of the order. *See* DX 186-26 (CCC contract with [text redacted]) (per valuation price, **[**104]** plus surcharge for certain methods of ordering, as well as additional fees for different vehicles); DX 187-10 (CCC contract with [text redacted]) (per valuation price for cars, additional for trucks, with separate minimum purchase requirements for both).

On balance, as Dr. Ordover suggests, the pricing information in these markets is **[*64]** best described as "shrouded," Ordover, Tr. (1/23 a.m.) at 88:8-22, *i.e*., neither as transparent as the FTC would wish nor as secret as the Defendants would now prefer.

Defendants also contend that long-term, high-value Estimatics and TLV contracts in the insurance industry lower the incentives to coordinate and increase the incentives for cheating. *See id*. at 85:15-23. Insurance contracts typically range from two to five years, and can be priced anywhere from a few thousand dollars a year for a small insurer to several million dollars a year for a large insurer. Conway, Tr. (1/9) at 96:16-20, 94:22-95:4 (Audatex); *see, e.g*., DX 252-4, 53 (five-year contract with CCC). Defendants and their expert assert that the insurance contracts,

---

[40] One source of competitive intelligence is former employees of one of the Big Three competitors who migrate to another one. Sun Dep. at 10-12 (Mitchell); PX 624-001. [Text redacted.]

particularly for Tier One insurers, are just too valuable for any one of the three competitors to agree to forego, whether implicitly **[**105]** or explicitly. The Merger Guidelines provide that "[w]here large buyers likely would engage in long-term contracting, so that the sale covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate" from the terms of coordination. Merger Guidelines § 2.12; *see also* United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1416, 1423 (S.D. Iowa) (finding coordination unlikely where transactions in the market were "relatively large" and "infrequent"). And, although individual repair facility contracts are not particularly large, Defendants argue that because CCC, Audatex and Mitchell earn large portions of their revenues from the sale of non-Estimatics products, they have an incentive to deviate from any potential terms of coordination in order to sell additional products.

In a similar vein, Defendants argue that the bargaining power and sophistication of their insurance company customers further impede coordination. A sophisticated customer base makes price coordination more difficult, *see* *Baker Hughes, 908 F.2d at 986* (sophisticated "buyers closely examine available options and typically insist on receiving **[**106]** multiple, confidential bids for each order"), but buyer power is greater when there are few buyers in the market. *See* *Elders Grain, 868 F.2d at 908* ("A concentrated and knowledgeable buying side makes collusion by sellers more difficult."). Although the top fifty insurance companies account for approximately 80% of the total revenues in physical damage claims market, PX 543-019, the insurance market as a whole is not concentrated. The HHI for the nineteen largest insurers (*i.e.*, the only insurers with a greater than 1% market share), who together represent 76% of the entire insurance market, is only 631 -- not very concentrated. *See* PX 515-028; *see also* PFF P 197. However, it is true that the larger automobile insurance companies have enough buying power to demand customized products and to use their leverage regularly to keep Estimatics prices low for repair facilities in their DRP networks. *See* Cheskis, Tr. (1/23 a.m.) at 13:16-14:13 (Gerber); *see also* Hall, Tr. (1/8 a.m.) at 94:15-24 (GMAC); Ramamurthy, Tr. (1/22 a.m.) at 110:15-111:6 (CCC). Collectively, the heterogeneity of the base products and customized bundling, the largely confidential pricing, and the high-value insurance **[**107]** contracts tend to make tacit coordination less likely than the huge HHIs might predict.

But this conclusion is not the end of the analysis. Defendants ignore a number of other factors present in these markets that would tend to confirm the HHI's predictions regarding the likelihood of coordination. Estimatics and TLV are "stable" markets in which the same three companies have been competing against each other for over a decade, making the market participants very familiar with each **[*65]** other. PX 583-024 (Mitchell); Sun, Tr. (1/8 p.m.) at 20:11-22 (Mitchell); *see also* PX 574-002 (Aurora); PX 554-054, 055 (Mitchell) ("the industry will not dramatically change over the next 5-10 years"); PX 1970-027 (CCC-Mitchell) ("The $ 40 billion auto damage claims industry is large and stable . . . ."). Defendants point to a lack of price transparency as the "[k]ey information" that is not "available routinely." *See* Merger Guidelines §§ 2.11 & 2.12. But pricing is not the only "key information" that is contemplated by the Guidelines. Indeed, the Guidelines state that if "key information about specific transactions *or* individual price or output levels is available routinely to competitors, it may be difficult **[**108]** for a firm to deviate secretly." *Id*. § 2.12 (emphasis added). These three firms know what products each offers, what insurance accounts each has won, and, often, the identities of the final two bidders for an insurance company contract. *See, e.g*., Balbirer IH Tr. at 73 (CCC) ("Obviously we know what their products are, they know what our products are, and we're in the marketplace. They know who we sell to and we know who they sell to."). In particular, each of these three companies knows which one of them sells to which of the top twenty-five insurance companies. PX 543-011-012 (Mitchell) (identifying top twenty-five insurers, who won the contract, and claims volume). CCC, Audatex and Mitchell have sought to "gather as much competitive information [about each other] as possible" for a number of years, Sun, Tr. (1/8 p.m.) at 57:17-58:1 (Mitchell), and have largely succeeded in their efforts.

These competitive markets are stable in part because they are very mature and have little room for growth. PX 543-005 (Mitchell); *see also* PX 1970-033 (CCC-Mitchell). [41] Estimatics is "90%+ saturated," making it a "game [of] market share take-away." PX 630-017. But market shares have also remained **[**109]** stable over the last several years. *See* PX 583-024 (Mitchell); PX 543-020 (Mitchell) ("not a lot of switching going on"). "Taking [m]arket [s]hare is [d]ifficult" in this industry, largely because of the high switching costs and the time associated with switching products. PX 543-016 (Mitchell); *see also* PX 634-002 (Mitchell e-mail) (cost of switching generally is $ [text

[41] [Text redacted.]

redacted] per user); PX 585-029 (Audatex); PX 574-003, 016 (Mitchell). Because of the difficulty of gaining market share, CCC, Audatex and Mitchell have all shifted their focus toward selling more products to their existing customers rather than engaging in price wars over each other's customers. *See* PX 543-019, 020; PX 550-024-025, 030; *see also* [text redacted]; PX 632-034. This can lead to even greater stabilization of market share and greater segmentation of the market, thus increasing the incentives and lowering the impediments to tacit coordination. *See* Merger Guidelines § 2.11 ("Firms coordinating their interactions need not reach complex terms concerning the allocation of the market output across firms or the level of the market prices but may, instead, follow simple terms such as . . . stable market shares, **[**110]** or customer or territorial restrictions.").

Nor are high switching costs the only characteristics that make these markets conducive to tacit coordination in the form of market stabilization or customer allocation. Product heterogeneity, which in some ways can reduce the likelihood of coordination, can also lead to greater segmentation of the market and more entrenched market shares. [42] Decreasing the **[*66]** number of firms who can service the larger contracts from three to two is likely to accelerate the trend of market stability, as gaining market share will be marginalized, and increased customization and integration of products will become the primary goal.

Finally, the argument that high fixed costs relative to variable costs creates an incentive to seek volume, while broadly appealing, is not as applicable to the Estimatics and TLV markets as it might be to other software markets. When fixed costs are high relative to variable costs, there is a "strong economic incentive[] to produce at close to full capacity" that "works against the likelihood of any collusive price raising scheme which would require output restrictions." *Archer-Daniels, 781 F. Supp. at 1423*. As Dr. Ordover noted, industries with high fixed costs relative to variable costs are likely to have no barriers to expansion, and no capacity constraints on production. Ordover, Tr. (1/23 a.m.) at 91:16-92:1. Here, while the Big Three firms have no capacity constraints, the Estimatics and TLV markets are already "very mature" and offer little room for growth. PX 543-005 (Mitchell). Capacity is limited by customer demand, not vendor cost, and the volume of claims has been growing at a slow rate over the last several years. *See id*. Moreover, because of the time and high costs associated with switching products, it is very difficult **[**112]** to gain market share. Accordingly, Dr. Hayes calculated that "it's not in [the merged firm's] interests to reduce prices; in fact, it's in their interest to raise prices." *See* Hayes, Tr. (1/21 a.m.) at 69:11-72:1.

The Defendants point to a Solera financial document to support their contention that Audatex sees the merger as a potential opportunity to increase its competition for CCC's and Mitchell's existing customers. In that document, Solera stated:

> We view potential industry consolidation as a positive for Solera [because]: [1] It provides an opportunity for Solera to gain share in North America as its two competitors will be distracted; [and] [2] it likely creates a *more rational North American market*, as the newly combined competitors would be highly levered and capital constrained.

DX 41-AUD0000229 (Audatex) (emphasis added). As indicated by an internal company e-mail from [text redacted], which the FTC championed as a "smoking gun" of sorts, to a profit maximizing business operating under these market conditions, "rational" means avoiding price wars with competitors. PX 552. [43]

In a highly concentrated market, with stable market shares, low growth rates and significant **[**113]** barriers to entry, there are few incentives to engage in healthy competition. Although the FTC has exaggerated the legal significance of the "merger-to-duopoly" inquiry, it is clear that CCC/Mitchell and Audatex will likely be the only major players in these markets for the foreseeable future. "[I]t is easier for two firms to collude without being detected than for three to do so," *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 602 (7th Cir. 1985)*, but price fixing

---

[42] "Although homogeneity of products may make the creation and enforcement of a traditional cartel easier, tacit collusion may be easier when products are differentiated. When products are highly differentiated, direct competition between them is limited, in effect creating a smaller number of critical points for tacit interaction. . . . The result may be that highly segmented markets . . . can sustain high profits more effectively than homogeneous markets." Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust:* ***[**111]*** *An Integrated Handbook* § 11.2e1, at 635 (2d ed. 2006).

[43] [Text redacted.]

is only one concern of the antitrust **[*67]** laws. A more common concern is "the creation or reinforcement by merger of . . . oligopolistic market structures in which tacit coordination can occur." *Heinz, 246 F.3d at 725*. With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom.

Nevertheless, Defendants have made a strong argument that despite these characteristics, the market dynamics create a number of incentives to compete, and indeed, have maintained a competitive marketplace to this day. *See* Mitchell, Tr. (2/17 p.m.) at 43:14-44:15 **[**114]** ("Concentrated though they are everybody agrees that [these markets] are competitive. . . . We know that this market does not operate the way the presumption indicates. Why? Because it's highly concentrated, [yet] it's [still] competitive, that's the first clue."). Although Defendants present several arguments why coordination is not likely to occur despite their merger, the FTC has responded with substantial evidence of significant barriers to entry as well as credible evidence that coordination is possible, and even likely, in these markets. Whether the Defendants' argument that the unique combination of factors in these markets negates the probability that the merger may tend to lessen competition substantially, or whether the FTC is correct that the market dynamics confirm the presumptions that follow its *prima facie* case, is ultimately not for this Court to decide. As Judge Tatel confirmed in *Whole Foods*, "[c]ritically, the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *548 F.3d at 1042* (Tatel, J., concurring) (quoting *Heinz, 246 F.3d at 714-15*). **[**115]** The Defendants' arguments may ultimately win the day when a more robust collection of economic data is lain before the FTC. On this preliminary record, however, the Court must conclude that the FTC has raised questions that are so "serious, substantial, difficult and doubtful" that they are "fair ground for thorough investigation, study, deliberation and determination by the FTC." *Heinz, 246 F.3d at 714-15*.

c. *Unilateral Effects*

The FTC's sufficient response to the Defendants' rebuttal arguments on coordinated effects alone could suffice, but because the parties focused on unilateral effects throughout the evidentiary hearing, a brief analysis on this issue is in order. There are two basic analytical frameworks for analyzing the competitive effects of a merger: coordinated and unilateral effects. Though the distinction between these two frameworks has more significance in law than it does in economics, *see* Hayes, Tr. (1/12 p.m.) at 138:5-8, 10-11 (describing the distinction between coordinated and unilateral effects as "artificial"), the basic premise underlying the distinction is that the unilateral effects theory surmises that firms do not recognize their shared interest in elevating **[**116]** price, whereas the coordinated effects theory assumes that they do. *Id*. at 138:15-19. Thus, under unilateral effects theory, economists assume that firms behave independently. *Id*. at 138:18-19.

There are two main theories that predict unilateral effects: (1) the "dominant firm" theory and (2) the differentiated products theory. Both experts agreed that the "dominant firm" theory, also known as the "network effects" or "tipping point" theory, does not apply here, so the Court turns to the differentiated products theory. *See* Hayes, Tr. (1/21 p.m.) at 209:18-210:7 ("I **[*68]** do not credit the strength of the network effects being sufficient to undermine Audatex. I [do not give] that argument a lot of weight."); Ordover, Tr. (1/23 p.m.) at 148:5-18.

The differentiated products theory applies to markets where the products sold by different suppliers are not perfect substitutes for one another. Unilateral effects in a differentiated product market are likely to be profitable under the following conditions: (1) the products must be differentiated; (2) the products controlled by the *merging* firms must be close substitutes, *i.e*., "a substantial number of the customers of one firm would turn to the other **[**117]** in response to a price increase"; (3) other products must be sufficiently different from the products offered by the merging firms that a merger would make a small but significant and nontransitory price increase profitable for the merging firm; and (4) repositioning must be unlikely. *Oracle, 331 F. Supp. 2d at 1118*. As Dr. Ordover observed, the Estimatics and TLV products sold by CCC, Mitchell and Audatex are significantly heterogeneous. *See* Ordover, Tr. (1/23 a.m.) at 85:2-11. As to the second, third and fourth conditions, the Merger Guidelines advise that:

> [s]ubstantial unilateral price elevation in a market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their

> first and second choices, and that repositioning of the non-parties' product lines to replace the localized competition lost through the merger be unlikely.

Merger Guidelines § 2.21. Thus, the key point in contention is whether a significant percentage of consumers view CCC and Mitchell as their first and second choice, and Audatex as a "more distant third." *See* PX 1020 P 79 (Hayes Prelim. Report).

Economists **[**118]** employ a separate category of models to predict unilateral behavior, that is, to predict whether a hypothetical profit maximizing firm would find it profitable to raise prices on its own. Hayes, Tr. (1/12 p.m.) at 138:11-15. Dr. Hayes prepared three different models to predict the likelihood of unilateral effects in these markets: (1) a Bertrand simulation of price effects for repair facilities, (2) a bidding model for the sale of Estimatics to insurance companies and (3) a separate bidding model for the sale of TLV to insurance companies.

Dr. Hayes's Bertrand model, which incorporates data on market shares, diversion ratios, and production costs, predicts a post-merger average price increase of about 30% for Estimatics for repair facilities. Hayes, Tr. (1/12 p.m.) at 153:17-55:15; *see also* PX 1059 PP 6-10, 17, Ex. S-2 (Hayes Suppl. Report). Accounting for the cost savings and cross-selling opportunities that would be facilitated by the merger, the model still predicts an average price increase of approximately 19%. PX 1059, Ex. S-2. [44] Dr. Ordover challenges the accuracy of the diversion ratios that **[*69]** Dr. Hayes employs in his model, but even using Dr. Ordover's suggested diversion ratios, **[**119]** the model still predicts substantial price increases for repair facilities. Hayes, Tr. (1/21 p.m.) at 213:24-214:14.

Because CCC, Mitchell and Audatex bid on Estimatics contracts with insurance companies, Dr. Hayes employed a derivation of an auction model to predict the merger's effect on prices for the insurance segment of **[**120]** the Estimatics market. PX 1020 P 78 (Hayes Prelim. Report). [45] This model assumes that in a procurement auction, which these bids resemble, though the winner is the supplier that is able to make the most attractive offer to the customer, the winning price is actually determined by the supplier with the second-most attractive offer. *Id*. Thus, the most attractive offer determines the winner and the second-most attractive offer determines the price. *Id*. Critically, the model predicts that the merger will cause prices to increase "*if* the merging suppliers would have been the most attractive and second-most attractive suppliers had they remained separate, and the third-most attractive supplier is viewed as a more distant choice." *Id*. P 79 (emphasis added). [46] Therefore, the model attempts to mirror the economic theory. Through a series of calculations, which include data on market shares, profit margin earned on incremental sales, and incumbent winning percentage, *see* PX 1059 PP 24, 26, 27 (Hayes Suppl. Report), Dr.

---

[44] Defendants argue that Dr. Hayes's opinions are not based in reality because the combined CCC/Mitchell could not "conceivably get away with the sort of price increase that" his Bertrand model predicts. CCC, Tr. (1/21 p.m.) at 179:22-25. But Dr. Hayes admits that he puts "less weight on the precise numbers than the general directional indications that come out of the analyses. . . . [W]hether it's going to be 40 percent or 20 percent at each particular supplier, I wouldn't stake my reputation on that." Hayes, Tr. (1/21 p.m.) at 161:24, 177:10-12; *see also* Hayes, Tr. (1/21 p.m.) at 164:11-12 ("The world is complex[;] we can't capture everything in a model that we might like to."). Thus, it is not particularly troublesome that the extraordinary price increases predicted in the model may not accord with "economic realities." *See* Ordover, Tr. (1/23 p.m.) at 151:20-25.

[45] Specifically, Dr. Hayes analyzed the price effects on sales of Estimatics to insurers using "an independent private values English auction with no reserve price. The key role of the 'independent private values' assumption is to acknowledge that while bidders may know something about their rivals' costs, they do not know more about those costs than their rivals know. The absence of a reserve price (i.e., a maximum acceptable bid set by the insurer) is justified by the fact that there are no good substitutes for estimatics software . . . ." PX 1020 P 78 n. 123 (Hayes Prelim. Report).

[46] In addition to inferring from the price increase that the non-merging firm is a more distant third choice, the model also assumes a more distant third. This is because the auction model always predicts some unilateral price increase, which, under economic theory, can occur only where **[**122]** the non-merging firm is a more distant third choice; and because the model was calibrated to generate the 80% price-cost margin exhibited in these markets, which, in combination with the high incumbent winning percentage and market share data, produces a significant price increase. *See* DX 644 P 24 (Ordover Report) (lowering the economic margin in the model makes "the gap between the challeng[ing bidders] . . . small[er]," which, in Dr. Ordover's view, is an "assumption [that] more accurately reflects the business realities").

Hayes's model predicts that insurance companies are likely to receive a price increase of approximately 7% for Estimatics products. *Id*., Ex. S-7. [47] Thus, "[w]hat the model **[**121]** is telling us is that there [is a] reasonably large fraction of customers that think that . . . Audatex is a more distant third." Hayes, Tr. (1/21 a.m.) at 42:16-18. If the Defendants' asserted cost-savings are included in the calculations, the average price increase is a more modest 1%. PX 1059, Ex. S-7 (Hayes Suppl. Report).

Finally, Dr. Hayes prepared a similar auction simulation to determine whether there would be price effects **[**123]** for the TLV market. Using similar inputs as the auction **[*70]** model for Estimatics, the TLV simulation predicted, without accounting for cost savings, an increase in price to insurance companies of 15.8%. *Id*., S-12; *see also* Hayes, Tr. (1/12 p.m.) at 166:15-167:17. With cost savings, the model still finds an average price increase of 6% in TLV. PX 1059, S-12 (Hayes Suppl. Report); *see also* Hayes, Tr. (1/12 p.m.) at 167:18-168:9.

The main problem with Dr. Hayes's models is that the data and predictions cannot reasonably be confirmed by the evidence on this record. The FTC argues that there is a presumption that a "significant share" of customers prefer the merging parties' products as their first and second choices if the merged firm has a market share of at least 35%. FTC's Post-Trial Brief at 47 (citing Merger Guidelines § 2.211). However, this presumption is warranted only if: "each product's market share is reflective of not only its relative appeal as a first choice to consumers of the merging firms['] products but also its relative appeal as a second choice, and hence as a competitive constraint to the first choice." Merger Guidelines § 2.211.

As part of his investigation, Dr. Hayes reviewed **[**124]** a sample of eighteen bidding contests for Estimatics between 2003 and 2007. PX 1020 P 80 (Hayes Prelim. Report). In seventeen of those contests, CCC was the victor, while Mitchell was one of the finalists in nine and Audatex was the runner-up in eight. *Id*. Mitchell and Audatex were the finalists in the one remaining instance. *Id*. P 80 n. 126. But, approximately one hundred insurance contracts are up for renewal each year, Brungger IH Tr. at 186:1-22 (Mitchell), meaning that Dr. Hayes reviewed a total of eighteen bidding contests out of approximately 400 that occurred during that time span. This fraction of auctions is not large enough to rely on as a representative sample of the entire insurance market. *See Oracle, 331 F. Supp. 2d at 1167* ("Drawing generalized conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible."); *see also SunGard, 172 F. Supp. 2d at 182-83*. On the TLV side, Dr. Hayes reviewed data from a larger set of recent bid events, but only four of them identified who the two finalists were. *See* PX 1020 P 88 (Hayes Prelim. Report). CCC and Mitchell were one of the finalists in all **[**125]** of these instances; CCC and Audatex were the two finalists in no instances. *Id*. Again, this sample is too small to rely on to make broad conclusions about a highly fragmented market.

With respect to repair facilities, the diversion ratios are the best indicators of whether a significant share of the market views CCC and Mitchell as their first and second choices, and Audatex a more distant third. Dr. Hayes's diversion ratios are derived from a two-year old survey of thirty-one former CCC customers which notes that the results "cannot be projected to the population as a whole due to the limited number of completes." PX 1423-005 (CCC); Hayes, Tr. (1/21 p.m.) at 175:6-13. The warning that the diversion ratios cannot be projected to CCC's entire customer portfolio is evidence of its unreliability. Moreover, the twenty-nine responses that Dr. Hayes used to calculate his diversion ratios account for less than 0.2% of all of CCC's repair facility customers. Ramamurthy, Tr. (1/22 a.m.) at 62:7-8 (CCC has approximately 22,000 repair facility customers). This data is even more unreliable than the data relating to insurance company choices, especially considering that Bertrand models typically **[**126]** rely on large volumes of data to estimate diversion ratios. Ordover, Tr. (1/23 p.m.) at 153:20-154:5; *see also id*. at 154:12-155:7 (the **[*71]** Bertrand model is most reliable in markets where there are tens of thousands of data points, such as a consumer products market); *see also* Hayes, Tr. (1/21 p.m.) at 176:6-8 ("Certainly 31 customers is not a terribly large number. More customer information would be useful."). Moreover, Dr. Hayes had

---

[47] Notably, Dr. Hayes's auction model predicts that Audatex will have to reduce prices for Estimatics by approximately 15% when it is the incumbent bidder, *i.e.*, when it has a nearly 90% chance of winning, even though the combined CCC/Mitchell will be able to raise prices. PX 1059, Ex. S-7 (Hayes Suppl. Report). Defendants make much of the fact that Audatex has aggressively attempted to impede this merger, arguing that Audatex's opposition to the merger is evidence in itself of the merger's likely competitive effects. *See, e.g.*, Defs.' Post-Trial Brief at 1.

no data from Mitchell or Audatex regarding their diversion ratios. Instead, he used CCC's diversion ratios to predict Mitchell and Audatex's diversion ratios based on their respective market shares. [48]

Alternatively, the Merger Guidelines state that a combined market share of at least 35% may be sufficient to presume that the merger will result in unilateral effects if "data on product attributes and relative product appeal show that a significant share of purchasers of one merging firm's product regard the other as their second choice." Merger Guidelines § 2.211. Evidence of this sort is sorely lacking in each segment of these markets. Dr. Hayes could not identify any characteristics of Estimatics or TLV products that might make Audatex a more distant third choice for certain insurers. Nor could he identify any characteristics of a particular class of insurers that might cause them to view Audatex as a more distant third -- with the possible exception of lack of familiarity. Furthermore, Dr. Hayes relied on statements of only six out of approximately 300 insurance companies for his conclusion that Audatex's Estimatics product is a "more distant third" choice for a significant share of insurance companies. Of those six insurance companies, none of them actually stated that they viewed Audatex as a more distant third choice, nor could they identify any characteristics **[**128]** of Audatex's product that would make it a more distant third choice for them. *See* Hall, Tr. (1/8 a.m.) at 89:8-21 (GMAC did not "know anything about Audatex"); Brandt, Tr. (1/8 a.m.) at 20:3-6, 41:8-18 (The Hartford was "impressed" with all three of the firms' offerings and a director within its auto and liability practice department opined that CCC, Audatex and Mitchell all had a relatively similar look, touch and feel); *id*. at 41:4-5 ("Q. You're not suggesting [Audatex offers] an inferior product are you? A. Oh, no.").

The evidence is similarly lacking for TLV. Dr. Hayes could not identify any insurers -- let alone any group or class of insurers -- that view Audatex's TLV product as a "more distant third" choice. The only evidence that Dr. Hayes found that might suggest that Audatex's product is less desirable in some respect was one reference about higher valuations. Hayes, Tr. (1/21 a.m.) at 98:15-21. All the same, he continued the faulty assumption that some insurers view Audatex as a more distant third for Estimatics to assume that those same insurers view it as a more distant third in TLV. *See* Hayes, Tr. (1/21) at 96:12-23.

Evidence relating to repair facilities is also notably **[**129]** absent. The vast majority of repair facilities who testified or were contacted by the parties ranked Audatex as first or second in Estimatics. *See, e.g*., Kostakis Dep. at 40 (Angelo's Auto Body Shop); DX 25 P 8 (Benjamin Decl., ABRA Auto Body & Glass). In fact, a 2006 *Collision Week* survey ranked Audatex as the **[*72]** "Best Overall Estimating System Provider in 2006," finding Audatex superior to CCC and Mitchell in 8 of 8 categories for Estimatics. DX 43; *see also* DX 33 at 00064042, 0064044 (survey showing that shops using two estimating systems most frequently use Audatex and CCC). The evidence showing that Audatex is at least comparable to CCC and Mitchell does not necessarily mean that Audatex is not viewed as a more distant third choice by some share of the market. Even so, the absence of any evidence of identifiable characteristics of these firms' products or their customers that might make Audatex a more distant third option makes it impossible to reach the conclusion that Audatex is a more distant third choice. [49]

Without credible evidence that Audatex is a more distant third choice for a significant share of the market to support the predictions of Dr. Hayes's models, the Court cannot conclude that the merger is likely to result in unilateral price elevations.

---

[48] The Court does not conclude that the predictions of Dr. Hayes's Bertrand model are necessarily wrong or that the diversion ratios he used are necessarily incorrect. The Court merely concludes that it cannot rely upon such a limited amount of data. Dr. Ordover concluded that "the diversion ratios that [Dr. Hayes] is putting into his model are not robust, I don't think they're sound, I don't understand them, and I don't believe that they *necessarily* match up with the economic realities of the repair facilities in the marketplace." Ordover, Tr. (1/23) at 151:20-25 **[**127]** (emphasis added).

[49] Even if Audatex were a distant third for some percentage of the market, a unilateral price increase would be profitable for the merged firm only if it were unlikely that **[**130]** Audatex could reposition itself to replace CCC or Mitchell should they raise prices to supracompetitive levels. *See* Merger Guidelines § 2.21. Because the only evidence in the record regarding customer preference is that a few insurance companies lack familiarity with Audatex's products, there is no reason to believe that Audatex would not be a suitable replacement for CCC or Mitchell. *See* Hall, Tr. (1/8 a.m.) at 89:11-21 (GMAC does not "know anything about Audatex," but it "plan[s] to learn something about [it]" if the merger is consummated).

d. *Efficiencies*

Finally, Defendants argue that the efficiencies that will result from the merger will offset any potential anticompetitive effects of the merger. The Merger Guidelines recognize that "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and **[**131]** quality than either firm could have achieved without the proposed transaction." Merger Guidelines § 4. Although the Supreme Court has not sanctioned the efficiencies defense in Section 7 cases, "the trend among lower courts is to recognize the defense." *Heinz, 246 F.3d at 720*. "The courts have recognized that 'in certain circumstances, a defendant may rebut the government's *prima facie* case with evidence showing that the intended merger would create significant efficiencies in the relevant market.'" *United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 146-47 (E.D.N.Y. 1997)* (quoting *Univ. Health, 938 F.2d at 1222*); *see also* *Arch Coal, Inc., 329 F. Supp. 2d at 150*. However, courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies. *See* *Heinz, 246 F.3d at 720*; *FTC v. Swedish Match N. Am., 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000)*; *Tote, 768 F. Supp. at 1084-85*. And in a highly concentrated market characterized by high barriers to entry, the parties opposing a preliminary injunction must provide "proof of extraordinary efficiencies" in order to rebut the presumption of anticompetitive effects. *Heinz, 246 F.3d at 720*; *see also* Phillip **[**132]** E. Areeda, *et al*., IVA ***Antitrust Law*** P 971f, at 47 (2d ed. 2006) (requiring "a showing of 'extraordinary'" efficiencies where the "post-merger market's HHI is well above 1800 and the HHI increase is well above 100"). Moreover, in such circumstances, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." **[*73]** *Heinz, 246 F.3d at 721*. The Defendants have not demonstrated here that their efficiencies are verifiable, *see* *Staples, 970 F. Supp. at 1089*, or that the cost savings achieved through efficiencies are likely to be greater than the transaction's likely anticompetitive effects, *see* *Cardinal Health, 12 F. Supp. 2d at 62-63*.

1. *Cost Savings*

Efficiencies enabled by a merger "can create incentives to reduce prices, and if these efficiencies are sufficiently large, they may fully offset any price elevation that might otherwise flow from the merger." PX 1020 P 75 (Hayes Prelim. Report). Defendants assert that the efficiencies achieved through the merger will produce cost savings of at least $ 48 to $ 55 million per year resulting **[**133]** from the elimination of redundant or overlapping functions and the consolidation of product lines. DX 27 at 6-21 (PriceWaterhouseCoopers ("PWC") Synergy Analysis); DX 28 at 4-13 (CCC/Mitchell Confidential Synergy Review); Balbirer IH Tr. at 26-27, 50-51 (CCC); PX 746-006, 007 (Mitchell). These projected potential cost savings exceed 20% of the companies' combined cost base. DX 28 at 6 (CCC/Mitchell Confidential Synergy Review).

The projected cost savings would indeed be substantial and such cost savings were fundamental to the parties' decision to merge. *See, e.g*., Sun, Tr. (1/9) at 9:8-15 (Mitchell). However, the vast majority of these cost savings will be realized only if, and when, Defendants consolidate to a single software platform. DX 27 at 6-21 (PWC Synergy Analysis); Sun, Tr. (1/9) at 19:20-22:1 (Mitchell); Balbirer IH Tr. at 68 (CCC); DX 28 at 4-13 (CCC/Mitchell Confidential Synergy Review). CCC and Mitchell estimate that it will take two to three years to combine their operations and eliminate redundant software systems, DX 115-48 (CCC/Mitchell Confidential Offering Mem.), but they acknowledge that it might take as long as ten years to complete the integration, and the nature **[**134]** of the ultimate software product is uncertain, *see* PX 755 ([text redacted]); *see also* Sun, Tr. (1/8 p.m.) at 77:9-12 (Mitchell); PX 756 (Mitchell [text redacted]).

The Merger Guidelines advise that "[d]elayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict." Merger Guidelines § 4 n. 37. Thus, while the Court does not doubt that Defendants intend to consolidate the two firms' software into one platform, it cannot place great weight on the predicted cost savings resulting from that consolidation because there is no telling when those savings might begin to accrue or whether they will actually materialize and not be absorbed in the consolidation effort.

Defendants admit that the merger will result in one-time costs of approximately $ 27.5 million over the first three years, thus lessening their projected cost savings to approximately $ 20-27 million per year during that time period. DX 27 at 2, 7 (PWC Synergy Analysis). Even these numbers are speculative and are supported by little more than lawyer argument. Mitchell hired **[**135]** two financial consultants to analyze and confirm that the merger makes financial sense. *See* Sun, Tr. (1/9) at 18:14-18 (Mitchell). In their final estimates, both Bain & Co. ("Bain") and PWC predicted that the merger would result in a net loss (in terms of costs versus synergies) at the end of three years. PX 1823 (Bain); *see also* Sun, Tr. (1/9) at 37:9-19 (Mitchell). *But see* DX 115-48 (CCC/Mitchell Confidential Offering Memorandum predicting net synergies of $ 11.2 million in year one); DX 27 at 7 (PWC **[*74]** Synergy Analysis). Defendants argue, however, that Bain's final projections do not accurately portray the likely synergies because its analysis (a) treats as "costs" certain expenditures, such as investment in research and development, without allowing such expenditures to show efficiency gains, Sun, Tr. (1/9) at 24:22-25:4 (Mitchell), and (b) lists integration expenses without attempting to quantify the benefits that will arise from non-overlapping business units, *id*. at 25:10-26:2 (Mitchell). But Bain and PWC are Defendants' financial consultants, not the FTC's, and Mr. Sun admitted that he did not "have any reason to believe that these guys . . . did a bad job." *Id*. at 37:17-20. Thus, **[**136]** without overanalyzing the accuracy of their predictions based on incomplete information, it is enough to conclude that the record is far from clear what the net savings would be; hence, Defendants have not demonstrated that the cost savings are likely to counteract the potential anticompetitive effects.

Even assuming *arguendo* that the Defendants will achieve significant cost savings in a timely manner, there is no evidence to suggest that a sufficient percentage of those savings will accrue to the benefit of the consumers to offset the potential for increased prices. *See* *Univ. Health, 938 F.2d at 1223* (defendant asserting efficiency defense "must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers"). First, platform consolidation would create significant one-time switching costs for a large number of repair facilities. At least a quarter of all repair facilities -- 11,000 or more -- use only one software platform. PX 635-018 (Mitchell). Those repair facilities currently using the platform that ultimately is not chosen for consolidation will incur one-time costs related to **[**137]** switching to the surviving platform. Rollins Dep. at 84 (Safeco); *see also* PX 1020 P 11 (Hayes Prelim. Report). Meanwhile, as of the end of 2007, only 1,500 use both CCC and Mitchell. *See* Ramamurthy Dep. at 72-73 (CCC); Balbirer IH Tr. at 189-190 (CCC); PX 632-033 (Mitchell); PX 516-006 (Mitchell). Thus, fewer than one in thirty repair facilities -- those that currently use both CCC and Mitchell -- will realize any costs savings by licensing one fewer product. *See* PX 516-006 (Mitchell). Furthermore, a substantial number of insurance companies would likewise incur switching costs.

Second, while reducing the costs of doing business provides several advantages for the merged firm, these advantages could show up in higher profits instead of benefitting customers or competition. *See* Hayes, Tr. (1/21 a.m.) at 87:7-88:14. Mr. Ramamurthy admits that CCC will give its shareholders much of any savings. Ramamurthy IH Tr. at 74-75 (CCC). CCC's CFO, Andrew Balbirer, similarly stated that the synergies from the deal would either be invested in new products or go to company profits. Balbirer IH Tr. at 50-51 (CCC). Likewise, Mr. Sun of Mitchell stated that the cost savings are likely to go to "building **[**138]** value added products" rather than lowering consumer costs. Sun IH Tr. at 49-50 (Mitchell).

2. *Innovations*

Defendants also assert that the merger will lead to innovations. Innovation claims are "often a speculative proposition," *see* *Heinz, 246 F.3d at 722*, and such claims are often looked upon with skepticism for good reason:

> [W]hen the two firms are already among the largest in the market, there is no empirical basis for thinking that even larger firms would produce more R&D. We would therefore limit the defense to **[*75]** instances in which the two merging firms can show that their size forces them to accept higher per-unit costs for research and development than larger firms in their market must pay, and that the merger will enable them to achieve some figure closer to parity.

IVA Areeda, *et al., supra*, P 975g, at 94. Defendants assert that as a result of the cost savings generated by the merger, the merged entity will spend considerably more on new product research and development than the two companies spend individually. *See* DX 28 at 2-3 (CCC/Mitchell Confidential Synergy Review); Ramamurthy IH Tr.

at 50-51 (CCC), 82-83; *see also* Ramamurthy, Tr. (1/22 a.m.) at 111:16-112:11 (CCC) (stating **[**139]** that the merger would "allow us to throw more resources" at development of [text redacted]). The CEOs for both Mitchell and CCC testified that the merged firm will spend approximately 50% more on new product research and development than the combined amount the two companies currently spend as separate companies. Sun, Tr. (1/9 a.m.) at 39:24-40:23 (Mitchell); Ramamurthy, Tr. (1/22 p.m.) at 148:20-25 (CCC) (stating that the combined firm will deploy $ 10-15 million more towards innovation). But there is no telling whether these aspirations of greatly enhanced investment in R&D will become a reality as the combined firm is saddled with the burden of paying off its combined debt. Furthermore, there is little evidence that these promises of increased R&D spending are merger-specific. Mr. Balbirer testified, for instance, that CCC could already afford to increase R&D funding on its own if its "shareholders were willing to trade off their return." Balbirer IH Tr. at 198 (CCC). This is a standard conflict between investors and management. There is no reason to believe that the merger will eliminate this pervasive problem.

In sum, although the merger may produce substantial efficiencies in **[**140]** the future, such efficiencies are too far afield and too speculative to overcome the strong presumption of anticompetitive effects created by the large HHIs and the high barriers to entry in the Estimatics and TLV markets.

B. Equities

When the FTC shows a likelihood of success on the merits, it will usually be able to obtain a preliminary injunction because the public equities often converge with the "success on the merits" analysis because "'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting" *Section 13(b)*. *Whole Foods, 548 F.3d at 1035 (Brown, J.)* (quoting *Heinz, 246 F.3d at 726*). However, the "likelihood of success" analysis and the "public equities" analysis are legally different points and the latter should be analyzed separately, no matter how strong the agency's case on the former. [50] But since, as discussed above, the FTC has demonstrated a likelihood of success on the merits as a preliminary matter, the Defendants must now show that, despite the likely anticompetitive effects of their proposed merger, the merger would nonetheless benefit their customers. Only "public **[*76]** equities" that benefit consumers **[**141]** can override the FTC's showing of serious questions on the merits. *Whole Foods, 548 F.3d at 1041 (Brown, J.)*. For instance, if potential merger partners can present credible evidence that the merged company will lower consumer prices because of extraordinary efficiencies (even when the same efficiencies might not suffice to overcome the presumption in favor of the FTC's *prima facie* case on the merits), and those efficiencies and lowered prices will be lost forever if the merger is preliminarily enjoined, the public equities in favor of the merger might outweigh the FTC's likelihood of success on the merits. However, it is clear that a "'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction." *Id*. (citing *Heinz, 246 F.3d at 726*; *Weyerhaeuser, 665 F.2d at 1082-83*).

The Defendants predict that the merger will produce cost savings of 20%. This would be an extraordinary degree of efficiencies. However, the evidence fails to induce confidence that such cost savings will in fact occur, much less when they might be realized. In addition, the evidence leaves uncertainty as to whether cost savings will be enjoyed by customers or by shareholders.

Contrary to this conclusion, Defendants urge the Court to recognize that "[t]he combined company will be able to offer an integrated product that incorporates the best features of each company's stand-alone product portfolio." DFF P 374. The Court accepts and agrees that the evidence supports this statement. "The merging parties envision using the combined resources of the two companies and spending more on new product research and development than they spend individually to improve existing and create new products and reduce costs" **[**143]** for customers.

---

[50] If the two factors always merged, then there would be 50 no need for a public equities analysis when the FTC shows a likelihood of success on the merits. The D.C. Circuit's plurality decision in *Whole Foods* indicated that a separate equities analysis is necessary. ***Whole Foods, 548 F.3d at 1035*** (Brown, J.) ("The district court did not apply **[**142]** the sliding scale, instead declining to consider the equities. . . . If, and only if, the district court's certainty [that the FTC would not succeed on the merits] was justified, it was appropriate for the court not to balance the likelihood of the FTC's success against the equities.").

Id. P 375. The Court accepts and agrees that the Defendants envision such a future. "[C]ustomers and consumers [will] benefit from more innovative products." *Id*. P 380. The Court agrees and accepts this statement as well.

Both timing and free choice undercut Defendants' predictions of the public value of the potential merger. That is, the parties predict that it will be at least three to five years before their separate software platforms might be merged, and perhaps as much as ten years before it makes sense to do that. During that lengthy waiting period, the serious questions raised by the FTC might ripen into fact and produce a coordinated marketplace through regional or customer allocation or other coordinated terms. During that lengthy waiting period, the evidentiary base for Dr. Hayes's predictions of unilateral effects might mature.

While the merging parties "envision" using their combined resources to increase research and development of new products, once a merger is effected, their choices would be wide open and they might reasonably decide to use profits to reduce debt instead of increase research, given the debt structure of the newly-merged company and its **[**144]** share of the markets for Estimatics and TLV. The Court does not doubt their intentions, but cannot bank on them for purposes of this preliminary analysis of the equities here.

The only "hard" equity point made by Defendants is that their customers will benefit from more innovative products. Even though such a result is uncertain, this benefit must be weighed against the public benefit. In that weighing, the Court uses a sliding scale. The uncertainty of the public benefit of innovative products is too long in coming and too uncertain in result to hold much weight against the FTC's interest in enforcing the antitrust **[*77]** laws. The equities favor granting a preliminary injunction.

V. CONCLUSION

For the foregoing reasons, the FTC's Motion for Preliminary Injunction [Dkt. # 4] will be granted. A memorializing order accompanies this Memorandum Opinion.

DATE: March 18, 2009

/s/

ROSEMARY M. COLLYER

United States District Judge

End of Document

Wiwa v. Royal Dutch Petroleum Co.

United States District Court for the Southern District of New York

March 18, 2009, Decided; March 18, 2009, Filed

96 Civ. 8386 (KMW) (HBP); 01 Civ. 1909 (KMW) (HBP); 02 Civ. 7618 (KMW) (HBP)

Reporter
2009 U.S. Dist. LEXIS 34843 *

KEN WIWA, et al., Plaintiffs, -against- ROYAL DUTCH PETROLEUM CO., et al., Defendants. KEN WIWA, et al., Plaintiffs, -against- BRIAN ANDERSON, Defendant. ESTHER KIOBEL, et al., Plaintiffs, -against- ROYAL DUTCH PETROLEUM CO., et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by *Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 2009 U.S. Dist. LEXIS 57081 (S.D.N.Y., Apr. 23, 2009)*

Prior History: *Wiwa v. Royal Dutch Petroleum Co., 2009 U.S. Dist. LEXIS 14883 (S.D.N.Y., Feb. 23, 2009)*

Core Terms

effects, Defendants', racketeering activity, oil, Plaintiffs', subject matter jurisdiction, extraterritorial, securities-based, antitrust-based, costs, production costs, flaring, exports, costly, invest, extracting, demands, imports, remediation, protesters, lowered, prices, stocks, tests, racketeering, allegations, speculative, antitrust, investors, indirect

Counsel: **[*1]** For Ken Wiwa, individually and as Administrator of the Estate of his deceased father KEN SARO-WIWA, Owens Wiwa, Blessing Kpuinen, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, Karalolo Kogbara, Michael Tema Vizor, Lucky Doobee, individually and on behalf of his late brother, Saturday Doobee, Friday Nuate, individually and on behal fof her late husband Felix Nuate and their surving children, Felix Nuate, Monday Gbokoo, individually and on behalf of his late brother Daniel Gbokoo, Daniel Gbokoo, David Kiobel, individually and on behalf of his si blings, Stella Kiobel, Leesi Kiobel, Angela Kiobel, Godwill Kiobel, for harm suffered for the death of their father Dr. Barinem Kiobel, Dr. Barinem Kiobel, James B. N-Nah, individually and on behal of his late brother, Uebari N-Nah, Plaintiffs: Jennifer M. Green, LEAD ATTORNEY, New York, NY; Judith Brown Chomsky, Law Office of Judith Brown Chomsky, Elkins Park, PA.

For Royal Dutch Petroleum Company, Shell Transport and Trading Company, p.l.c., Defendants: Michael T Reynolds, Thomas G. Rafferty, LEAD ATTORNEYS, Rory O Millson, Cravath, Swaine & Moore LLP, New York, NY.

For Shell Petroleum, N.V., formerly known as **[*2]** Royal Dutch Petroleum Company, Shell Transport and Trading Company, LTD, formerly known as Shell Transport and Trading Company, p.l.c., Defendants: Rory O Millson, LEAD ATTORNEY, Cravath, Swaine & Moore LLP, New York, NY.

For Brian Anderson, Consolidated Defendant: Michael T Reynolds, Thomas G. Rafferty, LEAD ATTORNEYS, Rory O Millson, Cravath, Swaine & Moore LLP, New York, NY.

For Baridi Kiobel, and on behalf of his moinor siblings, ADR Provider: Jennifer M. Green, LEAD ATTORNEY, New York, NY; Judith Brown Chomsky, Law Office of Judith Brown Chomsky, Elkins Park, PA.

Judges: Kimba M. Wood, United States District Judge.

Opinion by: Kimba M. Wood

Opinion

OPINION & ORDER

KIMBA M. WOOD, U.S.D.J.:

Defendants Shell Petroleum, N.V. and Shell Transport and Trading Co., Ltd. ("Defendants") in *Wiwa v. Royal Dutch Petroleum Co*., 96 Civ. 8386 ("*Wiwa*"), move, pursuant to *Federal Rule of Civil Procedure 12(b)(1)*, to dismiss the Racketeer Influenced and Corrupt Organizations Act ("RICO") claims brought by *Wiwa* plaintiffs Owens Wiwa and Karololo Kogbara ("Plaintiffs") for lack of subject matter jurisdiction. (96 Civ. 8386 D.E. ("96-D.E.") 308.)

Among the ways that plaintiffs can establish that a court has subject matter jurisdiction over a RICO claim **[*3]** that involves foreign parties and racketeering activity that occurred outside the United States (an "extraterritorial" RICO claim), is to establish that the alleged racketeering activity had sufficient effects in the United States. They may also have to establish that these effects were intentional.

Here, Plaintiffs argue that Defendants' alleged racketeering activity, which occurred primarily in Nigeria, was intended to and did affect the United States by lowering Defendants' costs for producing Nigerian oil, which, in turn, gave Defendants a competitive advantage and/or increased profits in the United States. (*See generally* Pls.' Mem. L. Opp'n Defs.' Mot. Dismiss RICO Claims ("Pls.' Opp'n"), 96-D.E. 313.)

Defendants contend that Plaintiffs have failed to demonstrate that the racketeering activity Plaintiffs allege had effects in the United States sufficient to give the Court subject matter jurisdiction over Plaintiffs' extraterritorial RICO claims. (*See generally* Defs.' Mem. L. Supp. *Rule 12 (b)(1)* Mot. Dismiss Pls.' RICO Claim for Lack Subj. Matter Jd. ("Defs.' Mem. L."), 96-D.E. 309; Defs.' Reply Mem. L. Supp. *Rule 12(b)(1)* Mot. Dismiss Pls.' RICO Claim for Lack Subj. Matter Jd. **[*4]** ("Defs.' Reply"), 96-D.E. 328.)

As explained in further detail below, the Court GRANTS Defendants' *Rule 12(b)(1)* motion to dismiss Plaintiffs' RICO claims because Plaintiffs have not established that Defendants' alleged racketeering activity had sufficient effects in the United States to give the Court subject matter jurisdiction.

I. BACKGROUND

A. Relevant Procedural History

Previously, Defendants moved, under *Rule 12(b)(1)*, for the Court to dismiss Plaintiffs' extraterritorial RICO claims for lack of subject matter jurisdiction. In this prior 12(b)(1) motion, Defendants made a facial challenge, arguing that Plaintiffs had failed to allege sufficient effects on the United States.

The Court denied Defendants' prior *Rule 12(b)(1)* motion. *Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *20-21 (S.D.N.Y. Feb. 28, 2002)*.

Since then, the parties have completed extensive discovery. Now Defendants make a factual challenge to the Court's subject matter jurisdiction over these same claims. [1] Specifically, Defendants argue that Plaintiffs lack

[1] "[T]he truth of jurisdictional allegations [need not] be determined with finality at the threshold of litigation." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)*. Instead, "'subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged.'" *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 121 n.1*

evidence that the alleged racketeering activity had sufficient intended and actual effects in the United States to fall within the Court's **[*5]** subject matter jurisdiction.

B. Relevant Facts

Plaintiffs' allegations span the period between 1990 and 1998, inclusive. (Pls.' Fourth Am. Compl. PP 38-108.) A general description of their allegations can be found in the Court's previous orders, familiarity with which is assumed. *See, especially, Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887*. Facts established through discovery that are relevant to deciding Defendants' *Rule 12(b)(1)* motion, particularly the intended and actual effects of Defendants' alleged racketeering activity in the United States, are described **[*6]** below. [2]

1. Defendants oil operations in Nigeria

During 1990 to 1993, a company affiliated with Defendants, Shell Petroleum Development Company ("SPDC"), [3] was extracting oil from the Ogoni region of Nigeria ("Ogoni"), located in that country's Niger Delta. During some or all of this period, SPDC operated in Nigeria pursuant to a joint venture agreement with the Nigerian government. (Pls.' Opp'n, Ex. 1-13.) SPDC sold oil that it produced in Nigeria to another Shell Group company for export from Nigeria. (Pls.' Opp'n, Exs. 1-55; 3-21 at 5686.)

In 1993, SPDC ceased extracting oil from Ogoni, but it continued to extract oil in Nigeria, including from other areas of the Niger Delta. (*see, e.g., id*. at Exs. 1-5 at app. 1; 1-9 at 20232-33, 20236-37, 20239; 1-12.) SPDC also continued work on a pipeline running through Ogoni. (*Id*. at Ex. 1-3 at 105-111.) In 1996, SPDC developed a plan for restarting oil production in Ogoni, but by 1998, the **[*8]** plan was still far from complete. (*Id*. at Ex. 1-48 at 1850.)

Between January 1990 and June 1996, SPDC shipped an average of approximately 3.5 million barrels of crude oil per month from Nigeria to the United States. [4] (Pls.' Opp'n, Ex. 3-22.)

(2d Cir. 1998) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 68, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)* (Scalia, J., concurring in part and concurring in the judgment).

[2] Plaintiffs submit, in opposition to Defendants' motion, certain evidence that is not relevant to the Court's analysis of its subject matter jurisdiction over Plaintiffs' RICO claims. For instance, Plaintiffs' evidence regarding the proportion of Nigeria's foreign revenue that is earned from the oil that Nigeria exports, (*see* Pls.' Opp'n 19), does not help establish the effect Defendants' alleged racketeering activity had *on the United States*. The Court does not consider or discuss here evidence irrelevant to determining the Court's jurisdiction over Plaintiffs' RICO claims.

Unless otherwise noted, facts discussed herein are undisputed.

[3] The exact **[*7]** nature of SPDC's relationship with Defendants is at issue in this case. Plaintiffs contend that Defendants (1) control SPDC, (2) can be held liable for SPDC's actions; and (3) share SPDC's intent. (Pls.' Opp'n 15-19.) Defendants contend that they cannot be held liable for SPDC's actions, and that SPDC's intent cannot be imputed to them. (*See, e.g*., Defs.' Reply 8-9.) For the purposes of this motion, the Court assumes, without deciding, that Defendants control SPDC in the way that Plaintiffs allege.

Documents that Defendants produced to Plaintiffs use the term the "Shell Group" to refer to the international network of Shell-related companies. (*See, e.g*., Pls.' Opp'n, Ex. 1-17 at 289.) For the purposes of this motion, the Court attributes evidence generated by Shell Group companies to Defendants.

[4] In a letter to Plaintiffs, Defendants contend that oil SPDC shipped from Nigeria destined for the United States did not necessarily arrive in the United States because the oil cargo could, and frequently did, change ownership and/or destination en route. (Pls.' Opp'n Ex. 3-22.) However, Defendants do not provide any evidence to support this contention. Accordingly, for the purposes of this Order, the Court will assume that the amount of oil SPDC exported that was destined for the United States equals the amount of SPDC oil the United States imported.

2. Ogoni opposition to Defendants' Nigerian oil operations

In the early 1990s, Ken Saro-Wiwa, the deceased father of Plaintiff Ken Wiwa, and an organization named Movement for the Survival of the Ogoni People ("MOSOP"), made demands on Defendants. Mr. Saro-Wiwa and MOSOP protested various effects of SPDC's oil extraction, including gas flaring. (*See, e.g.*, Pls.' Opp'n Exs. 1-2 at 3116; 1-16 at 955; 1-17 **[*9]** at 290.) In 1992, they sent a list of demands to SPDC, including a demand that the company pay to the people of Ogoni ten billion American dollars in royalties for past oil extraction and to compensate the Ogoni for SPDC's environmental damage to their land. (*See id*. at Ex. 1-15.) MOSOP's list particularly emphasized the detrimental environmental effects of SPDC's gas flares. (*See id*.)

3. Defendants' response to the Ogoni opposition [5]

Beginning in 1992, there was significant international attention paid to Defendants' operations in Nigeria, including to the issue of gas flaring. (*See id*. at Exs. 1-3 at 102-03; 1-5 at 58; 1-14 at 2738; 1-16 at 955; 1-17 at 290.) Even after SPDC ceased extracting oil from Ogoni in 1993, Defendants determined that the Ogoni protests were a threat to their international reputation. (*See id*. at Exs. 1-5; 1-16 at 955; 1-17 at 289; 2-3 at 328:10-24.)

SPDC and Defendants invested resources to counter and mitigate the protests' effect **[*10]** from at least 1992 to 1996. (*See* Pls.' Opp'n Exs. 1-16 at 956; 1-17 at 290-92; 3-8 at 4313.) However, until 1996, although Defendants planned to take some measures to avoid some instances of gas flaring, they found the prevention of gas flaring too costly to implement on a broad scale. (*See* Pls.' Opp'n Exs. 1-5 at 44, 48; 1-6 at 2015; 1-7 at 120; 1-8 at 5414.) In 1996, Defendants determined that gas flaring was no longer an acceptable practice. [6] (*See id*. at Ex. 1-9 at 20238.) They proposed accelerating their "flare reduction projects" so that they could have their "'flares out by 2005.'" (*Id*.)

4. The health of Defendants' Nigerian operations during the period of Ogoni opposition

In 1994, SPDC was expected to achieve its financial targets, despite Defendants' concern about the "political turbulence in Nigeria." (*See* Pls.' Ex. 1-23 at 746, 750.) In 1995, Defendants reported that the country had continued its "steady decline into ungovernability," which created "challenges" for SPDC in its efforts to "sustain[] **[*11]** growth and continuous improvement of performance against a very tough environment." (*See* Pls.' Ex. 1-25 at 667.) In 1996, Defendants estimated that about one-quarter of its equity reserves were based in Nigeria and determined that despite the problems with its operations in Nigeria, the reserves had a "large potential," making Nigeria "a country worth investing in." (*See* Pls.' Ex. 1-1 at 570.)

II. DISCUSSION

A. Legal Standard

1. *Rule 12(b)(1)* Motion to Dismiss

---

[5] For the purposes of this order, the Court does not consider or weigh Plaintiffs' evidence regarding Defendants' alleged racketeering activity as this evidence is not essential to deciding the jurisdictional question before the Court.

[6] Plaintiffs mistakenly state that Defendants made this determination in 1998, (*see* Pls.' Opp'n 2 n.4). The exhibit that they cite as support is actually dated 1996. (*See id*. at Ex. 1-9.)

When a motion to dismiss under Rule 12(b)(1) challenges the factual basis for a court's subject matter jurisdiction, a court may refer to evidence outside the pleadings. [7] *See* Makarova v. U.S., 201 F.3d 110, 113 (2d Cir. 2000) (*citing* Kamen v. American Tel. & Tel. Co., 791 F. 2d 1006, 1011 (2d Cir. 1986)). This may include affidavits or other competent evidence. *See* Kamen, 791 F.2d at 1011.

The burden is on the plaintiff asserting **[*12]** subject matter jurisdiction to prove, by a preponderance of the evidence, that it exists. *See* Makarova 201 F.3d at 113; *see also* Luckett v. Bure, 290 F.3d 493, 497 (2d Cir. 2002); Scelsa v. City Univ. of N.Y., 76 F.3d 37, 40 (2d Cir. 1996).

Where, as here, the jurisdictional facts are sufficiently separable from the merits of a claim, they may be decided by a court. *Compare* Grubart, 513 U.S. at 537 ("any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone"), *with* Alliance for Envtl. Renewal, Inc., v. Pyramid Crossgates Co., 436 F.3d 82, 88 (2d Cir. 2006) (noting that where the overlap between jurisdictional and merits evidence "is such that fact-finding on the jurisdictional issue will adjudicate factual issues required by the Seventh Amendment to be resolved by a jury, then the Court must leave the jurisdictional issue for the trial").

2. Extraterritorial Application of RICO

The RICO statute is silent as to its extraterritorial application. *See* North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996). The Second Circuit Court of Appeals ("Second Circuit") has not determined what test district **[*13]** courts should apply in order to determine the statute's extraterritorial reach. *See* id. at 1052. However, the Second Circuit has recognized that, in determining the RICO statute's extraterritorial reach, courts have been guided "by precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters." [8] Id. at 1052.

These precedents establish two kinds of **[*14]** tests, "conduct" and "effects," which assess the extent to which the otherwise extraterritorial racketeering activity involved conduct in, or had sufficient effects in, the United States. The effects test is further subdivided into a test derived from securities law ("securities-based effects test") and a test derived from ***antitrust law*** ("antitrust-based effects test"). *See id*. In either case, however, these tests apply only insofar as they serve the RICO statute's purpose, which is "to protect . . . domestic markets from corrupt foreign influences." Madanes v. Madanes, 981 F. Supp. 241, 250 n.6 (S.D.N.Y. 1997).

Plaintiffs assert, and Defendants do not dispute, that Plaintiffs may establish the Court's subject matter jurisdiction by meeting either the securities or antitrust version of the effects test. [9] (*See* Defs.' Mem. L. 9; Pls.' Opp'n 20.) Accordingly, the Court will apply both variants of the effects test.

---

[7] When the Court denied Defendants' prior facial challenge to the Court's jurisdiction over Plaintiffs' RICO claims, it noted that "plaintiffs' allegations are perhaps less explicit than they could be." Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *22. Plaintiffs' evidence must now provide the specificity lacking in their pleadings.

[8] The Court notes that, in light of the Supreme Court's decision in Arbaugh v. Y & H Corp., 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (holding that only those statutory requirements that "the Legislature clearly states [are] . . . a threshold limitation on a statute's scope shall count as jurisdictional"), there is some doubt whether analyzing if a particular claim falls within the RICO statute's extraterritorial reach is, in fact, a *jurisdictional* inquiry. *See* Norex Petroleum Ltd. v. Access Indus. Inc., 540 F. Supp. 2d 438, 440-41 (S.D.N.Y. 2007); Republic of Colom. v. Diageo N. Am. Inc., 531 F. Supp. 2d 365, 381-82 (E.D.N.Y. 2007); Ayyash v. Bank Al Madina, No. 04 Civ. 9201, 2006 U.S. Dist. LEXIS 9677, 2006 WL 587342, at *4 (S.D.N.Y. March 9, 2006). Neither party, however, raises this question. Accordingly, the Court does not address it.

[9] The Second Circuit has suggested that the antitrust-based effects test may be "more appropriate" for RICO claims than the securities-based effects test because of the significant similarities between the RICO statute and the antitrust laws. Specifically, "the civil action provision **[*15]** of RICO was patterned after the Clayton Act" and both the RICO and antitrust statutes provide for treble damages. North South Fin., 100 F.3d at 1052 (internal quotations omitted).

The securities- and antitrust-based effects tests differ: Plaintiffs must show *substantial, direct* effects on the United States to meet the securities-based effects test and they must show *intentional, actual*, and *substantial* effects on United States imports and exports to meet the antitrust-based effects test. However, the two tests are similar in that Plaintiffs must provide specific, rather than general or speculative, evidence that the alleged racketeering activity affected the United States. Plaintiffs have failed to do so here.

a. Securities-Based Effects Test

Statutes prohibiting securities fraud "may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States." *North South Fin., 100 F.3d at 1052* (*quoting Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989)*). **[*16]** Transactions "with only remote and indirect effects in the United States do not qualify as substantial." [10] *Id*.

Courts applying the securities-based effects test demand that plaintiffs establish actual, as opposed to speculative, substantial effects. *See Nat'l Group for Communications and Computers, Ltd. v. Lucent Techs. Inc., 420 F. Supp. 2d 253, 261- 62 (S.D.N.Y. 2006)* **[*17]** (holding that securities-based effects test not met where the estimated impact on defendant's profits or stock price was purely speculative); *Roquette America, Inc. v. Amylum N.V., No. 03 Civ. 0434, 2004 U.S. Dist. LEXIS 12297, 2004 WL 1488384, at *8 (S.D.N.Y. July 1, 2004)* (finding effects test not met where plaintiffs did not identify any specific instances in which products using their trade secrets were made or sold in the United States); *Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP, No. 03 Civ. 0613, 2004 U.S. Dist. LEXIS 24900, 2004 WL 2848524, at *4 (S.D.N.Y. Dec. 9, 2004)* (holding that plaintiffs' allegation that defendant's racketeering activity caused United States investors to lose value on their investments, unaccompanied by information regarding the number of United States investors affected or the amount of their monetary loss, was too vague and conclusory to support a court's jurisdiction). *See also Nasser v. Andersen Worldwide Societe Cooperative, No. 02 Civ. 6832, 2003 U.S. Dist. LEXIS 16710, 2003 WL 22179008, at *6 (S.D.N.Y. Sept. 23, 2003)*.

In addition, where there are multiple intermediary steps between the alleged racketeering activity and the effect on U.S. markets, courts find that plaintiffs fail to meet the securities-based effects test. **[*18]** *See Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 252 (S.D.N.Y. 2008)* (holding that an extraterritorial monopoly's effect on United States prices was too indirect where it was only "one factor among many" determining those prices); *Lucent, 420 F. Supp. 2d at 262* (finding cascading cancellation of contracts with United States businesses, which resulted after the alleged racketeering activities caused the cancellation of a contract with a foreign company, too "remote and indirect") (internal quotations omitted); *Amylum, 2004 U.S. Dist. LEXIS 12297, 2004 WL 1488384, at *8* (finding effects too indirect where plaintiffs' trade secrets were transferred to a United States company via an intermediary); *Giro v. Banco Espanol de Credito, No. 98 Civ. 6195, 1999 U.S. Dist. LEXIS 9673, 1999 WL 440462, at *3 (S.D.N.Y. June 28, 1999)* (deeming "four intermediate effects that led to the loss in the United States" too "remote and indirect").

b. Antitrust-Based Effects Test

Antitrust statutes may reach anticompetitive behavior occurring outside the United States "if the conduct is intended to and actually does have an effect on United States imports or exports which the state reprehends." *North South*

However, because neither party objects to the applicability of the securities-based effects test, and because the Court finds that Plaintiffs fail to meet either test, the Court need not resolve this issue.

[10] Defendants urge the Court, (Defs.' Mem. L. 10-11), to follow its sister court and further require that, in order to meet the securities-based effects test, plaintiffs establish that they, *themselves*, were harmed *in the United States* by Defendants' alleged racketeering activity. *See, Norex, 540 F. Supp. 2d at 446*. Plaintiffs urge the Court not to follow this approach because the Second Circuit has not adopted the United States injury requirement. (Pls.' Opp'n at 22).

As explained infra part II.C.1, Plaintiffs have not provided sufficient evidence that Defendants' racketeering activity affected *anyone* in the United States substantially and directly. Accordingly, the Court need not reach the question of whether Plaintiffs must particularly demonstrate that they, themselves, were harmed in the United States by Defendants' alleged racketeering activity.

Fin., 100 F.3d at 1052 (*citing* United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945). **[*19]** Under the antitrust statutes, the foreign conduct's effect in the United States must be "substantial." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993).

In applying the antitrust-based effects test, courts have required that plaintiffs' evidence be specific. *See* Norex, 540 F. Supp. 2d 438, 448 (finding general allegations of American shareholder losses and unfair competitive advantages in United States oil markets insufficiently specific to support subject matter jurisdiction over an extraterritorial RICO claim); Nuevo Mundo, 2004 U.S. Dist. LEXIS 24900, 2004 WL 2848524, at *4 (deeming insufficient general allegations of United States investors' losses, unaccompanied by specific information about the number of investors affected or the amount of their losses). *See also* Nasser, 2003 U.S. Dist. LEXIS 16710, 2003 WL 22179008, at *6.

B. Summary of Arguments

1. Plaintiffs' Arguments

Plaintiffs argue that Defendants engaged in racketeering activities with, *inter alia*, SPDC and the Nigerian government to suppress MOSOP and its opposition to SPDC's operations in Ogoni as well as to "diminish[] Ken Saro-Wiwa's influence." (Pls.' Opp'n 2.) According to Plaintiffs, Defendants' racketeering activity (1) protected Defendants from "a challenge **[*20]** to SPDC's manner of operations and Defendants' international position," (Pls.' Opp'n 4), (2) allowed Defendants to avoid meeting MOSOP's multi-billion dollar demands, and (3) allowed Defendants to avoid addressing the environmental hazards, including gas flaring, that MOSOP and Mr. Saro-Wiwa were protesting. [11] (*See* Pls.' Opp'n 1-2, 4.) Defendants wanted to avoid these costs in order to minimize the expense and maximize the profits of extracting the Nigerian oil that they ultimately intended to export to the United States. (Pls.' Opp'n 20-21.)

Plaintiffs further argue that Defendants' racketeering activities affected the United States both through the United States' import of Defendants' Nigerian-produced oil and through the sale of Defendants' stocks and ADR in the United States. Plaintiffs observe that SPDC's oil entered the United States market, although they are not clear precisely how this affected the United States. [12] (Pls.' Opp'n 3.) Plaintiffs also contend that SPDC's oil affected the

---

[11] Previously, Plaintiffs alleged that Defendants engaged in their racketeering activity in order to (1) prevent MOSOP and Mr. SaroWiwa's protests from interfering with Defendants' oil production in Ogoni, (*see, e.g.*, Pls.' RICO Statement, 96-D.E. 10, at 20-22), or (2) prevent the Ogoni protests from spreading to Defendants' other oil producing areas in Nigeria, (*see* Order, November 6, 2008, 96-D.E. 283, at 5). Plaintiffs do not make the former argument in response to this motion; the evidence they cite does not support the latter argument. Accordingly, the Court does not consider them herein. However, the Court notes that these alternate purposes **[*21]** would not change the Court's analysis of the effect of Defendants' alleged racketeering activity on the United States.

[12] Plaintiffs make no claims, nor do they offer any evidence, regarding *how* Defendants' oil affected the United States, e.g. by being sold at lower prices. They seem to assume that the fact that Defendants' oil entered the United States is, in and of itself, evidence that it affected the United States sufficiently for the Court to assume jurisdiction **[*22]** over Plaintiffs' RICO claims. It is not.

The closest Plaintiffs come to suggesting a theory of *how* Defendants' oil affected United States commerce is Plaintiffs' assertion that Defendants were able to produce oil at a lower cost than other Nigerian producers. (*See* Pls.' Opp'n 1-2.) Perhaps Plaintiffs mean to suggest, although they do not state, that, to the extent that the United States imported these other Nigerian producers' oil, Defendants had a competitive advantage in the United States over these other Nigerian producers. If so, Plaintiffs provide no evidence to support this contention. These other producers (1) may not have made any costly investments that Defendants avoided, and/or (2) may have also benefitted from Defendants' alleged racketeering activities.

United States because it allowed Defendants to sell stocks and American Depository Receipts ("ADR") in the United States that offered investors a higher margin of return than they would have had if Defendants had met MOSOP and Mr. Saro-Wiwa's demands. [13] (Pls.' Opp'n 3.)

2. Defendants' Arguments

Defendants argue that Plaintiffs' contention that the Court has jurisdiction over Plaintiffs' RICO claims lacks evidentiary support. In particular, they contend that Plaintiffs have failed to offer any specific proof (1) that Defendants had a competitive advantage in the sale of their oil, stocks, or ADR in the United States, (*see* Defs.' Reply 3, 5); or (2) that any effect Defendants' alleged racketeering activities had on the United States was direct or foreseeable, (*see id*. at 5). [14] (*See id*.)

C. Analysis

In order to meet the securities-based effects test, Plaintiffs must show *substantial, direct* effects on the United States. They must show *intentional, actual*, and *substantial* effects on United States imports and exports to meet the antitrust-based effects test. Both tests require Plaintiffs to provide specific, rather than general or speculative, evidence that the alleged racketeering activity affected the United States.

Plaintiffs have not proven by a preponderance of the evidence that Defendants' alleged racketeering activity had sufficient effects, under either the securities-based or the antitrust-based effects tests, to establish that the Court has subject matter jurisdiction over Plaintiffs' RICO claims.

1. Securities-Based Effects Test

Plaintiffs have not established either (1) that Defendants' alleged racketeering activity lowered their costs of producing oil in Nigeria ("Nigerian production costs"), or (2) if Defendants did have lower production costs in Nigeria, that these lower costs resulted in greater investment returns or otherwise affected commerce in the United States ("United States effects"). As a result, Plaintiffs have not established **[*25]** that Defendants' racketeering activities had an *actual* substantial and direct effect within the United States, as needed to meet the securities-based effects test.

a. Nigerian Production Costs

Plaintiffs have not proved that Defendants' racketeering activities lowered their costs of producing oil in Nigeria. In a similar case involving alleged human rights abuses related to oil exploration in Nigeria, *Bowoto v. Chevron Corp*., the court dismissed the plaintiffs' RICO claim because it found that they had "fail[ed] . . . to provide any evidence that defendants' treatment of the environment, the local community, oil protestors generally, or these specific

---

Accordingly, Plaintiffs offer evidence only *that* Defendants' oil entered the United States market. They do not allege or establish *how*, or how *substantially*, it affected United States commerce.

[13] Plaintiffs characterize this as a "competitive advantage" but they do not identify any person or entity against whom Defendants enjoyed this competitive advantage. (Pls.' Opp'n 3.) Plaintiffs appear to assume that, if Defendants lowered **[*23]** their costs of producing oil in Nigeria by engaging in the alleged racketeering activity rather than meeting protesters' demands, Defendants were able to translate these lower costs into higher profits. However, Plaintiffs do not specify *how*, or document *that*, Defendants were actually able to do so. *See infra*, pt. II.C.1.b.

[14] Because the Court finds that Plaintiffs do not prove by a preponderance of the evidence that Defendants' alleged racketeering activity had sufficient effects in the United States to justify the Court's jurisdiction over Plaintiffs' RICO claims, the Court does not reach Defendants' argument that principles of comity bar its assumption of jurisdiction. **[*24]** (Defs.' Mot. 14-15.)

plaintiffs . . . [at *] save[d] defendants money, or otherwise increase[d] their profit margin." *481 F. Supp. 2d 1010, 1014-1015 (N.D. Cal. 2007)*. The court noted that it was "equally likely that defendants' alleged exploitation and abuses have led to increased instability and violence in the region, resulting in increased production costs and decreased output." *Id. at 1015 n.3*. The court also observed that "defendants' alleged actions might have had both deleterious and beneficial effects, resulting in no net impact." *Id*.

Plaintiffs contend **[*26]** that they have succeeded where the *Bowoto* plaintiffs failed. The Court disagrees. Plaintiffs *have* provided evidence that the preventive and remedial measures that the Ogoni protestors demanded from Defendants were costly - more costly than the Defendants were initially willing to spend. (*See, e.g*., Pls.' Opp'n Ex. 1-5 at 44, 48.)

However, although Plaintiffs contend that they have also demonstrated that Defendants' alleged racketeering activities created a net saving for Defendants, (*see* Pls.' Opp'n 21), they *have not* done so.

Plaintiffs' evidence that Defendants' racketeering activity saved Defendants' money is insufficient. Plaintiffs assume that Defendants had to choose between racketeering or paying for the remedial and preventive measures protesters demanded. [15] Even if Defendants had to choose between investing in prevention and remediation or in racketeering activities, Plaintiffs have not proven that the alleged choice to invest in racketeering activity was less costly. Plaintiffs' only evidence that it was less costly for SPDC to engage in racketeering activity is the fact that SPDC predicted that it would meet its projected business goals for 1994, [16] (*see* Pls.' Opp'n Exs. **[*27]** 1-23 at 750; 1-24 at 765), a year in which the Defendants were allegedly engaging in racketeering activity rather than investing in these costly alternatives.

There are at least three ways this evidence does not **[*28]** support Plaintiffs' conclusion. First, just because Defendants *projected* that they would meet their business goals for the year does not establish that they actually *did* meet those goals. Second, even if Defendants *did* meet their goals in 1994, this fact, on its own, does not demonstrate that, in meeting these goals, Defendants' costs were lower than if they had instead invested in the remedial and preventive measures Ogoni protesters demanded. Defendants' ability to meet their business goals does not establish the relative costs of racketeering versus remediation. Third, even assuming that Plaintiffs have shown that, in 1994, racketeering was less costly than remediation, this fact alone would not support Plaintiffs' contention that *overall* racketeering was less costly than remediation. For instance, if Defendants' alleged racketeering activities increased violence and instability in Nigeria, as the *Bowoto* court hypothesized that they might, presumably the resulting costs would accrue over the long term, not immediately. As a result, evidence from one year alone does not demonstrate the overall relative impact that Defendants' alleged choice to invest in violence and repression, rather **[*29]** than remediation or prevention, had on their production costs.

b. United States Effects

Even assuming, *arguendo*, that Defendants' alleged choice to invest in repression rather than remediation lowered Defendants' Nigerian production costs, Plaintiffs' arguments would still fail because Plaintiffs do not establish that these lower costs affected the United States. The only specific evidence Plaintiffs provide that could help the Court establish how substantial an effect Defendants' alleged racketeering activity had within the United States is the gross amount of oil per month that SPDC exported to the United States. (*See* Pls.' Opp'n Ex. 3-22.) But Plaintiffs

---

[15] The Court notes that this may not be a necessary assumption. Faced with protests, Defendants could have chosen to neither suppress the protests nor meet the protesters' demands. For instance, they might have instead chosen to launch a public relations campaign against the protesters, or do nothing at all.

[16] The other evidence Plaintiffs cite in support of the proposition that "[a]ny costs Defendants incurred as a result of violence or instability in the region did not substantially affect their business" do not support this proposition. (Pls.' Opp'n 4 n.6.) Specifically, to the extent that the 1994 internal Shell memorandum Plaintiffs provide mentions the state of SPDC's business, it reports that the company's production was dropping and that it was "taking a lot of pain" because of changes in the Nigerian economy. (*See id*. at Ex. 1-22 at 10084.) The cited page of the "1995 Country Business Plan," also does not provide any relevant information. (*See id*. at Ex. 1-25 at 665.)

provide *no* evidence that would allow the Court to determine how substantial an effect this oil had on the United States. [17] For instance, Plaintiffs provide no evidence regarding what proportion of the oil that the United States imported during the relevant period originated from Defendants' Nigerian operations; how Defendants' lower Nigerian production costs affected the oil they produced, e.g. through lower prices or higher profits, once that oil reached the United States; or that this activity altered the rate of return on Defendants' **[*30]** stocks and ADR. [18] Thus, even if Plaintiffs' evidence supported the conclusion that Defendants' alleged racketeering activity lowered their Nigerian production costs, Plaintiffs have not provided *any* evidence that these lower costs affected the United States in the form of lower prices, higher investment returns, or in any other way.

Speculative claims about general effects on commodity prices or stock values do not satisfy the securities-based effects test. *See, e.g.,* *Lucent, 420 F. Supp. 2d at 261-62*; *Nuevo Mundo, 2004 U.S. Dist. LEXIS 24900, 2004 WL 2848524, at *4*. Accordingly, Plaintiffs have not established that Defendants' alleged racketeering activity affected the United States, substantially or otherwise. [19]

2. Antitrust-Based Effects Test

Plaintiffs also do not establish that Defendants' alleged racketeering activity was intended to, and actually did, affect United States imports and exports.

The antitrust-based effects test, like the securities-based effects test, requires that a plaintiff provide *specific evidence* that a defendant's alleged racketeering activity affected the United States. As discussed above, even assuming that Defendants' alleged racketeering activity lowered their Nigerian production costs, Plaintiffs provide no specific evidence that these lower costs resulted in lower oil prices or higher investment returns in the United States. *See* *Norex, 540 F. Supp. 2d at 448* (finding general allegations of effects on American oil commodity and investment markets insufficient **[*33]** to support a court's subject matter jurisdiction over an extraterritorial RICO claim). Accordingly, Plaintiffs do not meet the antitrust-based effects test. [20]

---

[17] The Court cannot use the other evidence Plaintiffs provide regarding United States effects. Plaintiffs provide evidence that, at some point in time, nearly half of Nigeria's oil was exported to the United States, most of it oil that had been produced by SPDC. (*Id*. Ex. 2-2 at 105: 15-18.) This evidence does not help establish the Court's jurisdiction over Plaintiffs' RICO claims because (1) this proportional measure does not help the Court quantify the impact of Defendants' oil in the United States, and (2) even if the Court could use this information to quantify the impact of Defendants' alleged racketeering activity in the United States, Plaintiffs do not indicate for what years this information was true.

Plaintiffs also provide a news article that states that Shell accounts for nearly half of Nigerian oil output and that Nigerian oil accounts for almost **[*31]** ten percent of United States oil imports. (*See* Pls.' Opp'n Ex. 3-23 at b-2.) However, the Court cannot use the article to help determine the impact of Defendants' alleged racketeering activities on the United States, in part because the article, which was published in 2002, does not state for which years these facts hold true.

[18] The Court does not decide whether these types of evidence are necessary or sufficient. They are listed only as examples of how Plaintiffs *might* have sought to prove United States effects. The Court's decision rests on Plaintiffs' lack of *any* evidence other than the gross number of barrels of Defendants' Nigerian oil that the United States imported. Regardless of what evidence *would* suffice, this evidence does *not* suffice.

[19] Plaintiffs' theory of a United States effect involves Defendants' racketeering activities **[*32]** leading to cost savings that in turn lead to higher investment returns in the United States. The Court notes that this theory, in addition to being too speculative, may also be too indirect to meet the securities-based effects test. *See* *Boyd, 544 F. Supp. 2d at 252* (holding effects on United States prices too indirect where the racketeering activity was only "one factor among many" determining those prices).

[20] The Court notes that Plaintiffs' theory of intent, that Defendants engaged in racketeering activity to minimize the expense of extracting Nigerian oil so as to affect the United States, also is not sufficiently supported by evidence. First, as explained above, Plaintiffs have not established that Defendants' alleged racketeering activity actually did lower their costs. Second, Plaintiffs have not established with sufficient specificity the proportion of Defendants' Nigerian oil that was exported to the United States. *See supra* note 17. Such evidence is necessary to support Plaintiffs' claim that enough of Defendants' Nigerian oil was exported to

D. Conclusion

Plaintiffs have not established that Defendants' alleged racketeering activity had the substantial, direct effects on the United States necessary to meet the securities-based **[*34]** effects test. In addition, Plaintiffs have not established that Defendants' alleged racketeering activity was intended to, or did, affect United States imports and exports sufficiently to meet the antitrust-based effects test. Accordingly, Plaintiffs have not met their burden of proving that their extraterritorial RICO claims fall within the Court's subject matter jurisdiction.

III. CONCLUSION

For the above reasons, Defendants' *Rule 12(b)(1)* motion to dismiss, 96-D.E. 308, Plaintiffs' extraterritorial RICO claims as outside the Court's subject matter jurisdiction is GRANTED.

SO ORDERED.

Dated: New York, New York

March 18, 2009

/s/ Kimba M. Wood

Kimba M. Wood

United States District Judge

End of Document

---

the United States to establish that Defendants undertook their alleged racketeering activity in order to affect the United States, in addition to, or as opposed to, other countries. (Pls.' Opp'n 20.)

Doe v. Ariz. Hosp.

United States District Court for the District of Arizona

March 19, 2009, Decided; March 19, 2009, Filed

No. CV 07-1292-PHX-SRB

Reporter

2009 U.S. Dist. LEXIS 42871 *; 2009-1 Trade Cas. (CCH) P76,591; 2009 WL 1423378

Jane Doe, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. Arizona Hospital and Healthcare Association, et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Class certification granted by, in part, Class certification denied by, in part *Johnson v. Ariz. Hosp. & Healthcare Ass'n, 2009 U.S. Dist. LEXIS 122807 (D. Ariz., July 14, 2009)*

Motion granted by *Johnson v. Ariz. Hosp. & Healthcare Ass'n, 2009 U.S. Dist. LEXIS 135007 (D. Ariz., Aug. 18, 2009)*

Class certification denied by *Johnson v. Ariz. Hosp. & Healthcare Ass'n, 2011 U.S. Dist. LEXIS 162496 (D. Ariz., Sept. 27, 2011)*

Core Terms

antitrust, purchaser, Plaintiffs', indirect, expectancy, agencies, damages, nurses, wages, anti trust law, Defendants', unjust enrichment, class representative, price-fixing, withdraw, unfair competition, exemption, motion to dismiss, allegations, discovery, courts, temporary, enrichment, purposes, prices, interference with business, antitrust claim, price fixing, contractual, violations

Counsel: **[*1]** For Cindy Johnson, on behalf of themselves and all other similarly situated, Plaintiff: Allen P Grunes, LEAD ATTORNEY, Brownstein Hyatt Farber Schreck LLP, Washington, DC; Andrew William Kelly, LEAD ATTORNEY, Odom & Des Roches LLP, New Orleans, LA; Barry Steven Taus, LEAD ATTORNEY, Garwin Gerstein & Fisher LLP, New York, NY; David P Smith, W Ross Foote, LEAD ATTORNEYS, Percy Smith & Foote LLP, Alexandria, LA; David F Sorensen, Eric L Cramer, Neill Wilson Clark, Shauna B Itri, LEAD ATTORNEYS, Berger & Montague PC, Philadelphia, PA; Jeffrey S Rugg, LEAD ATTORNEY, Brownstein Hyatt Farber Schreck LLP, Las Vegas, NV; John D Radice, Linda P Nussbaum, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Mark A Griffin, LEAD ATTORNEY, PRO HAC VICE, Amy N L Hanson, Raymond J Farrow, Keller Rohrback LLP, Seattle, WA; Martha F Bauer, Timothy R Beyer, LEAD ATTORNEYS, Brownstein Hyatt Farber Schreck LLP, Denver, CO; Ron Kilgard, LEAD ATTORNEY, Mark D Samson, Keller Rohrback PLC, Phoenix, AZ.

For Barbara A Craig, on behalf of themselves and all others similarly situated, Stephanie L Walker, on behalf of herself and all others similarly situated, Plaintiffs: Mark A Griffin, LEAD ATTORNEY, PRO **[*2]** HAC VICE, Amy N L Hanson, Raymond J Farrow, Keller Rohrback LLP, Seattle, WA; Allen P Grunes, Brownstein Hyatt Farber Schreck LLP, Washington, DC; Andrew William Kelly, Odom & Des Roches LLP, New Orleans, LA; Barry Steven Taus, Garwin Gerstein & Fisher LLP, New York, NY; David P Smith, W Ross Foote, Percy Smith & Foote LLP, Alexandria, LA; David F Sorensen, Eric L Cramer, Neill Wilson Clark, Shauna B Itri, Berger & Montague PC, Philadelphia, PA; Jeffrey S Rugg, Brownstein Hyatt Farber Schreck LLP, Las Vegas, NV; John D Radice, Linda P

Nussbaum, Kaplan Fox & Kilsheimer LLP, New York, NY; Mark D Samson, Ron Kilgard, Keller Rohrback PLC, Phoenix, AZ; Martha F Bauer, Timothy R Beyer, Brownstein Hyatt Farber Schreck LLP, Denver, CO.

For Arizona Hospital and Healthcare Association, AzHHA Service Corporation, Defendants: Keith Beauchamp, Lauren Jacqueline Weinzweig, LEAD ATTORNEYS, Coppersmith Schermer & Brockelman PLC, Phoenix, AZ; Roopali H Desai, LEAD ATTORNEY, Coppersmith Schermer & Brockelman LLP, Phoenix, AZ.

For Banner Health, Sun Health Corp., Defendants: Jill Louise Ripke, Michael T Liburdi, LEAD ATTORNEYS, Charles A Blanchard, Scott Sebastian Minder, Tyler Reese Bowen, Perkins Coie **[*3]** Brown & Bain PA, Phoenix, AZ.

For University Medical Center Corporation, Defendant: John J Calkins, Teisha C Johnson, LEAD ATTORNEYS, Katherine I Funk, Sonnenschein Nath & Rosenthal LLP, Washington, DC; Randall Papetti, Lewis & Roca LLP, Phoenix, AZ.

For Carondelet Health Network, Defendant: Allen Spencer Boston, David B Helms, Richard B Walsh, Jr, Stephen Michael Durbin, Winthrop Blackstone Reed, III, LEAD ATTORNEYS, Lewis Rice & Fingersh LC, St Louis, MO; Christopher Anthony Coury, LEAD ATTORNEY, Ryley Carlock & Applewhite PA, Phoenix, AZ; Robert James Pohlman, LEAD ATTORNEY, Ryley Carlock & Applewhite PC, Phoenix, AZ.

For John C. Lincoln Health Network, Defendant: Andrew L Pringle, Mariscal Weeks McIntyre & Friedlander PA, Phoenix, AZ.

For Regional Care Services Corp, Defendant: Douglas Gerlach, Jennings Strouss & Salmon PLC, Phoenix, AZ.

For Northern Arizona Healthcare Corporation, Defendant: David A Ettinger, Honigman Miller Schwartz & Cohn LLP, Detroit, MI; Patrick Michael Klein, II, Fennemore Craig, Phoenix, AZ; Timothy J Burke, Fennemore Craig PC, Phoenix, AZ.

For TMC Healthcare, Defendant: Catherine T Broderick, Jeffrey A LeVee, Jones Day, Los Angeles, CA; Jeffrey J Campbell, Campbell **[*4]** Yost Clare & Norell PC, Phoenix, AZ.

For Catholic Healthcare West, Defendant: Patrick Michael Klein, II, Fennemore Craig, Phoenix, AZ.

For Yuma Regional Medical Center, Inc, Defendant: James A Craft, Gammage & Burnham PLC, Phoenix, AZ.

For Scottsdale Healthcare Corp., Defendant: Barry D Halpern, Benjamin William Reeves, Daniel Joseph McAuliffe, Scott Anthony Shuman, Snell & Wilmer LLP, Phoenix, AZ; Dan W Goldfine, Snell & Wilmer, Phoenix, AZ; Timothy J Burke, Fennemore Craig PC, Phoenix, AZ.

For Summit Healthcare Association, University Physicians Healthcare, Defendants: Dennis D Palmer, Polsinelli Shughart PC, Kansas City, MO; George E Leonard, Shughart Thomson & Kilroy PC, Kansas City, MO.

For Kingman Hospital, Inc., Defendant: Leigh Eric Dowell, LEAD ATTORNEY, Kerry Scott Martin, Ogletree Deakins Nash Smoak & Stewart PC, Phoenix, AZ.

For Phoenix Children's Hospital, Inc., Defendant: Barry D Halpern, Daniel Joseph McAuliffe, LEAD ATTORNEY, Benjamin William Reeves, Scott Anthony Shuman, Snell & Wilmer LLP, Phoenix, AZ; Dan W Goldfine, Snell & Wilmer, Phoenix, AZ.

For Select Specialty Hospital - Arizona, Inc., Defendant: Deana S Peck, Nicole Maroulakos Goodwin, Quarles & Brady LLP, Phoenix, **[*5]** AZ.

For Sierra Vista Regional Health Center, Defendant: James R Broening, LEAD ATTORNEY, Robert Thomas Aquinas Sullivan, Broening Oberg Woods & Wilson PC, Phoenix, AZ.

For Arizona Heart Hospital, LLC, doing business as Arizona Heart Hospital, Defendant: James P McLoughlin, Jr, Penny Hirsch Edwards, Tonya L Mitchell, LEAD ATTORNEYS, Moore & Van Allen PLLC, Charlotte, NC; Charles Steven Price, Mariscal Weeks McIntyre & Friedlander PA, Phoenix, AZ.

For Brim Healthcare Inc, Cobre Valley Community Hospital, Defendants: Randall S Yavitz, Hunter Humphrey & Yavitz PLC, Phoenix, AZ.

For Hospital Development of West Phoenix Inc, VHS Acquisition Subsidiary Number 1, Inc., VHS Acquisition Corporation, VHS of Arrowhead, Inc., VHS of Phoenix, Inc., VHS Acquisition Company Number 1, LLC, PHC-Fort Mohave, Inc, doing business as Valley View Medical Center, Havasu Regional Medical Center, LLC, doing business as Havasu Regional Medical Center, Defendants: Kerry Scott Martin, Ogletree Deakins Nash Smoak & Stewart PC, Phoenix, AZ.

For Bullhead City Hospital Corporation, doing business as Western Arizona Regional Medical Center, Payson Hospital Corporation, doing business as Payson Regional Medical Center, Oro **[*6]** Valley Hospital, LLC, doing business as Northwest Medical Center-Oro Valley, Northwest Hospital LLC, doing business as Northwest Medical Center, Defendants: Debbie Weston Harden, Mark J Horoschak, Womble Carlyle Sandridge & Rice PLLC, Charlotte, NC; Timothy J Burke, Fennemore Craig PC, Phoenix, AZ.

For Healthsouth Valley of the Sun, LP, doing business as HealthSouth Valley of the Sun Rehabilitation Hospital, Defendant: Lawrence Allen Katz, Steptoe & Johnson LLP, Phoenix, AZ.

For Healthsouth Rehabilitation Institute of Tucson, LLC, doing business as Healthsouth Rehabilitation Institute of Tucson, Southern Arizona Regional Rehabilitation Hospital, L.P., doing business as Healthsouth Rehabilitation Hospital of Southern Arizona, Defendants: Kami S Galvani, Lawrence Allen Katz, P Bruce Converse, Steptoe & Johnson LLP, Phoenix, AZ.

For IASIS Healthcare Holdings, Inc, St. Luke's Medical Center, L.P., doing business as St. Luke's Medical Center, St Luke's Behavioral Hospital, LP, doing business as St Luke's Behavioral Hospital, Mesa General Hospital, LP, Defendants: David B Rosenbaum, Osborn Maledon PA, Phoenix, AZ.

For Kindred Hospitals West, LLC, Defendant: Thomas P Hanrahan, Sidley Austin LLP, **[*7]** Los Angeles, CA.

For Mayo Clinic Arizona, Defendant: Barry D Halpern, Benjamin William Reeves, Daniel Joseph McAuliffe, Scott Anthony Shuman, Snell & Wilmer LLP, Phoenix, AZ; Dan W Goldfine, Snell & Wilmer, Phoenix, AZ.

For Navajo Health Foundation-Sage Memorial Hospital Inc, Defendant: Franklin James Hoover, Mangum Wall Stoops & Warden PLLC, Flagstaff, AZ.

For Select Specialty Hospital Phoenix, Inc, Defendant: Nicole Maroulakos Goodwin, Quarles & Brady LLP, Phoenix, AZ.

For AHH Management, Inc, Defendant: Charles Steven Price, Mariscal Weeks McIntyre & Friedlander PA, Phoenix, AZ.

Judges: Susan R. Bolton, United States District Judge.

Opinion by: Susan R. Bolton

Opinion

ORDER

The Court now considers Defendants Mayo Clinic Arizona and Phoenix Children's Hospital's ("Defendants") Motion to Dismiss Class Plaintiffs' Third Amended Complaint ("Defs.' Mot.") (Doc. 318). Scottsdale Health Corporation has joined Defendants' Motion. (Doc. 319.) [1] The Court will also resolve Plaintiff Jane Doe's Motion to Withdraw as a Proposed Class Representative and for Other Relief ("Pl.'s Mot.") (Doc. 260).

---

[1] Plaintiffs note that Scottsdale Health Corporation already filed an answer to a previous iteration of the Complaint. (Pls.' Mem. of **[*8]** Law in Opp'n to Defs.' Mot. ("Pls.' Opp'n") at 6 n.1.) However, as Scottsdale Health Corporation has not answered Plaintiffs' Third Amended Complaint ("Compl."), they may join in the Moving Defendants' Motion to Dismiss.

I. Background

Plaintiffs are "Registered Nurses who work, or have worked, as temporary (per diem or travel) nurses." (Compl. P 1.) They have brought this lawsuit against Defendants Arizona Hospital and Healthcare Association, its subsidiary the AzHHA Service Corporation (collectively, "AzHHA"), and certain participating hospitals, charging that AzHHA and the hospitals engaged in illegal price-fixing. (Compl. PP 1-2.) The Complaint alleges that AzHHA's nursing Registry Program, which contracts with various agencies representing temporary nurses, operated as "an illegal and anticompetitive buyers' cartel." (Compl. PP3-5.) Plaintiffs claim that the AzHHA Registry and the Defendant hospitals conspired to keep temporary nursing wages below free market levels. (Compl. P4.) On May 22, 2007, the U.S. Department of Justice and the Arizona Attorney General filed a complaint against AzHHA, alleging violations of federal and state ***antitrust law***, after a lengthy investigation. (Compl. **[*9]** PP 13-14.) A final judgment was entered in that case, against AzHHA, in September 2007. (Compl. P 16.) The Complaint in the instant case contains claims under federal and state ***antitrust law***, as well as pursuant to Arizona tort law for interference with business expectancy, unfair competition, and unjust enrichment. (Compl. PP 146-70.) Defendants Mayo Clinic Arizona, Phoenix Children's Hospital, and Scottsdale Healthcare Corporation have moved to dismiss the Third Amended Complaint. (Defs.' Mot. at 1.)

Initially, the instant matter involved two pseudonymous class representatives, Jane Doe and Rhonda Roe. (Pl.'s Mot. at 4.) Plaintiffs claimed that the class representatives required anonymity because they feared retaliation from Defendants, who represent almost all the hospitals in Arizona. (*Id.*) On June 17, 2008, Rhonda Roe notified the Court that she wished to withdraw as a class representative "due to a family medical issue, and in light of the Court's Order of May 23, 2008, regarding disclosure of her identity to Defendants[.]" (Pl.'s Mot. at 5.) Her motion to withdraw was unopposed, and the Court granted it on June 18, 2008. (Pl.'s Mot. at 5; Doc. 209.) Plaintiff Jane Doe has subsequently **[*10]** also decided not to continue as a class representative, and she moved to withdraw on September 29, 2008. (Doc. 260.) Defendants oppose her Motion. (Doc. 284.)

II. Legal Standards and Analysis

A. Motion to Dismiss

The Federal Rules of Civil Procedure require "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997)*. Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp., 633 F.2d 757, 759 (9th Cir. 1980)*. A complaint should not be dismissed under *Rule 12(b)(6)* "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. A *Rule 12(b)(6)* dismissal for failure to state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)*. In determining whether **[*11]** an asserted claim can be sustained, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994)*. The Supreme Court has explained that factual allegations need to be "plausible" and "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. In ruling on a motion to dismiss, the issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *Gilligan, 108 F.3d at 249*.

1. Per Se Versus Rule of Reason Analysis

Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. In construing § 1, however, the Supreme Court has interpreted the statute to only ban those contracts or combinations that are "unreasonably restrictive of competitive conditions," because many agreements that are beneficial to competition also restrain trade. *Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*.

Treatment **[*12]** of an agreement as per se illegal is reserved for "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. The Supreme Court has held that the appropriate inquiry in these cases is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Broad. Music, Inc. v. Columbia Broad., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* (internal quotation and citation omitted). "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements [using the per se method] that a fullblown inquiry might have proved to be reasonable." *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*.

The Supreme Court has also held, "[O]ur decisions **[*13]** establish that price-fixing agreements are unlawful on their face." *Id. at 342*. "'The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.'" *Id. at 346* (quoting *United States v. Trenton Potteries Co., 273 U.S. 392, 398, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*); *see also* *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* ("Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements."); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* (finding that price-fixing agreements are per se illegal regardless of whether the price is fixed with some reference to the market price; "[P]rices are fixed because they are agreed upon."); *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1144 n.10 (9th Cir. 2003)* ("One manual captures the principle nicely in question and answer format: '[Q.] May competitors agree to fix prices? [A.] Duh. What do you think?'" (quoting ELIOT G. DISNER, ***ANTITRUST LAW*** FOR BUSINESS LAWYERS § 4.06, at 82 (2001))); *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000)* (holding that "[h]orizontal **[*14]** price fixing is a per se violation regardless of whether the prices set are minimum or maximum").

Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damage caused by the agreement is to sellers and not consumers. *Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*; *Socony-Vacuum, 310 U.S. at 223-24*. "'Most courts understand that a buying cartel's low buying prices are illegal . . . . Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury.'" *Knevelbaard, 232 F.3d at 988-89* (quoting 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 375b at 297 (rev. ed. 1995)); *see also* AREEDA & HOVENKAMP, supra, P 2012 at 133-41 (observing that "once a naked agreement is found among rivals in the buying market limiting the price they will pay or the amount they will purchase, they are condemned categorically without inquiry into power or effects" and distinguishing these agreements from legal joint purchasing arrangements, which produce market efficiencies and increase output, rather than reducing **[*15]** output by forcing sellers to accept less than a competitive price).

To survive Defendants' Motion to Dismiss, Plaintiffs must allege sufficient facts to establish a plausible case of per se illegality. *Twombly, 127 S. Ct. at 1965*. Defendants argue that "Plaintiffs' mere allegation of price fixing does not mean that the *per se* illegal rule applies." (Defs.' Mot. at 8.) Plaintiffs, however, have done more than merely allege price fixing by the Defendants. The Complaint contains a number of allegations that raise the level of the claim above a generalized assertion. (*See, e.g.,* Compl. PP 5-6, 8-9, 11, 100-04.) The Complaint alleges not only that "Defendants have jointly set - and wrongfully suppressed - the wages and compensation" of temporary nursing staff, but also that those rates were set "below competitive levels" and that "[a]gencies have not obtained significant transactional efficiencies or scale economies as a result of the imposition of uniform bill rates." (Compl. PP 5, 9, 11.) Plaintiffs allege that Defendants also fraudulently "affirmatively misled Plaintiffs into believing that their wages were true market wages . . . rather than . . . artificially depressed wages[.]" (Compl. **[*16]** P 74.) The Complaint also contains specific allegations about the means by which Defendants allegedly engaged in price-fixing, including requiring that the agencies adopt a uniform pay rate scale for per diem and travel nurses and agreeing to "expel [from AzHHA] any hospital using participating agencies for less than 50 percent of its total per diem needs." (Compl. PP 101-02.)

Defendants have argued that their arrangement was not illegal price-fixing, but rather an efficient joint purchasing agreement. (Defs.' Mot. at 9-10; Defs.' Reply at 12-13.) Plaintiffs argue that "while AzHHA may have begun in 1988 to serve some legitimate ends, such as quality assurance, the program changed significantly in 1997 - with the support and active participation of the hospitals - and began to blatantly fix rates for temporary nursing personnel." (Pls.' Opp'n at 5; Compl. PP 3, 8, 101.) Plaintiffs claim that "there was no need for [Defendants] to begin price-fixing to permit AzHHA to continue providing other benefits to the hospitals." (Pls.' Opp'n at 5.) Defendants also contend that Plaintiffs are attempting to "cherry pick" one aspect of AzHHA's role, without considering the other, pro-competitive **[*17]** activities of the organization. (Defs.' Reply at 12-13.) In support of this argument, Defendants cite *Meijer, Inc. v. Barr Pharms. Inc., 572 F. Supp. 2d 38, 49 (D.D.C. 2008)*. In that case, however, the agreement at issue was a contract that contained an exclusive supply arrangement whereby a supplier and a potential competitor agreed not to compete with a buyer for the duration of the agreement. The court in *Meijer* held, "Considering that arrangement as a whole, it is apparent that the Agreement's resulting economic effects largely depend on the definition of the relevant market." *Id.* This scenario is entirely unlike the instant case, in which Plaintiffs challenge a different practice (price-fixing), one that is clearly established to be per se illegal. The present case does not involve a situation in which the economic effects necessarily or largely depend on the definition of the relevant market. "With few exceptions, price-fixing agreements are unlawful per se under the Sherman Act[.] . . . The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman, 322 F.3d at 1144*.

For the purposes of this Motion, Plaintiffs have alleged **[*18]** facts sufficient to support a claim of per se illegality. [2]

2. Standing for Federal Antitrust Claims

Defendants advance that Plaintiffs do not have standing in this case because they "allege only an indirect injury that results from a negotiation between the agencies and the Defendants." (Defs.' Mot. at 10.) "[C]ourts have constructed the concept of antitrust standing, under which they 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them' to determine whether a plaintiff is a proper party to bring an antitrust claim." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, Inc., 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. Because of the difficulty in creating a bright line rule to designate which plaintiffs have standing in antitrust matters, the Ninth Circuit Court of Appeals distilled the Supreme Court's decision in *Associated General* to five factors "for determining whether a plaintiff who has borne an injury has antitrust standing." *Id.* **[*19]** They are:

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
> (2) the directness of the injury;
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

---

[2] As such, the Court will not address the parties' arguments about market definition in this Order.

Id. "To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. Generally, no single factor is decisive." *Id. at 1055* (quotation and citations omitted). Courts are advised to balance the factors instead, giving great weight to the nature of the plaintiff's alleged injury. *Id.* "In fact, the Supreme Court has noted that [a] showing of antitrust injury is necessary, but not always sufficient to establish standing [in an antitrust case]." *Id.* (quotation and citation omitted).

After examining all five factors, the Court concludes that Plaintiffs have standing in this matter. Plaintiffs allege that they were injured when Defendants fixed the price of their wages below a competitive rate. (*See, e.g.,* Compl. PP 5, 7, 9, 19, 113, 138, 145.) As discussed in greater detail above, this is an example of the type of injury the antitrust laws are meant to protect **[*20]** against, thus satisfying the first factor. *Mandeville Island Farms, 334 U.S. at 235*; *Socony-Vacuum, 310 U.S. at 223-24*; *Knevelbaard, 232 F.3d at 988-89*. To establish the second factor, the Plaintiffs' injury must be the direct result of Defendants' allegedly anticompetitive behavior. *Am. Ad Mgmt., 190 F.3d at 1058*; *see also* *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1162 (9th Cir. 1991)* ("Directness in the antitrust context means close in the chain of causation." (internal quotation and citation omitted)). Plaintiffs have alleged that there is a direct correlation between bill rates set by AzHHA and nursing wages at the Defendant hospitals. (Compl. P 7.) This causal link, as alleged, between reduced bill rates and lower wages, is sufficiently direct for the purposes of antitrust standing. The Complaint states, "Most of the monies received by nursing agencies in the form of their bill rates are passed directly to nurses as wages and benefits. . . . Participating Hospitals, including the Hospital Defendants, also pay and compensate, and have paid and compensated, Class members directly." (Compl. P 7.) *Compare* *R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 147 (9th Cir. 1989)* **[*21]** (finding that lost royalties were a direct injury, but that damages from lessened ability to compete due to overall lack of revenue, though traceable to lost royalties, were an indirect injury).

Turning to the third factor, the damages Plaintiffs allege are not speculative. Plaintiffs have alleged that a direct correlation exists between bill rates set by AzHHA and wages for temporary nurses at the Defendant hospitals and also that multiple calculations have been made of the "savings" to the hospitals due to the reduced rates for temporary nursing wages. (Compl. PP 7, 133-34.) Defendants argue that because "the price is ***always*** negotiated with the nurse agency, any measure of harm is speculative at best and apportioning damages between the agencies - one of which has already sued the same defendants for the same alleged antitrust violations - risks duplicative recovery and complex apportionment of any damages." (Defs.' Mot. at 11.) Defendants clarify in their Reply that this argument is not meant to suggest that the amount of any individual Plaintiff's damages might be speculative, but rather that "Plaintiffs' purported injury was too remote from the alleged antitrust harm to amount **[*22]** to an antitrust injury under *Associated General Contractors.*" (Defs.' Reply at 14.) In any event, the Court finds that the damages are both direct (for the purposes of standing) and not speculative. Regardless of the reliability of the estimates that have already been made, should damages need to be assessed, presumably the amount Plaintiffs' wages were depressed could be calculated.

The fourth and fifth factors have to do with other potential plaintiffs for the same injury. In this case, Defendants state that they have been sued by a nursing agency for the same antitrust violations. (Defs.' Mot. at 11.) Plaintiffs dispute that claim, saying that the only suit by an agency thus far instead sought lost profits arising from an illegal boycott and was settled in the summer of 2007. (Pl.'s Opp'n at 14.) For the purposes of this Order, the Court will assume that Plaintiffs' allegations are true. *Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987)* (In ruling on a motion to dismiss, "the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party."). Even assuming that none of the nursing agencies are presently **[*23]** suing these defendants for antitrust violations, however, the possibility presumably still exists of parallel suits. The crux of the issue is the problem of apportioning damages between the nursing agencies and the individual nurses, which could depend on how much of the rate cut is passed on to nurses by their agencies. As Plaintiffs note, this is an issue to be decided using expert testimony and other evidence. (Pls.' Opp'n at 13.) For the purposes of a *Rule 12(b)(6)* motion, the Court confines itself to the allegations in the Complaint, on the basis of which the Court does not find a risk of duplicative recovery, provided that the damages were apportioned properly. While apportionment undoubtedly would need to be addressed in any damages calculation, the Court does not see any reason for that process to be prohibitively complex. For these reasons, the Court concludes that Plaintiffs have antitrust standing in this case.

3. Indirect Purchaser Rule

Defendants also argue that the indirect purchaser rule, outlined by the Supreme Court in *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, bars Plaintiffs' claims in this case. (Defs.' Mot. at 11; Defs.' Reply at 14-16.) Defendants' argument **[*24]** essentially is that because the hospitals purchased Plaintiffs' labor through an agency, the agency was the direct seller, so any antitrust action could only properly be brought by the agency itself. (Defs.' Mot. at 11.) Analysis under the indirect purchaser rule is distinct from a determination of standing, although it raises many of the same issues. *Ill. Brick, 431 U.S. at 728 n.7*. *Illinois Brick* involved claims brought by the State of Illinois and a number of local governmental entities against certain manufacturers of concrete blocks. The plaintiffs had hired general contractors, who had hired subcontractors, who had purchased blocks from the defendant manufacturers. The plaintiffs in *Illinois Brick* alleged that the block manufacturers had illegally fixed prices and that they were injured, although they did not purchase the blocks directly from the manufacturers. Under the rule of *Illinois Brick,* indirect purchasers are prohibited from recovering damages except in certain limited circumstances. *Id. at 730-33*. Indirect purchasers retain standing for injunctive relief. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998)*.

The rule announced in **[*25]** *Illinois Brick* stems from the Supreme Court's previous ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, which held that an antitrust defendant was not permitted to introduce evidence that injury was passed on to indirect purchasers, thereby requiring the defendant to pay all recovery to the direct purchaser. The Supreme Court gave two reasons for its decision. First, the Supreme Court was concerned about the possibility of multiple liability because *Hanover Shoe* forbids defendants from introducing evidence of passing on an alleged antitrust injury to indirect buyers. *Ill. Brick, 431 U.S. at 730-31*. Second, analysis of indirect antitrust injury would protract and complicate already cumbersome proceedings. *Id. at 731-33*. As in other areas of ***antitrust law***, this logic applies equally to alleged buyers' cartels like the one at issue in this case. *See, e.g., Zinser v. Cont'l Grain Co., 660 F.2d 754, 760 (10th Cir. 1981), cert. denied, 455 U.S. 941, 102 S. Ct. 1434, 71 L. Ed. 2d 652 (1982)*; *In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1164-65 (5th Cir. 1979), cert. denied, 449 U.S. 905, 101 S. Ct. 280, 101 S. Ct. 281, 66 L. Ed. 2d 137 (1980)*.

In *Illinois Brick,* the Supreme Court suggested two exceptions to the prohibition against **[*26]** indirect purchaser antitrust suits: (1) if an indirect purchaser received goods from the direct purchaser according to a preexisting "cost-plus contract;" or (2) if the direct purchaser is controlled or owned by another party, either by the seller or the indirect purchaser. *Ill. Brick, 431 U.S. at 726 n.2, 736 n.16*; *see also Alaska v. Chevron Chem. Co., 669 F.2d 1299, 1301 & n.3 (9th Cir. 1982)* (discussing a conditionally certified class consisting of direct purchasers and "indirect purchasers who acquired fertilizer under the economic equivalent of a preexisting cost-plus contract"); *Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)* (applying ownership or control exception to allow indirect purchaser's suit). The Supreme Court later clarified that these exceptions should be read narrowly and not expanded. *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 216-17, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; *see also Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 148 (N.D. Cal. 1991)* ("The Supreme Court has made it clear that these are very limited exceptions."). The Supreme Court reasoned that cost-plus contracts present a different situation than the typical indirect purchaser **[*27]** scenario because the direct purchaser is insulated from any overcharge since its customer has agreed to buy a fixed quantity regardless of price. *Ill. Brick, 431 U.S. at 736*. The rationale of the second exception is that, in those situations, the direct purchaser would have little or no incentive to sue on their own behalf, thus leaving the indirect purchaser without recourse for any antitrust injuries. *Freeman, 322 F.3d at 1145-46*. Plaintiffs allege that none of the agencies have sued or are suing Defendants, but they do not claim that the agencies have no incentive to sue. (Pls.' Opp'n at 14.)

Plaintiffs argue that their "relationship with Defendants cannot be described as 'indirect'" because the members of the class worked at the hospitals and were compensated directly by the hospitals. (Pls.' Opp'n at 14-15; Compl. PP

4, 7, 92.) Plaintiffs analogize their situation to that presented in *In re Mercedes-Benz Antitrust Litigation, 364 F. Supp. 2d 468 (D.N.J. 2005)*. The individual plaintiffs in that case held leases on Mercedes-Benz vehicles, and the defendant car dealerships. Mercedes-Benz USA moved to dismiss their claims, citing the indirect purchaser rule, because the lease was financed **[*28]** by a separate company, Mercedes-Benz Credit Corporation, which typically pays the dealer for the car before leasing it to the customer, in effect purchasing it from the dealer. *Mercedes-Benz, 364 F. Supp. 2d at 469, 472*. The plaintiffs generally had negotiated the terms of the lease with the dealer, not the financing company. *Id. at 472*. The court held that the plaintiffs' claims could proceed because, under those facts, "both the leasing companies and the lessees could be considered the immediate buyers." *Id. at 478*. The court in *Mercedes-Benz* also noted the "direct interaction" between the customers and the alleged antitrust violators, which is "unlike the paradigm in which there is usually no direct interaction between the antitrust violator and the indirect purchaser." *Id. at 480*. The instant case is somewhere between *Illinois Brick* and *Mercedes-Benz,* as the Plaintiffs here did have some direct interaction with the Defendants, since they worked in the hospitals and were sometimes paid directly by the Defendants, but Plaintiffs do not allege that they had contact with Defendants at the negotiation stage of the transaction. (Defs.' Reply at 14.)

Plaintiffs also argue that Defendants' **[*29]** allegedly anticompetitive behavior caused a separate harm to individual nurses, distinct from the harm to the nursing agencies. (Pls.' Opp'n at 15-16.) In support of this contention, Plaintiffs cite *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* and *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002)*. In *McCready,* the plaintiff sued her insurance company for allegedly conspiring with psychiatrists and increasing her costs for treatment by a psychologist. *457 U.S. at 468-70*. The defendant argued that *Illinois Brick* prohibited the plaintiff from pursuing her claim because the employer was the direct purchaser of the insurance plan, but the court disagreed, holding that the injury Ms. McCready had suffered was distinct from the injury to the employer. *Id. at 475*. The court found that because the plaintiff had paid out of pocket to visit the psychologist, the employer had not experienced an injury due to the alleged overcharge. *Id.* The plaintiffs in *Loeb Industries* were purchasers of copper cathode, copper rod, and scrap copper who claimed that they had overpaid due to the defendants' alleged conspiracy to fix the price of copper futures at artificially high **[*30]** levels on international exchange markets. The court in that case relied on *McCready* when it observed that

> different injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus . . . differently situated plaintiffs might be able to raise claims. The injuries [in that case] suffered by the copper traders who purchased inflated futures contracts from the defendants are distinct from any harm inflicted on Viacom when it paid inflated cash prices for cathode or on Ocean View to the extent that it purchased copper rod from integrated producers.

Loeb Indus., 306 F.3d at 481-82.

For the purposes of a motion to dismiss, it is too early for the Court to conclude definitively that the indirect purchaser rule bars Plaintiffs from recovering damages for their federal antitrust claims. Without examining the contracts between the Defendant hospitals and the nursing agencies, there is no way for the Court to ascertain whether they were not, in fact, cost-plus arrangements that would fall within an exception to the indirect purchaser rule, and such a searching review would be inappropriate on a *Rule 12(b)(6)* motion. *See, e.g., Lucas Auto. Eng'g, 140 F.3d at 1234* (applying **[*31]** the rule from *Illinois Brick* to bar Plaintiffs from recovering damages on a motion for summary judgment, after studying the contracts between the parties). The Complaint alleges a direct correlation between the illegally suppressed wage rates and lower take-home pay for individual nurses and also that the Defendant hospitals sometimes paid temporary nursing staff directly. (Compl. PP 7, 91-92.) The facts of this case do not map neatly onto any of the examples the parties have cited, including *McCready or Loeb:* the individual nurses are undoubtedly indirect sellers, but the mechanics of the relationship between the nurses and the agencies, between the agencies and the hospitals, and between the nurses and the hospitals are not analogous to a wholesaler who sells to a retailer who sells to a consumer. [3] The Court, therefore, will not apply the indirect

[3] The instant case is also very different from a situation wherein a subcontractor **[*32]** purchases materials from a seller, then charges a general contractor, who charges his customer, as in *Illinois Brick.*

purchaser rule at this point to hold that Plaintiffs cannot recover damages for their alleged injury. Furthermore, even if the rule from *Illinois Brick* did operate to bar Plaintiffs' recovery, they could still pursue injunctive relief for their federal claims.

4. Arizona Uniform State Antitrust Act Statutory Labor Exemption

Under the version of the Uniform State Antitrust Act adopted in Arizona, "Labor of a human being is not a commodity or an article of commerce." *Ariz. Rev. Stat. ("A.R.S.") § 44-1404(A)*. Defendants argue that this provision bars Plaintiffs' state antitrust claims. (Defs.' Mot. at 12.) Plaintiffs respond that the statutory language, which is nearly identical to *§ 6* of the Clayton Act, "simply constitutes the 'statutory labor exclusion,' necessary to keep collective bargaining and union activity from being antitrust violations." (Pls.' Opp'n at 18.) Plaintiffs argue that to allow this language, intended to protect union activity from antitrust liability, to prohibit lawsuits such as the present case would be inimical to the purposes of the antitrust laws. (*Id.*) Indeed, the statute also states, "This article shall not be construed to forbid the existence and operation of any labor, agricultural or horticultural organization instituted for the purpose of mutual help, while lawfully carrying out its legitimate **[*33]** objects." *A.R.S. § 44-1404(B)*. "An exemption to the antitrust laws for activities related to collective bargaining traces its origin to *sections 6* and *20* of the Clayton Act and to the Norris-LaGuardia Act." *Brown v. Pro Football, Inc., 50 F.3d 1041, 1048, 311 U.S. App. D.C. 89 (D.C. Cir. 1995)* (citations omitted).

The Arizona Uniform State Antitrust Act "is interpreted in conformity with the federal [antitrust laws]." *Arizona v. Maricopa County Med. Soc'y, 643 F.2d 553, 554 n.1 (9th Cir. 1980)*, *rev'd on other grounds, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *see also Wedgewood Inv. Corp. v. Int'l Harvester Co., 126 Ariz. 157, 613 P.2d 620, 623 (Ariz. 1979)* ("The Arizona legislature clearly intended to strive for uniformity between federal and state antitrust laws."). Moreover, *A.R.S. § 44-1412* explicitly states, "It is the intent of the legislature that in construing [the Arizona antitrust laws], the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes." *But cf. Bunker's Glass Co. v. Pilkington, PLC, 206 Ariz. 9, 75 P.3d 99, 102, 106 (Ariz. 2003)* (acknowledging the federal antitrust laws' general "importance" to the interpretation of the Uniform State Antitrust Act, while also noting that Arizona **[*34]** courts need not "rigidly follow federal precedent on every issue of ***antitrust law*** regardless of whether differing concerns and interests exist in the state and federal systems").

No Arizona court has yet applied *A.R.S. § 44-1404* to a set of facts like the instant case. Nevertheless, in light of the Arizona legislature's avowed desire to achieve uniformity between the Uniform State Antitrust Act and the federal antitrust laws, the Arizona Supreme Court would most likely follow federal precedent and hold that the labor exemption is intended to apply only to lawful union activities. *See Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia, 379 F.3d 557, 560 (9th Cir. 2004)* ("[W]hen interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue. . . ." (internal quotation marks and citation omitted)). "While none of [the corresponding federal] statutory provisions is phrased in terms of an exemption from the Sherman Act, the Supreme Court has interpreted them generally to waive antitrust liability for unilateral union conduct such as boycotts and **[*35]** picketing." *Brown, 50 F.3d at 1048* (citing *H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 714-15, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981)*; *United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941))*.

Neither party has cited a case in which any court applied the Arizona labor exemption or a similar provision in any context other than one involving organized labor. Defendants point to *Montgomery v. Emerging Technologies Corp., No. 03-70947, 2006 U.S. Dist. LEXIS 13378, 2006 WL 680860 (E.D. Mich. Mar. 16, 2006)* as "applying the identical language under the Michigan Antitrust Reform Act" and dismissing an employee's claim against his employer. (Defs.' Mot. at 12.) However, while the same statutory language is cited by the court in *Montgomery,* the case was not decided on the grounds of the labor exemption. The court in that case notes that, under the plain language of the labor exemption, "any alleged conspiracy to restrict employment opportunities would not run afoul of the [Michigan antitrust laws'] 'restraint of trade' provision," but it goes on to determine that the plaintiff's complaint did not identify the parties with whom those defendants allegedly conspired, thus failing to include the essential elements of the claim and mandating **[*36]** dismissal. *Montgomery, 2006 U.S. Dist. LEXIS 13378, 2006 WL 680860, at *1*. The disposition of this case, even if it addressed the Arizona statute, would not countenance against the guidance of the Arizona legislature and the Arizona Supreme Court that courts interpreting Arizona ***antitrust law*** should look to comparable federal precedent. Here, federal courts and the U.S. Supreme Court have uniformly interpreted the analogous labor exemption in federal ***antitrust law*** as applying to unions engaged in lawful activities. *See, e.g., H.A. Artists, 451 U.S. at 713-17*; *Hutcheson, 312 U.S. at 232*; *Burlington N. Santa Fe Ry Co. v. Int'l Bhd. of Teamsters Local 174, 203 F.3d 703, 708 (9th Cir. 2000)*; *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 829 n.9 (5th Cir. 1976)*; *Cordova v. Bache & Co., 321 F. Supp. 600, 605 (S.D.N.Y. 1970)* (concluding that given the legislative history and purpose of *§ 6* of the Clayton Act and the consequences of its enforcement, "the sole purpose and effect of the section is to exempt activities and agreements on the part of labor, agricultural or horticultural organizations with respect to their furnishing labor in the marketplace"); *accord People v. N. Ave. Furniture & Appliance, Inc., 645 P.2d 1291, 1299 (Colo. 1982)* **[*37]** (en banc) (analyzing virtually identical statutory labor exemption in Colorado state antitrust laws and concluding that it applied only to concerted employee activities directed to the improvement of conditions of employment).

Even examining only the plain language of the statute, to find the meaning Defendants' advance, the Court would have to just read section (A), without considering section (B), which includes language also found in the Clayton Act and refers specifically to "labor, agricultural or horticultural organization[s] instituted for the purpose of mutual help." *A.R.S. § 44-1404(B)*. "To construe the labor exemption as suggested [by Defendants] would result in its extension to practically any form of human labor involving work for pay, independently of any employer-employee relationship. Such a construction inevitably would lead to the abrogation of the antitrust proscription itself." *N. Ave. Furniture, 645 P.2d at 1299*. The Court concludes that the labor exemption in Arizona's version of the Uniform State Antitrust Act does not bar Plaintiffs' claims in this case.

5. Common Law Claims

a. Interference with Business Expectancy

Under Arizona law, to make out a claim for tortious **[*38]** interference with business expectancy, a plaintiff must establish "the existence of a valid contractual relationship or business expectancy; the interferer's knowledge of the relationship or expectancy; intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted." *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors, 184 Ariz. 419, 909 P.2d 486, 494 (Ariz. Ct. App. 1995)*. Defendants have made several arguments with respect to Plaintiffs' claim for interference with business expectancy. First, Defendants argue that "[t]he only 'improper motive or means' alleged by [P]laintiffs are the antitrust claims." (Defs.' Mot. at 12.) Consequently, as Defendants believe that Plaintiffs' antitrust claims fail as a matter of law, Defendants contend that they could not be liable for interference with business expectancy. (*Id.*) As the Court concluded above, however, Plaintiffs' claims survive Defendants' Motion, at least as to injunctive relief, so this argument is unavailing.

Defendants also argue that "the cornerstone of a claim for interference with business expectancy **[*39]** is the existence of a valid business expectancy." (Defs.' Mot. at 13.) "A claim for tortious interference with a business expectancy is insufficient unless the plaintiff alleges facts showing the expectancy constitutes more than a mere 'hope.'" *Dube v. Likins, 216 Ariz. 406, 167 P.3d 93, 99-100 (Ariz. Ct. App. 2007)* (citing *Marmis v. Solot Co., 117 Ariz. 499, 573 P.2d 899, 902 (Ariz. Ct. App. 1977))*; *see also Pre-Fit Door, Inc. v. Dor-Ways, Inc., 13 Ariz. App. 438, 477 P.2d 557, 560 (Ariz. Ct. App. 1970)* ("In order for the plaintiff to prove a prima facie case it is fundamental that it must establish the existence of a valid contractual relationship or business expectancy."). Under Arizona law, "to prevail on a claim of tortious interference with a business relationship, when the relationship is prospective, there must be a reasonable assurance that the contract or relationship would have been entered into but for the interference." *S. Union Co. v. Sw. Gas Corp., 180 F. Supp. 2d 1021, 1048 (D. Ariz. 2002)* (internal quotation and citation omitted). Defendants note that the "Complaint provides no allegation of a reasonable assurance that, absent the alleged interference, any business expectancy would have been realized by the [P]laintiffs." **[*40]** (Defs.' Mot. at 13.)

Plaintiffs rejoin that, rather than the traditional conception of this tort, involving a prospective contractual or business relationship, they "allege that Defendants interfered with the reasonable expectancy that their wages and compensation would be set by a free market, not one corrupted by illegal price-fixing." (Pls.' Opp'n at 19; Compl. PP 74-76, 159-61.) Defendants respond that Plaintiffs have cited no authority for this novel claim and that "Arizona courts would never permit such a tort that, in practical terms, covers all worldly actions and transactions." (Defs.' Reply at 17.) Plaintiffs conceded in oral argument that if the Court recognized this claim as a version of the tort of interference with business expectancy, it would be ruling on an issue not yet spoken on by the Arizona Supreme Court or an Arizona Court of Appeals. (Mot. Hr'g Tr. ("Hr'g Tr.") 50:21-24, Feb. 13, 2009.) The Court declines to plow that new ground. As no Arizona court has recognized interference with the free market with respect to wage determination as a type of tortious interference with business expectancy, Plaintiffs cannot advance that argument in lieu of establishing the **[*41]** existence of a valid contractual relationship or business expectancy. The Complaint does not allege, and Plaintiffs do not argue in their briefs, that Plaintiffs have a reasonable assurance that the expectancy would have been realized absent the alleged interference. [4] Accordingly, Count III of the Complaint, for interference with business expectancy, is dismissed.

b. Unfair Competition

Count IV of the Complaint alleges that Defendants engaged in unfair competition, under Arizona law. (Compl. PP 164-67.) Defendants argue that the claim must be dismissed because "Plaintiffs do not allege that Defendants made any false representation to induce another to purchase Defendants' product . . ." (Defs.' Mot. at 14.) Plaintiffs respond that the tort is not limited to such circumstances of "palming off" and note that in other jurisdictions, antitrust activity has been found to qualify as unfair competition. (Pls.' Opp'n at 20.) The Arizona Court of Appeals has held that the common law doctrine of unfair competition **[*42]** "encompasses several tort theories, such as trademark infringement, false advertising, 'palming off,' and misappropriation." *Fairway Constructors, Inc. v. Ahern, 193 Ariz. 122, 970 P.2d 954, 956 (Ariz. Ct. App. 1998)* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130 (5th ed. 1984)). "[T]he central tort in unfair competition at common law is known as 'palming off,' or 'passing off.' It consists in a false representation tending to induce buyers to believe that the defendant's product is that of the plaintiff . . ." *Id.* Moreover, while collecting opinions and noting that "no inflexible rule can be stated as to what conduct will constitute unfair competition," the Arizona Supreme Court held, "The universal test is whether the public is likely to be confused." *Boice v. Stevenson, 66 Ariz. 308, 187 P.2d 648, 653 (Ariz. 1947)*; *see also* *Sutter Home Winery, Inc. v. Vintage Selections, Ltd., 971 F.2d 401, 407 (9th Cir. 1992)* (explaining that, under Arizona law, an action for unfair competition requires the plaintiff to show either "that it was engaged in competitive business" with the defendant or that the defendant's actions "were likely to produce public confusion" (citations omitted)).

Neither **[*43]** party has cited a case where a court applied Arizona law and found that the tort of unfair competition existed in the absence of allegations of public confusion, and the Court is not aware of such a case. The Complaint does not allege that the public could be or has been misled by Defendants' conduct, merely that Plaintiffs and the other members of the class were injured by the alleged antitrust activity. (Compl. PP 165-67.) Nor does Plaintiffs' Complaint allege trademark infringement, false advertising, palming off, misappropriation, or any of the other actions that have been found to constitute unfair competition. Here, again, the Court is unwilling to find that Plaintiffs may maintain a theory of unfair competition that is entirely novel in Arizona. Count IV is also dismissed.

c. Unjust Enrichment

Defendants have also moved to dismiss Plaintiffs' claim for unjust enrichment. (Defs.' Mot. at 15-16.) Defendants argue that Plaintiffs cannot make out such a claim because they received the benefit of their bargain when they

---

[4] Because the Court determines that the Complaint does not allege a valid business expectancy, it will not reach the parties' arguments about whether the harm must involve a third party.

worked for the Defendant hospitals pursuant to a contract with the nursing agency. (Defs.' Mot. at 15-16.) Plaintiffs respond that unjust enrichment is a "flexible, **[*44]** equitable remedy" available when a defendant "is obliged by the ties of natural justice and equity" to compensate a plaintiff. (Pls.' Opp'n at 21 (internal quotations and citations omitted).) Plaintiffs cite *Adelman v. Christy, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000)*. While the court in *Adelman* remarked that the existence of a contract does not automatically invalidate an unjust enrichment claim, it also held that "[a] theory of unjust enrichment is unavailable only to a plaintiff if that plaintiff has already *received* the benefit of her contractual bargain." *Id.* In that case, the plaintiff had claimed unjust enrichment as an alternative to breach of contract, when she allegedly had not been compensated under the contract. *Id.* The instant case presents a different situation: Plaintiffs are not arguing that Defendants did not pay the agencies what they owed under the contract; rather, they argue that the contractual amount was improperly reduced due to Defendants' allegedly anticompetitive behavior.

"Unjust enrichment occurs whenever a person has and retains money or benefits that in justice and equity belong to another." *City of Sierra Vista v. Cochise Enters., Inc., 144 Ariz. 375, 697 P.2d 1125, 1131 (Ariz. Ct. App. 1984)*. **[*45]** To recover on a theory of unjust enrichment, "a party must show: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal remedy." *Trustmark Ins. Co. v. Bank One, Ariz., NA, 202 Ariz. 535, 48 P.3d 485, 491 (Ariz. Ct. App. 2002)* (citing *City of Sierra Vista, 697 P.3d at 1131*). Defendants also argue that Plaintiffs have not alleged sufficient facts to establish a "nexus between Defendants' supposed enrichment and the [P]laintiffs' supposed impoverishment." (Defs.' Mot. at 16.) Defendants advance that because the individual nurses were paid by agencies, the connection between their allegedly reduced compensation and bad acts of the Defendants is too tenuous. (*Id.*) Defendants cite *A M Leasing, Ltd. v. Baker, 163 Ariz. 194, 786 P.2d 1045, 1049 (Ariz. Ct. App. 1989)* as standing for the proposition that a plaintiff in an unjust enrichment action cannot recover where "the defendant paid in full, but paid someone to whom he was contractually liable for payment rather than the plaintiff." (Defs.' Mot. at 16.) In *A M Leasing,* the court was examining cases in which subcontractors **[*46]** performed work and expected to be paid directly by the defendants, who instead paid a general contractor for the service. *786 P.2d at 1049*. Here, the situation is slightly different. Plaintiffs argue that Defendants were unjustly enriched because they were able to retain the money saved by paying depressed wages to temporary nurses. (Pls.' Opp'n at 23.)

The only case the parties cite addressing analogous claims was in the Eastern District of Pennsylvania, where the court applied Arizona law to uphold the plaintiffs' claims for unjust enrichment based on alleged price-fixing. *D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 507-08 (E.D. Pa. 2006)*. The court in *D.R. Ward* determined that "Arizona law does not require either a direct causal connection between the enrichment and the impoverishment, or the transference of a direct enrichment from the plaintiff to the defendant." *Id. at 507*. The court in that case held that the plaintiffs had stated a claim under Arizona law sufficient to survive a motion to dismiss because they had alleged facts to suggest (1) that those defendants were enriched due to their unlawful price-fixing; (2) that the plaintiffs in that case were impoverished **[*47]** because they had paid the inflated prices; (3) that the plaintiffs' overpayment had flowed up the distribution chain and enriched the defendants; and (4) that the principles of equity demanded that the defendants disgorge this benefit. *Id. at 507-08*. Likewise, in the instant case, Plaintiffs have alleged that the Defendants were enriched because of the wrongfully suppressed wages of temporary nurses; that Plaintiffs were injured because their wages were set lower than market value; that Plaintiffs' injury stemmed from Defendants' allegedly anticompetitive behavior; and that Defendants therefore ought to be compelled to disgorge their ill-gotten savings. (Compl. PP 162, 169-70.) Defendants' Motion is denied as to Count V of the Complaint, for unjust enrichment.

B. Plaintiff Jane Doe's Motion to Withdraw as a Proposed Class Representative

Plaintiff Jane Doe has moved to withdraw as a class representative, to dismiss her claim without prejudice pursuant to *Rule 41(a) of the Federal Rules of Civil Procedure*, to be relieved of her discovery obligations (including appearing for a deposition), and to have Defendants return or destroy all documents she has produced in this litigation. (Pl.'s **[*48]** Mot. at 1.) Defendant Carondelet Health Network has responded, and that Response is joined by all the other Defendants in this case. Defendants argue that Jane Doe should not be allowed to withdraw as a class representative without the imposition of conditions, namely that she be required by the Court to comply with all outstanding discovery requests and to sit for a deposition. [5] (Def.'s Resp. at 3.)

"In **[*49]** federal practice, voluntary dismissals sought in good faith are generally granted 'unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical advantage.'" *In re Vitamins Antitrust Litig., 198 F.R.D. 296, 304 (D.D.C. 2000)* (quoting *Conafay v. Wyeth Labs., 793 F.2d 350, 353, 253 U.S. App. D.C. 279 (D.C. Cir. 1986))*. Allowing Jane Doe to withdraw as class representative "is the appropriate and just approach if [she] does not wish to represent the class." *In re Neopharm, Inc. Sec. Litig., No. 02 C 2976, 2004 U.S. Dist. LEXIS 5814, 2004 WL 742084, at *1 (N.D. Ill. Apr. 7, 2004)* (citing *KOrg. of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R., No. 79 C 1512, 1987 U.S. Dist. LEXIS 14049, 1987 WL 8997, at *1 (N.D. Ill. Apr. 2, 1987)* ("Absent a good reason . . . a plaintiff should not be compelled to litigate if it doesn't wish to.")). In this case, there is no reason to believe that Jane Doe seeks to withdraw for anything other than good faith reasons, and there will be no serious prejudice to the Defendants, especially given that the litigation is in its relatively early stages. The Court is not in a position to question Ms. Doe's family or personal situation, which is her stated reason for wishing to withdraw; certainly, the **[*50]** pressures and obligations of extended litigation would present challenges to many people. Also, because there are several other identified class representatives, and the class has not yet been certified, Defendants in this case will not suffer the sort of prejudice that might stem from a later-stage withdrawal of a class representative. *See, e.g., In re Vitamins, 198 F.R.D. at 304* ("In determining whether a defendant would suffer legal prejudice by a voluntary dismissal of certain plaintiffs, the Court must consider: (1) the defendants' effort and expense for preparation of trial; (2) excessive delay or lack of diligence on the plaintiffs' part in prosecuting the action; (3) the adequacy of plaintiffs' explanation of the need for dismissal; and (4) the stage of the litigation at the time the motion to dismiss is made, specifically whether a motion for summary judgment is pending."). The Court concludes that Jane Doe's request to withdraw as class representative is made in good faith and that Defendants will not suffer undue prejudice as a result of her withdrawal.

Ordinarily, the burden to obtain discovery of any kind from absent class members is very high. *See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 n.2, 105 S. Ct. 2965, 86 L. Ed. 2d 628* **[*51]** (noting that burdens, including discovery, "are rarely imposed upon plaintiff class members"); *Pierce v. County of Orange, 526 F.3d 1190, 1202 n.9 (9th Cir. 2008)* (*Rule 23 of the Federal Rules of Civil Procedure* imposes inherent limitations on absent class member discovery); *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971)* (observing that while courts have the power to compel absent class members to comply with discovery requests, they "should not be required to submit to discovery as a matter of course"); *In re Currency Conversion Fee Antitrust Litig., No. 1409, M-21-95, 2004 U.S. Dist. LEXIS 22320, 2004 WL 2453927 (S.D.N.Y. Nov. 3, 2004)* (denying request to depose withdrawing class representatives); *Redmond v. Moody's Investor Serv., No. 92 Civ. 9161 (WK), 1995 U.S. Dist. LEXIS 6277, 1995 WL 276150, at *1 (S.D.N.Y. May 10, 1995)* (holding that "discovery of absent class members regarding individual issues, as opposed to common questions, is inappropriate[, and]. . . . the burden on the defendant to justify discovery of absent class members by means of deposition is particularly heavy."). Here, Defendants have not met the substantial burden required to compel an absent plaintiff to submit to discovery, particularly **[*52]** a deposition.

The Court sees no convincing reason for the imposition of conditions on Jane Doe's withdrawal like those suggested by Carondelet. Such conditions seem particularly unnecessary in light of the fact that there are currently three identified class representatives who could be-and, in at least one case, already have been-deposed in her stead. (Pl.'s Reply Mem. in Supp. of Pl.'s Mot. ("Pl.'s Reply") at 4 & n.1.) Accordingly, Plaintiff Jane Doe's Motion to Withdraw is granted and her claim is dismissed without prejudice. Jane Doe is relieved of her discovery obligations

---

[5] Defendant Carondelet also argues that Jane Doe's request to withdraw is nothing more than a ploy to avoid complying with discovery requests, including sitting for a deposition. (Def. Carondolet Health Network's Resp. to Pl.'s Mot. ("Def.'s Resp.") at 2.) Defendant contends that the information provided about Doe "offered tantalizing glimpses of the truly individual and unique work patterns that characterize the nurses who make up the proposed class." (*Id.* at 8.) This argument goes to issues of class certification, which are not at issue in this Motion and will not be addressed at this time.

with respect to this case, including any deposition. Defendants are directed to return or destroy (and certify to Plaintiffs' counsel the destruction of) all documents produced by Jane Doe in the course of this litigation.

III. Conclusions

For the purposes of this Motion, under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the Court finds that Plaintiffs have alleged sufficient facts to state a claim for a per se violation of the federal antitrust laws. The Court concludes that Plaintiffs have standing to pursue federal antitrust claims, and, at this stage, the indirect purchaser rule from *Illinois Brick* **[*53]** does not bar them from recovering damages, as well as injunctive relief, for those claims. Plaintiffs' claims under Arizona state law for interference with business expectancy and unfair competition are dismissed for failure to state a claim. Remaining are Plaintiffs' claims for injunctive relief under federal ***antitrust law***, Plaintiffs' claims under Arizona state ***antitrust law***, and Plaintiffs' claim for unjust enrichment under Arizona tort law. Plaintiff Jane Doe is permitted to withdraw as a class representative, and her claims are dismissed without prejudice as explained above.

IT IS ORDERED granting in part and denying in part Defendants Mayo Clinic Arizona and Phoenix Children's Hospital's Motion to Dismiss Class Plaintiffs' Third Amended Complaint (Doc. 318).

IT IS FURTHER ORDERED granting Plaintiff Jane Doe's Motion to Withdraw as a Proposed Class Representative and for Other Relief (Doc. 260).

DATED this 19th day of March, 2009.

/s/ Susan R. Bolton

Susan R. Bolton

United States District Judge

End of Document

Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC

United States District Court for the Western District of Kentucky

March 20, 2009, Decided; March 20, 2009, Filed

CIVIL ACTION NO. 3:08-CV-225-H

Reporter

605 F. Supp. 2d 870 *; 2009 U.S. Dist. LEXIS 24167 **; 2009-1 Trade Cas. (CCH) P76,555

CHURCHILL DOWNS INC., et al, PLAINTIFFS v. THOROUGHBRED HORSEMEN'S GROUP, LLC, et al, DEFENDANTS

Core Terms

horsemen's, signal, immunity, wagering, track, antitrust, racetrack, host, Licensing, anti trust law, negotiate, veto, group boycott, contracts, off-track, antitrust violation, Plaintiffs', interstate, price-fixing, allegations, Takeout, Purse, conspiracy, regulation, per se violation, anticompetitive, rule of reason, cooperatives, appointing, betting

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN1[] **Antitrust & Trade Law, Regulated Industries**

The Interstate Horseracing Act (IHA), *15 U.S.C.S. §§ 3001-07*, requires that to engage in the off-track wagering business, industry participants must cooperate. Of particular interest here, the IHA requires five consents to approve any off-track wagering agreement: (1) the authorized horsemen's group, (2) the host racing association, that is, the host racetrack, *15 U.S.C.S. § 3002(9)*, *(3)* the host state racing commission, (4) the off-track racing commission, and (5) all currently operating tracks within 60 miles of the off-track betting office, or, if there are none, then the closest such track in an adjoining state. *15 U.S.C.S. § 3004*. The horsemen's group is defined as the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day. *15 U.S.C.S. § 3002(12)*. Thus, only the authorized horsemen's group at the host track can provide the required consent. A horsemen's group at another track has no ability to provide the statutory consent. Refusal to consent is commonly referred to as a horsemen's veto. The host racing commission and off-track racing commission's consents are governed by state law.

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

HN2[] **Sherman Act, Scope**

The Sherman Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 15 U.S.C.S. § 1. The Act only forbids unreasonable restraints on trade. Courts determine whether a restraint is unreasonable using either the per se rule or the rule of reason.

Antitrust & Trade Law > Clayton Act > Scope

HN3[] Antitrust & Trade Law, Clayton Act

The Clayton Act gives a right of action to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. 15 U.S.C.S. § 15(a).

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

HN4[] Standing, Requirements

Those making antitrust claims face heightened standing requirements. Thus plaintiffs must not only show the U.S. Const. art. III requirements of injury-in-fact, causation, and redressability, but must also show that the injury is an antitrust injury. Dismissal for failure to show antitrust standing is appropriate at an early stage. In reviewing such a motion, the court draws all reasonable inferences in favor of the plaintiff.

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

HN5[] Standing, Elements

U.S. Const. art. III standing requires the plaintiff allege that he or she has suffered an actual injury, that is fairly traceable to the defendant's conduct, and that can likely be redressed by a favorable decision by the court. Plaintiffs do not have standing if it is purely speculative whether their injury resulted from defendants' conduct or whether it resulted from decisions made by third parties.

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

HN6[] Standing, Requirements

To address standing, the court assumes that an antitrust violation occurred and then determines whether plaintiffs are persons injured by reason of a violation of the antitrust laws. The antitrust standing analysis evaluates the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. Since standing is determined under the assumption that Plaintiffs have pled an antitrust violation, analysis regarding the existence of a violation is irrelevant.

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

HN7[] Standing, Requirements

A private antitrust plaintiff must plead an antitrust injury, which ensures that any loss stems from a competition-reducing aspect or effect of the defendant's behavior. The plaintiff must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.

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

HN8[ ] **Standing, Requirements**

A complaint must allege an anticompetitive effect on competition, i.e. the market, not merely the competitors themselves. Paying higher prices for a product due to a lack of competition in the market is a potential antitrust injury. A reduction of output can be proof of actual detrimental effects on competition. For purposes of standing analysis, the court must assume two things: that the facts in the complaint to are true, and that plaintiffs' antitrust theory is supported by facts that actually amount to antitrust violations.

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

HN9[ ] **Standing, Requirements**

The second factor for antitrust standing requires the plaintiffs' alleged personal injury be attributable to an anticompetitive aspect of the practice under scrutiny. That is to say that the plaintiff must allege that the antitrust violation is either the necessary predicate for its injury or the only means by which the defendant could have caused its injury. Dismissal is warranted only where it is apparent from the allegations in the complaints that the plaintiffs' injury would have occurred even if there had been no antitrust violation. The defendant's legal action must be independent of the alleged antitrust violation, which was the actual indisputable, and sole cause of the plaintiff's injury to warrant dismissal. Thus, causation can be found where plaintiffs allege the violation caused the injury and no evidence of an independent, non-violative cause exists.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN10[ ] **Antitrust & Trade Law, Exemptions & Immunities**

Congress can preclude application of antitrust laws either by (1) explicitly stating such preclusion, or by (2) so regulating the substantive area that preclusion must be implied.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN11[ ] **Antitrust & Trade Law, Exemptions & Immunities**

Courts are cautioned that implied immunity is disfavored, because if exceptions are to be written into the Sherman Act, they must come from the Congress, not courts. Implied immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. It should be narrowly construed and only be found if necessary to make another federal law work.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN12[ ] **Antitrust & Trade Law, Exemptions & Immunities**

In all the cases where the U.S. Supreme Court has found immunity from antitrust laws, Congress has created a statutory and regulatory structure that actively controlled and monitored behavior or the participants within a particular substantive area. In each of these circumstances, the comprehensive regulatory scheme was deemed a substitute for antitrust regulation. In addition, the regulatory scheme was seen as likely to produce conflicting guidance from antitrust laws or to conflict directly with regulatory practices. Thus, the regulatory schemes confer implied immunity by providing alternative methods for supervising the regulated activity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN13[] **Antitrust & Trade Law, Exemptions & Immunities**

Where a statute grants express immunity for certain activity and for certain groups, it can provide comprehensive immunity throughout the entire system. Implied immunity is not comprehensive and requires a different analysis.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN14[] **Exemptions & Immunities, Collectives & Cooperatives**

The Interstate Horseracing Act (IHA), *15 U.S.C.S. §§ 3001-07*, does not imply immunity from antitrust laws for either an individual horseman or a group of them acting as one. Consequently, there is no implied immunity that courts may extend to a group of horsemen's groups.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN15[] **Antitrust & Trade Law, Exemptions & Immunities**

All of the circumstances where courts have found implied immunity present clear potential for conflict between the antitrust laws and the subsequent law. Mere incompatibility, as opposed to clear repugnancy, seems insufficient to find implied immunity. Immunity is only appropriate where the legislature's subsequent legislation would be so contradictory to antitrust legislation, or where attempting to follow both sets of legislation would be so confusing, that the legislature must have intended to repeal the antitrust laws in certain circumstances despite having failed to explicitly say so.

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

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

HN16[] **Regulated Practices, Private Actions**

An antitrust complaint must nudge the claim across the line from conceivable to plausible. A plaintiff's allegations, while assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. Antitrust complaints are held to a plausibility standard, which requires plaintiffs plead enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Antitrust & Trade Law > Sherman Act > Claims

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

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

***HN17*[]** **Sherman Act, Claims**

Pleading a *15 U.S.C.S. § 1* violation cannot merely recite the elements of the cause of action, one must provide facts that support them. Those factual allegations, however, need not be detailed to survive a motion to dismiss. Either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory is sufficient. A bare assertion of a conspiracy, however, is insufficient. The facts must give rise to a plausible finding of an agreement that unreasonably restrains trade.

Antitrust & Trade Law > Sherman Act > Claims

***HN18*[]** **Sherman Act, Claims**

Plaintiffs must allege three elements to sustain a *15 U.S.C.S. § 1* cause of action: (1) the existence of a contract, combination, or conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable restraint on trade. Element one requires evidence of the terms and membership of the conspiracy and the method adopted to effectuate its ends. Element two requires plaintiffs define the relevant product market and relevant geographic market. Element three requires showing the agreement had an anticompetitive effect. An anticompetitive effect can be shown using one of two analytical approaches: the per se rule and the rule of reason.

Antitrust & Trade Law > Sherman Act > Claims

***HN19*[]** **Sherman Act, Claims**

Plaintiffs must show that corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends in order to bring an antitrust action against them.

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

Evidence > Inferences & Presumptions > Presumptions

***HN20*[]** **Per Se Rule & Rule of Reason, Per Se Violations**

The per se rule applies to practices that by their nature have a substantial potential for impact on competition. Once the court determines that a practice is illegal per se, it does not have to further examine the practice's impact on the market or the procompetitive justifications for the practice to find a violation. As such, a per se violation only requires plaintiffs prove three things: (1) two or more entities engaged in a conspiracy, combination, or contract, (2) to effect a restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), (3) that was the proximate cause of the plaintiff's antitrust injury. Plaintiffs do not have to show power, intent or impact. The presumption, however, is against per se violations.

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

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

HN21[] **Horizontal Refusals to Deal, Boycotts**

Horizontal agreements involve direct competitors at a given level of the market and are viewed as especially injurious, and courts therefore bar them per se, regardless of any alleged ameliorative rationale. Examples include price-fixing and group boycotts. Commercially motivated group boycotts are per se violations because the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote. Such boycotts are designed to pressure another party into doing something by withholding, or enlisting others to withhold, patronage or services from the target. Evidence of a group boycott used to effectuate a price-fixing arrangement is sufficient to support a per se violation.

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

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason analysis permits case-by-case evaluation of a restraint's effect on competition. The prima facie case under the rule of reason requires facts sufficient to prove (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy. The defendant then has the burden to come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitive injuries. Then, the plaintiff must show that any legitimate objectives can be achieved in a substantially less restrictive manner.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN23[] **Contract Interpretation, Ambiguities & Contra Proferentem**

A court will strictly enforce the terms of an unambiguous contract. Where a contract is susceptible to inconsistent interpretations, an ambiguity exists. The court interprets the provision according to the intention of the parties as demonstrated by the language used, the subject matter, and the purpose of the contract.

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

HN24[] **State & Territorial Government Licensing, Gaming & Lotteries**

The Interstate Horseracing Act (IHA), *15 U.S.C.S. §§ 3001-07*, defines horsemen's group in relation to a particular racetrack. *15 U.S.C.S. § 3002 (12)*. As such, the IHA requires the local horsemen's group consent to any off-track betting. *15 U.S.C.S. § 3004*.

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

HN25[] **Agency Relationships, Fiduciaries**

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. In an agency relationship, the principal retains control.

Counsel: **[**1]** For Churchill Downs Incorporated, Calder Race Course, Inc., Churchill Downs Technology Initiatives Company, Plaintiffs: David M. Schiffman, John W. Treece, Kevin C Pecoraro, LEAD ATTORNEYS, Sidley Austin LLP, Chicago, IL; Gregory Haynes, LEAD ATTORNEY, Wyatt, Tarrant & Combs LLP, Louisville, KY.

For Thoroughbred Horsemen's Group, LLC, Robert A. Reeves, Joseph Santanna, Frank Petramalo, Jr., Wilson Shirley, Defendants: Alfred C. Pfeiffer, LEAD ATTORNEY, Latham & Watkins, San Francisco, CA; Derek D. Smith, Jason D. Cruise, Margaret M. Zwisler, Marguerite M. Sullivan, LEAD ATTORNEYS, Latham & Watkins, Washington, DC; Marvin L. Coan, LEAD ATTORNEY, Hummel Coan Miller & Sage, Louisville, KY.

For Kentucky Horsemen's Protective and Benevolent Association, Inc., Defendant: Andrew D. DeSimone, Douglas L. McSwain, Kevin G. Henry, Sarah Charles Wright, LEAD ATTORNEYS, Sturgill, Turner, Barker & Moloney, PLLC, Lexington, KY.

For Kentucky Horsemen's Protective and Benevolent Association, Inc., Rick Hiles, Martin A. Maline, Counter Claimants: Andrew D. DeSimone, Douglas L. McSwain, Kevin G. Henry, Sarah Charles Wright, LEAD ATTORNEYS, Sturgill, Turner, Barker & Moloney, PLLC, Lexington, KY.

For Churchill **[**2]** Downs Incorporated, Churchill Downs Technology Initiatives Company, Counter Defendants: David M. Schiffman, John W. Treece, Kevin C Pecoraro, LEAD ATTORNEYS, Sidley Austin LLP, Chicago, IL; Gregory Haynes, LEAD ATTORNEY, Wyatt, Tarrant & Combs LLP, Louisville, KY.

Judges: John G. Heyburn II, United States District Judge.

Opinion by: John G. Heyburn II

Opinion

[*873] MEMORANDUM OPINION

Churchill Downs Incorporated ("Churchill"), Calder Race Course, Inc. ("Calder"), and Churchill Downs Technology Initiatives Company ("TwinSpires") (collectively, "Plaintiffs") brought suit asserting antitrust violations and breach of contract claims against Thoroughbred Horsemen's Group, LLC ("THG"), Kentucky Horsemen's Protective and Benevolent Association, Inc. ("Ky HBPA"), Rick Hiles ("Hiles"), and Martin A. Maline ("Maline") (collectively, "Defendants").

Defendants have moved to dismiss the amended complaint on the grounds that the Plaintiffs lack antitrust standing, that the Interstate Horseracing Act immunizes the Defendants' actions from antitrust liability, that the Plaintiffs fail to allege sufficient facts under *Bell Atlantic Corp. v. Twombly,* and that Ky HBPA's actions did not breach the contract between those groups and Churchill. **[**3]** Defendants Hiles and Maline also move to dismiss on the grounds that they are protected by the Volunteer Protection Act.

This litigation occurs in the context of the on-going dispute between the horse owners and trainers (collectively "horsemen") and racetracks concerning the proceeds from all forms of off-track betting. To apply some financial leverage against the racetracks, the horsemen have withheld their permission for the racetracks to sell the ability for off-track betting operators to accept wagers on the track's races. This antitrust action amounts to the racetracks' **[*874]** return salvo in an escalating war between two groups whose economic destinies are intertwined.

To decide these issues the Court must apply the concepts of antitrust standing and pleading in the unusual context of a federal statute which creates the business of interstate parimutuel wagering. Further, these issues, and analysis thereof, are interrelated, without clear delineations. The Court will address standing, statutory immunity, pleading under *Twombly,* and breach of contract in turn.

I.

The description of the facts is critical because it helps determine whether an antitrust violation is occurring at all. Regardless **[**4]** of the conclusions Plaintiffs allege, the facts themselves must illustrate the violation. For those reasons, a detailed review of the factual basis of this suit follows.

Churchill is a large racetrack conglomerate that operates both the famous racetrack in Louisville, Kentucky, and the internet-based interstate wagering company TwinSpires. Calder operates a racetrack in Florida. Churchill, as well as other racetracks, earns its revenue largely from pari-mutuel wagering at the racetrack and at off-track betting sites ("OTBs"). [1] As an OTB, both Churchill and Calder accept wagers on races run at other tracks. Another form of off-track betting is advanced deposit wagering ("ADW"). An ADW operation is one in which account holders deposit money with an operator for the purpose of making wagers. Account holders make wagers from remote locations via telephone, the internet, or a mobile device. TwinSpires is an example of an ADW.

In the pari-mutuel wagering system, wagers from all sources are placed **[**5]** together in a pool. Thus, the bettors wager against each other not against the operator of the pool. The tracks, ADWs and OTBs return 80% of the pool in the form of "payouts" to the winning bettors. The remaining 20% is called the "Takeout," which is in essence the profit divided between the OTB or ADW, the host racetrack, horsemen's groups (by way of race purses), and various governmental agencies.

Since 1978 when Congress authorized interstate wagering, OTBs and ADWs must contract with the host racetrack for the right to accept wagers on horse racing at other tracks. These agreements allow the off-site operators to accept wagers on those races and also to receive a simulcast of the races, referred to as the "signal." The "price" for the product is the percentage of the Takeout that is paid to the host racetrack and the horsemen's groups. The current dispute concerns the allocation of the ADW Takeout with regards to the fee it pays for the right to accept wagers on host track races.

OTBs pay the host track a "host fee" for the signal. ADWs compensate the host track by paying two separate fees: the "host fee" and the "source market fee" (collectively the "Signal Fee"). The host fee is **[**6]** a percentage of the Takeout from wagers made at the OTB or ADW on the races at the host racetrack. The source market fee is a percentage of all wagers placed by ADW customers who are located near the host racetrack (e.g., within 25 miles). The source market fee is designed to compensate the host racetrack for wagering that the customers would otherwise have made at the host racetrack. These fees can vary depending on the popularity **[*875]** of the racetrack. In the past, the host track has always entered into a separate agreement with the horsemen's groups governing the percentage of the Signal Fee that is used directly to increase race purses.

In 1978, Congress enacted the Interstate Horseracing Act ("IHA"), primarily to protect the business of smaller racetracks and horsemen's groups from potential interstate off-track wagering abuses. *15 U.S.C. § 3001-07*. Essentially, ***HN1***[] the IHA required that to engage in the business, industry participants must cooperate. Of particular interest here, the IHA requires five (5) consents to approve any off-track wagering agreement: (1) the authorized horsemen's group, (2) the host racing association, [2] (3) the host state racing commission, (4) the off-track racing **[**7]** commission, and (5) all currently operating tracks within 60 miles of the off-track betting office, or, if there are none, then the closest such track in an adjoining state. [3] *15 U.S.C. § 3004*. The horsemen's group is

---

[1] For purposes of this opinion, the Court defines "OTBs" as off-track betting sites that do not allow for advanced deposit wagering. Typically then, an OTB is a racetrack such as Churchill or Calder.

[2] The host racing association is the host racetrack. *15 U.S.C. § 3002(9)*.

[3] The host racing commission and off-track racing commission's consents are governed by state law.

defined as "the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day." *15 U.S.C. § 3002(12)*. Thus, only the authorized horsemen's group at the host track can provide the required consent. A horsemen's group at another track has no ability to provide the statutory consent. Refusal to consent is commonly referred to as a "horsemen's veto."

Two horsemen's groups, Ky HBPA and Kentucky Thoroughbred Association, Inc. ("KTA"), [4] represent the owners and trainers at Churchill Downs. Until recently, Churchill obtained Ky HBPA and KTA's consent to negotiate with OTBs and ADWs to sell Churchill's signals. Churchill then negotiated contracts with OTBs and ADWs. Churchill presented these contracts to Ky HBPA and KTA, which **[**8]** the horsemen's groups could veto on an individual basis. The horsemen's groups have consented to Churchill exporting the signal for the Kentucky Derby, the Kentucky Oaks, the Kentucky Derby Trial, the Woodford Reserve Turf Classic, and the Breeders' Cup Event Day races to any OTB or ADW and the horsemen's groups only reserve the right to veto four of those contracts. Churchill pays the horsemen's groups, by way of purses, 51% of the price Churchill receives for the signal. [5] This is the "Purse Share." The contracts stipulate that Churchill cannot export the signal for any other races without the horsemen's groups' consent, which the IHA requires.

In November 2007, horsemen's groups from many tracks formed the Thoroughbred Horsemen's Group, LLC ("THG"). [6] **[*876]** These horsemen's groups authorized THG to negotiate a separate but uniform Horsemen's Simulcast Licensing Agreement (the "Licensing Agreement") with each ADW. The Licensing Agreement sets a uniform fee by requiring ADWs pay THG **[**9]** a "License Fee" equivalent to at least one-third of the Takeout. [7] It also provides that THG member horsemen's groups would consent to the sale of the host signal only if the ADW signed it. In this way, THG will contract directly with ADWs, excluding the host tracks entirely. Defendant THG notes that each THG member would choose whether to join in each separate Licensing Agreement. Once signed, the Licensing Agreement's terms would control the relationship between ADWs and all of THG's member horsemen's groups who also sign it. Until the ADWs execute the Licensing Agreement, several THG members have vetoed their host racetracks' attempts to export race signals to all the ADWs.

The Licensing Agreement does not directly affect the existing relationship between the tracks and the ADWs, or between the tracks and the horsemen's groups. The ADWs would continue to pay the Signal Fee and the tracks would still pay the Purse Share. For that reason, the Licensing Agreement provides that the License Fee be reduced by the Purse Share. In this way, the benefit the horsemen's group and the host track receive **[**11]** are intertwined.

By requiring execution of the Licensing Agreement, the horsemen's goal is to ensure a minimum allocation from the Takeout. Nevertheless, the ADW may negotiate distribution of the remaining funds as it chooses. One, the ADW can continue to pay the host racetrack the current Signal Fee. In this scenario, the ADW would then pay THG

[4] KTA and KTA Executive Director David L. Switzer were formally parties to this lawsuit and have subsequently been dismissed by agreement of the parties.

[5] The purses receive 51% of the post-tax Signal Fee revenue.

[6] Horsemen's groups at over 40 tracks, which account for more than 65% of wagering on thoroughbred horseracing in the United States, have joined THG. The alliance includes the Arkansas Horsemen's Benevolent and Protective Association, the Delaware Thoroughbred Horsemen's Association, the Florida Horsemen's Benevolent and Protective Association, the Indiana Horsemen's Benevolent and Protective Association, the KTA, the Ky HBPA, the Louisiana Horsemen's Benevolent and Protective Association, the Maryland Thoroughbred **[**10]** Horsemen's Association, the Minnesota Horsemen's Benevolent and Protective Association, the Mountaineer Park Horsemen's Benevolent and Protective Association (in West Virginia), the Ohio Horsemen's Benevolent and Protective Association, the Oklahoma Horsemen's Benevolent and Protective Association, the Pennsylvania Horsemen's Benevolent and Protective Association, the Tampa Bay Downs Horsemen's Benevolent and Protective Association, the Texas Horsemen's Partnership, the Thoroughbred Owners of California, and the Virginia Horsemen's Benevolent and Protective Association.

[7] The Licensing Agreement would create a contractual obligation for the ADW to pay THG. The License Fee would be allocated through THG to the horsemen's groups directly, bypassing the track entirely.

directly the difference between the License Fee and the Purse Share. [8] Two, the ADW could renegotiate the Signal Fee with the host racetrack such that the Purse Share of the Signal Fee would itself equal 1/3 of the Takeout. Either way, the ADW would pay a higher price for the signal than it currently pays, so long as the Purse Share is not already 1/3 of the Takeout. The Licensing Agreement effectively precludes an ADW from negotiating to buy that signal for less than 1/3 of the Takeout.

In October 2006 Churchill entered into contracts with both KTA and Ky HBPA, which continued their past dealings. Once Churchill obtained contracts with several ADWs and OTBs, however, KTA and Ky HBPA refused to give their consent. KTA and Ky HBPA continued to exercise **[**12]** their horsemen's veto through 2008, while every ADW refused to enter into the Licensing Agreement. Even though Churchill and Calder did negotiate new contracts with several ADWs for a higher Signal Fee, KTA and Ky HBPA withheld their consent because none of the ADWs would sign the Licensing Agreement. Additionally, the FL HBPA has vetoed Calder's attempts to sell its signal to ADWs. Calder's dispute **[*877]** with the FL HBPA has caused several other horsemen's groups to revoke consent for their track to sell its signal to Calder. [9] Due to Florida law, the revocations prevent any Florida OTB or ADW from accepting wagers on any race not simulcast at Calder. [10]

In the midst of all this public controversy, on April 24, 2008, Churchill filed this federal lawsuit. One consequence of **[**13]** the ongoing dispute has been Churchill's decision to reduce its purses in the midst of its 2008 spring meet. Defendants claimed that the purse reductions violated the contracts between KTA and Ky HBPA and Churchill. In response, the horsemen immediately filed their own motion for a preliminary injunction to prevent Churchill from reducing purses.

On June 16, 2008, the Court held a full day hearing on the horsemen's request for injunctive relief. After hearing all the arguments, the Court issued an opinion from the bench denying the injunctive relief. The Court denied the relief because it was unclear from the evidence whether Churchill had breached its contractual duty to consult and because the damages, if any, did not appear to be irreparable. Shortly thereafter, Defendants filed the currently pending motions.

II.

HN2[] The Sherman Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The Act only forbids unreasonable restraints on trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Courts determine whether a restraint is unreasonable **[**14]** using either the *per se* rule or the rule of reason. *Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 432 (6th Cir. 2008)*. To analyze the claims here, one must understand the theoretical and factual basis for the antitrust allegations.

The complaint presents one theory of antitrust violation: price-fixing perpetrated by a group boycott. Plaintiffs pleaded a "*per se* violation of *Section 1* of the Sherman Act" because "various horsemen's groups have contracted, combined and conspired to raise the amounts they receive from advanced deposit wagering" and that the horsemen are engaging in "an unlawful group boycott of racetrack operators" in order to accomplish this objective. (Am. Compl. P 1.) A more specific outline of Plaintiffs' argument follows. [11]

---

[8] This presumes that the current Purse Share is not equal to or greater than 1/3 of the Takeout.

[9] The horsemen's groups who have withdrawn their consent include the Delaware Thoroughbred Horsemen's Association, the Ky HBPA, the Maryland Thoroughbred Horsemen's Association, and the Ohio Horsemen's Benevolent and Protective Association.

[10] Florida law permits off-track wagering within the state only on race signals that are imported by Florida tracks presently hosting live races, which at this time only includes Calder.

[11] Defendants obviously characterize the facts and claims in a different light. They deny that the horsemen's groups can be engaged in a group boycott because the horsemen's groups do not compete against one another for the sale of signals.

[*878] In November 2007, Ky HBPA allied with THG, agreeing to a uniform policy with horsemen's groups at 40 other racetracks. (Am. Compl. P P 63-64.) Plaintiffs allege that the following **[**16]** concerted action amongst competitors. [12] KTA, Ky HBPA, and three other named horsemen's groups appointed THG to negotiate on their behalf. The Ky HBPA, the Pennsylvania HBPA, Florida HBPA, and the Texas Horsemen's Partnership have all stated in letters that they will not consent to the sale of the host track's signal unless the ADW signs the Licensing Agreement. THG members have vetoed racetrack attempts to sell their signals to ADWs that have not signed the Licensing Agreement. THG's member groups each exercise their separate vetoes collusively to create the boycott and effectuate their plan.

Plaintiffs say that the horsemen's groups control the signal price by refusing to allow its sale unless each ADW agrees to pay the specified percentage of the Takeout to the horsemen. Defendants do not directly set the minimum price at which the host track can sell its signal, but the Licensing Agreement does set a minimum purchase price for the ADW. According to Plaintiffs, ADWs are no longer able to freely negotiate to purchase the signal at the lowest price possible. When every horsemen's group collectively withholds the consent from all host racetracks to send signals to a particular ADW, Plaintiffs say their action constitutes a group boycott, which raises prices and limits competition. As a result, market forces alone no longer determine the lowest signal price.

III.

HN3[] The Clayton Act gives a right of action to "any person who shall be injured **[**18]** in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*. ***HN4***[] Those making antitrust claims face heightened standing requirements. *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449, 450 (6th Cir. 2007)*. Thus Plaintiffs must not only show the Article III requirements of injury-in-fact, causation, and redressability, but must also show that the injury is an antitrust injury. [13] *Id. at **[*879]** 449*. Dismissal for failure to show antitrust

---

Defendants say that the horsemen's groups play no role in controlling the pricing of the signals because the Ky HBPA contract with Churchill states that Churchill and the ADWs will establish the signal **[**15]** price. In fact, Defendants contend that the horsemen's groups cannot be appropriately viewed as sellers of signals since they only provide their consent to the racetrack, which independently negotiates the signal sale. Further, Defendants deny that horsemen's groups can be considered competitors since each horsemen's group only has the power to withhold their consent from their respective racetrack's sales.

Their characterization focuses on describing the horsemen's groups actions as merely ensuring the horsemen's groups' allocation of the revenues from ADW wagering. In so focusing, the Defendants attempt to divorce the allocation of revenues from the price of the signal, despite the Licensing Agreement's fee structure, which explicitly entwines revenue allocation with the Signal Fee. Finally, Defendants dispute whether a group boycott exists because Plaintiffs did not identify a target of the boycott and claim that the only potentially injured party would be the ADWs, who do not compete with the horsemen's groups.

[12] Plaintiffs allege that the horsemen's groups are at least indirectly competing with each other through their host racetrack. They explain that the host racetracks compete with each other to get ADWs, and other OTB operators, to buy their signal. Accordingly, the racetracks have an interest in selling their signal to as many OTB or ADW operators as possible, for the best price possible. The horsemen's groups benefit from this by way of their purses. Since they must consent to the sale of the signal, Plaintiffs contend that they are a party to the sale. Plaintiffs further contend that the horsemen's **[**17]** groups and tracks are actually joint sellers of the right to accept wagers on races since both must consent to the contracts. In that respect, the horsemen's groups may also be seen as direct competitors in their joint seller capacity. *See* Section VI for additional discussion of how the horsemen's groups participate in the market for signals.

[13] As a threshold requirement, Plaintiffs must have Article III standing. ***HN5***[] Article III standing requires the plaintiff allege that he or she has suffered an actual injury, that is fairly traceable to the defendant's conduct, and that can likely be redressed by a favorable decision by the court. *Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)*. Plaintiffs do not have standing if it is purely speculative whether their injury resulted from Defendants' conduct or whether it resulted from decisions made by third parties. *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42-43, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*. **[**19]** Churchill and Calder's injuries, the inability to sell their signals, result from the collective behavior of the horsemen's groups and ADWs, who are not defendants in this lawsuit. However, Plaintiffs do provide indication that if the Court removed the obstruction caused by the antitrust violation, Churchill and Calder could sell their signal to ADWs. Similarly, the allegations indicate the tracks would sell signals to Twinspires. Since the complaint alleges that Churchill and Calder have

standing is appropriate at an early stage. *Id. at 450*. In reviewing such a motion, the Court draws all reasonable inferences in favor of the plaintiff. *DirecTv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)*.

HN6[] To address standing, the Court assumes that an antitrust violation occurred and then determines whether **[**20]** Plaintiffs are "person[s] injured by reason of a violation of the antitrust laws." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528-29, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (*see also* *Watkins & Son Pet Supplies v. Iams Co., 254 F.3d 607, 616 (6th Cir. 2001)* (holding no antitrust injury and dismissing for lack of standing under analysis that assumed arguendo that defendant violated the Clayton Act)). [14] The antitrust standing analysis "evaluate[s] the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id. at 535*.

HN7[] A private antitrust plaintiff must plead an antitrust injury, which ensures that any "loss stems from a *competition-reducing* **[**21]** aspect or effect of the defendant's behavior." *NicSand, 507 F.3d at 449* (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. The Sixth Circuit requires the plaintiff show "(1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989)*. The Court will analyze each.

A.

The first factor focuses on the nature of the injury. ***HN8***[] The complaint must allege an anticompetitive effect on competition, i.e. the market, not merely the competitors themselves. *Bassett, 528 F.3d at 434*. The Sixth Circuit has previously held that "paying higher prices for a product due to a lack of competition in the market" is a potential antitrust injury. *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 900 (6th Cir. 2002)*. The Supreme Court **[*880]** has also found that a reduction of output can be "proof of actual detrimental effects" on competition. *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

For purposes of standing analysis, the Court must assume two things: **[**22]** that the facts in the complaint to are true, and that Plaintiffs' antitrust theory is supported by facts that actually amount to antitrust violations. [15] Plaintiffs' antitrust theory is price-fixing perpetrated by group boycott. The group boycott is the horsemen's groups' agreement, through THG, to veto any sales of signals to ADWs absent a Licensing Agreement. The group boycott produces a detrimental effect when the horsemen's groups prevent signals from being sold, which results in fewer wagering opportunities for the ultimate individual consumer.

The Licensing Agreement sets a minimum cost of the signal that is higher than any ADW currently pays. Plaintiffs further allege that current pending contracts with ADWs, although not consented to yet, provide for higher fees than the ADWs paid in previous years. The Sixth Circuit has previously indicated that paying higher prices for a product due to a lack of competition causes harm to competition. The Supreme Court has also recognized the harm to competition a reduction of output causes. Since fewer signals are available **[**23]** for purchase, resulting in fewer

---

negotiated contracts for the 2008 season with several ADWs, which Defendants have vetoed as part of the alleged antitrust violation, remedying that violation could result in the contracts being approved. Plaintiffs provide the Court sufficient support to conclude that in this case victory would be substantially likely to result in Churchill and Calder being able to sell their signals to ADWs and Twinspires being able to purchase signals. Plaintiffs have Article III standing based on an alleged loss of wagering opportunities and an increased signal price caused by supposed anti-competitive behavior.

[14] Defendants' arguments regarding the application of the "rule of reason" and *per se* rule to the alleged violation are misplaced with regards to standing. That analysis is properly applied to determine whether an antitrust violation occurred since both standards assess whether the restraint on trade is unreasonable. *See* *Bassett, 528 F.3d at 432*. Since standing is determined under the assumption that Plaintiffs have pled an antitrust violation, analysis regarding the existence of a violation is irrelevant.

[15] The Court will directly address the issue of the nature of the an antitrust violation in Section VI of this opinion.

wagering opportunities, and prices are inflated because the group boycott prevents competition in the sale of signals, the complaint alleges harm to competition. Thus, the allegations appear to satisfy the first element of antitrust standing.

B.

HN9[] The second factor requires the Plaintiffs' alleged personal injury be "attributable to an anticompetitive aspect of the practice under scrutiny." *NicSand, 507 F.3d at 451* (quoting *Atl. Richfield Co., 495 U.S. at 334* (internal quotations omitted)). That is to say that the "plaintiff must allege that the antitrust violation is *either* the 'necessary predicate' for its injury or the only means by which the defendant could have caused its injury." *In re Cardizem CD Antitrust Litig., 332 F.3d at 900*. "[D]ismissal is warranted only where it is apparent from the allegations in the complaints that the plaintiffs' injury would have occurred even if there had been no antitrust violation." *In Re Cardizem CD Antitrust Litigation, 332 F.3d at 914*. The defendant's legal action must be "independent of the alleged antitrust violation, which was the actual indisputable, and sole cause of the plaintiff's injury" to warrant dismissal. **[**24]** *Id. at 914*. Thus, causation can be found where Plaintiffs allege the violation caused the injury and no evidence of an independent, non-violative cause exists.

Plaintiffs' specific injury is three-fold: (1) Churchill and Calder's inability to sell their signal, (2) the consequential decrease in wagering opportunities, and (3) a higher price to Twinspires, an ADW, to purchase the signal. The anti-trust violation causes these specific injuries. Price-fixing raises TwinSpires's cost of the signal. That price increase may lower the revenue Churchill and Calder receive. The group boycott also decreases the number of ADWs purchasing the signal, thereby reducing wager revenue to Churchill and Calder. It also reduces the wagering opportunities Twinspires can provide.

[*881] Although each horsemen's group could individually veto signal sales thereby causing similar injuries to tracks and ADWs, that behavior is not independent and separate from the alleged collusion. Since no independent lawful cause of the injury can be identified, Plaintiffs meet the second element of antitrust standing.

IV.

The Court next addresses whether the enactment of the Interstate Horseracing Act (the "IHA") creates a legislative **[**25]** immunity from antitrust liability under the Sherman Antitrust Act. Defendants argue that because the IHA authorizes their individual actions, it impliedly repeals Sherman Act liability and immunizes them from liability for any collective action. Indeed, ***HN10***[] Congress can preclude application of antitrust laws either by (1) explicitly stating such preclusion, or by (2) so regulating the substantive area that preclusion must be implied. *Credit Suisse Sec. LLC v. Billing, 551 U.S. 264, 127 S. Ct. 2383, 2389, 168 L. Ed. 2d 145 (2007)*. Neither party argues that the IHA does this explicitly. No court has addressed whether the IHA does so impliedly. This is a difficult issue because the IHA occupies such an unusual place within the business of parimutuel wagering.

HN11[] Courts are cautioned that implied immunity is disfavored, *Gordon v. New York Stock Exch., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)*, because "if exceptions are to be written into the [Sherman] Act, they must come from the Congress, not [the] Court." *U.S. v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*. Implied immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *U.S. v. Nat'l Ass'n of Secs. Dealers, Inc., 422 U.S. 694, 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*. **[**26]** It should be narrowly construed and only be found if necessary to make another federal law work. *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)*; *Silver v. New York Stock Exch., 373 U.S. 341, 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*.

A.

Both parties agree that *Credit Suisse* sets the general ground rules for determining implied immunity in this case. The Supreme Court set out a number of factors that determine whether the securities laws were "plainly repugnant" to the antitrust laws, thus requiring immunity. *Credit Suisse, 127 S. Ct. at 2392*. Because *Credit Suisse* dealt with a hedge fund and securities laws, it is not directly applicable here. Nevertheless, its principles are instructive.

HN12[] In *Credit Suisse* and in all the other cases where the Supreme Court has found immunity, Congress has created a statutory and regulatory structure that actively controlled and monitored behavior or the participants within a particular substantive area. *See Credit Suisse, 127 S.Ct. at 2389*; *Brown v. Pro Football, Inc., 518 U.S. 231, 242, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* (federal labor laws); *Gordon, 422 U.S. at 682* (Securities and Exchange Act of 1934); *United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)* (Investment **[**27]** Company Act of 1940); *Silver, 373 U.S. at 358-59, 364* (Securities Exchange Act of 1934); *U.S. v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 84 L. Ed. 181 (1939)* (Agricultural Marketing Agreement Act of 1937). In each of these circumstances, the comprehensive regulatory scheme was deemed a substitute for antitrust regulation. In addition, the regulatory scheme was seen as likely **[*882]** to produce conflicting guidance from antitrust laws or to conflict directly with regulatory practices. *Credit Suisse, 127 S.Ct. at 2389*. Thus, the regulatory schemes confer implied immunity by providing alternative methods for supervising the regulated activity.

The IHA is an unusual piece of legislation. Its provisions created the rules under which racetracks could legally market and facilitate inter-state horse race wagering. It requires consents from various parties before any track can sell its signal or before any wagering can occur. But the legislation neither creates nor envisions any other supervision or regulatory scheme. Its limited provisions do not seem to conflict either directly or indirectly with antitrust principles. In fact, regulation of the horse wagering industry is left to the respective state racing commissions. The **[**28]** Sixth Circuit seems to agree, given its passing assessment that the IHA envisions a lack of government regulation and interference. *Ky. Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406, 1414-15 (6th Cir. 1994)* (holding that the IHA is a constitutional exercise of Congressional power.)

In all the cases above, the Supreme Court found implied immunity from the antitrust laws because Congress had, in effect, substituted rigorous and pointed regulation. Moreover, it did so in highly regulated areas where the regulatory function appeared less certain and where nothing in the statute indicated a purpose justifying immunity. *See Silver, 373 U.S. at 358-59, 364*. The IHA's legislative framework suggests that antitrust immunity should not be implied here.

B.

Defendants argue that implied immunity may apply even where active supervision is absent. The Sixth Circuit has in fact found implied immunity in at least one arguably less regulated situation which Defendants liken to ours. *See McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399 (6th Cir. 2006)*. The Tennessee Valley Authority ("TVA") is a federally-chartered corporation that is **[**29]** charged with "maintaining and operating the properties now owned by the United States . . . in the interest of the national defense and for agricultural and industrial development." *16 U.S.C. § 831*. Electrical cooperative members challenged the legality of contracts between the TVA and the electrical cooperatives. *McCarthy, 466 F.3d at 403*. The Sixth Circuit held that TVA was immune from antitrust liability related to these contracts because the statute created municipal monopolies for electrical power, which was at odds with concerns about competition. *Id.* The Court also said that the statute specifically authorized the activity at issue. *Id. at 414*. Finally, the Sixth Circuit recognized that the actions were performed by a semipublic entity, and indicated that additional supervision could exist. *Id. at 414, n.25*. [16]

---

[16] Defendants cite no other convincing authority to support this avenue of argument. The Fifth, Tenth, and Eleventh Circuit have found implied immunity arising from the Amateur Sports Act ("ASA"). *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198 (5th Cir. 2000)*; *Behagen v. Amateur Basketball Ass'n, 884 F.2d 524, 526 (10th Cir. 1989)*; *JES Props., Inc. v. USA*

[*883] The TVA represents a unique situation, as it is a quasi-governmental entity, wholly owned by the U.S. government. *Id. at 403, n.2*. In fact, the TVA is treated as an agency and evaluated under the Administrative Procedures Act. *Id. at 406*. The contracts at issue **[**31]** were approved by that agency board. *Id.* State law further regulates the TVA rates. *Id. at 414*. The combination of federal authority and state regulation created a regulatory scheme of sorts, and the scheme applied to the process of rate determinations and contract formation. *Id. at 414*. Applying antitrust laws would be completely at odds with that scheme. *Id.*

The IHA has a much more limited purview. Its purpose is to ensure that horsemen are compensated for their contributions to the successful operation of an off-track betting system. 124 Cong. Rec. 31,552, 31, 554. That purpose seems neither at odds with nor inhibited by antitrust laws. The IHA provides no such standards or oversights to regulate the horsemen's veto. The horsemen's groups have neither a public purpose nor a federal charter. Thus, the close nexus between the claims in the TVA case, and government control and involvement in that industry are simply not present here.

For all these reasons, the Court declines to use *McCarthy* as a launching pad to expand the doctrine of implied immunity.

C.

Defendants must acknowledge the difficulty of comparing the lack of comprehensive regulatory scheme in the IHA with that in other implied **[**32]** immunity cases. So, they make an interesting and nuanced argument-perhaps their best argument. They say that the IHA's proper application confers and, indeed, requires immunity from the antitrust laws. This is so based upon the theory of "extended immunity." The theory posits that if certain concerted action by individuals affiliated in a group is immune from antitrust laws, acts by a group of the groups of individuals must also be immune as well. As applied here, Defendants argue that because individual horsemen cannot comply with both the IHA and antitrust laws, the IHA creates implied antitrust immunity for groups of individuals. [17] Defendants then extend this individual immunity to the horsemen's groups, concluding that groups of the horsemen's groups are also immunized.

Defendants offer three cases to illustrate extending individual immunity to a **[*884]** group. The first two cases involved the Copper-Volstead Act, which regulates agricultural cooperatives. In *Sunkist Growers v. Winckler & Smith Citrus Products,* 12,000 citrus growers joined Sunkist Growers, Inc. and also formed two separate cooperatives: the Exchange Lemon and the Exchange Orange. *370 U.S. 19, 21-22, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*. The Supreme Court held that these three legal entities could not be "considered independent parties for the

---

Equestrian, Inc., 458 F.3d 1224, 1231 (11th Cir. 2006). **[**30]** The ASA authorizes the United States Olympic Commission ("USOC") "to recognize one national governing body ("NGB") for each sport included in the program of the Olympic games." *Jes Props., Inc., 458 F.3d at 1229*. To be recognized, the NGB must satisfy a number of requirements. *Id.* Although the NGBs enjoy a great deal of autonomy, "the ASA provides for ongoing review of the NGB by the USOC in order to ensure compliance with the ASA." *Id. at 1229* (citing *Behagen, 884 F.2d at 528*). Not only does the ASA provide for regulatory supervision, but the circuits have rested their finding of immunity on the grounds that the activity at odds with ***antitrust law*** is "*necessary to implement Congress' intent.*" *Id. at 1231* (citing *Behagen, 884 F.2d at 527*) (emphasis in original). For the reasons explained in this Memorandum Opinion, the Court concludes that the antitrust activity alleged here is not so at odds with Congressional intent of the IHA.

[17] Defendants cite *Washington Trotting Ass'n v. Pennsylvania Harness Horsemen's Ass'n* to support the proposition that concerted action amongst individual horsemen could violate antitrust laws. *428 F. Supp. 122 (W.D. Pa. 1977)*. Although the case holds that individual horsemen acting together could violate antitrust laws, the case did not involve the IHA. *Id. at 126*. At issue was whether one horsemen's group could **[**33]** be recognized as the sole representative of the horsemen at the track. *Id. at 124*. To persuade the track to only deal with one horsemen's group, individual horsemen refused to enter their horses in races. *Id. at 124-25*. The Western District of Pennsylvania concluded that individual horsemen could independently choose not to participate in any track's races, but to do so in concert would violate the antitrust laws. *Id. at 126*. However, the *Washington Trotter Ass'n* case did not involve action under the IHA and this difference is critical. The IHA authorizes only the acts of a group, not an action of any individual.

purposes of the" antitrust acts. *Id. at 27*. It reasoned that the Capper-Volstead **[**34]** Act contemplated a "cooperative of such size and general activities" as the situation in the case. *Id. at 29*. The Supreme Court stated that the configuration of organizations here constituted "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though" there were three separate legal entities. *Id.*

In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.,* individual potato sellers joined two larger grower associations that worked together to bargain collectively with the potato buyers. *497 F.2d 203, 206 (9th Cir. 1974)*. The two bargaining associations had at least a tacit agreement to secure similar contracts for both organizations' members. *Id. at 215*. The Ninth Circuit found that the Capper-Volstead Act expressly exempted agricultural cooperatives from antitrust liability. *Id. at 217*. It correctly reasoned that express immunity protects groups of individuals grouped in cooperatives from antitrust liability as well as protecting the cooperatives when they act together as one association. *Id.*

In the third case, *Brown v. Pro Football, Inc.,* the NFL Players Association challenged collective action on behalf of the NFL Clubs **[**35]** in contract negotiations with developmental squad players. *518 U.S. 231, 234-35, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*. The NFL Clubs agreed on a salary floor for developmental squad players. *Id. at 235*. The Supreme Court reasoned that the implied antitrust immunity deriving from the federal labor laws applied here as well. *Id. at 236, 237*. [18] Such a conclusion was necessary to "make the statutorily authorized collective-bargaining process work." *Id. at 237*. The Supreme Court recognized these circumstances as simply a case of multi-employer bargaining under the federal labor laws. *Id. at 239*. The case did not involve groups joining together into a larger group of those groups.

Upon examination, however, none of these cases articulates a theory of immunity that is applicable here. Both *Sunkist* [19] and *Ore-Ida* [20] concerned statutes that provided express immunity. ***HN13***[] Where a statute grants express immunity **[**36]** for certain activity and for certain groups, it can provide comprehensive immunity throughout the entire system. Implied immunity is not comprehensive and requires a different **[*885]** analysis. In *Brown,* the Supreme Court did not actually extend implied immunity to groups but only held that it applied equally to employees and employers. To analogize *Brown* to this case would only indicate that any immunity, if found, would apply to both the horsemen's groups and the racetracks or ADWs.

The Court has spent considerable effort to understand this argument in the context of the IHA. However, the Court ultimately concludes that neither the cases cited nor the particular logic of them provide reason enough to extend antitrust immunity to state horsemen groups exercising their IHA powers **[**37]** in concert. With all due respect, these arguments actually confuse and conflate several different concepts. None of these cases support the proposition that implied immunity extends to a group of immune individuals. In fact, implied immunity doctrine would suggest the opposite conclusion given the fact that immunity is to be implied narrowly and only to the minimum extent necessary. *See Silver, 373 U.S. at 357*.

Moreover, to conclude that individual horsemen must be immune from antitrust liability under the IHA misconstrues these circumstances and the statutory scheme. Individual horsemen do not need immunity because no individual can exercise a horsemen's veto or, for that matter, take any action under the IHA. Prior to enactment of the IHA,

---

[18] The Supreme Court has recognized a "'nonstatutory' labor exemption from the antitrust laws," implied from federal labor statutes. *Brown, 518 U.S. at 235-36* (citing *Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*; *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*; *Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965))*.

[19] *Sunkist* does not clearly stand for the principle of extending individual immunity to group activity, but instead seems only to support the premise that legally separate entities may in reality only constitute one entity for purposes of the Capper-Volstead Act.

[20] The Court also notes that *Ore-Ida* only provides non-binding Ninth Circuit precedent, which for the reasons discussed it does not find supportive or persuasive.

individual horsemen had no right to prevent the tracks from exporting a signal. The IHA restructured the business of interstate wagering so that an authorized horsemen's group could withhold consent to the track. Since the horsemen only have a group right, individual horsemen cannot join together to exercise individual consents. ***Antitrust law*** prohibitions on colluding and conspiring do not interfere with each horsemen's group executing its consent **[**38]** power. [21] This grant of power does not conflict with an antitrust prohibition of concerted action among those groups.

HN14[] The IHA does not imply immunity for either an individual horseman or a group of them acting as one. Consequently, there is no implied immunity that the Court could then extend to a group of horsemen's groups, such as THG. If the IHA granted express immunity to horsemen's groups, then the logic of *Sunkist* and *Ore-Ida* might well extend to a group of groups. But, the IHA does not provide for express immunity and there is still no individual implied immunity here. Thus, neither could be extended. [22]

[*886] D.

HN15[] All of the circumstances where courts have found implied immunity present clear potential for conflict between the antitrust laws and the subsequent law. Mere incompatibility, as opposed to clear repugnancy, seems insufficient to find implied immunity. Immunity is only appropriate where the legislature's subsequent legislation would be so contradictory to antitrust legislation, or where attempting to follow both sets of legislation would be so **[**41]** confusing, that the legislature must have intended to repeal the antitrust laws in certain circumstances despite having failed to explicitly say so. *Credit Suisse, 127 S. Ct. at 2392*.

The facts and statute at hand fall outside such circumstances. The Court finds no such clear repugnancy between the IHA and the antitrust laws here. Although Defendants may later show that imposing the antitrust laws would disrupt the intended enactment of the IHA, this is not apparent as a matter of law at this time. Though Congress clearly intended that a horsemen's group at a racetrack could exercise the statutory veto, it expressed nothing else. The Court does not find the language to imply a broader authorization or immunization for groups to act in concert.

[21] Although the Western District of Pennsylvania concluded that some horsemen actions may be antitrust violations, its logic does not extend to this case.

[22] Defendants cite to a decision of Judge Charles Simpson of this district in which he found in open court that the IHA confers implied immunity from antitrust regulation. TRO Hr'g Tr., 69:16 to 69:21, Choctaw Racing Srvs., LLC v. Ky. Horsemen's Benevolent and Protective Ass'n, Inc., No. 07-237 (W.D. Ky. May 3, 2007) (citing *JES Properties v. U.S.A. Equestrian, 458 F.3d 1224 (11th Cir. 2006))*. The activity at issue in *Choctaw* was **[**39]** whether an individual horsemen's group's use of its veto with regard to a single OTB violated the antitrust laws. Compl. PP 2-3, 33, Choctaw Racing Srvs., LLC v. Ky. Horsemen's Benevolent and Protective Ass'n, Inc., No. 07-237 (W.D. Ky. May 5, 2007). Judge Simpson concluded that in that circumstance there was clear repugnancy between the IHA and anti-trust laws. TRO Hr'g Tr., 67:6 to 67:7. The implied repeal, he said, was the only way to ensure that the IHA's grant of the horsemen's veto to protect the entire sport of horseracing could work effectively. *Id.* 68:21 to 68:23, 69:7 to 69:11, 69: 16 to 69:2.

This Court agrees with the result in these circumstances, but not the analysis. For the reasons stated in the foregoing section, individual horsemen cannot be liable under the antitrust laws for exercising their IHA veto as part of an authorized group. Nor can an authorized group be liable for independently exercising its IHA veto right. Thus, neither an individual nor a group require immunity for their acts under the IHA. *See also, Hialeah, Inc. v. Fla. Horsemen's Benevolent & Protective Ass'n, 899 F.Supp. 616, 622 (S.D. Fla. 1995)* (holding the IHA provides no antitrust immunity).

Judge **[**40]** Simpson relied heavily on Congressional intent in reaching his conclusion. *Id.* 69:2 to 69:6. He cites to *Hialeah, 899 F.Supp. at 616* and *Saratoga Harness Racing v. Veneglia, 1997 U.S. Dist. LEXIS 3566, 1997 WL 135946 (N.D.N.Y. 1997)*. *Id.* 67:6 to 68:4. However, *Hialeah* makes a convincing case from the legislative history on the House bill, which stated the "legislation in no way modifies or affects the scope or application of antitrust laws," that the IHA does not provide immunity from antitrust liability. *Hialeah, 899 F. Supp. at 621*. *Saratoga* questions that conclusion. But, the Senate did not make any mention of antitrust concerns and this Court is not persuaded that Congress expressed any intent to apply or repeal the antitrust laws through its enactment of the IHA.

To so find, would require finding that Congress has so regulated the field that its intent to repeal the antitrust laws is implicit. *Credit Suisse, 127 S.Ct. at 2389*. This does not appear to be true.

V.

Defendants next argue that Plaintiffs' Sherman Act § 1 claim should be dismissed because it fails to state a claim for relief under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* [hereinafter *Twombly*]. In *Twombly,* the Supreme **[**42]** Court clarified the *Rule 8(a)(2)* pleading standard by holding that the ***HN16***[] antitrust complaint must "nudge[] [the] claim[] across the line from conceivable to plausible." *Id., 127 S. Ct. at 1974*. *Twombly* requires that "a plaintiff's allegations, [while] 'assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief.'" *League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)*. *Twombly* established that antitrust complaints are held to a "plausibility standard," which requires Plaintiffs plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 1965*. [23]

[*887] Under *Twombly,* ***HN17***[] pleading a § 1 violation cannot merely recite the elements of the cause of action, one must provide facts that support them. *Twombly, 127 S. Ct. at 1965*. Those factual allegations, however, need not be detailed to survive a motion to dismiss. *Id. at 1964*. "[E]ither direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory" is sufficient. *Bredesen, 500 F.3d at 527* (citing *Twombly, 127 S. Ct. at 1969*). A bare assertion of a conspiracy, however, is insufficient. *Twombly, 127 S. Ct. at 1966*. The facts must give rise to a plausible finding of an agreement that unreasonably restrains trade.

The parties' *Twombly* arguments center on whether Plaintiffs have alleged an actual violation. The Court's analysis as to the existence of an antitrust cause of action is limited to only a determination that such a finding is plausible. Certainly if the complaint supports a finding of a *per se* violation such a finding would be plausible. If the complaint does not provide facts supporting a *per se* violation, the complaint must **[**45]** only provide sufficient facts to make finding a violation under a rule of reason analysis plausible. Full analysis under the rule of reason would not be appropriate at this time given the fact intensive nature of that analysis. The Court will proceed with its analysis under *Twombly* by assessing whether Plaintiffs have pleaded facts that support the elements of an antitrust violation.

A.

Plaintiffs' theory of violation is that Defendants are engaged in a group boycott for the purpose of price-fixing. The pleaded theory is a *per se* violation of antitrust laws because it has such "'predictable and pernicious anticompetitive effect[s], and such limited potential for procompetitive benefit,' that it is conclusively presumed to be

---

[23] Since *Twombly* expressly disavowed the previous pleading standard set forth in *Conley v. Gibson* courts have wrestled with its appropriate application. The Sixth Circuit has only addressed the issue of *Twombly's* pleading standard and antitrust litigation in a handful of decisions. Those decisions do not suggest a departure from the concept of notice pleading, but instead suggest that *Twombly* is best read as clarifying notice pleading. *See e.g., Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008)* **[**43]** (stating *Twombly* does not require heightened fact pleading); *Ferron v. Zoomego, Inc., 276 Fed. Appx. 473, 2008 WL 1988587, *2 (6th Cir. 2008)*; *Mich. Div.-Monument Builders of North America v. Mich. Cemetery Assoc., 524 F.3d 726, 731 (6th Cir. 2008)*. The Second Circuit agrees that *Twombly's* plausibility standard does not significantly alter notice pleading. *Weisbarth v. Geauga Park Dist., 499 F.3d 538, 542 (6th Cir. 2007)* (citing *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007))*. Although the Sixth Circuit has not given such an explicit analysis, at least two Sixth Circuit judges have explicitly stated such an understanding in dissents. Judge Martin has stated "the key distinction is between a bare-bones complaint asserting only the elements of a claim and a complaint asserting not only legal elements, but also facts to support those elements." *NicSand, 507 F.3d at 460* (Martin, dissenting) (dismissed for lack of antitrust standing). Judge Clay similarly stated, "In other words, Twombly was a case where the plaintiff invoked a statute banning collusion, but failed to actually state any facts suggesting collusion." *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio, 503 F.3d 456, 472 n.3 (6th Cir. 2007)* **[**44]** (Clay, dissenting) (dismissed for lack of standing under redressability and the overbreadth doctrine).

unreasonable." *Bassett, 528 F.3d at 426*; *Expert Masonry, Inc. v. Boone County, KY, 440 F.3d 336, 342 (6th Cir. 2006)* (quoting *Bailey's, Inc. v. Windsor America, Inc., 948 F.2d 1018, 1027 (6th Cir. 1991))*.

Facts that make Plaintiffs' theory plausible, even though not conclusive, would meet the *Twombly* pleading standard. The question is only whether Plaintiff has pled sufficient facts to support finding price-fixing. ***HN18***[] Plaintiffs must allege three elements to sustain a § 1 cause **[**46]** of action: (1) the existence of a contract, combination, or conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable **[*888]** restraint on trade. 54 Am. Jur. Monopolies and Restraints of Trade § 484; *see Cont'l Cablevison of Ohio, Inc. v. Am. Elec. Power Co., 715 F.2d 1115, 1118 (6th Cir. 1983)* (stating the essential elements plaintiffs must prove to sustain a § 1 claim); *see also Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 827 (6th Cir. 1982)*. Element one requires evidence of "the terms and membership of the conspiracy and the method adopted to effectuate its ends." 54 Am. Jur. Monopolies § 484. Element two requires Plaintiffs define the relevant product market and relevant geographic market. *See Mich. Div.-Monument Builders of N. America, 524 F.3d 726, 733 (6th Cir. 2008)* (quoting *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 531 (6th Cir. 2001))*. Element three requires showing the agreement had an anticompetitive effect. *See Richter Concrete Corp., 691 F.2d at 827*. An anticompetitive effect can be shown using one of two analytical approaches: the *per se* rule and the rule of reason. *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)* **[**47]** (citing *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998))*.

Plaintiffs have pled the following facts in support of their antitrust allegations. Ky HBPA allied with THG in November 2007, thereby entering into an agreement with horsemen's groups at 40 other racetracks. (Am. Compl. P P 63-64.) The views of the group are memorialized in a uniform Licensing Agreement that is attached to the complaint. (Am. Compl. P 65.) Once signed by an ADW, the Licensing Agreement would dictate minimum prices for ADWs purchasing signals. The presence of a tangible, and agreed upon, contract makes the existence of a combination or conspiracy amongst the horsemen plausible.

Plaintiffs define the relevant market as "the sale and licensing of the right to receive simulcast signals and to accept wagers on horse racing at locations other than the host racetrack." (Am. Compl. P 59.) The relevant geographic market is the entire United States. (Am. Compl. P 59.) These designations define where the buyers and sellers compete. As such, these allegations present sufficient facts to meet the plausibility standard for element two. Defendants strongly argue that this is the incorrect product **[**48]** market. For purposes of this motion, however, the Court accepts the market as pled. The Court does recognize Defendants' concerns as to whether Defendants actually participate in that market. The Court will discuss that question in Section VI of this Memorandum.

Plaintiffs' legal theory to support their claim of an antitrust violation is price-fixing effectuated by group boycotting. They assert that, as a part of the THG alliance, Ky HBPA "agreed to the terms of a uniform Horsemen's Simulcast Licensing Agreement" that "provides that horsemen's groups must receive one-third of the takeout arising from the sale of signals." (Am. Compl. P 65.) The Licensing Agreement requires any ADW to pay a minimum of 1/3 of the Takeout to any track horsemen's group that is a signatory THG member. In this way, the horsemen's groups have allied to require that minimum fee. These facts describe an agreement that plausibly sets a floor for the price of a signal. Such an agreement is plausibly construed as price-fixing.

Plaintiffs offer the Licensing Agreement and Defendants' contemporaneous use of their horsemen's veto as evidence of the perpetrating group boycott. Supporting facts include the KTA and Ky **[**49]** HBPA, as well as three other named horsemen's **[*889]** groups, appointing THG to negotiate with ADWs on their behalf and adopting a uniform agreement for signing by multiple horsemen's groups. This suggests concerted action beyond independent or mere parallel action since one single entity is performing each members' tasks in negotiations. They also assert that the Ky HBPA, the Pennsylvania HBPA, Florida HBPA, and the Texas Horsemen's Partnership have all stated in letters that they will not consent to the sale of the host track's signal unless the ADW has signed the Licensing Agreement. (Am. Compl. P 69.) The Florida HBPA's disagreement with Calder, its host track, has led other THG members [24] to revoke consent for their track to simulcast its signal to Calder. Plaintiffs further allege that "[t]he

---

[24] This includes the Delaware THA, Ky HBPA, **[**50]** Maryland THA, and Ohio HBPA. (Am. Compl. P 70.)

avowed goal of this concerted action by competing horsemen is to raise the prices paid to horsemen for signals." (Am. Compl. P 65.) These facts further illustrate a plausible finding of a group boycott to raise prices, which shows an anticompetitve effect. All three elements of a § 1 violation claim are plausibly supported by facts alleged in the complaint.

B.

For the individual defendants Hiles and Maline, ***HN19***[] Plaintiffs must show that the "corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends." *Brown v. Donco Enters., Inc., 783 F.2d 644, 646 (6th Cir. 1986)*. The Amended Complaint fails to provide facts that would support the plausibility of this claim. It identifies Hiles as the President of the Ky HBPA, and Maline as the Executive Director of the Ky HBPA. Beyond this mere identification of the defendants' roles in the organizations, it provides no facts that suggest the role these individuals played in the decision making process. Plaintiffs assert in conclusory language that these individual defendants "made a conscious commitment to the scheme to raise prices by directing the Kentucky HBPA and the KTA to appoint the THG as agent, and by requiring the Kentucky HBPA and the KTA to join the boycott of ADW operators." (Am. Compl. P 79.) Plaintiffs provide no facts that support the required elements that the agents be "actively and knowingly" engaged in the scheme. As such, Plaintiffs failed to plead in such a way as to create more than mere speculation **[**51]** of the individuals' involvement in the alleged conspiracy. [25]

Embedded in Defendants' *Twombly* arguments is a more fundamental question of whether the Amended Complaint actually alleges an antitrust cause of action. The proceeding factual basis supports finding that Plaintiffs have alleged a plausible conspiracy against the horsemen's groups in a relevant market for the purpose of price-fixing. The Court will separately address whether these facts, if true, may give rise to an antitrust violation.

VI.

Both parties argue about whether these facts amount to an antitrust violation under either a *per se* or a rule of reason analysis. Defendants' arguments question the viability of Plaintiffs' underlying claim. Defendants argue that the facts, as presented in the complaint, cannot constitute **[*890]** a group boycott for the purpose price-fixing and thus Plaintiffs fail to assert either a *per se* or rule of reason violation. Based upon **[**52]** its current understanding of this antitrust claim, the Court has concluded that the facts as pled do support its plausibility.

HN20[] The *per se* rule applies to "practices [that] by their nature have 'a substantial potential for impact on competition.'" *F.T.C. v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 433, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*. Once the Court determines that "a practice is illegal *per se,*" it does not have to further examine "the practice's impact on the market or the procompetitive justifications for the practice" to find a violation. *Expert Masonry, 440 F.3d at 342*. As such, a *per se* violation only requires Plaintiffs prove three things:

> (1) two or more entities engaged in a conspiracy, combination, or contract, *Guzowski v. Hartman, 969 F.2d 211, 214 (6th Cir.1992)*, (2) to effect a restraint or combination prohibited per se (wherein the anticompetitive effects within a relevant geographic and product market are implied), *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir.1982)*, (3) that was the proximate cause of the plaintiff's antitrust injury, *Hodges v. WSM, Inc., 26 F.3d 36, 38 (6th Cir.1994)*.

Expert Masonry, 440 F.3d at 342. Plaintiffs do not have to show power, intent or **[**53]** impact. *Id.* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004))*. The presumption, however, is against *per se* violations. *Expert Masonry, 440 F.3d at 343*.

---

[25] The Court need not address Defendants' motion to dismiss on the grounds that Hiles and Maline are immune from antitrust liability under the Volunteer Protection Act since those defendants have been dismissed, pursuant to *12(b)(6)* and *Twombly,* for failure to state a claim.

HN21[] Horizontal agreements, as alleged here, "involve direct competitors at a given level of the market … [and] are viewed as especially injurious, and courts therefore bar them *per se,* regardless of any alleged ameliorative rationale." *Id. at 344*. Examples include price-fixing and group boycotts. *Id.* Commercially motivated group boycotts are *per se* violations because "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (U.S. 1985)*. Such boycotts are "designed to 'pressure' another party into doing something by 'withholding, or enlisting others to withhold, patronage or services from the target.'" WILLIAM C. HOLMES, ***ANTITRUST LAW*** HANDBOOK § 2:16 Group boycotts-In general (quoting *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541-43, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978))*. Evidence of a group boycott used to effectuate a price-fixing arrangement is sufficient **[**54]** to support a *per se* violation. *See Super. Ct. Trial Lawyers Ass'n, 493 U.S. at 436 n.19*; *see also* HOLMES § 2:16.

HN22[] The rule of reason analysis "permits case-by-case evaluation of [the restraint's] effect on competition." *Expert Masonry, 440 F.3d at 342* (quoting *Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1027 (6th Cir. 1991))*. The prima facie case under the rule of reason requires facts sufficient to prove:

> 1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy.

Int'l Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989). **[*891]** The defendant then has the burden "to 'come forward with evidence of the restraint's procompetitive effects to establish that the alleged conduct justifies the otherwise anticompetitive injuries.'" *Expert Masonry, 440 F.3d at 343* (citing *Nat'l Hockey League Players' Ass'n, 325 F.3d at 718*). Then, the plaintiff "must show that any **[**55]** legitimate objectives can be achieved in a substantially less restrictive manner." *Id. at 343* (citing *Nat'l Hockey League Players' Ass'n, 325 F.3d at 718*).

Although the Court does not conclude whether the actions at issue are definitely a *per se* violation, the Court will discuss it. [26] Defendants' primary contention is that the horsemen's groups are not direct competitors at a given level of the market, and thus cannot be price-fixing. The complaint identifies the given market as the market for the sale of signals. The "signal" is the common term to describe what the ADW receives, which is the ability to accept wagers on races at tracks in other states. As part of the package Churchill provides video footage of the races; however, that is not exactly the product at issue in this case. The visual images are ancillary to that core product of off-track betting under the IHA legislative scheme. [27]

Given the market as pled, the question remains whether the horsemen's groups participate in the market for the right to accept wagers on off-track races, "the signal." At this point, it appears that they may do so. The tracks clearly compete with one another to get the best deal from an ADW. The IHA makes the horsemen's groups and the tracks joint sellers of the right. Though neither party independently owns the right to allow ADWs or OTBs to accept wagers on the race, the horsemen's groups do hold that property right jointly with the track. Though the horsemen's groups are not selling the end product, their actions may still fix or increase the price of that product in a way that restrains commerce. Such an arrangement, if true, seems **[**57]** to indicate that the horsemen's groups do participate as competitors in the market for signals.

---

[26] The Court focuses on the *per se* analysis at this time given the pleadings and the Court's *Twombly* analysis. Since a boycott for the purpose of price-fixing has consistently been held as a *per se* illegal horizontal agreement, the Court only addresses the viability of that contention. If it proves **[**56]** unviable, the Court may perform a rule of reason analysis following discovery.

[27] If Plaintiffs had pled a market for consent only, no anti-trust violation could exist. Since each horsemen's group can only give consent to their track, there is no market for consents. The horsemen's groups are not competitors in regards to giving their consent to the track because the horsemen's groups cannot offer their consent to different tracks for a different price.

The Licensing Agreement pressures the ADWs, as the target of the boycott, to pay a minimum price for any signal it receives from tracks with THG member local horsemen's groups. The THG member groups are collectively threatening all ADWs that they must contract with THG horsemen's groups according to a certain set of terms. The ultimate result is that if the ADW does not assent to the Licensing Agreement, it is precluded from purchasing a signal from any track whose local horsemen's group participates in the THG scheme. Again, if true, this arrangement seems synonymous with previously identified *per se* violations.

There are many facts and economic relations as yet unknown that could influence this case. Plaintiffs' theory of an antitrust violation and injury may be quite difficult to establish in fact. Additional evidence may show that Plaintiffs are unable to **[*892]** support their allegations under either analytical approach: *per se* or rule of reason. At that time, the Court may more appropriately assess whether a violation has actually occurred.

VII.

Ky HBPA has also moved for dismissal of Count II **[**58]** of the Amended Complaint, which alleges breach of both (1) the contract's anti-assignment provision [28] and (2) its exclusive representation provision. As a basis for the breach, the Amended Complaint cites the appointment of THG to negotiate a License Fee for the horsemen's groups with the ADWs. It says that appointing THG as an agent "directly conflicts" with the horsemen's groups' obligation to serve as exclusive representative for purposes of the IHA. For the following reasons, the Court finds no grounds for a breach of contract claim.

The exclusive representation provision reads: "with respect to the matters set forth herein during the Term of this Agreement, the Ky HBPA shall be the exclusive representative of its members." ***HN23***[] The Court will strictly enforce the terms of an unambiguous contract. *Frear v. P.T.A. Indus., Inc., 103 S.W.3d 99, 106 (Ky. 2003)*. Where a contract is susceptible to inconsistent interpretations, an ambiguity exists. *Transp. Ins. Co. v. Ford, 886 S.W.2d 901, 905 (Ky. App. 1994)*. **[**59]** The Court interprets the provision according to the intention of the parties as demonstrated by "the language used, the subject matter, and the purpose of the contract." *D.L Walker & Co. v. Lewis, 267 Ky. 107, 101 S.W.2d 685, 687 (Ky. App. 1937)*. The parties agree that the exclusive representation provision does not prohibit the horsemen's group from appointing an agent to negotiate on its behalf. The Court's analysis must proceed by determining the nature of the relationship at issue and its relation to the contract terms.

The Court interprets the exclusive representation language in light of the contract's purpose. The focus of the contract is revenue distribution according to the purpose and terms of the IHA. As such the IHA impacts the scope and effect of the provision. ***HN24***[] The IHA defines horsemen's group in relation to a particular racetrack. *15 U.S.C. § 3002 (12)*. As such, the IHA requires the local horsemen's group consent to any off-track betting. *15 U.S.C. § 3004*. The contract provision provides that the local horsemen's group must be the exclusive representative of the horsemen for the purpose of consenting.

The crux of the analysis is determining whether THG's actions constitute only an agency **[**60]** relationship. Both parties agree that the local horsemen's groups can appoint an agent to advise, consult, or represent the groups during negotiations. ***HN25***[] "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *McAlister v. Whitford, 365 S.W.2d 317, 319 (Ky. 1962)*. In an agency relationship, the principal retains control. *Louisville Ry. Co. v. Louisville Area Transp. Workers Union, 312 Ky. 656, 228 S.W.2d 652, 654 (1950)*.

Plaintiffs' own allegation asserts that the Ky HBPA breached the contract by appointing "the THG to act as their ***agent*** to negotiate a license fee for the sale of Churchill Downs' signals to ADWs." (Am. Compl. P 89.) (emphasis added). Not only **[*893]** do the Plaintiffs identify the relationship as an agency relationship, but the allegations support such a finding. THG is carrying out Ky HBPA's, the principal, interests. The local horsemen's groups have

---

[28] Plaintiffs concede Defendants have not violated the anti-assignment provision by their own admission in their response brief. The Court will therefore dismiss any claim for breach of the anti-assignment contract provision.

asserted the horsemen's veto themselves, THG has not exercised the veto on Ky HBPA's behalf. THG has no authority to decide when Ky HBPA may enter into a contract over interstate off-track **[**61]** wagering rights or when to consent to the sale of Churchill's interstate simulcast signal - and the complaint never alleges facts to the contrary. Any participation THG has in the negotiation process is in an agency capacity on behalf of the principal in furtherance of its specified interests. Further, THG's negotiations for a License Fee are between it and the ADWs themselves. Such negotiations seem outside the purview of the contracts' provisions. Even if the contract extends to such negotiations, THG remains in its agent role. Therefore, the exclusive representation provision is not violated because Ky HBPA has only appointed an agent to participate in the negotiations.

The Court will enter an order consistent with this Memorandum Opinion.

March 20, 2009

/s/ John G. Heyburn II

John G. Heyburn II, Judge

United States District Court

ORDER

Defendants have moved to dismiss almost every aspect of Plaintiffs' complaint on various grounds. The Court has issued a Memorandum Opinion addressing each issue Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motions to dismiss the antitrust claims for lack of standing and due to antitrust immunity is DENIED as to all Plaintiffs.

IT IS FURTHER ORDERED that Defendants' motion to dismiss the antitrust claims for failure to satisfy *Twombly* is SUSTAINED as to Plaintiffs' claim against the individual Defendants Maline and Hiles and these Defendants are DISMISSED WITH PREJUDICE. The motion is DENIED regarding the remaining Defendants.

IT IS FURTHER ORDERED that Defendants' motion to dismiss for failure to state a claim for breach of contract is SUSTAINED and therefore the breach of contract claim is DISMISSED WITH PREJUDICE.

This is not a final order.

March 20, 2009

/s/ John G. Heyburn II

John G. Heyburn II, Judge

United States District Court

Haines v. Verimed Healthcare Network, LLC

United States District Court for the Eastern District of Missouri, Eastern Division

March 24, 2009, Decided; March 24, 2009, Filed

Case No. 4:08CV791 CDP

Reporter

613 F. Supp. 2d 1133 *; 2009 U.S. Dist. LEXIS 23247 **; 2009-1 Trade Cas. (CCH) P76,598

CYNTHIA HAINES, Plaintiff, vs. VERIMED HEALTHCARE NETWORK, LLC, Defendant.

Subsequent History: Motion granted by *Haines v. Verimed Healthcare Network, LLC, 2009 U.S. Dist. LEXIS 41606 (E.D. Mo., May 18, 2009)*

Core Terms

antitrust, anti trust law, websites, employees, hire, independent contractor, constrained, restrain, shoppers, motion to dismiss, non-compete, covenants, no-hire, antitrust claim, rule of reason

LexisNexis® Headnotes

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

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

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

A defendant may move to dismiss a claim for failure to state a claim upon which relief can be granted under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under R. 12(b)(6) is to test the legal sufficiency of the complaint. When considering a R. 12(b)(6) motion, the factual allegations of a complaint are assumed true and are construed in favor of the plaintiff. To avoid dismissal for failure to state a claim, the complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. Although specific facts are not necessary, the plaintiff must allege facts sufficient to give fair notice of what the claim is and the grounds upon which it rests. A complaint should not be dismissed merely because the court doubts that a plaintiff will be able to prove all the necessary allegations. The issue is not whether the plaintiff will ultimately prevail, but whether she is entitled to present evidence to support her claims.

Antitrust & Trade Law > Sherman Act > Claims

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

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

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

HN2[] **Sherman Act, Claims**

To prove a violation of § 1 of the Sherman Antitrust Act, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. The elements of a § 1 of the Sherman Antitrust Act case are: (1) an agreement or conspiracy among two or more entities; (2) with the intent to unreasonably restrain competition; (3) which causes injury to competition. The entities must be legally distinct economic entities. The unreasonableness of a restraint is determined using either a per se standard or a standard that examines all of the circumstances, the so-called rule of reason. Examples of restraints that violate the per se standard include price-fixing, tying arrangements, and group boycotts. Most agreements are evaluated under the rule of reason, a standard that asks whether a contract unreasonably restrains trade in a relevant product or geographic market. Ultimately, the goal is to determine whether restrictions in an agreement among competitors potentially harm consumers.

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

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

HN3[] **Sherman Act, Scope**

Courts have, on occasion, found certain no-hire agreements to violate or potentially violate antitrust laws.

Labor & Employment Law > Employment Relationships > Independent Contractors

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] **Employment Relationships, Independent Contractors**

Where an agreement's intended purpose is not to constrain competition between an employer and a client, but to constrain competition between the employer and one of its workers--the employer seeks to prevent its own employees from choosing to work for its clients directly--that is not a "no-hire" agreement, it's a "noncompete" agreement--a common feature of countless independent contractor relationships in any number of industries. To the extent that the agreement constrains competition, it does so only to protect the employer's legitimate business interests.

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

HN5[] **Sherman Act, Scope**

Although the text of the Sherman Antitrust Act declares every restraint on trade to be illegal, it cannot mean what it says because, to read it literally, would outlaw the entire body of private contract law.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

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

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Legitimate reasons exist to uphold noncompete covenants, even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are now beyond question. The argument that noncompete agreements should be a per se antitrust violation is both bizarre and frivolous. An agreement that precludes two potential employers from competing for the services of a discrete group of employees can best be characterized as a covenant not to compete.

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

HN7[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Where an agreement is properly analyzed under the antitrust rule of reason, the next step is to determine whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN8[] **Sherman Act, Claims**

Applying the rule of reason, the United States Court of Appeals for the Eleventh Circuit has held that a plaintiff failed as a matter of law to state an antitrust violation under §§ 1, 2, of the Sherman Antitrust Act arising from contracts between a supplier of temporary technical workers and the supplier's customers and between the supplier and its workers, which specified that neither the client nor the supplier would hire one another's employees and that the workers would not accept employment, directly or indirectly, with a client for 90 days after they finished working for that client. The court noted that the restrictive covenants impacted two sets of parties--the workers and the clients--but held that they did not have an adverse impact on competition of the type that violates the Sherman Antitrust Act. Rather, the covenants merely imposed contractual obligations that could be freely negotiated by all parties.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN9[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Where an entity is not in the business of unilaterally barring its employees from seeking work, but merely sets a price at which it is willing to relinquish its right to its own employees' services, and a client is free to hire away any of the entity's employee, provided it does so on a full-time basis or pays the entity agreed-upon rates, this is a perfectly legitimate way for the entity to protect its business interests.

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

HN10[] **Sherman Act, Scope**

The antitrust laws are not designed to redress an "informational" injury to a single plaintiff. They are designed to redress the injuries of consumers when an entire market is unlawfully constrained.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

Claims under the antitrust laws of Missouri and Florida necessarily fail when a plaintiff cannot maintain a federal antitrust action. The Missouri ***antitrust law*** expressly directs that its provisions shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes. *Mo. Rev. Stat. § 416.141*. The Florida statute similarly contains a provision stating that any activity or conduct exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of Florida's ***antitrust law***. *Fla. Stat. § 542.20*. When a defendant is exempt from antitrust liability under federal law, a plaintiff's Florida antitrust claims must similarly fail.

Counsel: **[**1]** For Cynthia Haines, M.D., Plaintiff: Paul E. Petruska, LEAD ATTORNEY, WILLIAMS AND VENKER, LLC, St. Louis, MO.

For Verimed Healthcare Network, LLC, Defendant: James R. Wyrsch, LEAD ATTORNEY, Arindam Kar, Mark B. Leadlove, BRYAN CAVE LLP, St. Louis, MO.

Judges: CATHERINE D. PERRY, UNITED STATES DISTRICT JUDGE.

Opinion by: CATHERINE D. PERRY

Opinion

[*1134] **MEMORANDUM AND ORDER**

Plaintiff Cynthia Haines is a medical doctor who worked as an independent contractor for defendant VeriMed, writing and editing articles that VeriMed then sold to companies that run medical websites. Haines asserts antitrust and tort law claims against VeriMed, alleging that VeriMed unlawfully constrained Haines' employment opportunities by entering into no-hire agreements with VeriMed's clients. VeriMed has moved to dismiss Haines' complaint. Because I conclude that the injury Haines asserts is not of the type that the antitrust laws were designed to remedy, I will grant VeriMed's motion to dismiss Haines' antitrust claims. I will, however, deny VeriMed's motion with respect to Haines' tort claims.

Background Facts

The following facts are asserted in plaintiff's Second Amended Complaint. Dr. Cynthia Haines is a medical doctor and president of Haines Medical **[**2]** Communications, Inc. Working as an independent contractor, Haines supplies and reviews written content for publication on medical websites. Haines began her business in 2004 by initially supplying articles to the website WebMD. Since that time Haines has expanded her business, working for several other websites.

In 2006, Haines entered into a relationship with defendant VeriMed Healthcare Network. Unlike websites like WebMD, VeriMed does not directly provide medical information to the public. Rather, VeriMed acts as a "middleman" in the medical consulting business. VeriMed hires independent contractors like Haines to produce certain content, and then sells that content to websites that have a need for it. Haines was told she was under "no obligation" **[*1135]** when working for VeriMed, and was always free to work on projects of her choice. Under this arrangement, Haines reviewed ten urology articles for VeriMed at a rate of $ 15.00 each.

Around this same time, Haines also developed a relationship with another web content provider, The HealthCentral Network (THCN). THCN owns and operates a collection of websites, including 32 condition-specific websites with more than 11 million monthly visitors **[**3]** and 60 million page views. Haines agreed to provide certain material to THCN for a price that was significantly more than the $ 150.00 she received from VeriMed.

Unbeknownst to Haines, however, in addition to THCN being a client of Haines' independent consulting business, THCN was also a client of VeriMed. In fact, it was THCN that had requested VeriMed to produce the urology articles. In other words, Haines was working for VeriMed and THCN separately, but she did not know that the content she produced for VeriMed was actually being supplied to THCN.

THCN and VeriMed had a contractual relationship that was designed to prevent this type of scenario. When THCN agreed to purchase website content from VeriMed, THCN also agreed that it would not "go around" VeriMed and hire any of VeriMed's current or former independent contractors. Specifically, the contract language stated:

> [THCN] will not be able to utilize the services of any present or former VeriMed member that had previously provided services to [THCN], unless such member joins [THCN] in a full-time capacity, without paying VeriMed the agreed upon rates in the corresponding Statement of Work. The following paragraphs shall survive the **[**4]** termination of this Agreement: . . . (Solicitation).

The paragraph headed "Solicitation" then went on to state:

> Solicitation of Personnel. During the term of this Agreement and for one (1) year afterward, neither party shall recruit or solicit for employment any current or former employee or Author of the other.

When THCN learned that Haines was an independent contractor working for VeriMed, THCN terminated its relationship with Haines and told Haines that it would no longer employ her to provide content to THCN directly.

Haines alleges that the agreement between THCN and VeriMed is an unlawful restraint on trade that violates the Sherman Antitrust Act, as well as Missouri and Florida state antitrust laws. In addition, Haines asserts state law claims of fraudulent misrepresentation, fraudulent concealment, and appropriation of name. VeriMed has moved to dismiss each count of the complaint under various theories. [1]

Discussion

HN1[] A defendant **[**5]** may move to dismiss a claim "for failure to state a claim upon which relief can be granted" under *Fed. R. Civ. P. 12(b)(6)*. The purpose of a motion to dismiss under *Rule 12(b)(6)* is to test the legal sufficiency of the complaint. When considering a 12(b)(6) motion, the factual allegations of a complaint are assumed true and are construed in favor of the plaintiff. *Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827,*

[1] Haines moved to amend her complaint after VeriMed filed its motion to dismiss. For reasons discussed during oral argument, I will grant Haines' motion to amend the complaint and will treat VeriMed's motion as though it relates to the newly amended pleading.

104 L. Ed. 2d 338 (1989). To avoid dismissal for failure to state a claim, the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled **[*1136]** to relief." Rule 8(a)(2), Fed. R. Civ. P.; Bell Atlantic v. Twombly 550 U.S. 544, 127 S. Ct. 1955, 1966, 167 L. Ed. 2d 929 (2007). Although specific facts are not necessary, the plaintiff must allege facts sufficient to give fair notice of what the claim is and the grounds upon which it rests. Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007).

A complaint should not be dismissed merely because the court doubts that a plaintiff will be able to prove all the necessary allegations. Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997). The issue is not whether the plaintiff will ultimately prevail but whether she is entitled **[**6]** to present evidence to support her claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

A. Federal Antitrust Claims

HN2[] To prove a violation of Section 1 of the Sherman Antitrust Act, "a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade." Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058 (8th Cir. 2000). Accord Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998). *See also* Masimo Corp. v. Tyco Health Care Group, L.P., 2006 WL 1236666, *3 (C.D. Cal.2006) ("The elements of a Section 1 case are: (1) an agreement or conspiracy among two or more entities; (2) with the intent to unreasonably restrain competition; (3) which causes injury to competition."). The entities must be legally distinct economic entities. Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2nd Cir. 1998).

"The unreasonableness of a restraint is determined using either a per se standard or a standard that examines all of the circumstances, the so-called rule of reason." Concord Boat, 207 F.3d at 1058. Examples of restraints that violate the per se standard include price fixing, tying arrangements, **[**7]** and group boycotts. *Id.;* Double D Spotting Serv., Inc., 136 F.3d at 558. "Most agreements are evaluated under the 'rule of reason,' a standard that asks whether the contract unreasonably restrains trade in a relevant product or geographic market." Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 659 (8th Cir. 2000). "Ultimately, the goal is to determine whether restrictions in an agreement among competitors potentially harm consumers." Virgin Atlantic Airways Ltd. v. British Airways PLC, 69 F. Supp. 2d 571, 582 (S.D.N.Y. 1999).

Haines argues that the agreement in place between VeriMed and THCN ought to constitute a per se violation of the Sherman Antitrust Act, or in the alternative, should be declared unlawful under the rule of reason. According to Haines, defendant's agreement with THCN unfairly restrains the market for contract employees like Haines who provide content to medical websites. Haines styles the arrangement between VeriMed and THCN as an unlawful "no-hire" agreement. That is to say, the two companies conspired to keep employment costs to a minimum by agreeing not to hire away one another's employees. Once VeriMed secured Haines as an independent contractor, **[**8]** it actively worked to prevent any other company from competing for the services Haines offered.

Haines correctly notes that **HN3**[] courts have on occasion found certain no-hire agreements to violate or potentially violate antitrust laws. *See* Roman v. Cessna Aircraft Co., 55 F.3d 542, 545 (10th Cir. 1995) (Plaintiff alleging that two airplane manufacturers conspired to restrain trade by agreeing not to hire one another's workers had adequately pleaded a violation of the Sherman Act.); Weisfeld v. Sun Chemical **[*1137]** Corp., 210 F.R.D. 136, 138 (D.N.J. 2002) (denying certification of a class action but discussing the antitrust implications of a no-hire agreement between competing companies). Haines' argument ultimately fails however, because the agreement to which Haines was subject was not a "no-hire" agreement of the type antitrust laws seek to prohibit.

In some limited sense, Haines is correct that "competition" between VeriMed and THCN for Haines' services was constrained. But Haines was working *for* VeriMed. **HN4**[] The agreement's intended purpose was not to constrain competition between VeriMed and THCN, but to constrain competition between VeriMed and Haines herself. VeriMed sought to prevent its own **[**9]** employees from choosing to work for VeriMed's clients directly. This is not a "no-hire" agreement; it's a "non-compete" agreement -- a common feature of countless independent contractor relationships in any number of industries. [2] To the extent that the agreement between VeriMed and THCN constrains competition, it does so only to protect VeriMed's legitimate business interests. *See* *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (noting that ***HN5***[] although the text of the Sherman Act declares "every" restraint on trade to be "illegal," the Act "cannot mean what it says" because to read it literally "would outlaw the entire body of private contract law").

Haines' argument that this non-compete agreement should form the basis for a new per se violation of antitrust laws is completely without merit. ***HN6***[] "Legitimate reasons **[**10]** exist to uphold noncompete covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are now beyond question." *Lektro-Vend Corp. v. The Vendo Co., 660 F.2d 255, 265 (7th Cir. 1982)*. *See also* *Consultants & Designers, Inc. v. Butler Serv. Group, 720 F.2d 1553, 1560 (11th Cir. 1983)* (calling the argument that non-compete agreements should be a per se antitrust violation "both bizarre and frivolous"); *Cesnik v. Chrysler Corp., 490 F. Supp. 859, 868 (D.C. Tenn. 1980)* (recognizing that an agreement "precluding two potential employers from competing for the services of a discrete group of employees . . . can best be characterized as a covenant not to compete").

Given that the ***HN7***[] agreement is properly analyzed under the rule of reason, the next step is to determine "whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007)* **[**11]** (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199(1997)*.

Haines' complaint fails to establish an antitrust violation under any of these considerations. The non-compete is limited in specific ways that narrowly tailor the agreement so as to protect VeriMed's legitimate business interests. Market participants are not precluded from all independent contracting work. Contractors such as Haines remain free to publish as much material as they wish on the Internet. They are merely restrained from **[*1138]** selling that material to VeriMed's clients, unless those clients choose to hire the contractors as full-time employees. The very nature of the independent contractor writing and publishing business is such that this type of agreement cannot have a market-wide impact. [3]

Haines' case is very similar to that of the plaintiffs in *Consultants & Designers, Inc. v. Butler Service Group, 720 F.2d 1553 (11th Cir. 1983)*. In that case, Butler, a technical services firm, recruited "job shoppers" who worked in fields such as engineering, designing, drafting and data processing. Butler then sent the job shoppers out to serve the needs of Butler's clients -- technical businesses that had a need for short-term highly skilled technical workers. *Id. at 1555*. Butler's contracts with its clients specified that neither the client nor Butler would hire one another's **[**13]** employees. Additionally, Butler's job shoppers agreed that they would not accept employment directly or indirectly by a Butler client for a period of 90 days following the completion of an assignment. *Id. at 1556*.

---

[2] At oral argument the Court noted that Haines' case is seemingly indistinguishable from, for example, that of a home healthcare worker who works for an agency. Such a worker is not allowed to go around the agency and provide services to clients directly. Haines' relationship with VeriMed is functionally equivalent to this type of situation.

[3] VeriMed further argues in its motion to dismiss that Haines' antitrust claims must fail because Haines is unable as a matter of law to define a relevant geographic market for her employment services. Under proper rule of reason analysis, a court must make "an inquiry into market power and market structure to assess the actual effect of the restraint." *Double D, 136 F.3d at 560* (quoting *Copperweld Corp v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. **[**12]** Here, the market exists over the Internet and is, by definition, worldwide. In theory, any person anywhere is capable of providing to VeriMed or THCN the type of website content that these companies seek. Moreover, individual actors are always free to publish on the Internet by themselves. Therefore, argues VeriMed, it is not possible for any one actor to assert market dominance. Defendant's argument is an interesting one, but it is not a theory I need consider. Because I conclude that Haines' antitrust claims fail for other reasons stated here, I will not consider VeriMed's arguments relating to geographic market.

The plaintiff, Consultants & Designers, Inc., was another technical services firm that competed with Butler, recruiting job shoppers and supplying clients with employees. C & D alleged that Butler's agreements with its clients and job shoppers violated *Sections 1* and *2* of the Sherman Act. *Id.*

HN8[] Applying the rule of reason, the Eleventh Circuit held that plaintiff failed as a matter of law to state an antitrust violation. *Id. at 1564*. The court noted that Butler's restrictive covenants impacted two sets of parties -- the job shoppers and the client firms. But the covenants did not have an adverse impact on competition of the type that violates the Sherman Act. Rather, the covenants merely imposed contractual obligations that could be freely negotiated by all parties. *Id. at 1562-63*. When Butler offered its job shoppers work, they had as an alternative all the other means of employment in their chosen fields. Similarly, when Butler offered its services to clients, they too had **[**14]** other alternative means of obtaining workers. *Id.* This is exactly analogous to the situation with Haines, VeriMed, and THCN. VeriMed had certain conditions under which it was willing to hire employees and provide services. Nothing in Haines' complaint establishes that these conditions had a market-wide impact that unfairly constrained competition among the entire universe of people working to provide medical content to websites.

Additionally, as the Eleventh Circuit in *Butler* noted, the contract rights retained by an entity such as VeriMed have a market value that can be bought and sold. That is, ***HN9***[] VeriMed is not in the business of unilaterally barring its employees from seeking work. Rather, it merely sets a **[*1139]** price at which VeriMed is willing to relinquish its right to its own employees' services. A VeriMed client is free to hire away any VeriMed employee, provided it does so on a full-time basis, or provided it pays VeriMed the agreed upon rates in the corresponding statement of work. This is a perfectly legitimate way for VeriMed to protect its business interests.

For the reasons stated above, Haines' complaint fails to allege an antitrust injury. That said, however, it would be premature **[**15]** to conclude that Haines' complaint does not allege an injury of any kind. The key difference between Haines' case and that in *Butler* was that Haines never agreed to be restrained from working for other companies. By agreeing to work for VeriMed, Haines unwittingly limited her other available options to seek contract work. She was, in effect, subjected to a non-compete agreement to which she was never made aware. Rather than tell Haines directly that she could not seek work from VeriMed's clients, VeriMed chose only to tell its clients that they could not hire Haines. Haines thus never knew that she would be confined to working only on the projects that VeriMed saw fit to give her. Haines' injury did not arise from an unlawful market restraint; it arose from her own lack of knowledge and VeriMed's failure to disclose material information. ***HN10***[] The antitrust laws are not designed to redress this type of "informational" injury to a single plaintiff. They are designed to redress the injuries of consumers when an entire market is unlawfully constrained. The "essential connection" between Haines' injury and the aims of the antitrust laws is missing in this case. *A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (2d Cir. 1980)*.

B. **[**16]** Missouri and Florida Antitrust Claims

Haines also asserts ***HN11***[] claims under the antitrust laws of Missouri (where Haines resides) and Florida (where VeriMed is based). These claims necessarily fail because Haines cannot maintain a federal antitrust action. The Missouri ***antitrust law*** expressly directs that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *Mo. Rev. Stat. 416.141*; *Fischer, Etc. v. Forrest T. Jones & Co., 586 S.W.2d 310, 313 (Mo. 1979)*. The Florida statute similarly contains a provision stating that "any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions [of Florida's ***antitrust law***]." *Fla. Stat. 542.20*. Because VeriMed is exempt from antitrust liability under Haines' federal claims, Haines' Florida antitrust claims must similarly fail. *Golta, Inc. v. Greater Orlando Aviation Authority, 761 F. Supp. 778, 782 (M.D. Fla. 1991)*.

C. Tort Claims

The remaining claims in Haines' complaint are state law tort claims for interference with a business expectancy, fraudulent misrepresentation, fraudulent concealment, and appropriation of name. **[**17]** Haines has alleged that she was intentionally misled by VeriMed, and that VeriMed's conduct prevented Haines from seeking work and obtaining contracts she was entitled to pursue. These are sufficient allegations to withstand a motion to dismiss. VeriMed's motion will be denied as to these counts.

Conclusion

For the foregoing reasons, plaintiff's federal and state antitrust claims will be dismissed. All other claims in plaintiff's Second Amended Complaint remain pending. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion [# 20] to file a Second Amended **[*1140]** Complaint and plaintiff's motion [# 22] for leave to file a sur-reply are GRANTED.

IT IS FURTHER ORDERED that defendant's motion [# 7] to dismiss or in the alternative for summary judgment is GRANTED IN PART and DENIED IN PART. Counts 1 through 6 of plaintiff's Second Amended Complaint are DISMISSED with prejudice. Defendant's motion is denied in all other respects. This case will be set for a Rule 16 Conference by a separate order.

IT IS FURTHER ORDERED that plaintiff's motion [# 13] to voluntarily dismiss Count 8 of the First Amended Complaint and plaintiff's motion [# 15] to deny defendant's summary judgment motion as premature are **[**18]** DENIED AS MOOT.

This case will be set for a Rule 16 Scheduling Conference by separate Order.

/s/ Catherine D. Perry

CATHERINE D. PERRY

UNITED STATES DISTRICT JUDGE

Dated this 24th day of March, 2009.

End of Document

Valuepest.com of Charlotte, Inc. v. Bayer Corp.

United States Court of Appeals for the Fourth Circuit

January 29, 2009, Argued; March 24, 2009, Decided

No. 07-1760

Reporter

561 F.3d 282 *; 2009 U.S. App. LEXIS 6111 **; 2009-1 Trade Cas. (CCH) P76,547

VALUEPEST.COM OF CHARLOTTE, INCORPORATED, formerly known as Budget Pest Prevention, Incorporated; NATIONAL PEST CONTROL, INCORPORATED; PEST PROS, INCORPORATED, individually and on behalf of persons similarly situated, Plaintiffs-Appellants, v. BAYER CORPORATION; BAYER CROPSCIENCE LP; BASF CORPORATION, Defendants-Appellees, and ORKIN, INCORPORATED; THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, Defendants.

Subsequent History: Motion denied by, Request denied by *Valuepest.com of Charlotte, Inc. v. Bayer Corp., 2009 U.S. Dist. LEXIS 46926 (W.D.N.C., May 19, 2009)*

US Supreme Court certiorari denied by *ValuePest.com of Charlotte, Inc. v. Bayer Corp., 2009 U.S. LEXIS 5702 (U.S., Oct. 5, 2009)*

Prior History: [1]** Appeal from the United States District Court for the Western District of North Carolina, at Asheville. (1:05-cv-00090-LHT). Lacy H. Thornburg, District Judge.

Valuepest.com of Charlotte, Inc. v. Bayer Corp., 2007 U.S. Dist. LEXIS 24525 (W.D.N.C., Apr. 2, 2007)

Disposition: AFFIRMED.

Core Terms

distributors, manufacturer, genuine, agency relationship, resale price, retailers, products, antitrust, termiticides, lamps, agency agreement, risk of loss, customers, courts, Sherman Act, consignment, selling, prices, Pest, bore, price fixing, consumers, gasoline, cases, defendants', plaintiffs', contracts, pesticide, factors, reasons

LexisNexis® Headnotes

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

***HN1*[]** **Sherman Act, Scope**

Section 1 of the Sherman Act forbids every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*. Although the Sherman Act, by its terms, prohibits every agreement in restraint of trade, the Supreme Court of the United States has repeatedly made clear that Congress intended to outlaw only unreasonable restraints.

Antitrust & Trade Law > Sherman Act > Claims

HN2[] Sherman Act, Claims

Showing a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, requires proof of two elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. The first element requires proof of some kind of agreement, for independent action is not proscribed. Plaintiffs must provide evidence of a relationship between at least two legally distinct persons or entities.

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

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

HN3[] Sherman Act, Scope

Only alleged resale price maintenance that actually involves an agreement between two parties comes within the scope of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Prohibited resale price maintenance is the practice by which a manufacturer and a distributor agree on a minimum price below which the distributor will not sell the manufacturer's products. Unilateral action by a manufacturer does not suffice to implicate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*; a manufacturer can, for example, refuse to sell to retailers who resell its products for less than the manufacturer's preferred price.

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

HN4[] Sherman Act, Scope

A manufacturer has the right to sell its products on whatever terms it wishes; it is only when the manufacturer adopts a combination with others that *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is implicated.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] Sherman Act, Claims

To support liability under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, an agreement must satisfy the second element of *§ 1*: it must be an unreasonable restraint on trade.

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

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

HN6[] Price Fixing & Restraints of Trade, Vertical Restraints

Vertical price restraints are to be judged according to the rule of reason. Under the rule of reason, a factfinder examines all of the circumstances to determine whether a practice unreasonably restrains competition. Factors that should be considered include specific information about the relevant business and the restraint's history, nature, and effect, as well as whether the businesses involved have market power.

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

HN7[] Sherman Act, Scope

Where a manufacturer sells its products through its genuine agents, there is no contract, combination or conspiracy, and thus no basis for antitrust liability. *15 U.S.C.S. § 1*.

Governments > Courts > Judicial Precedent

HN8[] Courts, Judicial Precedent

The Supreme Court of the United states does not normally overturn earlier authority sub silentio.

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

HN9[] Sherman Act, Scope

Employment relations do not violate the antitrust laws. The cases refusing to extend liability under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, to genuine agency relationships are premised on the idea that such relationships should be treated like employment relations.

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

HN10[] Vertical Restraints, Resale Price Maintenance

A careful inquiry into a purported agency agreement is required in order to determine whether it is genuine or a sham. Courts must look to the substance of the parties' dealings rather than merely to form. In this inquiry, courts have considered most important how business risks were allocated between the parties. If a distributor deals with his supplier as an independent businessman who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risks of transactions with the customers it is likely that the distributor is merely an agent for the manufacturer. Looking to the distribution of business risks is sensible. If a manufacturer designates a distributor its agent yet insists that the distributor bear most or all of the traditional burdens of ownership, it is likely that the claimed agency relationship is merely a clever manipulation of words and not a legitimate business arrangement that should be protected by law. On the other hand, when a manufacturer is willing to assume the burdens associated with ownership, it should be entitled to the benefits as well--including the right to sell its property through an agent.

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

HN11[] Vertical Restraints, Resale Price Maintenance

In cases in which courts are concerned that a company attempted to evade the rule against resale price maintenance by labeling its arrangement an agency relationship, courts should ask whether the agency relationship has a function other than to circumvent the rule against price fixing. As with the inquiry into the distribution of risks, considering economic justification helps distinguish between those arrangements that further the goal of ***antitrust law*** and those that subvert it. The purpose of ***antitrust law***, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency. Agency relationships that have strong business justifications are the ones most likely to promote efficiency; those created merely to avoid antitrust scrutiny are the most likely to be inefficient and harmful to consumers.

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

HN12[] **Vertical Restraints, Resale Price Maintenance**

In cases in which courts are concerned that a company attempted to evade the rule against resale price maintenance by labeling its arrangement an agency relationship, courts look to whether the agency agreement is a product of coercion.

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

HN13[] **Vertical Restraints, Resale Price Maintenance**

In cases in which courts are concerned that a company attempted to evade the rule against resale price maintenance by labeling its arrangement an agency relationship, courts should be wary of arrangements where the purported agent possesses all or most of the indicia of entrepreneurship, but that is a far cry from saying that agents cannot have any of those attributes. The agent in a principal-agency relationship need be loyal, but not robotic.

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

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

HN14[] **Sherman Act, Scope**

Manufacturers can use the agency method to distribute their products. Yet a distribution method labeled "agency" but that in substance is simply an agreement between manufacturers and retailers to fix prices can create liability under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Counsel: ARGUED: David Barry, BARRY & ASSOCIATES, San Francisco, California, for Appellants.

Glen David Nager, JONES DAY, Washington, D.C., for Appellees.

ON BRIEF: Michael D. Bland, Benjamin L. Worley, WEAVER, BENNETT & BLAND, P.A., Matthews, North Carolina; Forrest A. Ferrell, Warren A. Hutton, SIGMON, CLARK, MACKIE, HUTTON, HANVEY & FERRELL, P.A., Hickory, North Carolina, for Appellants.

Larry S. McDevitt, VAN WINKLE, BUCK, WALL, STARNES AND DAVIS, P.A., Asheville, North Carolina; Lawrence D. Rosenberg, JONES DAY, Washington, D.C.; George T. Manning, JONES DAY, Atlanta, Georgia, for Appellees

Bayer Corporation and Bayer CropScience LP. Douglas W. Ey, Jr., Catherine E. Thompson, William C. Mayberry, Jason D. Evans, HELMS, MULLIS & WICKER, P.L.L.C., Charlotte, North Carolina, for Appellee BASF Corporation.

Judges: Before WILKINSON, TRAXLER, and SHEDD, Circuit Judges. Judge Wilkinson wrote the opinion, in which Judge Traxler and Judge Shedd joined.

Opinion by: WILKINSON

Opinion

[*284] WILKINSON, Circuit Judge:

In this Sherman Act suit, plaintiffs, who provide pest control **[**2]** services to individual customers, allege that defendants, who manufacture pesticides, illegally conspired with their distributors to set minimum resale prices of certain termiticide products. Specifically, plaintiffs claim that defendant manufacturers Bayer CropScience LP and Bayer Corp. (hereinafter collectively referred to as "Bayer") and BASF Corp. each engaged in the practice known as "resale price maintenance" or "vertical price fixing"--Bayer with its product Premise and BASF with its product Termidor. Defendants counter that *United States v. General Electric Co., 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362 (1926)*, held that a manufacturer may lawfully set minimum prices for its products when there is a genuine principal-agent relationship between the manufacturer and its distributors, and that such relationships existed here. Plaintiffs rejoin that *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*, implicitly overruled *General Electric*, and in the alternative argue that the agency relationships between defendants and their distributors were a sham. Because *Leegin* did not eliminate the agency defense to a claim of resale price maintenance and the agency relationships between defendants **[**3]** and their distributors were genuine, we find no basis for antitrust liability and thus affirm the district court's grant of summary judgment to defendants.

I.

In 1996, Bayer introduced Premise, a termiticide that uses the active ingredient imidacloprid. Premise is a liquid "non-repellent" termiticide. Prior to Premise's arrival to the market, the only liquid termiticides were repellents, which create a chemical barrier around a house or other structure that prevents termites from entering. Non-repellent termiticides are similarly used to create a barrier around a structure, but do not repel termites; instead, the barrier they create is poisonous to termites that pass through it. The poison does not kill the termites immediately. Termites carry it back to their nests and likely spread it to the entire colony. Non-repellents are highly efficacious and have steadily grown in market share since their introduction.

Bayer initially sold its Premise products to the distributors of its other pesticide products. One of those distributors is a company now known as Univar USA, Inc., which is one of the nation's largest distributors of termiticides to pest management professionals ("PMPs"), who provide **[**4]** pest control services to homeowners and other individual customers. Univar and other distributors then resold the products to PMPs such as plaintiffs Valuepest.com of Charlotte, Inc. (formerly Budget Pest Prevention, Inc. and hereinafter "Valuepest"), National Pest Control, Inc., and Pest Pros, **[*285]** Inc. This arrangement continued for several years.

Then, in 2000, Aventis CropScience, L.P. began selling Termidor, a new non-repellent termiticide using the active ingredient fipronil. In early 2000, Aventis began selling Termidor directly to a select group of 200 PMPs, which was expanded to a group of 400 in July. In September of 2000, however, Aventis began distributing Termidor through Univar and other distributors pursuant to non-exclusive agency agreements. The agency agreements provided that Aventis was the seller of Termidor to PMPs, while the distributor-agent merely facilitated that transaction. Further, the agreements specified that Aventis retained title to the Termidor until it was sold to a PMP. The agents received commissions for the sales they facilitated. The agency arrangement allowed Aventis to set the price at which Termidor was sold to PMPs.

According to Bayer, after experiencing **[**5]** the benefits of the Termidor agency arrangement, some distributors became unhappy with the distribution arrangement for Premise. The agency contracts were more profitable to distributors than the previous distribution arrangement, in which the distributors purchased Premise from Bayer and resold it to PMPs. Bayer, dependent on its distributors for marketing, became concerned about losing sales if distributors chose to encourage PMPs to purchase Termidor instead of Premise--which the distributors had every incentive to do, given that they made more money selling Termidor.

Thus, in January of 2001 Bayer began selling Premise through an agency program similar to that used by Aventis. Bayer continued to use its old distributors, but whereas before the distributors had purchased the product from Bayer, the new agency agreements stated that Bayer would retain title to the Premise until it was sold to a PMP. The agreements further specified that Bayer would set the retail prices and that the distributors would receive a fixed commission for each sale.

In October of 2001, Bayer's and Aventis's respective boards of directors announced a plan in which Bayer would purchase all shares of Aventis. **[**6]** An investigation by the Federal Trade Commission ("FTC") ensued. The FTC approved the acquisition, which was completed in June of 2002, but required that Bayer divest assets relating to fipronil, Termidor's active ingredient. BASF acquired the fipronil assets from Bayer on March 21, 2003, and since that date has manufactured and sold Termidor in the United States. BASF became the assignee of the earlier agency contracts for Termidor, and continues to sell Termidor using agency agreements. Bayer ceased selling Premise via agency contracts in 2005.

On April 25, 2005, Valuepest filed a class action lawsuit in the United States District Court for the Western District of North Carolina, alleging vertical price fixing by Bayer, BASF, and other defendants in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. The complaint was amended three times, adding and then dropping a claim, dismissing defendants other than Bayer and BASF, and adding National Pest Control and Pest Pros as plaintiffs and proposed class representatives.

On November 21, 2006, plaintiffs and defendants each filed motions for summary judgment; plaintiffs also filed a petition for class certification. [1] While the district **[*286]** court **[**7]** was considering these motions, the Supreme Court held argument in *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. The district court issued an order stating it would wait to rule on plaintiffs' summary judgment motion until after *Leegin* was decided, but would continue consideration of defendants' motions. Two weeks after the Supreme Court handed down its decision in *Leegin*, the district court granted summary judgment for defendants on the ground that defendants' contracts with their distributors represented genuine agency relationships that did not support liability under *§ 1*. The court also denied plaintiffs' motion for class certification as moot. Plaintiffs now appeal.

II.

Plaintiffs insist in their briefs and at oral argument that after *Leegin* the agency defense under *General Electric* to a claim of resale price maintenance is no longer viable. This argument fails because the two cases dealt with two separate elements of antitrust liability: *General Electric* addressed what types of relationships constitute agreements to set prices for purposes of the Sherman Act, while *Leegin* concerned whether such agreements, once proven, should be considered *per se* unlawful or evaluated for their reasonableness. The structure of *§ 1* of the Sherman Act makes the different focus of the two decisions clear.

HN1[] *Section 1* forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." *15 U.S.C. § 1*. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,'"

---

[1] The parties agreed that the district court would resolve first the vertical price fixing claims with respect to only one of Bayer's and BASF's distributors, Univar, and that the court's resolution of the claims regarding Univar would "set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors." **[**8]** J.A. 430. Accordingly, in our subsequent analysis of the claims we discuss only the facts related to the agreements with Univar.

the Supreme Court has repeatedly made clear that "Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. ***HN2***[] Showing a violation of *§ 1* thus requires proof of two elements: **[**9]** "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)*.

The first element requires proof of some kind of agreement, for "[i]ndependent action is not proscribed." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Plaintiffs must provide "evidence of a relationship between at least two legally distinct persons or entities." *Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991)* (en banc). Thus ***HN3***[] only alleged resale price maintenance that actually involves an agreement between two parties comes within the scope of *§ 1*. Prohibited resale price maintenance is the practice by which a manufacturer and a distributor agree on a minimum price below which the distributor will not sell the manufacturer's products. *See* 8 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* 206-07 (2d ed. 2004). Unilateral action by a manufacturer does not suffice to implicate *§ 1*; a manufacturer can, for example, refuse to sell to retailers who resell its products for less than the manufacturer's preferred price. *See* *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

In **[**10]** *General Electric*, the Court addressed an allegation of resale price maintenance by a lamp manufacturer and its **[*287]** network of distributors. The defendant claimed "that its distributors were *bona fide* agents," while the government contended that "the system of distribution adopted was merely a device to enable the [defendant] to fix the resale prices of lamps in the hands of purchasers," and "that the so-called agents were in fact wholesale and retail merchants." *Gen. Elec., 272 U.S. at 479*. After examining the terms of the contracts between the defendant and its distributors, the Court determined that the distributors were genuinely the manufacturer's agents, and that therefore the scheme did not violate the Sherman Act. *See* *id. at 484-88*.

The Court reasoned that ***HN4***[] a manufacturer has the right to sell its products on whatever terms it wishes; it is only when the manufacturer "adopts a combination with others" that the Sherman Act is implicated. *Id. at 485*. Because the Court found that General Electric was indeed selling its lamps directly to consumers via its agents, rather than selling them to the retailers and requiring the retailers to resell them at a fixed price, the defendant was not **[**11]** guilty of unlawful vertical price fixing. *General Electric* thus concerned what facts sufficed in resale price maintenance claims to prove the first element of § 1 liability-whether a "contract, combination," or "conspiracy" existed. *15 U.S.C. § 1*.

As a general matter, ***HN5***[] to support liability an agreement must also satisfy the second element of *§ 1*: it must be an unreasonable restraint on trade. *See* *Dickson, 309 F.3d at 202*. Under the longstanding precedent of *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, resale price maintenance agreements were considered *per se* unlawful, and plaintiffs who could prove that such an agreement existed did not need to adduce further proof that the agreement unreasonably restrained trade. *Dr. Miles* remained the law for nearly a century until 2007, when it was overruled by the Supreme Court in *Leegin*. In that case, the Court abolished the *per se* rule against resale price maintenance and held that ***HN6***[] "[v]ertical price restraints are to be judged according to the rule of reason." *Leegin, 127 S. Ct. at 2725*.

Under the rule of reason, a factfinder examines all of the circumstances to determine whether a practice unreasonably restrains competition. **[**12]** *Id. at 2712*. Factors that should be considered "include 'specific information about the relevant business' and 'the restraint's history, nature, and effect,'" *id*. (quoting *Khan, 522 U.S. at 10*), as well as "[w]hether the businesses involved have market power," *id*. (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*). The Court rejected the *per se* rule of *Dr. Miles* as excessively formalistic and not sufficiently grounded in the actual economic impact of vertical price restraints. *Id. at 2714*. The Court looked to a growing consensus in economic theory that vertical pricing agreements, while sometimes anti-competitive, can often have procompetitive effects. *Id. at 2714-16* (detailing how resale price maintenance can promote interbrand competition by encouraging retailers to invest in promotional efforts, giving customers a range of options including "low-price, low-service brands" and "high-price, high-service brands," and by facilitating market entry for new products).

Plaintiffs contend that *Leegin* overruled *General Electric* and replaced it with a generalized inquiry into market power and procompetitive benefits even where a genuine agency relationship exists. **[**13]** The foregoing analysis of § 1's structure should **[*288]** make clear why this assertion must be rejected. Plaintiffs' argument conflates the distinction between the two elements required to prove liability under *§ 1*. *General Electric* concerned the first necessary element of § 1 liability--the existence of an agreement. ***HN7***[] Where a manufacturer sells its products through its genuine agents, there is no "contract, combination" or "conspiracy," and thus no basis for antitrust liability. *15 U.S.C. § 1*. At issue in *Leegin* was an entirely different question regarding the second element of § 1 liability that applies when an agreement has been proven: should that agreement be considered *per se* unlawful or should it be analyzed under the rule of reason? The two cases dealt with separate and distinct issues, and thus no part of Leegin's reasoning casts the slightest bit of doubt on the underpinnings of the rule of *General Electric*.

Furthermore, *Leegin* never once mentioned or cited *General Electric*. The Court has made clear that ***HN8***[] it "does not normally overturn . . . earlier authority *sub silentio." Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000)*. It would be especially odd for the Court **[**14]** to have overruled *General Electric* by implication given that the Court spent several pages of its decision in *Leegin* explicitly analyzing whether *stare decisis* required adherence to *Dr. Miles. See Leegin, 127 S. Ct. at 2720-25*. If the Court had thought that overruling *Dr. Miles* would simultaneously overrule another venerable antitrust precedent, it surely would have said so.

Quite simply, *Leegin* has no bearing on the continued vitality of *General Electric*, and plaintiffs' argument to the contrary cannot stand. The two holdings stand independently of each other. *General Electric* holds that a principal-agent relationship is not an agreement for antitrust purposes, while *Leegin* only addressed the circumstances under which an agreement proven to exist is reasonable under *§ 1*. *Leegin* thus is only relevant if plaintiffs can prove the agency relationships claimed by defendants were a sham. We must thus determine whether the agreements between defendants and Univar were genuine agency relationships under *General Electric*.

III.

It is important at the outset to note why principal-agency agreements are important. The owner of a good may generally set the price at which the good is sold. If one of **[**15]** the benefits of manufacturing a good is to set the price by which it is sold, then it is only sensible not to deprive the manufacturer of its right if, for reasons of efficiency, it chooses to use agents that are loyal to it rather than employees. ***HN9***[] "Employment relations do not violate the antitrust laws." *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 806 F.2d 722, 724-25 (7th Cir. 1986)*. The cases refusing to extend § 1 liability to genuine agency relationships are premised on the idea that such relationships "should be treated like employment relations." *Id. at 725*; *see also Day v. Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005)*.

Several factors are important in our evaluation of the relationships at issue here. Once again, *General Electric* is instructive. General Electric sold its lamps to consumers via a consignment arrangement with retail and wholesale merchants. *Gen. Elec., 272 U.S. at 481-83*. Prices were set by GE, and the dealers received fixed commissions. *Id*. GE retained title to the lamps in the possession of the agents until they were sold to actual consumers. *Id. at 482*. The manufacturer also assumed the risk of loss from fire, flood, obsolescence, **[*289]** and price decline, paid **[**16]** the taxes on the lamps, and carried insurance on the stock. *Id. at 483*. The agents were required to pay for all expenses related to storage, transportation, sale, and distribution of the lamps, and were responsible for lamps lost or damaged while in the agent's care. *Id. at 482-83*. The agents collected payments from customers and remitted the proceeds to the manufacturer, less their commission. *Id. at 482*.

After reviewing the details of the arrangement, the Court found "nothing in the form of the contracts and the practice under them" that made the distributors "anything more than genuine agents of the company." *Id. at 484*. The Court stressed several facts, including that the agents were not required to pay for the lamps until they had been sold to customers and that the title of the lamps passed directly from the manufacturer to the consumer at the time of sale. *Id*. The Court did not find the agents' obligations to pay for lost or damaged lamps or to pay for storage, transportation, sale, and distribution expenses inconsistent with a genuine agency relationship. *Id*. Nor did the "circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior

[17]** arrangement had bought the lamps, and sold them as their owners" preclude GE from changing the relationship to one of genuine agency. *Id. at 484-85*.

The Court's other major case on the agency defense to a claim of resale price maintenance is *Simpson v. Union Oil Co. of California, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1963)*. At issue in that case was an oil company's scheme to set the retail price of its gasoline sold to customers by gas stations. Under the purported consignment agreement, retailers received commissions on gasoline sold, and the title to the consigned gasoline passed directly from the oil company to the consumer at the time of sale. *Id. at 15*. The oil company paid property taxes on the gasoline held by the retailers, but the retailers were required to carry personal liability and property damage insurance and were responsible for virtually all losses of the gasoline in their possession. *Id*.

The Court held that the arrangement constituted unlawful resale price maintenance. *Id. at 24*. It observed that the dealers were "independent businessmen" possessing "all or most of the indicia of entrepreneurs, except for price fixing." *Id. at 20*. The Court acknowledged that consignment is a legitimate method **[**18]** for an owner to sell his property. *Id. at 21*. But it looked beyond the agreements' form to consider their substance, and concluded they were precisely the kind of price-fixing arrangement that *§ 1* was meant to prevent. *Id. at 24*. "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship," the Court reasoned. *Id*.

The Court conceded that the agreement upheld in *General Electric* "somewhat parallels the one in the instant case." *Id. at 22-23*. The Court distinguished *General Electric* on the ground that that case concerned patented articles, and found its holding "not apposite to the special facts here." *Id. at 23*. In dissent, Justice Stewart called the Court's ground for distinguishing *General Electric* "specious," for the *General Electric* Court "gave no intimation whatsoever that its conclusion would have differed in any respect if the consigned article had been unpatented." *Id. at 27-28* (Stewart, J., dissenting).

[*290] Some subsequent commentators have agreed with Justice Stewart that the holdings in *General Electric* and *Simpson* are irreconcilable. *See, e.g.*, Terry **[**19]** Calvani & Andrew G. Berg, *Resale Price Maintenance after Monsanto: A Doctrine Still at War with Itself*, *1984 Duke L.J. 1163, 1178*. However, "courts generally have not interpreted *Simpson* as a blanket condemnation of all consignment agreements in which the manufacturer/supplier sets retail prices." *Hardwick v. Nu-Way Oil Co., 589 F.2d 806, 809 (5th Cir. 1979)*. Nor should they have. It cannot "seriously be argued that the ancient and ubiquitous practice of principals' telling their agents what price to charge the consumer is just some massive evasion of the rule against price fixing." *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986)*. Otherwise, perverse results would obtain--such as a homeowner being guilty of violating *§ 1* "when he tells his broker at what price to sell his home." *Id. at 1436*.

Instead, courts have read *Simpson* to require ***HN10***[] a careful inquiry into a purported agency agreement, in order to determine whether it is genuine or a sham. Courts must look "to the substance of the parties' dealings rather than merely to form." *Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266, 269 (4th Cir. 1979)*. In this inquiry, courts have considered most important how business **[**20]** risks were allocated between the parties. "If a distributor deals with his supplier as an 'independent businessman' who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risks of transactions with the customers . . . it is likely that the distributor is merely an agent for the manufacturer." *Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1223 (8th Cir. 1987)* (citations omitted); *see also* *Farm Stores, Inc. v. Texaco, 763 F.2d 1335, 1344 (11th Cir. 1985)*; *Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339, 342-43 (9th Cir. 1983)*.

Looking to the distribution of business risks is sensible. If a manufacturer designates a distributor its agent yet insists that the distributor bear most or all of the traditional burdens of ownership, it is likely that the claimed agency relationship is merely a "clever manipulation of words," *Simpson, 377 U.S. at 22*, and not a legitimate business arrangement that should be protected by law. On the other hand, when a manufacturer is willing to assume the burdens associated **[**21]** with ownership, it should be entitled to the benefits as well--including the right to sell its property through an agent. *See* id. at 21 ("[A]n owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. There is nothing illegal about that arrangement.").

Courts also consider the economic justification offered for the agency agreement. The Seventh Circuit, noting the *Simpson* Court's concern that the oil company had merely evaded the rule against resale price maintenance by labeling its arrangement an agency relationship, held that ***HN11***[] in such cases courts should ask "whether the agency relationship has a function other than to circumvent the rule against price fixing." Morrison, 797 F.2d at 1436. As with the inquiry into the distribution of risks, considering economic justification helps distinguish between those arrangements that further the goal of ***antitrust law*** and those that subvert it. "The purpose of ***antitrust law***, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." **[*291]** Id. at 1437. Agency relationships that have strong business justifications are the **[**22]** ones most likely to promote efficiency; those created merely to avoid antitrust scrutiny are the most likely to be inefficient and harmful to consumers.

Finally, ***HN12***[] courts look to whether the agency agreement is a product of coercion. *See, e.g.,* Day, 400 F.3d at 1278. The Court in *Simpson* was concerned that the defendant oil company exercised coercive power over the gasoline retailers, for the retailers depended entirely on the contracts with the oil company for their business. *See* Simpson, 377 U.S. at 21. With these factors in mind, we now turn to an examination of the "substance" of the relationships between defendants and Univar. Marty's Floor Covering Co., 604 F.2d at 269.

IV.

A.

In examining Bayer's and BASF's contracts with Univar, the threshold question is which party bore the risk of loss. We find that this factor weighs in favor of a genuine agency relationship. First, as a formal matter, both Bayer and BASF retained title on their respective products while in Univar's possession, and the agreements specified that defendants, not Univar, bore the risk of loss on the termiticides until they were delivered into the hands of PMPs. While plaintiffs not surprisingly seek to dismiss the **[**23]** retention of title as a mere formality, such traditional incidents of property law, embodied here in the agency agreements, have real significance. And beyond the formal labels in the agreements, defendants also satisfied the standard in substance. They retained many of the burdens of ownership, indicating the agency relationships were authentic. The evidence strongly supports the conclusion that the risk of loss was borne by defendants.

A number of facts support the conclusion that defendants bore the risk of loss. The agreements required that Univar store defendants' termiticides separate from Univar's own property, and label the products as belonging to defendants. The agreements squarely placed the risk of economic loss due to nonpaying PMPs on defendants' shoulders. Both defendants' agreements set limits on the amounts of credit Univar could extend to purchasers, and required defendants, not Univar, to pursue delinquent purchasers. Under the contracts, defendants retained the right to audit Univar for compliance with the agency agreements; BASF, at least, audited Univar annually. Bayer's contract with Univar explicitly stated that Bayer would pay all property taxes on the Premise **[**24]** owned by Bayer.

Beyond the formal terms of the agreements, Bayer and BASF bore the risk of loss in practice as well. As the district court concluded, "testimony from representatives of Bayer, BASF, and Univar . . . confirm that Bayer and BASF actually retain both title and the risk of loss on Premise or Termidor, respectively" until sold to PMPs. J.A. 449. When Termidor in Univar's possession was stolen on two occasions, BASF, not Univar, wrote off the losses. When Univar suffered a credit loss on a sale of Premise, Bayer reimbursed Univar. Invoices sent to PMPs buying Premise or Termidor stated that the products were owned by Bayer or BASF, not by Univar.

Plaintiffs' arguments that defendants did not actually bear the risk of loss are unavailing. They contend that the fact Univar was required to carry insurance against its own negligence is evidence that Univar bore the risk of physical loss, but it makes perfect sense for a principal to require **[*292]** a genuine agent to be responsible for the agent's own carelessness in order to discourage it. *See* Day, 400 F.3d at 1277. Plaintiffs point out that until recently both defendants failed to pay property taxes on their products held by Univar in **[**25]** a number of states. But Univar never paid property taxes on the termiticides either, and Bayer's agreement, at least, assigned this responsibility to Bayer, not Univar. Furthermore, BASF paid inventory taxes on its Termidor.

Plaintiffs claim that the fact that defendants' insurance deductibles for their termiticides are greater than the amount of product stored at any one Univar location means that Univar bore the risk of loss. This conclusion does not follow; simply because defendants have made the business decision not to insure against the loss of their products from Univar's locations does not mean that they do not bear the risk of that loss. Plaintiffs point out that Univar designed its accounting system so that Univar took title to the pesticides at the moment of sale. However, this bookkeeping method, utilized by Univar in order to minimize Univar's tax liability, was clearly inconsistent with the clear terms of the agency agreements, and, so far as the record shows, was not even known to defendants.

Plaintiffs argue that Univar bore the risks associated with PMPs paying Univar by credit card. To alight on such an accepted method of payment as material is grasping at straws. Moreover, **[**26]** according to the agreements Univar was not required to accept credit cards in the first place. That Univar chose to attract customers in this manner and increase its commission income under the agency arrangement does not prove that the relationship was anything other than genuine. *See* *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751, 753 (7th Cir. 1989)*. Plaintiffs are apparently under the misapprehension that an agency relationship must be devoid of any indication of entrepreneurship on the part of the agents involved. This view simply overlooks the point that every business relationship, however characterized, will have some elements of enterprise. *Simpson* directed that ***HN13***[] courts should be wary of arrangements where the purported agent possesses "all or most of the indicia of entrepreneur[ship]," *377 U.S. at 20*, but that is a far cry from saying that agents cannot have *any* of those attributes. The agent in a principal-agency relationship need be loyal, but not robotic.

Thus, we find that defendants, not Univar, bore the risk of loss of the termiticides--a factor which strongly supports a determination that Univar was a genuine agent of defendants. *See* *Ryko Mfg. Co., 823 F.2d at 1223*. **[**27]** The other two significant factors also weigh in favor of a genuine agency relationship. We review each in turn.

First, the record indicates that defendants used the agency sales method for legitimate business reasons. When Aventis first launched Termidor, it chose to use the agency method in order to retain more control over how Termidor was sold to PMPs than would have been possible under a more traditional distribution arrangement. The company wanted Termidor to be seen as a premium product of high efficacy, and thus wanted to retain control over how the product was presented to PMPs. Further, because Termidor was an entirely new termiticide, the company wanted through its agents to restrict sales to PMPs who had been trained how to use the product appropriately. Releasing a new product in a highly competitive marketplace is a difficult endeavor. In such a venture, the agency method can be useful because it enables a manufacturer **[*293]** to retain more control over how its product is marketed than it would if it merely sold the products to distributors. True resale price maintenance can usefully promote interbrand competition. *See* *Leegin, 127 S. Ct. at 2714-16*. Agency arrangements may likewise **[**28]** be suited to do so, given the greater control they give manufacturers over product presentation. The decision by Aventis, and later BASF, to use the agency method seems justified by sound business reasons.

Bayer, for its part, elected to switch to the agency sales method not out of a desire to fix prices, but because distributors preferred the agency method and the commissions they received from it to the traditional distribution method Bayer had been using. Bayer was forced to switch to the agency method in order to stay competitive. Certainly a desire to emulate a successful business model cannot be said to be an illegitimate business motive. Both defendants had legitimate business reasons for using the agency method.

Second, there is no evidence whatsoever that the agency agreements were the product of coercion. Unlike the gasoline retailers in *Simpson*, Univar was not dependent on the agency contracts for its livelihood; indeed, they constituted no more than a small fraction of its business. The record indicates that far from being compelled to adopt the agency sales method, distributors like Univar actually preferred it.

Thus, the factors courts consider when evaluating whether an **[**29]** agreement creates a genuine agency relationship militate in favor of finding that such a relationship existed here.

B.

Notwithstanding the several factors that weigh in favor of a genuine agency relationship, plaintiffs make several additional arguments against that conclusion. First, plaintiffs argue that distributors like Univar could not be agents while serving Bayer and BASF simultaneously. This argument is premised on a misunderstanding of the agency method, in which nonexclusive relationships are common. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989)*, the Seventh Circuit held that a travel service operator was an airline's genuine agent notwithstanding the fact that the relationship was nonexclusive, for "this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting." *Id. at 752-53*. Plaintiffs cite no case for the proposition that only exclusive agency relationships are genuine for antitrust purposes.

Second, plaintiffs make a number of related arguments **[**30]** about actions taken by Univar that plaintiffs suggest should instead have been taken by defendants. For example, plaintiffs state that Univar, not defendants, took out pesticide licenses. They point out that Univar hired and fired employees and paid for workers' compensation insurance. Plaintiffs emphasize that Univar, not defendants, sent bills to PMPs. Plaintiffs also note that Univar remitted payment to defendants less its commission rather than being paid by defendants for services rendered. They draw attention to the fact that Univar, not defendants, dealt with expenses relating to its warehouses and paid for warehouse insurance.

These arguments ignore the reasons why a manufacturer would use sales agents in the first place. It is hardly surprising that many effective agents have experienced employees and tested business **[*294]** techniques of their own. Univar, as a distributor that already sold many companies' pesticides, had low overhead costs and was in a better position to make staffing decisions, deal with licensing requirements, bill customers, and maintain its warehouses than were defendants. It was reasonable for defendants to leave those matters to the party best positioned to **[**31]** deal with them. Defendants chose to use Univar as an agent precisely because, with its robust pesticide distribution business, it was well-equipped to handle retail transactions more efficiently than could Bayer or BASF themselves. If the rule were otherwise--that is, if a manufacturer could not leave to an agent the responsibility for dealing with hiring employees and so on--there would be little reason for a manufacturer to use agents rather than employees. But "[e]fficiency would not be promoted by a rule that forbade principals to tell their agents at what price to sell the principal's product unless the agent was an employee." *Morrison, 797 F.2d at 1437*.

In sum, we find unconvincing plaintiffs' various arguments that the agency agreements at issue in this case were shams. Because the agency relationships between defendants and Univar were genuine, neither defendant violated *§ 1*. [2]

V.

Section 1 of the Sherman Act and the Supreme Court's cases interpreting it attempt to strike a balance. **[**32]** The law must prevent agreements that undermine the principle of competition necessary to make a free market function. Yet if law sweepingly declares off-limits business methods that companies might opt to use for legitimate commercial reasons, consumers--the intended beneficiaries of ***antitrust law***--are worse off. The Court's cases on resale price maintenance have walked this sensible path. Under *General Electric*, ***HN14***[] manufacturers can use the agency method to distribute their products. Yet under *Simpson*, a distribution method labeled "agency" but that in substance is simply an agreement between manufacturers and retailers to fix prices can create liability under *§ 1*. Here we are persuaded that the relationships at issue stand comfortably on the *General Electric* side of the line. Because the agency contracts are legitimate business arrangements, and not unreasonable restraints on trade creating potential § 1 liability, the judgment is affirmed.

AFFIRMED

---

[2] Because we conclude that there was no substantive § 1 violation, we need not reach defendants' argument that plaintiffs failed to prove injury as required by *§ 4* of the Clayton Act, *15 U.S.C. § 15*.

Habitat, Ltd. v. Art of the Muse, Inc.

United States District Court for the Eastern District of New York

March 25, 2009, Decided; March 25, 2009, Filed

07-CV-2883 (DRH)(ARL)

Reporter

2009 U.S. Dist. LEXIS 25096 *; 2009-1 Trade Cas. (CCH) P76,573; 2009 WL 803380

HABITAT, LTD., Plaintiff, v. THE ART OF THE MUSE, INC. d/b/a OLY STUDIO and MECOX GARDENS & POTTERY, INC., Defendants.

Core Terms

furniture, products, distributor, manufacturer, cause of action, allegations, retail, consumers, terminated, antique, monopoly, adverse effect, distributorship, Defendants', faux, motion to dismiss, competitors, Consulting, phones, antitrust, state law claim, anti trust law, leave to amend, Sherman Act, monopolistic, harmed, output, prices, relevant market, cellular phone

Counsel: **[*1]** For Plaintiff: Stuart A. Jackson, Esq., S.A. Jackson Law Firm, P.C., New York, New York.

For The Art of the Muse, Inc. d/b/a/ Oly Studio, Defendant: Jolee Land, Esq., Phelps Dunbar LLP, Tampa, FL; Sarah E. Zgliniec, Esq., Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Mecox Gardens & Pottery, Inc., Defendant: Tracy Victoria Schaffer, Esq., Jones Day, New York, NY.

Judges: Denis R. Hurley, United States District Judge.

Opinion by: Denis R. Hurley

Opinion

MEMORANDUM AND ORDER

HURLEY, Senior District Judge:

Plaintiff Habitat, Ltd. ("Plaintiff") brings this antitrust suit against defendants The Art of the Muse, Inc. d/b/a Oly Studio ("Oly") and Mecox Gardens & Pottery, Inc. ("Mecox") (collectively, "Defendants"). The Complaint asserts seven Causes of Action. The First, Second and Fourth Causes of Action are asserted against both Defendants; the Third and Seventh Causes of Action are asserted against Mecox only, and the Fifth and Sixth Causes of Action are asserted against Oly only.

Oly moves to dismiss the First, Second, Fourth and Fifth Causes of Action for failure to state a claim pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. Oly also moves for a more definitive statement pursuant to *Rule 12(e)* **[*2]** as to the Fifth Cause of Action, and to strike Plaintiff's demand for exemplary damages and attorneys' fees under the Fifth and Sixth Causes of Action. Mecox moves to dismiss the First, Second, Third, Fourth and Seventh Causes of Action pursuant to *Rule 12(b)(6)*. For the reasons that follow, Defendants' motions to dismiss the First, Second and Third Causes of Action -- the federal antitrust claims -- are granted. The Court declines to exercise supplemental jurisdiction over the remaining state law claims.

BACKGROUND

In crafting the following summary of facts, the Court accepts all of the factual allegations in the Complaint as true.

Plaintiff is a domestic retailer of antique and faux antique furniture in Suffolk County, New York. Plaintiff has operated an antique furniture retail store in Water Mill, New York for more than ten years (the "Original Store"). Plaintiff entered the faux antique furniture retail market three years ago. Plaintiff recently opened up a second retail store in Suffolk County in Bridgehampton (the "New Store").

Oly is a manufacturer and distributor of faux antique furniture. For more than three years, Plaintiff and other faux antique furniture dealers in Suffolk **[*3]** County have purchased Oly's products. In fact, Plaintiff has dealt "almost exclusively with Oly with regard to the purchase of faux antique furniture for resale to consumers in Suffolk County, NY." (Compl. P 13.)

Plaintiff first began selling Oly furniture in 2004. According to Plaintiff, Oly's faux antique furniture is one of a kind:

> Oly is an industry leader for the manufacture and distribution of faux antiques furniture because of the superior design, reasonable price and quality of its Products. Oly's Products are highly-sought-after pieces in the current market. Oly's Products are a fresh blend of clean lines and antique motifs synchronizing traditional with contemporary. Oly's Products are hand crated, unique and are considered a 'must-have' for any serious retailer or decorator of faux antique furniture in the current market; in fact defendant's Products make a market in and of themselves. No other company rivals the quality, pricing or the extent of Oly's Products. . . .

(*Id*. P 15.)

In 2004, Plaintiff ordered $ 21,744.54 worth of merchandise from Oly. In 2005, Plaintiff ordered $ 18,613.12 worth of merchandise from Oly. "Due to the popularity of Oly's Products at its Original Store **[*4]** . . . and relying to its detriment on the promise by Oly to [Plaintiff] that Oly would supply it with Oly's Products, [Plaintiff] in 2006 prepared to open [the] New Store exclusively for Oly's products . . . ." (*Id*. P 18.) Plaintiff signed a six-year lease at the total cost of $ 400,000 and renovated the space for an additional $ 250,000 plus insurance costs to operate the New Store for the exclusive sale of Oly's products.

In January 2007, Plaintiff placed an order for $ 27,670.91 of Oly's products for the New Store. On January 28, 2007, Plaintiff's President met with Oly's Director and informed him that Plaintiff was opening a New Store for Oly's products and would soon be ordering an additional $ 100,000 worth of Oly's products to stock the New Store. Oly's Director responded that "he would have to secure permission from third-party Mecox in order to continue to sell Oly's Products to [Plaintiff]." (*Id*. P 21.) Mecox is large retailer of home furnishings, including Oly furniture, operating at least seven retail stores nationwide, two of which are located in Suffolk County. Mecox is alleged to be Oly's largest or one of Oly's largest accounts and purchases a significant amount of Oly **[*5]** furniture for resale to consumers in Suffolk County.

On March 9, 2007, after consulting with Mecox and before Plaintiff could place any additional orders with Oly, Oly sent a letter to Plaintiff terminating their business relationship effective that date. As a result of the termination, Plaintiff was forced to exit the business of selling faux antique furniture at its retail stores and was caused a great loss of current and future revenue.

Plaintiff alleges that the intent of Defendants' actions in "boycotting" Plaintiff was to maintain their monopolistic power over the Suffolk County market for faux antique furniture, or alternatively, Oly furniture; to use their enormous market power to prevent competition in Suffolk County; to drive Plaintiff out of the faux antique furniture business; and to discourage other retailers in the faux antique furniture business from expanding. Plaintiff further alleges that Defendants' actions have harmed consumers in Suffolk County "in that consumers have less market options for the purchase of Oly's Products because [P]laintiff, a retail competitor of Mecox has been forced out of the business of selling Oly's Products in Suffolk County, NY and other **[*6]** small competitors in that locality may not seek to purchase larger orders of Oly products for resale for fear of having their purchase agreements similarly terminated." (*Id*. P 31.)

The Complaint asserts seven causes of action, to wit: (1) Defendants committed a per se violation of Section 1 of the Sherman Act (*15 U.S.C. § 1*); (2) Defendants violated Section 1 of the Sherman Act under the rule of reason; (3) Mecox violated *Section 2* of the Sherman Act (*15 U.S.C. § 2*); (4) Defendants violated the Donnelly Act (*N.Y. Gen. Bus. L. § 340*); (5) breach of contract against Oly; (6) detrimental reliance against Oly; and (7) tortious interference with commercial relations against Mecox. Both Oly and Mecox have filed motions to dismiss. For the reasons stated below, Defendants' motions are granted.

DISCUSSION

I. *Motion to Dismiss: Legal Standards*

A complaint is subject to dismissal under *Rule 12(b)(6)* where it "fail[s] to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The test is whether the plaintiff is entitled to offer evidence to support her claim, not whether he is ultimately likely to prevail. *Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998)*. A court must liberally **[*7]** construe the claims and "accept[] all factual allegations in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *ATSI Commcn's, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*.

Rule 8(a) provides that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The Supreme Court recently addressed the pleading standard applicable in evaluating a motion to dismiss under *Rule 12(b)(6)*. In *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Court disavowed the well-known statement in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley, 355 U.S. at 45-46*. Instead, to survive a motion to dismiss under *Twombly*, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *127 S. Ct. at 1974*.

> While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to **[*8]** provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Id. at 1964-65 (citations and internal quotation marks omitted).

The Second Circuit has stated that *Twombly* does not require a universally heightened standard of fact pleading, but "instead requir[es] a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*. In other words, *Twombly* "'require[s] enough facts to 'nudge [plaintiffs'] claims across the line from conceivable to *plausible*.'" *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)* (quoting *Twombly, 127 S. Ct. at 1974*).

II. *Plaintiff's Claims Under Section 1 of the Sherman Act (the First and Second Causes of Action) are Dismissed*

A. The Requirement that Plaintiff Plead an Adverse Effect [*9] on Competition in the Relevant Market

Section 1 of the Sherman act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Thus, to state a Section 1 claim, a plaintiff must establish: "[1] a combination or some form of concerted action between at least two legally distinct economic entities that [2] constituted an unreasonable restraint of trade either per se or under the rule of reason." *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002)* (citations and internal quotation marks omitted).

Here, Plaintiff's First Cause of Action alleges that Defendants' restraint of trade constituted a per se violation under Section 1. In response to Defendants' motions to dismiss, Plaintiffs have withdrawn this claim. Accordingly, Plaintiff's First Cause of Action is hereby dismissed.

Plaintiff's Second Cause of Action alleges that Oly's agreement with Mecox to restrain the trade of Oly furniture in Suffolk County constituted an unreasonable restraint of trade in violation of Section 1 under the rule of reason. The rule of reason analysis "seeks to determine **[*10]** if the alleged restraint is unreasonable because its 'anticompetitive effects outweigh its procompetitive effects.'" *E & L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 29 (2d Cir. 2006)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. Under the rule of reason, plaintiff bears an initial burden to show that "defendants' challenged behavior 'had an *actual* adverse effect on competition as a whole in the relevant market.'" *Geneva Pharms. Tech. v. Barr Labs. Inc., 386 F.3d 485, 506-07 (2d Cir. 2004)* (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993))*; *see also* *E & L Consulting, 472 F.3d at 28* (stating that an injury to competition is an element of a prima facie Section 1 claim). "Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice." *Geneva Pharms. Tech., 386 F.3d at 507*. It is axiomatic that "'[t]he antitrust laws . . . were enacted for the protection of *competition*, not *competitors*.'" *Paycom Billing Servs. v. Mastercard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

If **[*11]** plaintiff satisfies its initial burden and demonstrates that the defendants' actions had an actual adverse effect on competition as a whole in the relevant market, "the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Geneva Pharms. Tech., 386 F.3d at 507*. "Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." *Id*. "Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement-both pro and con-to determine if the effects of the challenged restraint tend to promote or destroy competition." *Id*.

B. Plaintiff Fails to Allege an Adverse Effect on Competition in the Relevant Market

Here, the Complaint alleges a vertical restraint between a manufacturer (Oly) and a distributor (Mecox). [1] Essentially Plaintiff alleges that Oly terminated its distribution agreement with Plaintiff at the behest of Mecox, a national distributor of Oly furniture. Defendants argue that Plaintiff's Section 1 claim fails as a matter of law because the only harm alleged **[*12]** in the Complaint was harm to Plaintiff and not to competition in the relevant market. For the reasons that follow, the Court agrees. The Court begins its analysis with a discussion of relevant Second Circuit case law.

1. ***Second Circuit Case Law on Harm to Competition***

A plaintiff can allege an adverse effect on competition in one of two ways. First, it can plead an actual adverse effect on competition by alleging "reduced output, increased prices and decreased quality." *Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001)*. Alternatively, it can plead adverse effect indirectly by alleging that defendants "had sufficient market power to cause an adverse effect on competition.'" *Id. at 265* (quoting *Top Mkts, Inc. v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998))*. "Market power is defined as 'the

---

[1] "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

ability of a single seller to raise price[s] and restrict output.'" *Id*. **[*13]** (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*.

In *Elecs. Commc'ns. Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240 (2d Cir. 1997)*, the plaintiff alleged that it entered into an agreement with defendant Toshiba America Consumer Products, Inc. ("Toshiba") whereby plaintiff became a distributor of Toshiba-brand cellular phones in the United States. Prior to this alleged agreement, these cellular phones were sold in the United States exclusively by defendant Audiovox Corp. ("Audiovox") under the Audiovox name. *Id. at 241*.

Plaintiff further alleged that when Audiovox learned of Toshiba's plan to distribute phones under the Toshiba brand name through other distributors, Audiovox threatened to use economic and political pressure to deter Toshiba. Despite repeated reassurances to plaintiff that the relationship would continue, Toshiba thereafter terminated its agreement with plaintiff. *Id. at 242*.

Finding that plaintiff failed to allege how the agreement between Toshiba and Audiovox reduced competition in the market for cellular phones, and noting that the Toshiba phones were still on the market, albeit under the Audiovox brand name, the district court **[*14]** granted defendants' *Rule 12(b)(6)* motion and dismissed the case. *Id*. On appeal, the Second Circuit affirmed, finding as follows:

> [Plaintiff's] allegations, if true, establish nothing more than that Audiovox sought to preserve its role as an exclusive distributor of Toshiba phones, a role it played for many years before Toshiba tried to distribute Toshiba-brand phones through [plaintiff]. This is a so-called vertical restraint. . . .
> To state a claim under section 1, it is not enough merely to allege that, as a result of the agreement between Toshiba and Audiovox, Toshiba-brand cellular phones no longer compete against Audiovox-brand cellular phones. The fact remains that the dispute involves one manufacturer's product, Toshiba cellular phones. Although two brand names are involved, this is essentially a dispute about the way one product is distributed, a question of intrabrand competition. . . . [A]n actual adverse effect on interbrand competition is not established merely because an agreement removes from the marketplace one brand name under which a manufacturer's products are sold.
>
> Nor is it a violation of the antitrust laws, without a showing of an actual adverse effect on competition **[*15]** market-wide, for a manufacturer to terminate a distributor like [plaintiff] and to appoint an exclusive distributor. . . . *see also* *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975)* ("Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.") . . . . [T]he allegations in [plaintiff's] complaint establish nothing more than a run-of-themill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier. Such exclusive distributorship arrangements are presumptively legal.
>
> The allegations in [plaintiff's] complaint, if true, do not establish that the agreement between Audiovox and Toshiba adversely affects market-wide competition. [Plaintiff] rests its entire case on the fact that the Toshiba name will no longer be available in the cellular telephone market, calling this a reduction **[*16]** in output of Toshiba phones that benefits only Audiovox. Toshiba phones, however, will still be available, presumably in whatever number is demanded by consumers. The complaint does not allege how Audiovox could sensibly reduce its sales of the phones and increase its prices. The allegations show, at most, a slight reduction in competition between Audiovox and Toshiba regarding the distribution of Toshiba-manufactured phones. It is settled, however, that to sustain a section 1 claim, a plaintiff must . . . show more than just an adverse effect on competition among different sellers of the same product. . . .
> Although competition from Toshiba could deter Audiovox from attempting to increase its margin on Toshiba phones by increasing price, the Toshiba-[plaintiff] endeavor was very limited in scope and would have had only a limited effect on Audiovox sales. In any event, ECC has not alleged how this slight reduction in intrabrand competition affects the market as a whole, given the continuing presence of Toshiba phones in the market-in

> whatever number consumers demand-and the lack of an allegedly anticompetitive agreement between Toshiba or Audiovox and their competitors.
>
> . . . .
>
> While **[*17]** Audiovox very well may have brought pressure to bear on Toshiba to preserve its role as an exclusive distributor of Toshiba products, that is not illegal without more. In the absence of pricefixing, agreements to terminate distributors, even at the behest of competing distributors who seek to maintain exclusive distribution rights, have repeatedly been sanctioned by the courts. . . . [citing cases] Manufacturers must enjoy some freedom to determine how to distribute their products without subjecting themselves to attack under the antitrust laws by disappointed distributors, absent activity that is manifestly anticompetitive. The fact that a distributor applies pressure to preserve its exclusive role does not alone raise special antitrust concerns.
>
> As we reasoned in *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)*, "[i]nsisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." While [plaintiff's] allegations suggest that it was harmed by Toshiba's decision to terminate it as a distributor, they **[*18]** do not show that the agreement threatens to harm overall competition in the cellular telephone market.

Id. at 243-246 (citations and internal quotation marks omitted).

Similarly, in *E & L Consulting*, the plaintiff was the distributor of green hem-fir lumber in New York, New Jersey, and Pennsylvania for defendant Doman Industries Limited ("Doman") and a Doman subsidiary. [2] Doman and its subsidiary supplied 95 percent of the green hem-fir lumber sold in New York, New Jersey, Pennsylvania, as well as other locations. *472 F.3d at 26*.

Doman thereafter terminated its relationship with plaintiff and notified its customers that Sherwood Lumber Corp. ("Sherwood") had become its exclusive distributor in the areas previously served by plaintiff. *Id. at 27*. Alleging that there were no commercially feasible alternative sources of green hem-fir lumber, plaintiff and the companies it did business under ("plaintiffs") brought an antitrust suit against Doman and Sherwood, which moved to dismiss the complaint under *Rule 12(b)(6)*. *Id*. The district court granted defendants' motion, **[*19]** finding that the complaint failed to adequately allege a relevant product market or injury cognizable under the antitrust laws. *Id. at 28*. The Second Circuit affirmed.

Analyzing plaintiffs' Section 1 claims under the rule of reason, the Circuit found that:

> [Plaintiffs] allege . . . the exclusive distributorship with Sherwood further harms competition. However, [plaintiffs'] hypothesizing of an unreasonable effect on competition fails because such a vertical arrangement provides no monopolistic benefit to Doman that it does not already enjoy and would not continue to enjoy if the exclusive distributorship were enjoined. To put it another way, had Doman established its own in-house distribution system with the same monopoly that Sherwood is alleged to possess, there would have been no increase in the restriction of output of green hem-fir lumber and in the resultant misallocation of resources.
>
> Indeed, an exclusive distributorship would be counterproductive so far as any monopolization goal of Doman is concerned. A monopolist manufacturer of a product restricts output of the product in order to maximize its profits. The power to restrict output to maximize profit is complete in the manufacturing **[*20]** monopoly, and there is no additional monopoly profit to be made by creating a monopoly in the retail distribution of the product. On the contrary, a firm with a monopoly at the retail distribution level will further reduce output to maximize its profits, thereby reducing the sales and profit of the monopoly manufacturer. Like any seller of a product, a monopolist would prefer multiple competing buyers unless an exclusive distributorship arrangement provides other benefits in the way of, for example, product promotion or distribution. In fact, we have explicitly noted that a vertically structured monopoly can take only one monopoly profit.

---

[2] Green hem-fir lumber is an inexpensive, durable wood that is often used for homebuilding. *See E & L Consulting, 472 F.3d at 26*.

> The only detriment to competition alleged to result from the Doman-Sherwood agreement is that "end-users of lumber and finished wood products have fewer options to purchase their required supplies and are now required to pay artificially inflated prices." This, by itself, is not a sufficient allegation of harm to competition caused by the exclusive distributorship, again, because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor.
>
> Thus, we have noted that "exclusive distributorship **[*21]** arrangements are presumptively legal." *Elecs. Commc'ns. Corp., 129 F.3d at 245*. . . .

Id. at 29-30 (internal citations and quotation marks omitted) [3]; *see also* *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc., 812 F. Supp. 387, 392 (S.D.N.Y. 1993)* ("An exclusive distributorship agreement between a manufacturer and a distributor causing harm to another distributor is not, standing alone, sufficient to show antitrust injury. . . . The intent to harm a particular competitor is not actionable, even if a distributor-competitor is put out of business.").

2. *Application [*22] to Plaintiff's Allegations*

This case is directly analogous to *Elecs. Commc'ns. Corp*. and *E & L Consulting*. Similar to those cases, Plaintiff alleges that Oly and Mecox entered into an agreement to black list Plaintiff from selling Oly furniture. Plaintiff then attempts to convert its individual injury into an injury to consumers, alleging that:

> Defendants' actions have harmed consumers in Suffolk County, NY in that consumers have less market options for the purchase of Oly's Products because plaintiff, a retail competitor of Mecox has been forced out of the business of selling Oly's Products in Suffolk County, NY and other small competitors in that locality may not seek to purchase larger orders of Oly products for resale for fear of having their purchase agreements similarly terminated. . . .

(Compl. P 31.) Even if the Court were to accept that the sale of Oly furniture in Suffolk County created a market in and of itself [4] the Complaint fails to adequately allege harm to competition in this market. Plaintiff's claim was squarely rejected in *E & L Consulting* where the Circuit found that just because "end-users" had fewer purchase options and were required to pay artificially inflated **[*23]** prices, a harm to competition was not alleged: "[T]he alleged single source and price increase, even if monopolistic, is something [Oly] can achieve without the aid of a distributor." *472 F.3d at 30*.

Here, Plaintiff does not even allege that Suffolk County consumers will be required to pay higher prices. Instead, Plaintiff only alleges that these consumers will be unable to purchase Oly furniture through Plaintiff and other small competitors who **[*24]** "may not seek to" do business with Oly for fear of having their agreements terminated. Plaintiff does not dispute, however, that these consumers will still be able to purchase Oly furniture through Mecox, a nationwide distributor with two stores in Suffolk County. Simply put, the fact that consumers can no longer purchase Oly furniture from Plaintiff or other hypothetical small retailers does not amount to an injury to competition as a whole. *See* *Floors-N-More, Inv. v. Freight Liquidators, 142 F. Supp. 2d 496, 502 (S.D.N.Y. 2001)* ("The fact that customers can no longer purchase Ashley furniture products (or products from Hickory or Stanley) at Floors-N-

---

[3] Citing *Geneva Pharms., 386 F.3d 485*, the Circuit noted that it has "never held that all exclusive arrangements are reasonable as a matter of law." *472 F.3d at 30*. However, plaintiff has not argued, nor could it, that *Geneva Pharms*. is applicable to its case. *See id*. (distinguishing *Geneva Pharms*. as a case involving "an allegation of two temporary, related monopolies in different products, a drug and its active ingredient[;] Moreover, the two firms, which had overlapping ownership, were jointly involved in predatory practices designed to extend their respective temporary monopolies by deterring entry by competitors.").

[4] Although Plaintiff's Complaint can be construed as alleging the relevant market to be both the faux antique furniture market in Suffolk County as well as only Oly furniture in Suffolk County, in its opposition papers, Plaintiff limits the relevant market to the latter. In essence, Plaintiff argues that Oly furniture is a market in and of itself due to its uniqueness. In moving to dismiss, Defendants argue that not only does the Complaint fail to allege an adverse effect on competition in the relevant market, but that it also fails to adequately define the relevant market. Because the Court finds the Complaint deficient with respect to the former argument, it need not, and does not, address whether Plaintiff's market allegations are sufficient.

More does not mean that competition has been harmed. For instance, plaintiffs have not alleged that Freight Liquidators is now the only store in the geographic market where customers can purchase products made by the manufacturers, or that prices for the manufacturers' furniture have been affected.").

In its opposition papers, Plaintiff attempts to distinguish *E & L Consulting* as follows:

> While it may be true that there is no additional profit in creating a monopoly in the retail distribution of a product in said restricted market, if **[*25]** a manufacturer agrees to the request of a retailer that has retail stores nationwide to stop the sale of the manufacturers' product to the competitor of the national retailer in a specific geographic market in exchange for the national retailer's promise to increase its purchase of the manufacturer's products at its other locations in its several geographic markets, then the manufacturer could receive an additional profit -- an increase in the sale of its product nationally over and above any losses it incurred by restricting the sale of its product in one geographic market -- in creating a monopoly for the retail distribution of its product by restricting certain geographic market.

(Pl.'s Mem. of Law in Opp'n to Oly's Mot. at 10-11.) Although Plaintiff concedes that "this situation has not to Plaintiff's knowledge been brought before this Court," Plaintiff urges that the *E & L Consulting* decision be limited so as not to apply to this case. (*Id*. at 11.)

The Court finds that Plaintiff's attempt to distinguish *E & L Consulting* is unavailing. Applying Plaintiff's hypothetical example, which is not pled in the Complaint, to the facts of this case, Plaintiff essentially argues that the agreement **[*26]** between Oly and Mecox harms competition as a whole in the Oly furniture market in Suffolk County because Mecox, a national distributor, agreed to purchase more Oly furniture for distribution at its other locations nationwide in exchange for Oly's promise to terminate its agreement with Plaintiff, a local Suffolk County distributor. In other words, consumers in Suffolk County are injured because the sale of Oly furniture in that locale is limited, presumably because Plaintiff is no longer able to sell Oly furniture there. The Court fails to see how Plaintiff's hypothetical removes Plaintiff's claim from the purview of *E & L Consulting*. The scenario proposed by Plaintiff -- manufacturer terminates agreement with local distributor and enters into exclusive relationship with nationwide retailer to ensure broad distribution of its product -- is exactly what the *E & L Consulting* case, as well as the *Elecs. Commc'ns. Corp*. decision, contemplated as an acceptable, legal business relationship. At the end of the day, Plaintiff's proposed hypothetical boils down to the same claim rejected repeatedly in the governing case law, to wit, simply because Suffolk County consumers can no longer purchase **[*27]** Oly furniture from Plaintiff does not mean that competition as a whole has been adversely affected. Moreover, as noted in *E & L Consulting*, there is no anticompetitive incentive for a manufacturer to create a monopoly in retail distribution of its product. *472 F.3d at 30* (noting that "[t]here is no additional monopoly profit to be made [for a monopolist manufacturer] by creating a monopoly in the retail distribution of the product").

In sum, the court finds that Plaintiff's allegations do not satisfy the requirement that Plaintiff demonstrate market-wide injury to competition. As in *Elecs. Commc'ns. Corp*. and *E & L Consulting*, Plaintiff's allegations are "a run-of-the-mill exclusive distributorship controversy, where a former . . . distributor is attempting to protect its competitive position vis a vis its supplier." *E & L Consulting, 472 F.3d at 31*; *Elecs. Commc'ns. Corp., 129 F.3d at 245*. Since "exclusive distributorship arrangements are presumptively legal," *Elecs. Commc'ns. Corp., 129 F.3d at 245*, it was incumbent on Plaintiff to plead further facts plausibly suggesting an adverse effect on competition in the relevant market. Plaintiff has failed to do so. Accordingly, Plaintiff's **[*28]** First and Second Causes of Action alleging violations of Section 1 of the Sherman Act are dismissed.

III. *Plaintiff's Claim Under Section 2 of the Sherman Act (the Third Cause of Action) is Dismissed*

Plaintiff's third cause of action asserts a violation of *Section 2* of the Sherman Act against Mecox only. *Section 2* provides that a person shall not "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . ." *15 U.S.C. § 2*. "A viable claim under *Section 2* challenging a distributorship agreement must, like a Section 1 claim, show a harm to competition." *E & L Consulting, 472 F.3d at 31*; *see also Elecs. Commc'ns. Corp., 129 F.3d at 246* ("The agreement between Audiovox and Toshiba cannot harm competition, and therefore cannot serve to further an alleged monopolization scheme."). Because Plaintiff has failed to allege a harm to competition, its *Section 2* claims are dismissed as well.

IV. *Leave to Amend is Denied*

Plaintiff does not move for leave to amend, either formally or informally, with regard to its federal antitrust claims. In fact, its brief makes no mention of it. Although this Court would well be within its discretion to deny **[*29]** leave to amend on that ground alone, *see* *Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1132 (2d Cir. 1994)* [5] ("Although federal courts are inclined to grant leave to amend following a dismissal order, we do not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought."), the Court notes that leave to amend is also not warranted in this case because any amendment would be futile. *See* *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (futility of amendment ground for denial of motion). Here, Plaintiff has not provided the Court with, or suggested the existence of, any new facts which could cure its pleading deficiencies. *Compare* *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 220 (2d Cir. 2006)* ("It is within the court's discretion to deny leave to amend implicitly by not addressing the request when leave is requested informally in a brief filed in opposition to a motion to dismiss. . . . Furthermore, where amendment would be futile, denial of leave to amend is proper.") (citation omitted); *Porat v. Lincoln Towers Community Assoc., 464 F.3d 274, 276 (2d Cir. 2006)* ("A counseled plaintiff is not necessarily entitled to a remand **[*30]** for repleading whenever he has indicated a desire to amend his complaint, notwithstanding the failure of plaintiff's counsel to make a showing that the complaint's defects can be cured."). As discussed more fully above, Plaintiff's allegations -- which arise solely out of Oly's termination of its distribution agreement with Plaintiff -- fail to allege harm to competition in a manner that the antitrust laws were meant to guard against. Accordingly, although no applications have been made, the Court declines to grant Plaintiff leave to amend its federal antitrust claims.

V. *Plaintiff's State Law Claims are Dismissed Without Prejudice*

Having found that Plaintiff's federal claims fail as a matter of law, there is no longer any independent basis for federal jurisdiction. Although the Court has the discretion to exercise supplemental jurisdiction over Plaintiff's remaining state law claims, *see* *29 U.S.C. § 1367(a)*, it declines to do so as resolution of the state claims would **[*31]** require the determination of additional factual and legal issues. *See* *28 U.S.C. § 1367(c)(3)* ("The district court may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . . ."); *N.Y. Mercantile Exch., Inc. v. Intercontinental Exchange, Inc., 497 F.3d 109, 119 (2d Cir. 2007)* (holding that dismissal of remaining state claims after the dismissal of federal claims is particularly appropriate where the resolution of the state law claims entails resolving additional legal and factual issues), *cert. denied*, *128 S. Ct. 1669, 170 L. Ed. 2d 357 (2008)*. "Since [*New York CPLR § 205*] allows a plaintiff to recommence a dismissed suit within six months without regard to the statute of limitations, plaintiff[] will not be prejudiced by the dismissal of [its state law] claims." *Tishman v. The Associated Press, 2007 U.S. Dist. LEXIS 85588, 2007 WL 4145556, at *9 (S.D.N.Y. Nov. 19, 2007)* (citations and internal quotation marks omitted). Accordingly, Plaintiff's state law claims are dismissed without prejudice.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Complaint are GRANTED. The First, Second, and Third Causes of **[*32]** Action are hereby dismissed WITH PREJUDICE. The remaining state law claims are dismissed WITHOUT PREJUDICE. Oly's motion for a more definitive statement and to strike Plaintiff's demand for exemplary damages and attorneys' fees under Plaintiff's state law causes of action is dismissed without prejudice to renew in state court. The Clerk of the Court is directed to close this case.

---

[5] The *Shields* decision was superseded by statute on other grounds, Private Securities Litigation Reform Act, *15 U.S.C. § 78u-4*, as recognized in *In re Paracelsus Corp. Sec. Litig., 61 F. Supp. 2d 591, 595 (S.D. Tex. 1998)*.

SO ORDERED

Dated: Central Islip, NY

March 25, 2009

/s/

Denis R. Hurley,

United States District Judge

End of Document

Arnold v. Petland, Inc.

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

March 26, 2009, Filed

Case No. 2:07-cv-01307

Reporter
2009 U.S. Dist. LEXIS 31377 *

Lucinda S. Arnold, et al., Plaintiffs, v. Petland, Inc., et al., Defendants.

Subsequent History: Count dismissed at, Claim dismissed by, Dismissed without prejudice by *Arnold v. Petland, Inc., 2010 U.S. Dist. LEXIS 55227 (S.D. Ohio, June 4, 2010)*

Core Terms

franchise, plaintiffs', pet, market power, franchisees, mail, puppies, misrepresentations, allegations, antitrust, relevant market, wire, district court, pleaded, food, franchise agreement, motion to dismiss, antitrust claim, continuity, investment opportunity, state law claim, franchisor, predicates, retail, tying arrangement, predicate act, instances, inventory, products, defraud

Counsel: **[*1]** For Lucinda S. Arnold, Fred J. Arnold, Plaintiffs: Gregory H Melick, LEAD ATTORNEY, Heather L Melick, Matthew T Anderson, Luper Neidenthal & Logan, Columbus, OH.

For Petland, Inc., Defendant: Matthew S Schmidt, LEAD ATTORNEY, Nusbaum Ater Schmidt & Wissler, LLP, Chillicothe, OH; Carmen D Caruso, Jeremy P Kreger, PRO HAC VICE, Stahl Cowen Crowley Addis LLC, Chicago, IL; Robert G Cohen, Kegler Brown Hill & Ritter - 2, Columbus, OH; Robert Kevin Kerns, Kegler, Brown, Hill & Ritter Co. LPA, Columbus, OH.

For Hunte Kennel Systems & Animal Care, Inc., Hunte Delivery System, Inc., Defendants: Lee W Westfall, LEAD ATTORNEY, Harris & Mazza, Columbus, OH; John Patrick Mazza, Harris Turano & Mazza, Columbus, OH.

Judges: MICHAEL H. WATSON, United States District Judge.

Opinion by: MICHAEL H. WATSON

Opinion

OPINION AND ORDER

This case concerns a pet store franchise. Plaintiffs bring this action under the Section 1 of the Sherman Act, *15 U.S.C. § 1*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(c)*. Plaintiffs also assert state law claims for violation of Ohio's statutory antitrust laws, fraud, breach of contract, breach of implied contract, negligent misrepresentation, and breach of implied **[*2]** and express warranties.

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(6)* and *(1)*. (Doc. 14). For the following reasons, the Court grants defendants' motion to dismiss in part and denies it in part.

I. Facts

The Court derives the following facts from plaintiffs' amended complaint. The Court accepts these facts as true for purposes of ruling on defendants' motion to dismiss.

Plaintiffs Lucinda S. Arnold and Fred J. Arnold (collectively "Arnolds" or "plaintiffs") are individual citizens of the State of Ohio. The Arnolds had a partnership in Marietta, Ohio for the purpose of opening and operating a Petland franchise.

Defendant Petland, Inc. ("Petland") is an Ohio corporation with its principal place of business in Chillicothe, Ohio. Petland is a franchisor in the pet and pet supply industry.

Defendants Hunte Kennell Systems & Animal Care, Inc. and Hunte Delivery System, Inc. (collectively, "Hunte") are in the business of supplying puppies to pet stores, and have their principal place of business in Missouri. Hunte is a preffered supplier **[*3]** of puppies to Petland, and supplied puppies to the Arnold's Petland franchise.

In about 2004, the Arnolds noticed an advertisement in a local newspaper concerning the opening of a Petland franchise in Marietta. The Arnolds responded to the advertisement and spoke with Petland representatives about purchasing the franchise. The franchise would have required an initial capital investment of $ 750,000 to $ 850,000, and the Arnolds decided not to pursue the matter further at that time. Petland built the Marieta store, however, and ran it as a corporate store until it found a franchisee to take over the operation.

Some time later, Petland contacted the Arnolds and offered to sell them the Marietta store for over $ 400,000. The Arnolds made a counteroffer, which Petland refused. In November 2006, the Marietta Petland closed for business. About a month later, Petland representative Jimmy Taylor contacted the Arnolds, offering to sell them the Marietta franchise as an existing, turn-key business. Petland represented to the Arnolds that the store was ready to open, requiring only a $ 20,000 to $ 25,000 investment in inventory.

The Arnolds investigated the offer, negotiated with Petland, and on **[*4]** February 28, 2007 entered into a franchise agreement with Petland. Under the franchise agreement, the Arnolds paid Petland an initial franchise fee of $ 12,500. Under a separate asset purchase agreement, the Arnolds bought the store's fixtures, equipment, inventory, and related assets for $ 110,000. The Arnolds paid another $ 50,000 to open the store, and spent an additional $ 50,000 to keep the store open for just over six months.

Responding to pressure from Petland, the Arnolds held the grand opening for the Marietta store on March 31, 2007. Prior to the opening, Petland placed an order for puppies for the grand opening through it's preferred supplier, Hunte. The puppies were sick from the very outset. Customers who purchased these puppies returned them within days. Two of the first puppies sold during the grand opening died from parvo and/or viral enteritis within days of sale. A third puppy from the initial Hunte order also died. The remaining puppies all showed symptoms of illness, requiring the Arnolds to obtain veterinary care for them at the Arnold's substantial expense. Customers also purchased pet food from the store's existing inventory. The customers soon began returning **[*5]** the pet food for full refunds because the expiration date for the food had passed. Other pet food was returned because it contained maggots. The Arnolds aver the problems with the sick puppies and expired food significantly harmed the store's bottom line as well as its reputation in the community. The Arnolds also faced problems with the store's Point-of-Sale ("POS") register system, which malfunctioned during the entire six-plus months the store was open. The system apparently crashed at times and would not accept credit card transactions after 8:00 p.m. Finally, the store's air conditioning and ventilation system was defective, which exacerbated the problems with the sick Hunte puppies.

The Arnolds allege that as a result of the aforementioned problems, by September 2007, the Marietta franchise was in deep financial trouble. For this reason, the Arnolds contacted Petland in an effort to obtain financial assistance from Petland's preferred lenders. Petland COO Greg Hudson informed the Arnolds that no financial help would be forthcoming from Petland. Instead, Hudson advised the Arnolds to stop paying their vendors, and to pay only the bank, the landlord, and Petland. Hudson warned the **[*6]** Arnolds that if they stopped paying franchise fees, Petland would "eat them for lunch." The Arnolds say that financial difficulties forced them to close the Marietta store on October 13, 2007.

The Arnolds maintain that Petland knowingly and deliberately made numerous misrepresentations to them in order to induce them to purchase the Marietta franchise. Specifically, Petland represented that it would cost the Arnolds only $ 20,000 to $ 25,000 for additional inventory to open the store, when in fact Petland knew the Arnolds would also have to spend an additional $ 25,000 to purchase animals. In addition, Petland repeatedly told the Arnolds the financials for the last two months of the prior franchisee's operation of the store were "very strong," but the Arnolds later discovered that the actual performance of the store during that period was well below what Petland had represented. Furthermore, Petland provided the Arnolds false and misleading information regarding the store's then-current inventory by failing to inform them that thousands of dollars worth of pet food on the shelves had expired, with some infested with maggots, making the inventory unmerchantable and worthless. Moreover, **[*7]** Petland mislead the Arnolds by telling them that the prior Marietta franchisee failed due to poor management, when in fact Petland knew the earlier franchise failed because of problems with sick puppies, inadequate air conditioning and ventilation, and the defective POS system.

The Arnolds filed the instant lawsuit on December 31, 2007. Their first complaint asserted only state law claims. Given that the Arnolds are Ohio citizens, and that Petland is an Ohio corporation, January 30, 2008, defendants moved to dismiss the action for lack of diversity of citizenship. (Doc. 5). The Arnolds responded on April 25, 2008 by filing an amended complaint, in which they assert the following claims:

Count I -- illegal tying under *§ 1* if the Sherman Act (*15 U.S.C. § 1*) as to defendant Petland

Count II -- conspiracy to commit illegal tying under *§ 1* of the Sherman Act (*15 U.S.C. § 1*) as to defendants Petland and Hunte

Count III -- civil RICO (*18 U.S.C. § 1962(c)*) as to defendant Petland

Count IV -- violation of Ohio ***antitrust law***, *Ohio Rev. Code § 1331.01 et seq*. As to defendants Petland and Hunte
Count V -- fraud as to defendant Petland
Count VI -- fraud in the inducement as to defendant Petland

Count VII **[*8]** -- breach of express contract as to defendant Petland
Count VIII -- breach of implied contract as to defendant Petland
Count IX -- negligent misrepresentation as to defendant Petland
Count X -- violation of implied and express warranties of merchanability as to defendant Hunte
(Doc. 10). Defendants thereafter filed a second motion to dismiss in which they argue that plaintiffs' federal antitrust and RICO claims fail to state a claim upon which relief can be granted, and that the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims. (Doc. 14).

II. Motion to Dismiss

Defendants move in part to dismiss plaintiffs' complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted. The Supreme Court has explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Nonetheless, **[*9]** the Supreme Court has also made clear that "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081*

(2007) (quoting Twombly, 127 S.Ct. at 1964). Moreover "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Id*. (citing Twombly, 127 S.Ct. at 1965).

Additional considerations apply in antitrust cases. On the one hand, the Court must be cautious in dismissing an antitrust claim prior to discovery. Twombly, 127 S.Ct. at 1966-67. On the other hand, the Court must be mindful that discovery in an antitrust action can be expensive." Id. at 1967.

Furthermore, plaintiffs assert mail and wire fraud as the predicate acts for their RICO claim. The claim is therefore subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See* Brown v. Cassens Trans. Co., 546 F.3d 347, 356 n.4 (6th Cir. 2008). Rule 9(b) provides: "In alleging **[*10]** fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P.9(b). A complaint satisfies Rule 9(b) particularity requirement for fraud if it alleges: the time, place, and content of the alleged misrepresentation; the fraudulent scheme; the fraudulent intent of the defendant; and the injury resulting from the fraud. U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503, 518 (6th Cir. 2009). In addition, even when a plaintiff's RICO allegations fail to satisfy the particularity requirement, the Court may allow discovery to proceed under Fed. R. Civ. P. 11 (b)(3). *See* Brown, 546 F.3d at 356 n.4; Rotella v. Wood, 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (In RICO action Rule 11(b)(3) provides "flexibility to allow pleadings based on evidence reasonably anticipated after further discovery."); *accord* Michaels Building Co. v. Ameritrust Co., 848 F.2d 674, 679-81 (6th Cir. 1988).

III. Discussion

Defendants seek dismissal of plaintiffs' antitrust and RICO claims, arguing plaintiffs have failed to state a claim upon which relief can be granted. Furthermore, defendants **[*11]** contend that since plaintiffs' federal claims must be dismissed the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims.

A. Antitrust

Section 1 of the Sherman Act provides: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Plaintiffs in the instant case assert a type of antitrust violation known as "tying." The U.S. Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). For example, "[a] supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the *tying* product, sugar as the *tied* product." Jefferson Parish Hosp. Dist No. 2 v. Hyde, 466 U.S. 2, 33, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (O'Connor, J., concurring) (emphasis in original), *abrogated on other grounds,* Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006).

A **[*12]** plaintiff asserting a claim of illegal tying must allege: (1) the seller has appreciable economic power in the tying product market; (2) the tying arrangement affects a substantial volume of commerce in the tied market; (3) the seller has a direct economic interest in the sale of the tied product; and (4) the plaintiff has suffered antitrust injury as a result of the tying arrangement. CTUnify, Inc. v. Nortel Networks, Inc., 115 Fed. Appx. 831, 834 (6th Cir. 2004).

Defendants advance three grounds for dismissal of plaintiffs' tying claims: (1) plaintiffs have incorrectly defined the relevant product market; (2) plaintiffs have not and cannot allege that defendant Petland has sufficient market power; and (3) plaintiffs have not and cannot allege that Petland has a direct economic interest in the alleged tied products. The Court finds it unnecessary to address the third argument, as the first two are clearly dispositive.

1. Relevant product market

Defendants first argue that the Court must dismiss plaintiffs' antitrust claims because plaintiffs have improperly defined the relevant tying product market. Plaintiffs aver that the relevant product market is the market for pet store franchises.

For **[*13]** the proposition that plaintiffs have failed to plead the relevant product market, defendants' rely upon the decision of the district court in *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 922 F.Supp. 1055, 1064 (E.D. Pa. 1996)*, *aff'd*, *124 F.3d 430 (3d Cir. 1997)*. The plaintiffs in *Queen City* were individual franchisees of Domino's pizza stores as well as an organization formed to represent franchisees. The plaintiffs alleged that Domino's used provisions of the franchise agreements to force the franchisees to purchase pizza ingredients and supplies, such as dough, at inflated prices from a Domino's subsidiary, thereby preventing the franchisees from obtaining ingredients at competitive prices from other sources. The plaintiffs asserted this conduct amounted to an illegal tying arrangement in violation of *§ 1* of the Sherman Act.

The defendant in *Queen City* moved to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, arguing that the plaintiffs failed to allege a relevant product market, and that to the extent the plaintiffs maintained the relevant product market was the market for ingredients and supplies among Domino's franchisees, the market definition was incorrect **[*14]** as a matter of law. The district court granted the motion to dismiss, holding that the market the plaintiffs identified arose from the contractual power Dominos exercised under the franchise agreement, and therefore did not support an antitrust claim. *Queen City, 922 F.Supp. at 1062*.

The district court in *Queen City* recognized that the relevant market is determined by examining the cross-elasticity of demand, or, the degree to which a rise in the price of the product creates a rise in the demand for like products in that market. *Id. at 1061*. It drew a sharp distinction between a franchisor's pre-contractual market power versus the post-contractual power the franchisor possesses under the franchise agreement. *Id. at 1061*. The district court embraced the concept, posited by two commentators, that the post-contractual power a franchisor derives from a franchise agreement "has nothing to do with market power, ultimate consumers' welfare, or antitrust." *Id. at 1062* (quoting Benjamin Klien & Lester Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.Law & Econ. 345, 356 (1985)). Applying this principle, the district court held that "antitrust claims predicated upon a 'relevant **[*15]** market' defined by the bounds of a franchise agreement are not cognizable." *Id. at 1063*. The district court further rejected the plaintiffs' contention that a contrary result was required under the U.S. Supreme Court's decision in *Eastman Kodak.* .*Id at 1062-63*. The district court distinguished *Eastman Kodak* on the ground that *Eastman Kodak* turned upon the unique nature of Kodak's copy equipment. *Id*. On appeal, the Third Circuit affirmed the judgment of the district court. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 444 (3d Cir. 1997)*.

The *Queen City* decisions rest on the principle that a product market cannot be defined by contractual restraints on the plaintiff franchisee. In *Queen City*, the plaintiffs ostensibly defined the relevant market as the market for ingredients and supplies among Domino's franchisees, which they were obligated to purchase under the terms of the franchise agreements. Here, in contrast, plaintiffs do not restrict their relevant market allegations to the market for goods and services associated with the operation of a Petland Franchise. Rather, plaintiffs identify the relevant tying product market as the market for pet store franchises. Dicta **[*16]** aside, neither *Queen City* decision compels the conclusion that the market for pet store franchises is not the relevant market in the instant case.

Defendants nonetheless argue that the relevant market in this case is, at the narrowest, the market for retail franchises. They maintain the market for pet store franchises is fatally narrow because it fails to include all equivalent investment opportunities. In support of these arguments, defendants cite *Westerfield v. Quizno's Franchise Co., 527 F. Supp. 2d 840, 857 (E.D. Wis. 2007)*, *vacated in part on other grounds*, *No. 06-C-1210, 2008 U.S. Dist. LEXIS 74398, 2008 WL 2512467 (E.D. Wis. Apr. 16, 2008)*. The court in *Westerfield* observed that the relevant product market includes "'all products that have reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered.'" *Id. at 857* (quoting *United States v. E.I. Dupont de*

Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)). It further concluded that "[i]n the area of franchises such as Quiznos, the relevant product market would include equivalent investment opportunities." *Id*.

> From the perspective of sound analysis and consistency with the fundamental legal principle, it is patent **[*17]** that-at the minimum-a franchisor market power assessment requires reference to all alternatives available to the potential consumer in a broad line of business endeavors. In many cases this will extend to the market for franchises of all types or the employment of capital. For market power to exist there must be something that shows that, pre-contract, the seller had the power to force a potential franchisee to purchase something that would not have occurred in a competitive market-a requirement drawn directly from *Jefferson Parish*.

Id. (quoting Alan Silberman, *Myths of Franchise "Market Power*", 65 Antitrust L.J. 181, 206 (1996)). The plaintiff franchisees in *Westerfield* asserted that the relevant product market was the market for "Quick Service Toasted Sandwich Restaurant Franchise[s]" *Id. at 858*. The *Westerfield* court found this assertion to be "patently absurd," explaining:

> It may well be that Quiznos holds substantial market power for those investors who wish to purchase a fast food franchise that sells toasted submarine sandwiches. But that's like saying that the seller of any franchise known for a particular product has market power over investors who are already determined to **[*18]** sell such a product. That cannot be the test. The mere fact that a particular franchise is known for a unique product and way of doing business does not show market power over investors.

Id. The Court agrees with this analysis. The purpose of a Petland franchise, as a product, is not to have a retail store with goldfish and puppies. Rather, its purpose, as well as that of any franchise, is to make money for the franchisee. It is, in the final analysis, an investment opportunity. Any number of other products created for the same purpose would be reasonably interchangeable. Plaintiffs confirm this when they allege that some time in 2004 they "first became aware of an *investment opportunity* in Petland . . . . (Am. Compl. (Doc. 10) P 8) (emphasis added). A Petland franchise is but one of many investment opportunities plaintiffs could have pursued. Equivalent investment opportunities would at least include other retail store franchises, and perhaps non-franchise retail stores. As the courts in *Queen City* and *Westerfield* suggest, plaintiffs need not have become Petland franchisees because a myriad of other equivalent opportunities were available. For these reasons, the Court finds that plaintiffs **[*19]** have failed to allege the relevant product market. Consequently, plaintiffs' antitrust claims are subject to dismissal under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted.

2. Market power

Defendants next contend that plaintiffs' antitrust claims are subject to dismissal because plaintiffs have not and cannot allege that Petland has sufficient market power to force the tying of other products to the purchase of a franchise. Plaintiffs argue that they adequately pleaded market power by alleging that Petland is the only full-service pet store franchise listed among Entrepreneur's Franchise 500 top retail pet franchises in 2007, and that Petland ranked number 182 in the annual "Top 200" franchisors in the United States as determined by Franchise Times magazine. (Am. Compl. (Doc. 10) P 36).

Not every instance of tying constitutes an antitrust violation. *Jefferson Parish, 466 U.S. at 11*. For example, "'if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself.'" *Id. at 12* (quoting *Northern Pac. R. Co. v. United States, 356 U.S. 1, 7, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. **[*20]** For this reason, a tying arrangement is not illegal unless the seller has "some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Id. at 13-14*.

Jefferson Parish involved an action by a plaintiff anesthesiologist against a hospital which had an exclusive relationship with an anesthesiologist group to which the plaintiff did not belong. The defendant hospital had a thirty percent share of the relevant market. The Court held that such a market share was insufficient to show the kind of market power required to make a tying arrangement unlawful. *Id. at 26-27*.

Here, the Court has concluded that the relevant market encompasses at least the market for franchises in general, and perhaps even similar non-franchise investment opportunities. The food store example from *Jefferson Parish* is apt -- Petland clearly lacks the requisite market power because plaintiffs were free to invest in any number of other franchises or even to choose among many available non-franchise investments. Petland's position in the relevant market is similar to that of the one store out of a dozen that sold flour only to buyers who would **[*21]** also purchase sugar. The Court finds that plaintiffs have not, and cannot, plead that Petland has sufficient market power in the relevant tying product market to force plaintiffs to purchase the tied products.

As an alternative basis for its ruling, however, the Court will also analyze market power assuming, *arguendo*, that the relevant market is the market for pet store franchises. Plaintiffs' allegations of market power fail even under this assumption. Plaintiffs assert that Petland is the only full-service pet store franchise listed among Entrepreneur's Franchise 500 top retail pet franchises in 2007. Even viewed in the light most favorable to plaintiffs, this assertion falls far short of establishing the kind of market power that renders tying an antitrust violation. The statement indicates that Petland is the only "full-service" pet store on the list of top retail pet franchises. This statement unmistakably implies that other pet store franchises which are not "full-service" are also on the list. If the relevant market is the market consisting of all pet store franchises, then Petland is only one of several or many competing pet store franchises available to investors.

Plaintiffs **[*22]** also allege that Petland ranked number 182 in the annual "Top 200" franchisors in the United States as determined by Franchise Times magazine. This allegation is so abstract as to be meaningless. Even viewed in the most favorable light, there is simply no basis to equate a ranking of 182 out of 200 with dominant market power.

Based on the above discussion, the Court concludes that plaintiffs have failed to adequately plead that Petland has dominant market power in the relevant product market. For this additional reason, defendants are entitled to dismissal of plaintiffs' antitrust claims.

B. RICO

Plaintiffs bring their civil RICO claim under *18 U.S.C. § 1962(c)*, which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id. Any person injured by a violation of *§ 1962(c)* may bring a civil action under that section to recover treble damages, attorney's fees, and costs. *18 U.S.C. § 1964(c)*.

Defendants contend **[*23]** the Court must dismiss plaintiffs' RICO claim, Count III, because plaintiffs have not and cannot plead any specific instances of misrepresentations made through mail or wire, and because plaintiffs cannot plead a pattern of racketeering.

1. Predicate offenses: mail and wire fraud

Defendants argue that plaintiffs' RICO claim fails because plaintiffs have not pleaded the predicate acts with requisite particularity, and because plaintiffs have not pleaded specific misrepresentations that were made by mail or wire. Plaintiffs maintain they have pleaded numerous specific instances of misrepresentations, and that they need not plead that the misrepresentations were made by mail or wire, but only that the scheme to defraud involved the use of mail or wire.

The amended complaint is replete with allegations of specific misrepresentations made with knowledge of their falsity and with fraudulent intent. (Am. Compl. (Doc. 10) PP 11, 25-33, 58-66, 69-75). Defendants appear to suggest that allegations appearing in the complaint after the RICO claim (PP 47-53) should not be considered. This argument lacks substance. The later allegations incorporate the earlier ones by reference. Hence, the RICO claim **[*24]** itself is incorporated in the later allegations. In any event, the Court would not dismiss plaintiffs' RICO claim with prejudice on the basis of such a trivial defect, which could readily be cured by amendment.

Plaintiffs are also correct in asserting that the mail and wire fraud statutes do not require them to plead instances of misrepresentations made via mail or wire.

> The upshot is that RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of acts indictable as mail fraud. Mail fraud, in turn, occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." *§ 1341*. The gravamen of the offense is the scheme to defraud, and any "mailing that is incident to an essential part of the scheme satisfies the mailing element," *Schmuck v. United States, 489 U.S. 705, 712, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)* (citation and internal quotation marks omitted), even if the mailing itself "contain[s] no false information," *id., at 715, 109 S.Ct. 1443*.

Bridge v. Phoenix Bond & Indem. Co., 128 S.Ct. 2131, 2138, 170 L. Ed. 2d 1012 (2008). **[*25]** Thus, whether plaintiffs have alleged specific instances of mail and wire communications which contain misrepresentations is of no consequence.

For the above reasons, the Court declines to dismiss plaintiffs' RICO claim on the ground that plaintiffs have not pleaded the underlying scheme to defraud with particularity or on the ground that plaintiffs have failed to plead any specific instances of misrepresentations made through mail or wire.

2. RICO pattern requirement

Defendants also assert that plaintiffs' RICO claim must be dismissed because plaintiffs have failed to plead a pattern of racketeering activity. Specifically, defendants contend that plaintiffs have, at most, pleaded a single scheme to defraud which took place over an eleven month period. Plaintiffs argue they have sufficiently pleaded the pattern element by alleging multiple instances of mail and wire fraud. Plaintiffs also point out that they allege, based upon information and belief, that Petland has used the same scheme against other past and present franchisees. (Am. Compl. (Doc. 10) P 52).

RICO requires proof of a "pattern of racketeering activity." *18 U.S.C. § 1962*; *H.J., Inc. v. Nw Bell Tel. Co., 492 U.S. 229, 232, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; **[*26]** *Brown v. Cassens Trans. Co., 546 F.3d 347, 353 (6th Cir. 2008)*. RICO provides that "'a pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *18 U.S.C. § 1961(5)*. Although two predicate acts are required, they do not necessarily establish a pattern. *H.J., Inc., 492 U.S. at 237*. Rather, to demonstrate a pattern, a plaintiff must show "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id. at 239* (emphasis in original). The relatedness component is satisfied if the predicate criminal acts "'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Id. at 240* (quoting 18 U.S.C. § 3575(e)). To prove a pattern a plaintiff must, in addition to relatedness, show continuity:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed **[*27]** period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987)*. It is, in either case, centrally a temporal concept-and particularly so in the RICO context, where *what* must be continuous, RICO's predicate

> acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. See S.Rep. No. 91-617, at 158.

Id. at 241-42 (emphasis in original).

Defendants assert that plaintiffs have failed to plead a pattern of racketeering activity because plaintiffs have, at most, pleaded a single scheme **[*28]** to defraud which took place over an eleven month period. In part, plaintiffs plead a closed period that lasted only about eleven months. By itself, the predicate acts taken against plaintiffs over an eleven month period do not constitute a "series of related predicates extending over a *substantial period of time*." *Id. at 242* (emphasis added); *Vemco, Inc. v. Camardella, 23 F.3d 129, 133-34 (6th Cir. 1994)* (single scheme spanning seventeen months did not satisfy continuity requirement).

But plaintiffs' pleading is not limited to a single scheme. Rather, plaintiffs also allege that Petland has used the same scheme to victimize other past and present Petland franchisees. Defendants contend, without citation to authority, that such an allegation "is far too weak to establish a RICO pattern." (Reply (Doc. 25) at 6). The Court disagrees. At this point, the Court may take judicial notice that other franchisees have brought actions in this Court against the same defendants, asserting similar factual allegations and claims. The Court finds that these related cases support plaintiffs' assertion that Petland has employed the same scheme against multiple franchisees over a substantial period of **[*29]** time. Stated another way, the existence of the other cases bolsters the plausibility of plaintiffs' allegations pertaining to relatedness and continuity. The Court holds that plaintiff has alleged sufficient facts to satisfy both the relatedness and continuity components of the RICO pattern requirement.

For the above reasons, the Court declines to dismiss plaintiffs' RICO claim against Petland.

C. State law claims

Lastly, defendants argue that because plaintiffs' federal claims must be dismissed, the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims. Since the Court has determined that plaintiffs' RICO claim is not subject to dismissal under *Fed. R. Civ. P. 12(b)(6)*, the Court will continue to exercise supplemental jurisdiction over plaintiffs' state law claims.

IV. Disposition

For the above reasons, the Court **GRANTS** defendants' motion to dismiss in part and **DENIES** it in part. (Doc. 14). The Court dismisses plaintiffs' antitrust claims with prejudice. All other claims remain pending.

IT IS SO ORDERED.

/s/ Michael H. Watson

MICHAEL H. WATSON, JUDGE

United States District Court

Hearing Components, Inc. v. Shure, Inc.

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

March 26, 2009, Decided; March 26, 2009, Filed

Civil Action No. 9:07-CV-104

Reporter

2009 U.S. Dist. LEXIS 25050 *; 2009 WL 815526

HEARING COMPONENTS, INC., Plaintiff, v. SHURE, INC., Defendant.

Notice: NOT INTENDED FOR PUBLICATION IN PRINT

Subsequent History: Costs and fees proceeding at, Motion denied by *Hearing Components, Inc. v. Shure, Inc., 2009 U.S. Dist. LEXIS 131116 (E.D. Tex., Apr. 6, 2009)*

Prior History: *Hearing Components, Inc. v. Shure, Inc., 2009 U.S. Dist. LEXIS 17168 (E.D. Tex., Mar. 6, 2009)*

Core Terms

patent, patent misuse, expired, marking, licensees, products, license, license agreement, anti-competitive, royalty, rule of reason, Ears, patent rights, post-expiration, tips, insufficient evidence, small business, no evidence, provisions, patentee, foam, numbers, royalty rate, coerced, retroactive, LICENSOR'S, terms, imported, misuse, rights

Counsel: **[*1]** For Hearing Components, Inc, a Minnesota Corporation, Plaintiff: Eric Hugh Findlay, LEAD ATTORNEY, Roger Brian Craft, Findlay Craft, Tyler, TX; Clayton Edward Dark, Jr, Attorney at Law, Lufkin, TX; Jacob Gantz, Joseph R. Heffern, Kevin M Flannery, Vincent A Gallo, PRO HAC VICE, Dechert LLP - Philadelphia, Philadelphia, PA.

For Shure, Inc, Defendant, Counter Claimant: Michael Edwin Jones, LEAD ATTORNEY, Potter Minton PC, Tyler, TX; Bradley J. Van Pelt, Jonathan Pieter van Es, Katherine L. Fink, Marc S Cooperman, Banner & Witcoff - Chicago, Chicago, IL; Diane DeVasto, Potter Minton, Tyler, Tx; Erik S Maurer, Banner & Witcoff Ltd., Chicago, IL.

For Shure, Inc, Counter Claimant: Marc S Cooperman, Banner & Witcoff - Chicago, Chicago, IL.

For Hearing Components, Inc, a Minnesota Corporation, Counter Defendant: Eric Hugh Findlay, LEAD ATTORNEY, Findlay Craft, Tyler, TX.

For Hearing Components, Inc, a Minnesota Corporation, Counter Defendant: Eric Hugh Findlay, LEAD ATTORNEY, Findlay Craft, Tyler, TX; Clayton Edward Dark, Jr, Attorney at Law, Lufkin, TX; Jacob Gantz, Joseph R. Heffern, Kevin M Flannery, Dechert LLP - Philadelphia, Philadelphia, PA.

Judges: Ron Clark, United States District Judge.

Opinion by: Ron Clark

Opinion

MEMORANDUM [*2] AND ORDER ON CLAIMS OF PATENT MISUSE

Plaintiff Hearing Components, Inc. filed suit against Defendant Shure, Inc. claiming infringement of United States Patent Nos. 4,880,076; 5,002,151; and 5,401,920. The '076 and '151 patents are directed toward a hearing aid ear piece or other sound transmission device connected to a disposable compressible foam sleeve. A bench trial was held on the equitable issues of laches and patent misuse on January 20, 2009. The court denied Shure's laches claims on the record, but reserved the issue of patent misuse at that time. [1]

Because Shure has not established that any of the complained-of limitations in HCI's licensing agreements constitute patent misuse, either per se or under a "rule of reason" analysis, the court will deny Shure's claims.

I. Applicable Law

The doctrine of patent misuse "relates generally to the use of patent rights to obtain or to coerce an unfair commercial advantage. Patent misuse relates primarily to a patentee's actions that affect competition in unpatented goods or **[*3]** that otherwise extend the economic effect beyond the scope of the patent grant." *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998)*.

> The patent misuse doctrine is an extension of the equitable doctrine of unclean hands, whereby a court of equity will not lend its support to enforcement of a patent that has been misused. Patent misuse arose, as an equitable defense available to the accused infringer, from the desire to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy. When used successfully, this defense results in rendering the patent unenforceable until the misuse is purged.

Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1025 (Fed. Cir. 2008) (internal citation excluded); *see also* *Bard, 157 F.3d at 1372* ("Patent misuse arises in equity, and a holding of misuse renders the patent unenforceable until the misuse is purged; it does not, of itself, invalidate the patent.").

While patent misuse is viewed as a "broader wrong" than an antitrust violation, the key inquiry will be whether the patentee has "impermissibly broadened the scope of the **[*4]** patent grant with anti[-]competitive effect" by "imposing conditions that derive their force from the patent." *Bard, 157 F.3d at 1372*. The activities characterized as "patent misuse" do not include a "general notion of 'wrongful' use"; rather, the doctrine has for the most part been confined to a few specific practices, such as enforced package licensing, price restraints, or extended royalty terms. *Id. at 1373*. The Federal Circuit has cautioned that the doctrine should be construed fairly narrowly. *Id.* ("the body of misuse law and precedent need not be enlarged into an open-ended pitfall for patent-supported commerce.").

To successfully assert a patent misuse defense, Shure must demonstrate that HCI has "impermissibly broadened the physical or temporal scope of the patent grant with anticompetitive effect." *Virginia Panel Corp. v. Mac Panel Co., 133 F.3d 860, 868 (Fed. Cir. 1997)*. Certain practices constitute patent misuse per se, "including so-called 'tying' arrangements in which a patentee conditions a license under the patent on the purchase of a separable, staple good, and arrangements in which a patentee effectively extends the term of the patent by requiring post-expiration royalties." **[*5]** *Id. at 869* (internal citations omitted). At the same time, *35 U.S.C. § 271(d)* provides that certain enumerated actions or tying arrangements, in the absence of market power, do not constitute patent misuse. [2]

---

[1] Having received proposed findings of fact from both parties, the court will not enter separate findings of fact, but will incorporate its findings in this memorandum.

[2] *Section 271(d)* states that:

In the situation where a practice alleged to constitute patent misuse is neither per se patent misuse nor specifically excluded from a misuse analysis by *Section 271(d)*, "a court must determine if that practice is reasonably within the patent grant, *i.e.,* that it relates to subject matter within the scope of the patent claims." *Virginia Panel, 133 F.3d at 869* (internal quotation omitted). If the practice's effect is to extend the patentee's statutory rights and does so with an anti-competitive effect, that practice must be analyzed in accordance with the "rule of reason." *Id.* Under the rule of reason, the fact finder decides whether the questioned practice imposes an "unreasonable restraint on competition," taking into account a number of factors, including (1) specific information about the relevant business; (2) the business's condition before and after the restraint was imposed, and (3) the restraint's history, nature, and effect. *Id.*

It is somewhat unclear whether false marking is patent misuse at all, much less patent misuse per se. However, this practice "clearly injures" the "important public **[*7]** interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain" because

> the act of false marking misleads the public into believing that a patentee controls the article in question (as well as like articles), externalizes the risk of error in the determination, placing it on the public rather than the manufacturer or seller of the article, and increases the cost to the public of ascertaining whether a patentee in fact controls the intellectual property embodied in an article.

Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1356-57 (Fed. Cir. 2005). False marking under *35 U.S.C. § 292(a)* requires proof of four elements: (1) a marking importing that an object is patented; (2) falsely affixed to; (3) an unpatented article; (4) with intent to deceive the public. *Id. at 1351*.

"Intent to deceive, while subjective in nature, is established in law by objective criteria. . . Thus, objective standards' control and the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent." *Id. at 1352* (internal quotation omitted). **[*8]** To establish knowledge of falsity, Shure must show by a preponderance of the evidence that HCI did not have a reasonable belief that the articles were properly marked (i.e., covered by a patent). Absent such proof of lack of reasonable belief, no liability under the rises to the level of statutory deception is a question of fact. *Id. at 1353*.

II. Analysis

Shure alleges that HCI entered into sixteen licenses [3] in the period between July 1, 2004 and May 15, 2008, and that the licensing agreements contain provisions that constitute patent misuse in one or more of the following four ways: (1) providing for a post-expiration marking requirement (i.e., requiring licensees to mark expired patent numbers on their products); (2) requiring post-expiration supply obligations (i.e., requiring the licensees to buy HCI products after the patents-in-suit expired); (3) providing for an undiminishing royalty rate (i.e., not decreasing the royalty rate the licensee paid for licensing both patents in suit after the '076 patent expired on December 5, 2006); and (4) including a potential retroactive royalty increase (i.e., the royalty rate paid by the licensee could increase

---

> (d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement; (4) refused to license or use any rights to the patent; or (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant **[*6]** market for the patent or patented product on which the license or sale is conditioned.

[3] Although **[*10]** there are sixteen different licensees, Shure's claims actually encompass nineteen license agreements. Two of the licensees -- Aloft Technologies, Inc. and Antonio Precise Products Manufactory, Ltd. -- entered into multiple license agreements with HCI.

from 3% to 5% after expiration **[*9]** of the patents, depending on what happened up to five years after the '151 patent expired on March 26, 2008). The following chart is drawn from Shure's Proposed Findings of Fact and Conclusions of Law [Doc. # 129], and summarizes Shure's allegations:

Licensee/ Sublicensee	**Effective Date**	**Post-Expiration Supply Obligation?**	**Un-diminishing royalty rate?**	**Potential Retroactive Royalty Increase?**	**Post-Expiration Marking Requirement?**
Aloft Technologies, Inc.	7/1/04		X		
Antonio Precise Products Manufactory, Ltd.	6/1/05		X		
Outside the Box, Inc.	7/1/05		X		
Trick Audio LLC	11/1/05		X		
Communications and Ear Protection, Inc.	12/1/05		X		
A Power Ltd.	5/1/06	X	X		X
Yazawa Corp.	8/4/06	X	X		X
Antonio Precise Prods. Manuf. Ltd.	8/17/06		X		
Nacre AS	9/22/06	X	X	X	X
Armour Home Electronics, Ltd.	9/27/06		X		X
Micro Optics Technologies, Inc.	10/21/06	X	X		X

Licensee/ Sublicensee	Effective Date	Post-Expiration Supply Obligation?	Un-diminishing royalty rate?	Potential Retroactive Royalty Increase?	Post-Expiration Marking Requirement?
Aloft Technologies, Inc.	1/22/07	X	N/A [4]		
Shenzhen Grandsun Electric Co., Ltd.	2/12/07	X	N/A	X	X
Antonio Precise Products Manufactory, Ltd.	7/1/07	X	N/A		X
Phillips Electronics	10/26/07		N/A		X
Skullcandy	11/15/07	X	N/A		X
Yashima Electric Co.	11/29/07		N/A		
Ultimate Ears, LLC	4/14/08	X	N/A		X
Blue Ant Wireless Pty. Ltd.	5/15/08	X	N/A		X

Licensee/ Sublicensee	Exhibit No.
Aloft Technologies, Inc.	DX104

[4] The '076 patent expired in December 2006. Shure alleges that the license agreements HCI entered into after that date with six new licensees -- all licensees with an "N/A" in this column except Aloft Technologies, Inc. and Antonio Precise Products Manufactory, Ltd. -- licensed the '076 patent after it had expired.

Licensee/ Sublicensee	Exhibit No.
Antonio Precise Products Manufactory, Ltd.	DX105
Outside the Box, Inc.	DX198
Trick Audio LLC	DX175
Communications and Ear Protection, Inc.	DX177
A Power Ltd.	DX193
Yazawa Corp.	DX201
Antonio Precise Prods. Manuf. Ltd.	DX194
Nacre AS	DX103
Armour Home Electronics, Ltd.	DX196
Micro Optics Technologies, Inc.	DX106
Aloft Technologies, Inc.	DX104
Shenzhen Grandsun Electric Co., Ltd.	DX110
Antonio Precise Products Manufactory,	DX195

Licensee/ Sublicensee	**Exhibit No.**
Ltd.	
Phillips Electronics	DX95
Skullcandy	DX107
Yashima Electric Co.	DX200
Ultimate Ears, LLC	DX108
Blue Ant Wireless Pty. Ltd.	DX197

A. Providing for a post-expiration marking requirement

Shure's first argument is that by requiring licensees to mark expired patent numbers on their products, HCI has engaged in patent misuse. Specifically, Shure suggests that because the license agreements do not provide for the removal of expired patent numbers, continued marking of a licensee's products after expiration of the '076 and/or '151 patents is patent misuse due to false marking. The court makes the following findings with respect to this claim:

1. Eleven agreements require post-expiration marking, and contain a provision similar to the following:

> MARKINGS ON LICENSED **[*11]** PRODUCTS:
>
> Patent Notice -- The following wording will be on each Licensed Product package and replacement tip package. "Manufactured under Hearing Components' U.S. Patent Numbers 4,880,076 and 5,002,151 *and International Equivalents.* Other patents pending."

See DX 110, at P 6.0 (emphasis added).

2. The court finds specific evidence that only two licensees, Blue Ant and Ultimate Ears, ever actually sold any products in the United States. Tr. at p.1543, ll. 15-21 (Blue Ant); Tr. at p. 1555, ll. 5-21 (Ultimate Ears).

3. HCI had foreign equivalents of the patents-in-suit in Australia, Canada, Denmark, France, Germany, Japan, Korea, and the United Kingdom, and these equivalents do not expire until 2010 (all but Korea) or 2011 (Korea). DX 316, at p. 16, n.35; *see also* Tr. at p. 1565, ll. 15-17; p. 1538, l. 7 - p. 1539, l. 2. (Shure did not dispute either of these assertions during the bench trial.)

4. Shenzhen Grandsun Electric Co.'s license was limited to the "Chinese market." Because HCI was not exactly sure what that meant, this license was never actually enforced. Tr. at p. 1564, l. 9 - p. 1565, l. 14. Although there was no foreign equivalent to the '076 and '151 patents in China, DX 316 **[*12]** at p. 16 and n.35, there was no evidence that Shenzhen ever sold products in the United States, marked with the '076 and '151 patent numbers or otherwise.

5. Regardless of the wording of the license agreements, there was no evidence that any item marked with an expired patent number was actually imported into, made in, sold in, or used in the United States. (At best, Shure elicited testimony from HCI's in-house general counsel, David Crompton, that Blue Ant and Ultimate Ears both entered into licensing agreements after the '076 and '151 patents had expired in the United States; that both sold products in the United States; and that under the licensing agreements, any covered products would be marked with the '076 and '151 patent numbers. Tr. at p.1543, ll. 15-21 [Blue Ant]; Tr. at p. 1555, ll. 5-21 [Ultimate Ears]. However, no samples of actual Blue Ant or Ultimate Ears products with the patent numbers on them were submitted to the court.)

6. The court finds credible the testimony of Dr. Olivera that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19.

7. There is no evidence that would suggest that HCI's licenses were coerced or not entered **[*13]** into voluntarily.

8. HCI did not have the requisite intent to deceive under the false marking statute. Shure presented insufficient evidence that HCI lacked a reasonable belief that its licensees' products were properly marked.

I. Patent misuse per se and exclusion under *Section 271(d)*

Shure points to, and the court has found, no case which terms the marking provisions included in HCI's license agreements patent misuse per se. False marking is not mentioned in *Section 271(d)*, so it is not excluded from patent misuse under that statutory provision.

II. Extending patent rights through anti-competitive effect

If a certain practice is not patent misuse *per se* and is not specifically excluded under *Section 271(d)*, a court must then determine if that practice has the effect of extending the patentee's statutory rights and does so with an anti-competitive effect. If so, that practice must be analyzed in accordance with the "rule of reason." *Id.* Under this analysis, the court will determine whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including (1) specific information about the relevant business; (2) the business's **[*14]** condition before and after the restraint was imposed, and (3) the restraint's history, nature, and effect. *Id.*

There are several problems with any argument that HCI's actions extended its patent rights with an anti-competitive effect. First, HCI asserted, and Shure did not dispute, that the '076 and/or '151 patents have foreign equivalents which do not expire until 2010, 2011, or 2013 [5]. The licensing agreements require that the phrase "and International Equivalents" be included in the marking licensees place on their products. The false marking statute, *Section 292*, "only prohibits the marking of articles that are not subject to either foreign or domestic patent protection." *Kor-CT, LLC v. Savvier, Inc., 344 F. Supp. 2d 847, 857 (D. Conn. 2004)*; *see also* *Project Strategies Corp. v. National Communications Corp., 948 F. Supp. 218, 225-27 (E.D.N.Y. 1996)*. While it is true that marking products with expired patent numbers can be false marking under *Section 292*, *Pequignot v. Solo Cup Co., 540 F. Supp. 2d 649, 654 (E.D. Va. 2008)*, Shure does not dispute that foreign equivalents of the '076 and/or '151 patents remain in force for several more years.

Section 292 is also penal in nature, providing a civil fine to the party mismarking the product for each violation. *Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1353 (Fed. Cir. 2005)*. Shure cites, and the court has

[5] Mr. Crompton testified during the bench **[*15]** trial that the Korean equivalent does not expire until 2013. This may have been a misstatement, as Dr. Ugone cites earlier testimony and e-mails from Mr. Crompton in which he states that the foreign equivalents expire in 2010 or 2011, depending on the country. No matter which date is used, the point is that Shure does not dispute that the foreign equivalents of the patents-in-suit have not yet expired.

found, no case or statute which even suggests that the false marking statute to be the basis for a patent misuse claim.

It is also somewhat unclear whether a patent holder can even be liable for patent misuse if the licensing provisions complained of were not enforced in the United States. If one analogizes licensing agreements and tying arrangements in ***antitrust law*** to patent law [6], several early cases might imply that it is immaterial whether a contract provision purporting to increase a patent monopoly was ever actually enforced in the United States, because the **[*16]** key is that the patent holder had the power to do so under the contract. *See, e.g., United Shoe Machinery Corp. v. United States, 258 U.S. 451, 458, 42 S. Ct. 363, 365, 66 L. Ed. 708 (1922)* ("The power to enforce them [tying restrictions] is omnipresent, and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act."); *F.C. Russell Co. v. Consumers Insulation Co., 226 F.2d 373, 376 (3d Cir. 1955)*; *Krampe v. Ideal Indus., Inc., 347 F. Supp. 1384, 1387 (D.C. Ill. 1972)*.

However, in both *United Shoe* and *F.C. Russell*, the licensees were domestic United States corporations. In contrast, many of the licensing agreements HCI entered into were with foreign companies. While most of the contracts may have permitted world-wide sales, Shure failed to present a single example of an allegedly mismarked product actually imported into, or made, used, offered for sale, or sold in, the United States, either by a foreign company (e.g., Blue Ant) or a domestic company (e.g., Ultimate Ears).

It is black letter law that a Defendant can only be liable for importing into, making, using, offering to sell, or selling a patented invention "within the United States." *35 U.S.C. § 271(a)*; *see also Aluminum Co. of America v. Sperry Prods., Inc., 285 F.2d 911, 925 (6th Cir. 1960)* ("Foreign patents grant no monopolies in the United States, nor do United States patents grant any monopolies in foreign countries. A patent is granted by a sovereign power and its rights, privileges, and obligations begin and end with the country that issues it."). [7] And although patent misuse is typically viewed as a "broader wrong" than an anti-trust violation, the Sherman Act was amended in **[*18]** 1982 to restrict the jurisdiction of an American court over alleged anti-trust violations based on foreign activities. *15 U.S.C. § 6a*; *see also Akzona Inc. v. E.I. Du Pont De Nemours & Co., 607 F. Supp. 227, 234-35 (D. Del. 1984)*. It would make little sense to restrict a patent holder to enforcement of its rights in the United States, while simultaneously permitting an accused infringer to use the patent holder's foreign activities as the basis for a patent misuse claim.

There was insufficient evidence to support a finding that HCI required a licensee to mark products to be sold in the United States under the licensing agreements after the '076 and '151 patents have expired. While Shure did elicit some testimony that two licensees, Blue Ant and Ultimate Ears, entered into licensing agreements after the '076 and '151 patents had expired in the United States with a provision that **[*19]** any covered products would be marked with the '076 and '151 patent numbers, Shure provided no samples of actual Blue Ant or Ultimate Ears products with the patent numbers on them to the court. In other words, there was little to no evidence presented regarding the first three elements of any false marking cause of action -- namely, that any licensee's product had a marking stating that it was patented, which was falsely affixed to an unpatented article.

The fourth element Shure is required to demonstrate under a false marking theory is that HCI had the intent to deceive the public. To do so, Shure must show that HCI did not have a reasonable belief that the articles were

---

[6] The analogy is apt, since patent misuse and antitrust violations, while not identical, are related causes of action. *See, e.g., Bard, 157 F.3d at 1372* ("Patent misuse is viewed as a broader wrong than antitrust violation because of the economic power that may be derived from the patentee's right to exclude. Thus, misuse may arise when the conditions of antitrust violation are not met. . .The key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive **[*17]** effect.")

[7] Perhaps marking a product with United States patent numbers gives a certain cachet in some foreign countries, just as the word "French" seems to increase sales of perfume here. It is up to that country, rather than this court, to decide whether using an expired United States patent number harms its citizens.

properly marked -- i.e., that they were covered by a valid patent or patents. The court is not persuaded by the limited evidence available that HCI did not have such a reasonable belief. There was testimony during the bench trial, which Shure did not dispute, that HCI had foreign equivalents of the patents-in-suit in other countries which do not expire until 2010 or 2011. HCI's purpose in requiring licensees to mark their products with the '076 and '151 patent numbers was to direct an interested party to the foreign **[*20]** equivalents of these patents, making it easier for a company or individual to find out what the patent protection on a given device is. The court finds the evidence does not show that HCI had the requisite intent to deceive.

III. Rule of reason analysis

As discussed above, it is unclear that HCI's actions in this case with respect to marking have the effect of extending its statutory rights with anti-competitive effect. Even assuming they do, Shure has put forth insufficient evidence on the *Virginia Panel* factors to permit the court to find patent misuse under a "rule of reason" analysis. Dr. Olivera testified that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19. The court does not find that HCI's condition changed after the licensing agreements with the marking provisions were entered into. The court finds there is insufficient evidence to make a determination regarding the restraint's history, nature, and effect.

The court also notes that "[v]oluntariness of the licensee's agreement to the royalty provisions is a key consideration" when analyzing potential patent misuse. *Engel Industries, Inc. v. Lockformer Co., 96 F.3d 1398, 1408 (Fed. Cir. 1996)*; **[*21]** *see also* *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998)* (patent misuse "relates generally to the use of patent rights to obtain *or to coerce* an unfair commercial advantage") (emphasis added); *Trading Techs. Int'l, Inc. v. eSpeed, Inc., 2008 U.S. Dist. LEXIS 4627, 2008 WL 203385 (N.D. Ill. Jan. 18, 2008)*. Shure has not produced any evidence that would so much as hint that HCI's licensees were anything but willing to enter into agreements with this clause. Even assuming that this provision has anti-competitive effect, Shure has put forth little to no specific evidence on the *Virginia Panel* factors that would permit the court to conclude that this practice is patent misuse.

While the court recognizes that false marking has the potential to injure the strong public interest in full and free competition by indicating that something is protected under a patent when it is, in fact, part of the public domain, it is a stretch to conclude that HCI's practice of including a marking provision in its licensing agreements has the effect of extending its statutory rights with an anti-competitive effect. The Federal Circuit has cautioned that the doctrine of patent misuse should be construed fairly narrowly, **[*22]** *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1373 (Fed. Cir. 1998)*, and Shure's theory would run contrary to that end.

B. Post-expiration supply obligations

Shure next alleges that ten of the nineteen license agreements required the licensees to buy HCI products after the patents-in-suit expired. The court makes the following findings regarding Shure's claim:

1. Ten agreements contain a provision similar to the clause found in the agreement between HCI and A Power Limited:

> SUBLICENSED PRODUCTS means hearing-in-noise devices that are covered by a claim of a PATENT and include means for releasably securing LICENSOR'S [HCI] disposable foam sleeves, with such means manufactured to LICENSOR'S specifications. SUBLICENSEE [A Power Limited] agrees that all foam sleeves to be used with Sublicensed products will be supplied by LICENSOR to assure proper coupling to LICENSOR'S specified means.

DX 193, at P 9.2.

2. Later agreements are more specific:

> LICENSEE [Nacre AS] agrees to exclusively buy special made for LICENSEE Comply TM Canal Tips from LICENSOR [HCI] for a period of 5 years after the last US patent ['076 and '151] expires for LICENSEE'S products that use polymeric foam tips.

DX 103, at P **[*23]** 5.2; *see also* DX 104 ("Licensee [Aloft Technologies, Inc.] agrees to exclusively buy Comply TM Canal Tips from Licensor [HCI] for a period of five (5) years, after the last patent expires, for use on Licensee's products that can utilize foam tips."); DX 110 (same); DX 107 ("Skullcandy will agree to use Comply TM Foam Tips for all foam tip needs for two years from the start of retail launch [dated 11/15/07]).

3. Four of the ten agreements were entered into before the '076 patent expired; four were entered into after the '076 patent expired in the United States December 2006 but while the '151 patent was still in force; and two were entered into after the '151 patent expired in the United States in March 2008.

4. There is insufficient evidence to find that HCI had the type of market power envisioned under *Section 271(d)(5)* that would make a tying agreement of this nature statutory patent misuse. To the contrary, the court finds credible the testimony of Dr. Olivera that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19. HCI's market power was not discussed during the bench trial, or in Dr. Ugone's expert report (DX 316).

5. There is no evidence **[*24]** that would suggest that HCI's licenses were coerced or not entered into voluntarily.

I. Patent misuse per se or under *Section 271(d)*

"[A] patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful per se," *Brulotte v. Thys Co., 379 U.S. 29, 32, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*. However, the Court in *Brulotte* was largely concerned with royalties paid to patentees after a patent has expired; here, HCI has instead conditioned grant of a license on the licensor's continued purchase of HCI's foam tips for five years after the patents-in-suit have expired. Shure has not cited, and the court has not found, any case in which a post-expiration supply obligation was found to be patent misuse per se.

Tying agreements such as this one are also not patent misuse under *35 U.S.C. § 271(d)(5)* "unless, in view of the circumstances, the patent owner had market power in the relevant market for the patent or patented product on which the license or sale is conditioned." However, Shure also put forth little, if any, evidence that HCI had the type of market power envisioned under *Section 271(d)(5)* that would make a tying agreement of this nature statutory patent misuse. In short, there is **[*25]** insufficient evidence that these practices extended HCI's patent rights with anti-competitive effect.

II. Extension of patent rights with anti-competitive effect and rule of reason analysis

Assuming, for the sake of argument, that Shure has demonstrated that HCI's tying arrangements extended its patent rights with anti-competitive effect, none of the post-expiration supply obligations appear to be patent misuse under a "rule of reason" analysis.

Shure has presented insufficient evidence on the *Virginia Panel* factors to permit the court to find patent misuse under a "rule of reason" analysis. As already discussed, Dr. Olivera testified that HCI was a small business. Tr. at p. 1635, ll. 10-19. The court is not persuaded that HCI's condition changed after the license agreements with the marking provisions were entered into. There was little, if any, information presented regarding the restraint's history, nature, and effect, and not even a suggestion that HCI's licensees were anything other than willing to enter into agreements with this clause. The court finds that Shure has failed to prove patent misuse.

C. Providing for an undiminishing royalty rate

Shure's third argument is that HCI's **[*26]** practice of not decreasing the royalty rate the licensee paid for licensing both patents in suit after the '076 patent expired is patent misuse. Shure's allegations on this point are actually two-fold: (1) with respect to the license agreements entered into before the '076 patent expired in December 2006, the agreements failed to decrease the royalty rate after the '076 patent expired; and (2) after December 2006, HCI licensed the '076 patent and/or the '151 patent after they had expired.

I. Pre-December 2006 agreements

The court makes the following findings with respect to this claim:

1. There is no evidence that the licenses were not entered into voluntarily or were coerced.

2. The court finds credible the testimony of Dr. Olivera that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19.

As with post-expiration supply obligations, Shure has pointed to no case that terms the first practice patent misuse per se. The practice is not exempted under *Section 271(d)*, and Shure puts forth little to no evidence that this practice extended HCI's patent rights with any anticompetitive effect.

Even assuming there was an anti-competitive effect, consideration **[*27]** of the "rule of reason" analysis discussed above does not favor terming this practice patent misuse under these facts. Again, HCI is a small business. The court does not find that HCI's condition changed after the license agreements with the marking provisions were entered into. The court finds there is insufficient evidence to make a determination regarding the restraint's history, nature, and effect. The license agreements appear to be entered into voluntarily.

The court also notes the Federal Circuit has stated in a different context that:

> A licensee which has taken a license under both patents, choosing to use the inventions claimed in both patents in the same commercial process, must know that, in the absence of some agreement to the contrary, it is not excused from paying royalty after one of the patents expires while the other is still in force and the invention it claims is being used.

General Foods Corp. v. Studiengesellschaft Kohle mbH, 972 F.2d 1272, 1279 (Fed. Cir. 1992) (discussing double patenting). In other words, after the '076 patent expired, the licensees knew they still had to pay a royalty to continue to use the '151 patent. While decreasing the royalty rate the licensees **[*28]** paid on the remaining patent is one option that parties voluntarily entering into a license agreement can utilize, Shure has pointed to no case supporting the theory that failing to do so, without coercion, is patent misuse. [8] The court finds there is insufficient evidence to conclude that this practice is patent misuse.

II. Post December 2006 agreements

Shure's second argument is, at first blush, more compelling. The court makes the following findings with regards to this claim:

1. The February 2007 agreement entered into with Shenzhen Grandsun Electronics Co. licensed the '076 patent. DX 110, at P 9.1 ("PATENT or PATENTS means the following listed patents and all divisions, continuations, reissues, foreign equivalents, substitutes, and extensions thereof" and listing both the '076 and '151 patents).

---

[8] *Brulotte,* which only states that requiring payment of royalties after the last of the licensed patents expired is patent misuse, is not to the contrary and in fact specifically distinguishes the situation where only some of the licensed patents have expired. *Brulotte, 379 U.S. at 33, 85 S. Ct. at 179*; *see also* *Hull v. Brunswick Corp., 704 F.2d 1195 (10th Cir. 1983)* ("Although the royalty rate does not change, the base for that rate changes. . .The lack of diminution in royalty rate for the use of one patent without another and the provisions for termination do not of themselves establish coercion.") (internal quotation omitted); ***In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127, 1141-42 (5th Cir. 1979)***, *cert. denied,* **433 U.S. 910, 97 S. Ct. 2976, 53 L. Ed. 2d 1094 (1977)** (provision that escalated royalties for one patent in package after expiration of another patent did **[*29]** not illegally extend life of first patent); ***Sunrise Medical HHG, Inc. v. AirSep Corp., 95 F. Supp. 2d 348, 458 (W.D. Pa. 2000)*** ("the royalty rate need not diminish as patents included in a package license expire, as long as the licensee is not coerced."); *Lightwave Techs., Inc. v. Corning Glass Works, 1991 U.S. Dist. LEXIS 543, 1991 WL 4737 at *2 (S.D.N.Y. Jan. 18, 1991)* ("Coercion, or attempted coercion, is an essential element of patent misuse by improper patent packaging.").

2. The '076 patent expired on December 5, 2006, and the '151 patent expired on March 26, 2008. Doc. # 139, at p. 10.

3. In addition to the agreement with Shenzhen, HCI entered into seven other license agreements -- five of which, like Shenzhen, were with new **[*30]** licensees and two of which were continuations of prior agreements -- which also licensed the '076 patent after December 5, 2006. *See* DX 104; 110; 195; 95; 107; 200; 108; and 197. Two of these agreements were entered into after the '151 patent expired in March 2008. DX 108 and 197.

4. HCI's license agreements that require post-expiration marking contain a provision similar to the following:

> MARKINGS ON LICENSED PRODUCTS:
>
> Patent Notice -- The following wording will be on each Licensed Product package and replacement tip package. "Manufactured under Hearing Components' U.S. Patent Numbers 4,880,076 and 5,002,151 *and International Equivalents.* Other patents pending."

See DX 110, at P 6.0 (emphasis added).

5. The court finds credible the testimony of Dr. Olivera that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19.

6. There is no evidence that the licenses were not entered into voluntarily or were coerced.

a. *Patent misuse per se or exemption under Section 271(d)*

Shure points to no case that terms this practice patent misuse per se, and it is not specifically exempted under Section 271(d).

b. *Extension of patent rights with anti-competitive effect*

There **[*31]** is some support for the position that licensing an expired patent can still extend the patentee's rights with anti-competitive effect, even when the general public is not prohibited from using the device covered under the patent. *Prestole Corp. v. Tinnerman Prods., Inc., 271 F.2d 146, 155 (6th Cir. 1959)*. In *Prestole,* the license specifically excluded a device covered by a series of patents, one of which had already expired when the agreement was signed. The Sixth Circuit stated that the condition extended a monopoly in an expired patent, and

> [t]he fact that the general public, other than [the licensee] was not thereby forbidden the use of this then unpatented device and that [the licensee] might employ it in manufacturing equipment not containing the invention of the licensed patents does not, in our opinion, exonerate [the licensor] from a charge of attempting to extend, for its own purposes, a monopoly in an expired patent.

Id.

Here, the court has found that HCI has licensed one or both of the patents-in-suit after their expiration in the United States. However, as already discussed, HCI asserts, and Shure does not dispute, that foreign equivalents of the '076 and '151 patents remain **[*32]** in effect in Australia, Canada, Denmark, France, Germany, Japan, Korea, and the United Kingdom until 2010 or 2011. By including the language "and International Equivalents," HCI is licensing patents that, while possibly expired in the United States, have equivalents which remain valid in a number of foreign countries.

Additionally, the royalty ends with the expiration of the last patent. *See, e.g.,* DX 110, at P 5.1. Unlike the license agreement in *Prestole,* HCI does not extend its monopoly beyond the expiration of the patents because it receives nothing in return -- i.e., no royalty at all after the foreign equivalents of the last patent expires. While there is a provision requiring the licensee to purchase HCI's foam tips for five years after expiration of the patents, the court has already found that neither the tying provision, or the failure to include a retroactive royalty decrease after expiration of the '076 patent, is patent misuse.

c. *Rule of reason analysis*

Even assuming HCI's actions extended its patent rights with an anti-competitive effect, consideration of the "rule of reason" analysis discussed above does not favor terming this practice patent misuse under these facts. **[*33]** HCI is a small business. The court does not find that HCI's condition changed after the license agreements with the marking provisions were entered into. The court finds there is insufficient evidence to make a determination regarding the restraint's history, nature, and effect. Shure has neither presented any evidence that any of these agreements were coerced, nor that any mismarked item was ever imported into, made in, sold in, or used in the United States. The court does not find that HCI has engaged in patent misuse.

D. Including a potential retroactive royalty increase

Shure's final argument is that HCI's practice of permitting the royalty rate paid by the licensee to increase from 3% to 5% after expiration of the patents, depending on what happened up to five years after the '151 patent expired, is patent misuse. The court makes the following findings of fact with respect to this claim:

1. This provision is found in only two of the license agreements, namely those HCI entered into with Shenzhen Grandsun Electronics (DX 110, P 5.2.4) and Nacre AS (DX 103, P 5.3.3). The following clause is found in the Shenzhen agreement:

> If 5.2.1 or 5.2.2 or 5.2.3 are not met, the Royalty will retroactively **[*34]** revert to 5% applied to all products sold on or after the date of this agreement until expiration of the last patent.

2. Section 5.2.1 in the Shenzhen agreement states that the licensee agrees to exclusively purchase HCI's foam tips for a period of five years after the last patent expires for all of the licensee's products which use foam tips. *Id.*

3. There is no evidence that the licenses were not entered into voluntarily or were coerced.

4. The Shenzhen agreement applied only to the China market and was never actually enforced.

5. There is no evidence that retroactive royalties were ever demanded or paid based on any products that were imported into, made in, sold in, or used in the United States by Nacre. Defense counsel's entire discussion of this agreement was couched in the hypothetical and does not provide any specific facts regarding enforcement or sales. Tr. at p. 1527, ll. 4-18; p. 1531, l. 5 - 1535, l. 9.

6. The court finds credible the testimony of Dr. Olivera that HCI was a "small business" that was always "looking for new customers." Tr. at p. 1635, ll. 10-19.

Again, Shure has pointed to no case that terms this practice patent misuse per se. The practice does not seem to be **[*35]** explicitly prohibited by *Section 271(d)*, and that court has already found that the tying arrangement itself is not patent misuse under the facts of this case. There is insufficient evidence that the practice extended HCI's patent rights with any anti-competitive effect in any other way.

Even assuming there was an anti-competitive effect, consideration of the "rule of reason" analysis does not favor, under these facts, terming this practice patent misuse. HCI is a small business. HCI is a small business. The court does not find that HCI's condition changed after the license agreements with the marking provisions were entered into. The court finds there is insufficient evidence to make a determination regarding the restraint's history, nature, and effect. Shure has neither presented any evidence that any of these agreements were coerced, nor that any mismarked item was ever imported into, made in, sold in, or used in the United States. The court has already found that the Shenzhen agreement applied only to the China market and was never actually enforced. Similarly, Shure pointed to no evidence that any products were ever sold in the United States by Nacre, or that the retroactive royalty **[*36]** provision was ever enforced. The court does not find that HCI has engaged in patent misuse.

III. Conclusion

For the reasons discussed above, the court will deny Shure's claims of patent misuse based on certain provisions included in HCI's licensing agreements, namely (1) providing for a post-expiration marking requirement; (2) requiring post-expiration supply obligations; (3) providing for an undiminishing royalty rate; and (4) including a potential retroactive royalty increase.

So **ORDERED** and **SIGNED** this **26** day of **March, 2009.**

/s/ Ron Clark

Ron Clark, United States District Judge

In re Mushroom Direct Purchaser Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

March 26, 2009, Decided; March 26, 2009, Filed

Master File NO. 06-0620; NO. 06-0638; NO. 06-0657; NO. 06-0677; NO. 06-0861; NO. 06-0932; NO. 06-1464; NO. 06-1854

Reporter

621 F. Supp. 2d 274 *; 2009 U.S. Dist. LEXIS 26254 **; 2009-1 Trade Cas. (CCH) P76,616

IN RE MUSHROOM DIRECT PURCHASER ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: All Actions

Subsequent History: Appeal dismissed by *In re Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 2011 U.S. App. LEXIS 17530 (3d Cir. Pa., Aug. 23, 2011)*

Reconsideration denied by *In re Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 2014 U.S. Dist. LEXIS 146120 (E.D. Pa., Oct. 14, 2014)*

Related proceeding at *Am. Mushroom Coop. v. Saul Ewing Arnstein & Lehr LLP, 2022 Phila. Ct. Com. Pl. LEXIS 18 (Aug. 17, 2022)*

Prior History: *In re Mushroom Direct Purchaser Antitrust Litig., 2008 U.S. Dist. LEXIS 16595 (E.D. Pa., Mar. 3, 2008)*

Core Terms

mushrooms, cooperative, growers, exemption, entities, distributors, conspiracy, agricultural, ownership, conspire, affiliated, immunity, prices, Enterprises, subsidiary, antitrust, distribution center, summary judgment, Sherman Act, plaintiffs', Phase, discovery, anti trust law, de minimis, monopolization, undisputed, marketing, destroy, Farms, defendants'

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56(c) provides that summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Summary judgment will be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN2[] **Summary Judgment, Burdens of Proof**

The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact. If the moving party sustains the burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. *Fed. R. Civ. P. 56(e)* provides that when a properly supported motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. The adverse party therefore must raise more than a mere scintilla of evidence in its favor in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. However, the existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against the moving party.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Summary disposition of antitrust cases is difficult because of their inherent factual complexity and because motive and intent are paramount considerations. However, complexity does not mean that summary disposition is thereby precluded or even disfavored in ***antitrust law***. Rather, summary judgment may be particularly important in antitrust cases to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN4[] **Sherman Act, Claims**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. *Section 2* of the Sherman Act provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. *15 U.S.C.S. § 2*. A related statute, the Clayton Act, provides plaintiffs with the right of private action to vindicate violations of the Sherman Act. *15 U.S.C.S. §§ 4* and *16*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN5[] **Collectives & Cooperatives, Capper-Volstead Act**

The Capper-Volstead Act, *7 U.S.C.S. § 291*, provides agricultural cooperatives a limited exemption from antitrust laws. The Capper-Volstead Act clarified and expanded the antitrust exemption for cooperatives found in Section 6 of the Clayton Act, *15 U.S.C.S. § 17*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN6[] **Collectives & Cooperatives, Capper-Volstead Act**

See *7 U.S.C.S. § 291*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

HN7[] **Collectives & Cooperatives, Clayton Act**

See *15 U.S.C.S. § 17*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN8[] **Collectives & Cooperatives, Capper-Volstead Act**

As the Supreme Court has made clear, for defendants to be exempt from antitrust liability under the Capper-Volstead Act, *7 U.S.C.S. § 291*, they must establish not only that the cooperative was entitled to the Act's protection but also that all of the entities that were members of the cooperative were likewise qualified under the Act. Even one non-farmer member in a cooperative disqualifies a cooperative from claiming the Capper-Volstead exemption. Thus, if non-producers participate as members in an agricultural cooperative, that cooperative is not entitled to avail itself of the Capper-Volstead exemption.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN9[] **Collectives & Cooperatives, Capper-Volstead Act**

A defendant cooperative claiming immunity from antitrust laws under the Capper-Volstead Act, *7 U.S.C.S. § 291*, must establish that the cooperative is a valid Capper-Volstead cooperative by showing all of the following: 1) all of the members of the cooperative are producers of agricultural products; 2) each member of the cooperative only gets one vote regardless of its size; 3) the cooperative does not pay dividends on stock or membership capital in excess of 8 per centum per annum; and 4) at least 50 percent of the products dealt with by the cooperative are products of its members. *7 U.S.C.S. § 291*. The last element is commonly referred to as the 50 percent rule.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN10[] **Collectives & Cooperatives, Capper-Volstead Act**

When agricultural industries vertically integrate, including non-farmer middlemen such as processors, the economic role of these middlemen exceeds the conduct Congress intended to permit through the Capper-Volstead exemption, *7 U.S.C.S. § 291*. Courts have held that inclusion of a wholly-owned subsidiary which is a processor as a member of an agricultural cooperative destroys Capper-Volstead immunity.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN11[] **Collectives & Cooperatives, Capper-Volstead Act**

For purposes of the Capper-Volstead anti-trust exemption for agricultural cooperatives, *7 U.S.C.S. § 291*, a member has been held to be a person with voting rights in the association. That is, a member, for purposes of the Capper-Volstead Act, is someone with the power to participate in the control and policy making of the association through voting or some equivalent form of power. Simply put, if a member does not have any input into the affairs of the association, surely such member should not be able to destroy the immunity which the association would otherwise enjoy.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN12[] **Collectives & Cooperatives, Capper-Volstead Act**

A cooperative made of fully integrated producers of agricultural products performing its own processing and which hence does not associate for purposes of common handling, processing, and marketing is nevertheless engaged in the production of agricultural products as a farmer for purposes of *15 U.S.C.S. § 1*'s exemption under Capper-Volstead, *7 U.S.C.S. § 291*, if the cooperative is also engaged in traditional farming activity.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN13[] **Collectives & Cooperatives, Capper-Volstead Act**

The existence of even one non-farmer member in an agricultural cooperative is sufficient to destroy Capper-Volstead immunity under *7 U.S.C.S. § 291*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

HN14[] **Collectives & Cooperatives, Capper-Volstead Act**

The Capper-Volstead Act, *7 U.S.C.S. § 291*, was not intended to create an absolute shield from antitrust liability for agricultural cooperatives. Courts have held that where an agricultural cooperative acts in concert or enters into an agreement with persons or entities not engaged in agricultural production the Capper-Volstead exemption does not apply. Cooperatives cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by cooperatives alone. Additionally, a cooperative cannot enter into agreements with persons not engaged in agricultural production for the purpose of acquiring monopoly power.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] **Sherman Act, Claims**

To establish a conspiracy in violation of the Sherman Act under *Section 1* and *Section 2*, *15 U.S.C.S. §§ 1*, *2*, plaintiffs must allege and eventually prove: (1) concerted action by defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that involved illegal conduct or purpose and (4) that proximately caused injury to plaintiffs. Claims for conspiracy to monopolize under *Section 2* of the Sherman Act also require evidence of a conspiracy.

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

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

HN16[] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontal price fixing is per se illegal. When an action engaged in is per se illegal, further examination of the practice's impact on the market is unnecessary to find that it produced adverse, anticompetitive effects within relevant product and geographic markets.

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

HN17[] **Conspiracy to Monopolize, Elements**

The essence of concerted action is the existence of an agreement. Unilateral action simply does not support antitrust liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement. Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff. The Supreme Court has determined that agricultural cooperatives, like corporations, do not have the plurality of actors necessary for a conspiracy.

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

HN18[] **Conspiracy to Monopolize, Sherman Act**

For purposes of determining whether certain entities are capable of conspiring in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the involvement of family relationships in varying ownerships is immaterial to determining common ownership and control. That partners in a company or between companies are related by blood or marriage--no matter how closely--does not ensure that they will uniformly agree on how to control the companies. Merely because two people are related does not mean that they have the same views and interests in their family businesses.

Counsel: **[**1]** For DIVERSIFIED FOODS & SEASONINGS, INC., Plaintiff (2:06-cv-00638-TON): ADAM M. MOSKOWITZ, THOMAS A. TUCKER RONZETTI, LEAD ATTORNEYS, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILADELPHIA, PA; BRENT B. BARRIERE, DAVID L. PATRON, SUSIE MORGAN, LEAD ATTORNEYS, PHELPS DUNBAR LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN BRONZAFT GERSTEIN AND FISHER L.L.P., NEW YORK, NY DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; KEVIN LANDAU, NOAH SILVERMAN, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00638-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For KAOLIN MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, MONTEREY MUSHROOMS, INC., PHILLIPS MUSHROOM **[**2]** FARMS, LP., FRANKLIN FARMS, INC., JOHN PIA, Defendants (2:06-cv-00638-TON): H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCK MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., Defendants (2:06-cv-00638-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For JOHN DOES 1-100, Defendant (2:06-cv-00638-TON): H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA.

For J-M FARMS, INC., Defendant (2:06-cv-00638-TON): JASON S. TAYLOR, CONNER & WINTERS LLP, TULSA, OK.

For KITCHEN PRIDE MUSHROOM FARMS, INC., Respondent (2:06-cv-00638-TON): FRANCIS P. NEWELL, LEAD ATTORNEY, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Respondent (2:06-cv-00638-TON): THOMAS K. SCHINDLER, LEAD ATTORNEY, REGER RIZZO **[**3]** KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Movant (2:06-cv-00638-TON): JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For ALL AMERICAN MUSHROOM, INC., ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED, Plaintiff (2:06-cv-01464-TON): JAY S. COHEN, LEAD ATTORNEY, EUGENE A. SPECTOR, SPECTOR ROSEMAN KODROFF & WILLIS, P.C., PHILADELPHIA, PA.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-01464-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For KAOLIN MUSHROOM, TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, MONTEREY MUSHROOMS, INC., PHILLIPS MUSHROOM FARMS, L.P., FRANKLIN FARMS, INC., MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., GIORGIO FOODS, INC., GASPARI BROS. INC., GOURMET'S FINEST MUSHROOM CO., SOUTH MILL MUSHROOM SALES, INC., OAKSHIRE MUSHROOM FARM, INC., JOHN PIA, MICHAEL PIA, Defendants **[**4]** (2:06-cv-01464-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant (2:06-cv-01464-TON): BARBARA T. SICALIDES, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For KITCHEN PRIDE MUSHROOM FARMS, INC., Respondent (2:06-cv-01464-TON): FRANCIS P. NEWELL, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Movant: JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For ASSOCIATED GROCERS, INC., Plaintiff (2:06-cv-01854-TON): ANDREW WILLIAM KELLY, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK, PHILA, PA.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-01854-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For ROBERT A. FERANTO, JR., trading **[**5]** as BELLA MUSHROOM FARMS, BROWNSTONE MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, FOREST MUSHROOM INC., FRANKLIN FARMS, INC., GINO GASPARI & SONS, INC., GASPARI BROS. INC., GIORGI MUSHROOM COMPANY, GIORGIO FOODS, INC., KAOLIN MUSHROOM FARMS, INC., SOUTH MILL MUSHROOM SALES, INC., LRP MUSHROOMS INC, LRP-M MUSHROOMS LLC, LEONE PIZZINI AND SON, INC., MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., OAKSHIRE MUSHROOM FARM, INC., PHILLIPS MUSHROOM FARMS, INC., LOUIS M. MARSON, JR., INC., MONTEREY MUSHROOMS, INC., STEVEN H. GUEST, trading as KENNETT SHITAKE, JOHN PIA, MICHAEL PIA, COUNTRY FRESH MUSHROOM CO., Defendants (2:06-cv-01854-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For HARVEST FRESH FARMS, INC., UNITED MUSHROOM FARMS COOPERATIVE, INC., Defendants (2:06-cv-01854-TON): WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For MARIO CUTONE MUSHROOM CO., INC., Defendant (2:06-cv-01854-TON): JOEL I. FISHBEIN, SPECTOR GADON & ROSEN, PHILADELPHIA, PA.

For M.D. BASCIANI & **[**6]** SONS, INC., Defendant (2:06-cv-01854-TON): DONNA M. ALBANI, LEAD ATTORNEY, LAW OFFICES OF DONNA M. ALBANI, GLEN MILLS, PA; THOMAS K. SCHINDLER, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant (2:06-cv-01854-TON): BARBARA T. SICALIDES, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

For JM FARMS, INC., Defendant (2:06-cv-01854-TON): JASON S. TAYLOR, CONNER & WINTERS LLP, TULSA, OK.

For KITCHEN PRIDE MUSHROOM FARMS, INC., Respondent (2:06-cv-01854-TON): FRANCIS P. NEWELL, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Movant (2:06-cv-01854-TON): JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For WM. ROSENSTEIN & SONS CO., Plaintiff (2:06-cv-00620-TON): ADAM M. MOSKOWITZ, THOMAS A. TUCKER RONZETTI, LEAD ATTORNEYS, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; ANDREW WILLIAM KELLY, CHARLES F. ZIMMER, II, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN BRONZAFT GERSTEIN AND FISHER **[**7]** L.L.P., NEW YORK, NY; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; KEVIN LANDAU, NOAH SILVERMAN, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For ROBERT ALTMAN, Plaintiff (2:06-cv-00620-TON): ADAM M. MOSKOWITZ, THOMAS A. TUCKER RONZETTI, LEAD ATTORNEYS, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; ANDREW WILLIAM KELLY, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEY, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; KEVIN LANDAU, NOAH SILVERMAN, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For MEIJER, INC., MEIJER DISTRIBUTION, INC., Plaintiffs (2:06-cv-00620-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; JOSHUA H. GRABAR, LEAD ATTORNEY, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; DAVID M. **[**8]** BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL; LINDA P. NUSSBAUM, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY.

For ALL AMERICAN MUSHROOM, INC., Plaintiff (2:06-cv-00620-TON): BARRY L. REFSIN, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For ASSOCIATED GROCERS, INC., M. ROBERT ENTERPRISES, INC., MARKET FAIR, INC.. Plaintiffs (2:06-cv-00620-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For DIVERSIFIED FOODS & SEASONINGS, INC., Plaintiff (2:06-cv-00620-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For M.L. ROBERT, II, L.L.C., Plaintiff (2:06-cv-00620-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; BRENT B. BARRIERE, DAVID L. PATRON, SUSIE MORGAN, LEAD ATTORNEYS, PHELPS DUNBAR LLP, NEW ORLEANS, LA; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For PUBLIX SUPER MARKETS, **[**9]** INC., Plaintiff (2:06-cv-00620-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID P. GERMAINE, LEAD ATTORNEY, VANEK VICKERS & MASINI PC, CHICAGO, IL; JOSEPH M. VANEK, LEAD ATTORNEY, VANEK, VICKERS, & MASINI, P.C., CHICAGO, IL; KATHRYN C. HARR, LEAD ATTORNEY, TRUJILLO RODRIGUEZ & RICHARDS LLC, PHILADELPHIA, PA; DAVID M. BUCKNER, KOZYAK TROPIN & THROCKMORTON, P.A., CORAL GABLES, FL.

For THEODORE J. KATSIROUBAS, d/b/a KATSIROUBAS BROTHERS WHOLESALE FRUIT AND PRODUCE, NATIVE MAINE PRODUCE AND SPECIALTY FOODS, LLC, Plaintiffs (2:06-cv-00620-TON): MANUEL JUAN DOMINGUEZ, LEAD ATTORNEY, BERMAN DEVALERIO, WEST PALM BEACH, FL; BARRY L. REFSIN, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00620-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; MARTIN I. TWERSKY, LEAD ATTORNEY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; TERRI A. PAWELSKI, WILLIAM A. DESTEFANO, LEAD ATTORNEYS, RUDOLPH GARCIA, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN **[**10]** INGERSOLL & ROONEY, PHILADELPHIA, PA.

For KAOLIN MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, MONTEREY MUSHROOMS, INC., PHILLIPS MUSHROOMS FARMS, LP., Defendants (2:06-cv-00620-TON): H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; TERRI A. PAWELSKI, WILLIAM A. DESTEFANO, LEAD ATTORNEYS, RUDOLPH GARCIA, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For FRANKLIN FARMS, INC., Defendant (2:06-cv-00620-TON): CHRISTOPHER H. CASEY, MARK ANDREW WACHLIN, LEAD ATTORNEYS, DILWORTH PAXSON LLP, PHILADELPHIA, PA; TERRI A. PAWELSKI, LEAD ATTORNEY, RUDOLPH GARCIA, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., JOHN PIA, Defendants (2:06-cv-00620-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; TERRI A. PAWELSKI, WILLIAM A. DESTEFANO, LEAD ATTORNEY,

RUDOLPH GARCIA, BUCHANAN INGERSOLL P.C., **[**11]** PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.For JOHN DOES 1-100, Defendant (2:06-cv-00620-TON): MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For BROWNSTONE MUSHROOM FARMS, INC., COUNTRY FRESH MUSHROOM CO., ROBERT A. FERANTO, JR., T/A BELLA MUSHROOM FARMS, FOREST MUSHROOM INC., GASPARI BROS. INC., GINO GASPARI & SONS, INC., GIORGI MUSHROOM COMPANY, GIORGIO FOODS, INC., LEONE PIZZINI AND SON, INC., LRP MUSHROOMS INC., LRP-M MUSHROOMS LLC, OAKSHIRE MUSHROOM FARM, INC., MICHAEL PIA, SOUTH MILL MUSHROOM SALES, INC., UNITED MUSHROOM FARMS COOPERATIVE, INC., Defendants (2:06-cv-00620-TON): TERRI A. PAWELSKI, LEAD ATTORNEY, RUDOLPH GARCIA, WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., BERGER & MONTAGUE PC, PHILA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant (2:06-cv-00620-TON): BARBARA T. SICALIDES, PEPPER HAMILTON LLP, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For HARVEST FRESH FARMS, INC., LOUIS M. MARSON, JR., INC., Defendants (2:06-cv-00620-TON): **[**12]** TERRI A. PAWELSKI, WILLIAM A. DESTEFANO, LEAD ATTORNEYS, RUDOLPH GARCIA, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., BERGER & MONTAGUE PC, PHILA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For JM FARMS, INC., Defendant (2:06-cv-00620-TON): D. RICHARD FUNK, JASON S. TAYLOR, LEAD ATTORNEYS, CONNER & WINTERS LLP, TULSA, OK; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For KITCHEN PRIDE MUSHROOMS, Defendant (2:06-cv-00620-TON): FRANCIS P. NEWELL, LEAD ATTORNEY, DAVID W. ENGSTROM, NEILL C. KLING, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Defendant (2:06-cv-00620-TON): DONNA M. ALBANI, LAW OFFICES OF DONNA M. ALBANI, GLEN MILLS, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; THOMAS K. SCHINDLER, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For MARIO CUTONE MUSHROOM CO., INC., Defendant (2:06-cv-00620-TON): JEFFREY A. KRAWITZ, LEAD ATTORNEY, SPECTOR GADON & ROSEN, P.C., PHILADELPHIA, **[**13]** PA; JOEL I. FISHBEIN, LEAD ATTORNEY, SPECTOR GADON & ROSEN, PHILADELPHIA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For MASHA & TOTO, INC., T/A M&T MUSHROOMS, Defendant (2:06-cv-00620-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For MUSHROOM ALLIANCE, INC., Defendant (2:06-cv-00620-TON): AMY R. RICHTER, LEAD ATTORNEY, PORTLAND, OR; MATTHEW J. BORGER, LEAD ATTORNEY, KLEHR HARRISON HARVEY BRANZBURG & ELLERS L.L.P., PHILADELPHIA, PA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For QUINCY FARMS, Defendant (2:06-cv-00620-TON): MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For W&P MUSHROOM INC., Defendant (2:06-cv-00620-TON): WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Movant (2:06-cv-00620-TON): JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For MEIJER, INC., MEIJER DISTRIBUTION, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs (2:06-cv-00677-TON): **[**14]** BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; JOSHUA H. GRABAR, LEAD ATTORNEY, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; LINDA P. NUSSBAUM, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00677-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For PHILLIPS MUSHROOM FARMS L.P., KAOLIN MUSHROOM FARMS, INC., GIORGIO FOODS, INC., TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., MONTEREY MUSHROOMS, INC., FRANKLIN FARMS, INC., GASPARI BROS. INC., GOURMET'S FINEST, OAKSHIRE MUSHROOM FARM INC., JOHN PIA, MICHAEL PIA, Defendants (2:06-cv-00677-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM **[**15]** FARM, C&C CARRIAGE MUSHROOM CO., Defendants (2:06-cv-00677-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant (2:06-cv-00677-TON): BARBARA T. SICALIDES, LEAD ATTORNEY, PEPPER HAMILTON LLP, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For EAST COAST EXOTICS, ELITE MUSHROOM COMPANY, MONEY'S MUSHROOMS, C J MUSHROOM COMPANY, Defendants (2:06-cv-00677-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For SOUTH MILL MUSHROOM SALES, INC., Defendant (2:06-cv-00677-TON): JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For J-M FARMS, INC.'S, Respondent (2:06-cv-00677-TON): JASON S. TAYLOR, CONNER & WINTERS LLP, TULSA, OK.

For M.D. BASCIANI & SONS, INC., Respondent (2:06-cv-00677-TON): THOMAS K. SCHINDLER, LEAD ATTORNEY, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For NATIONAL COUNCIL OF FARMER **[**16]** COOPERATIVES, Movant (2:06-cv-00677-TON): JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For KITCHEN PRIDE MUSHROOM FARMS, INC., Movant (2:06-cv-00677-TON): FRANCIS P. NEWELL, LEAD ATTORNEY, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

For M.L. ROBERT, II, L.L.C., Plaintiff (2:06-cv-00861-TON): ADAM M. MOSKOWITZ, THOMAS A. TUCKER RONZETTI, LEAD ATTORNEYS, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; ANDREW WILLIAM KELLY, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILADELPHIA, PA; BRENT B. BARRIERE, DAVID L. PATRON, SUSIE MORGAN, LEAD ATTORNEYS, PHELPS DUNBAR LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, KEVIN LANDAU, NOAH SILVERMAN, LEAD ATTORNEYS, GARWIN BRONZAFT GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP,

ALEXANDRIA, LA; NICOLE S. TYGIER, ROBERT A. KUTCHER, LEAD ATTORNEYS, CHOPIN, WAGAR, RICHARD & KUTCHER LLP, METAIRIE, LA.

For M. ROBERT ENTERPRISES, INC., MARKET FAIR, INC., Plaintiffs (2:06-cv-00861-TON): ADAM M. MOSKOWITZ, THOMAS A. TUCKER RONZETTI, **[**17]** LEAD ATTORNEYS, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; ANDREW WILLIAM KELLY, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILADELPHIA, PA; BRENT B. BARRIERE, DAVID L. PATRON, SUSIE MORGAN, LEAD ATTORNEYS, PHELPS DUNBAR LLP, NEW ORLEANS, LA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; NICOLE S. TYGIER, ROBERT A. KUTCHER, LEAD ATTORNEYS, CHOPIN, WAGAR, RICHARD & KUTCHER LLP, METAIRIE, LA.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00861-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For KAOLIN MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, MONTEREY MUSHROOMS, INC., PHILLIPS MUSHROOM FARMS, L.P., FRANKLIN FARMS, INC., GIORGIO FOODS, INC., GASPARI **[**18]** BROS. INC., GASPARI BROS. INC., SOUTH MILL MUSHROOM SALES, INC., OAKSHIRE MUSHROOM FARM, INC., JOHN PIA, MICHAEL PIA, Defendants (2:06-cv-00861-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., Defendant (2:06-cv-00861-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For CREEKSIDE MUSHROOMS LTD., Defendant (2:06-cv-00861-TON): BARAK BASSMAN, BARBARA T. SICALIDES, LEAD ATTORNEYS, PEPPER HAMILTON LLP, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For EAST COAST EXOTICS, ELITE MUSHROOM CO. INC., C J MUSHROOM CO, Defendants (2:06-cv-00861-TON): WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For J-M FARMS, INC., Defendant (2:06-cv-00861-TON): JASON S. TAYLOR, LEAD ATTORNEY, CONNER & WINTERS LLP, TULSA, OK.

For KITCHEN PRIDE MUSHROOM **[**19]** FARMS, INC., Defendant (2:06-cv-00861-TON): DAVID W. ENGSTROM, FRANCIS P. NEWELL, HARKINS CUNNINGHAM LLP, PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Defendant (2:06-cv-00861-TON): THOMAS K. SCHINDLER, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Movant (2:06-cv-00861-TON): JAMES A. BACKSTROM, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For PUBLIX SUPER MARKETS, INC., Plaintiff (2:06-cv-00932-TON): BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; DAVID P. GERMAINE, JOSEPH M. VANEK, LEAD ATTORNEYS, VANEK VICKERS & MASINI PC, CHICAGO, IL; KATHRYN C. HARR, LEAD ATTORNEY, TRUJILLO RODRIGUEZ & RICHARDS LLC, PHILADELPHIA, PA.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00932-TON): DONALD M. BARNES, LEAD ATTORNEY, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., SALVATORE A. ROMANO, LEAD ATTORNEYS, BERGER & MONTAGUE PC, PHILA, PA;

JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA; WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For PHILLIPS MUSHROOM FARMS, INC., KAOLIN MUSHROOM FARMS, INC., TO-JO FRESH MUSHROOMS, **[**20]** INC., CARDILE MUSHROOMS, INC., MONTEREY MUSHROOMS, INC., FRANKLIN FARMS, INC., SOUTH MILL MUSHROOM SALES, INC., OAKSHIRE MUSHROOM FARM INC., JOHN PIA, MICHAEL PIA, Defendants (2:06-cv-00932-TON): H. LADDIE MONTAGUE, JR., LEAD ATTORNEYS, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, LLC, LLC, C&C CARRIAGE MUSHROOM CO., Defendant (2:06-cv-00932-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEYS, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA; JOSEPH R. LOVERDI, BUCHANAN INGERSOLL & ROONEY, PHILADELPHIA, PA.

For BROWNSTONE FARMS, INC., and/or BROWNSTONE MUSHROOM FARM, COUNTRY FRESH MUSHROOM CO., ROBERT A. FERRANTO, JR., trading as BELLA MUSHROOM FARMS, FOREST MUSHROOMS, INC., GINO GASPARI & SONS, INC., GASPARI MUSHROOM CO., INC. and/or GASPARI BROS. INC., GIORGIO MUSHROOM CO., and/or GIORGIO FOODS, INC, HARVEST FRESH FARMS, INC., LOUIS MARSON, JR., INC., **[**21]** LRP-M MUSHROOMS LLC, LRP MUSHROOMS, INC. and/or LEONE PIZZINI & SON, INC., UNITED MUSHROOM FARMS COOPERATIVE, INC., and/or UNITED MUSHROOM FARMS COOP, INC., CARDILE BROS. MUSHROOMS PACKAGING, INC., Defendants (2:06-cv-00932-TON): WILLIAM A. DESTEFANO, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For M.D. BASCIANI & SONS, INC., Defendant (2:06-cv-00932-TON): DONNA M. ALBANI, LAW OFFICES OF DONNA M. ALBANI, GLEN MILLS, PA; THOMAS K. SCHINDLER, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For MARIO CUTONE MUSHROOM CO., INC., Defendant (2:06-cv-00932-TON): JOEL I. FISHBEIN, LEAD ATTORNEY, SPECTOR GADON & ROSEN, PHILADELPHIA, PA.

For MUSHROOM ALLIANCE, INC., Defendant (2:06-cv-00932-TON): MATTHEW J. BORGER, LEAD ATTORNEY, KLEHR HARRISON HARVEY BRANZBURG & ELLERS L.L.P., PHILADELPHIA, PA.

For KITCHEN PRIDE MUSHROOMS, INC., Defendant (2:06-cv-00932-TON): NEILL C. KLING, HARKINS CUNNINGHAM LLP, PHILADELPHIA, PA.

For JM FARMS, Defendant (2:06-cv-00932-TON): JASON S. TAYLOR, LEAD ATTORNEY, CONNER & WINTERS LLP, TULSA, OK.

For NATIONAL COUNCIL OF FARMER COOPERATIVES, Defendant (2:06-cv-00932-TON): JAMES A. BACKSTROM, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For KITCHEN PRIDE **[**22]** MUSHROOM FARMS, INC., Respondent (2:06-cv-00932-TON): FRANCIS P. NEWELL, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

For ROBERT ALTMAN, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF STEPHEN LEE MCCUE D/B/A JOHN MANNING CO., Plaintiff (2:06-cv-00657-TON): ADAM M. MOSKOWITZ, LEAD ATTORNEY, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL; ANDREW WILLIAM KELLY, JOHN ALDEN MEADE, JOHN GREGORY ODOM, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BARRY L. REFSIN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILA, PA; BRUCE E. GERSTEIN, KEVIN LANDAU, NOAH SILVERMAN, LEAD ATTORNEYS, GARWIN BRONZAFT GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; THOMAS A. TUCKER RONZETTI, LEAD ATTORNEY, KOZYAK TROPIN & THROCKMORTON, MIAMI, FL.

For EASTERN MUSHROOM MARKETING COOPERATIVE, INC., Defendant (2:06-cv-00657-TON): DONALD M. BARNES, SALVATORE A. ROMANO, LEAD ATTORNEYS, PORTER WRIGHT MORRIS & ARTHUR LLP, WASHINGTON, DC; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, JOSEPH R. LOVERDI, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For KAOLIN MUSHROOM **[**23]** FARMS, INC, TO-JO FRESH MUSHROOMS, INC., CARDILE MUSHROOMS, INC., CARDILE BROS. MUSHROOMS PACKAGING, MONTEREY MUSHROOMS, INC., PHILLIPS MUSHROOM FARMS, LP., FRANKLIN FARMS, INC., JOHN PIA, Defendants (2:06-cv-00657-TON): H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, JOSEPH R. LOVERDI, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For MODERN MUSHROOM FARMS, INC., SHER-ROCKEE MUSHROOM FARM, C & C CARRIAGE MUSHROOM CO., Defendants (2:06-cv-00657-TON): ABRAHAM C. REICH, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; H. LADDIE MONTAGUE, JR., LEAD ATTORNEY, BERGER & MONTAGUE PC, PHILA, PA; WILLIAM A. DESTEFANO, LEAD ATTORNEY, JOSEPH R. LOVERDI, BUCHANAN INGERSOLL P.C., PHILADELPHIA, PA.

For J-M FARMS, INC.'S, Respondent (2:06-cv-00657-TON): JASON S. TAYLOR, CONNER & WINTERS LLP, TULSA, OK.

For M.D. BASCIANI & SONS, INC., Respondent (2:06-cv-00657-TON): THOMAS K. SCHINDLER, LEAD ATTORNEY, REGER RIZZO KAVULICH & DARNALL, LLP, WEST CHESTER, PA.

For NATIONAL COUNCIL OF FARMERS COOPERATIVES, Movant (2:06-cv-00657-TON): JAMES A. BACKSTROM, LEAD ATTORNEY, JAMES A. BACKSTROM, COUNSELLOR AT LAW, PHILADELPHIA, PA.

For **[**24]** KITCHEN PRIDE MUSHROOM FARMS, INC., Movant (2:06-cv-00657-TON): FRANCIS P. NEWELL, LEAD ATTORNEY, HARKINS CUNNINGHAM, LLP, PHILADELPHIA, PA.

Judges: THOMAS N. O'NEILL, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: THOMAS N. O'NEILL, JR.

Opinion

[*277] O'NEILL, J.

MEMORANDUM

This is an antitrust case involving the applicability of the Capper-Volstead exemption for agricultural cooperatives. Discovery was phased with Phase One concerning the Capper-Volstead issue. Presently before me are the motions for summary judgment filed by defendant Mushroom Alliance, Inc., defendant Kitchen Pride Mushrooms, defendant M.D. Basciani & Sons, Inc., defendant Eastern Mushroom Marketing Cooperative, Inc. ("EMMC") [1] and certain defendants, [2] defendant **[*278]** JM Farms and defendant Franklin Farms, plaintiffs' omnibus response, and

---

[1] The EMMC's motion is one for partial summary judgment as it does not seek summary judgment at this time on plaintiffs' claims for monopolization, attempted monopolization or claims under *Section 7* of the Clayton Act.

[2] The following defendants are included as "certain defendants" in the EMMC's motion: Eastern Mushroom Marketing Cooperative, Inc.; Kaolin Mushroom Farms, Inc.; To-Jo Fresh Mushrooms, Inc.; Cardile Mushrooms, Inc.; Mario Cutone Mushroom Co., Inc.; Cardile Bros. Mushrooms, Packaging; Monterey Mushrooms, Inc.; Phillips Mushrooms Farms, LP; Modern Mushroom Farms, Inc.; Sher-Rockee Mushroom Farm; C&C Carriage Mushroom Co.; John Pia; Michael Pia; Brownstone Mushroom Farms, Inc.; Robert A. Ferato T/A Bella Mushroom; Farms, Inc.; Forest Mushroom, Inc.; Gaspari Bros. Inc.; Gino Gaspari & Sons, Inc.; Giorgi Mushroom Company; Giorgio Foods, Inc.; Harvest Fresh Farms, Inc.; Leone Pizzini and Son, Inc.;

some defendants' replies thereto; [3] the motion for summary judgment filed by consolidated plaintiffs, responses by some defendants and plaintiffs' omnibus reply; and the motion to strike filed by plaintiffs All American Mushroom, Inc., Robert Altman and Associate Grocers, Inc., [4] responses by some defendants and plaintiffs' reply thereto. The parties have submitted voluminous exhibits including witness depositions from **[**25]** the various entities involved in this litigation.

BACKGROUND

The history between the parties to this antitrust lawsuit is lengthy, convoluted and contentious; thus, I will begin by identifying some of the relevant entities at issue in the current motions and the undisputed facts regarding their structure and provide a limited recitation of the relevant procedural history.

I. Factual History

Incorporated in the Commonwealth of Pennsylvania and headquartered in Kennett Square, Pennsylvania, the EMMC is a large mushroom cooperative comprised of entities that grow, buy, sell, package and ship mushrooms to retail and food service outlets across the United States. The list of defendants includes mushroom growers, packagers, sellers, distributors and other related entities that were either members or affiliates of members of the EMMC.

It is **[**27]** undisputed that from 2001 to 2005, the EMMC adapted and amended various minimum pricing policies for mushrooms sold to the fresh market. Defendants assert that these policies had exceptions, were not enforced by the EMMC and were routinely not followed by members. It is undisputed that member dues were based on the number of pounds of mushrooms that were sold to the fresh market by the distributor operations and not the amount grown by the growing operations.

According to the undisputed facts, M. Cutone Mushroom Co., Inc., joined the EMMC on January 20, 2001. M. Cutone is one of several mushroom related companies owned by the Cutone family that defendants allege are commonly owned, controlled and operated by Mario Cutone, his wife and their three adult sons. M&V Enterprises is also owned by the Cutone family and grows mushrooms and sells or transfers 100% of the mushrooms it grows to M. Cutone Avondale which transfers them to M. Cutone Chelsea along with other mushrooms it purchases. The address on Cutone's EMMC membership agreement bears the M. Cutone Chelsea address and the letterhead describes M. Cutone as "Receivers and Commission Merchants Fruits, Vegetables and Flowers." **[*279]** M. Cutone **[**28]** does not grow mushrooms. The EMMC minimum pricing applied to M. Cutone's sales to its wholesale and retail customers.

Kaolin Mushroom Farms, Inc. joined the EMMC on January 9, 2001. South Mill Mushroom Sales Inc. is a mushroom marketer, packer and shipper. Both Kaolin and South Mill are jointly owned and operated by John and Michael Pia, each of whom have a 50% interest in each company. John and Michael Pia, through 100% ownership in two companies, Pennsylvania Mushroom Distribution, Inc. and Mushroom Substrate Technologies, Inc., held a 50% ownership interest in four companies that operated mushroom distribution centers in Dallas, Houston, New Orleans and Atlanta. The remaining 50% ownership interest in the distribution centers was held by Stuart Thomas through his ownership of Thomas Mushroom Distribution Inc. and Dallas South Mill Inc. The Kaolin/South Mill distribution centers were not EMMC members, did not grow mushrooms but sold mushrooms grown by defendant

---

Louis M. Marson, Jr., Inc.; LRP Mushrooms, Inc.; LRP-M Mushrooms LLC; Oakshire Mushroom Farm, Inc.; South Mill Mushroom Sales, Inc.; United Mushroom Farms Cooperative, Inc.; and Country Fresh Farms, Inc.

The following defendants joined **[**26]** in the motion filed by the EMMC defendants: M.D. Basciani & Sons, Inc.; Mushroom Alliance, Inc.; Kitchen Pride Mushrooms; JM Farms; and Franklin Farms.

[3] Defendants Masha & Toto, Inc., T/A M&T Mushrooms and W&P Mushroom Inc. have not joined in or filed separate motions for summary judgment.

[4] The motion to strike is to exclude the portions of defendants' motions that are beyond the scope of Phase One discovery.

Kaolin. The Kaolin/South Mill distribution centers adhered to EMMC minimums in their mushroom sales. Defendants assert that the distribution centers were contractually obligated to price mushrooms at prices specified by Kaolin/South **[**29]** Mill.

LRP-M Mushrooms LLC joined the EMMC on January 9, 2001. The Articles of Incorporation for LRP-M were filed in January 2001. Dominic Manfredini and his nephew Lucio Pizzini each have a 50% ownership interest in LRP-M. Lucio Pizzini also owns LRP Mushrooms. LRP grows mushrooms on land leased to him by Dominic Manfredini. Both LRP-M and LRP sell 100% of their mushrooms to Manfredini Enterprises, Inc., which buys, packages and markets produce including mushrooms. Manfredini Enterprises is owned by the wife of Dominic Manfredini and Dominic Manfredini serves as its president and operator. Manfredini Enterprises does not grow mushrooms. The mushrooms that Manfredini Enterprises acquired from LRP-M account for 20-25% of the mushrooms that Manfredini Enterprises resold to its customers. EMMC minimum pricing applied to sales by Manfredini Enterprises.

Although it will not be addressed in this opinion because the only issue upon which discovery was conducted was the EMMC's Capper-Volstead immunity, as background, plaintiffs assert that defendants allegedly launched a "supply control" campaign by using membership funds collected during 2001 and 2002 to acquire and subsequently dismantle non-EMMC **[**30]** mushroom growing operations in order to support and maintain artificial price increases. Plaintiffs allege that the EMMC repeatedly would purchase a mushroom farm or a parcel of farmland and then sell or exchange that farm or parcel at a loss, attaching a permanent or long-term deed restriction to the land prohibiting the conduct of any business related to the growing of mushrooms. Plaintiffs cite several specific examples of this alleged practice during 2001 and 2002.

Plaintiffs further allege that defendants collectively interfered with non-EMMC growers that sought to sell at prices below those set by the EMMC and pressured independent growers to join the EMMC. The pressure and coercion tactics alleged include threatening and/or implementing a group boycott in which EMMC members would not sell mushrooms to assist independent growers in satisfying their short-term supply needs and/or selling mushrooms to independent growers at inflated prices.

[*280] II. Procedural History

On December 16, 2004, the United States Department of Justice filed an antitrust complaint against the EMMC after an eighteen-month investigation of the EMMC's membership activities, qualifications as a cooperative and marketing **[**31]** practices. United States v. E. Mushroom Mktg. Coop., Inc., Civil Action No. 04-CV-5829 (E.D. Pa. Dec. 16, 2004). On September 9, 2005, final judgment was entered, pursuant to which the United States and the EMMC agreed to file documents nullifying deed restrictions placed on six parcels sold or transferred by the EMMC and to impose no similar deed restrictions on other properties for the next ten years. [5]

On June 26, 2006, plaintiffs, direct purchasers of mushrooms, filed a consolidated amended antitrust class action under federal law against defendants, the EMMC, thirty-seven members, officers and affiliates of members, and unidentified members and/or co-conspirators during the class period (collectively, "defendants"), alleging that defendants engaged in an illegal scheme and conspiracy to cause plaintiffs to pay artificially inflated prices for mushrooms from January 2001 **[**32]** to date of filing. Plaintiffs filed their consolidated amended antitrust class action complaint pursuant to my June 5, 2006 Order consolidating seven class actions and one non-class action previously filed against defendants to promote judicial economy and avoid duplication. The consolidated actions include the Class Action Complaint, the Giant Eagle Amended Complaint and the Publix Amended Complaint.

Specifically, plaintiffs brought this action to recover treble damages, equitable relief, costs of suit and reasonable attorneys' fees pursuant to the Clayton Act, *15 U.S.C. §§ 15(a)* and *26 (2007)*, for defendants' alleged violations of

---

[5] Some defendants rely on the final judgment of the DOJ in asserting that the EMMC is properly formed under the Capper-Volstead Act. However, the Competitive Impact Statement specifically states that "the Final Judgment has no prima facie effect in any subsequent lawsuits that may be brought against the Defendants."

the anti-competitive conspiracy, monopolization and attempted monopolization provisions of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and the unlawful acquisition provision of the Clayton Act, *15 U.S.C. § 18*.

On April 25, 2007, I granted defendants' motions to dismiss Count II of plaintiffs' consolidated amended complaint for monopolization and attempted monopolization under *Section 2* of the Sherman Act as to all defendants other than defendant EMMC and denied defendants' motion to dismiss in all other respects.

On August 8, 2007, I ordered phased discovery with **[**33]** Phase One discovery limited to: (1) whether all members of the EMMC are mushroom growers; (2) facts regarding the vertical integration of EMMC members; (3) whether any third parties conspired with the EMMC or any of its members to violate the antitrust laws; and (4) whether any parties were coerced, threatened or pressured by defendants to participate, join or conspire with the EMMC or any of its members to violate the antitrust laws. In my Order of April 17, 2008, I stated that "[t]he purpose of phasing discovery was to facilitate a determination on the issue of Capper-Volstead immunity at the earliest possible stage in the litigation." My January 8, 2008 Order stated that "Phase One must encroach upon the merits of plaintiffs' claims to some extent and achieving an impermeable divide between Phase One and the merits was never the goal of phased discovery in this case." In my February 12, 2008 Order, I allowed discovery **[*281]** under Phase One of "all communications between [defendants] and any members of the EMMC and/or the EMMCGA . . . ." and "all documents concerning the 'supply control' campaign . . . ."

STANDARD OF REVIEW

HN1[] *Rule 56(c) of the Federal Rules of Civil Procedure* provides, in **[**34]** relevant part, that summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

HN2[] The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact. *Id. at 322-23*. If the moving party sustains the burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. See *Anderson, 477 U.S. at 255*. *Rule 56(e)* provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations **[**35]** or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. The adverse party therefore must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)*. However, the "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against'" the moving party. *Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978)*, quoting *Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972)*.

HN3[] Several courts have noted that summary disposition of antitrust cases is difficult because of their inherent factual complexity and because motive and intent are paramount considerations. See e.g., *Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*; *Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 68 (2d Cir. 1984)*. **[**36]** However, complexity does not mean that summary disposition is thereby precluded or even disfavored in ***antitrust law***. *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.., 996 F.2d 537, 541 (2d Cir. 1993)*. Rather, summary judgment may be particularly important in antitrust cases to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces. Id. The present motions will be considered in light of these standards.

Defendants are moving for summary judgment with respect to plaintiffs' claims under *Section 1* and the conspiracy claims under *Section 2* on the ground that they are exempt under the Capper-Volstead Act. Thus, defendants have the burden of proof to show that EMMC qualifies as a Capper-Volstead cooperative. See *El v. Southeastern Penn. Trans. Auth., 479 F.3d 232, 237 **[*282]** (3d Cir. 2007)*. Plaintiffs filed cross motions for summary judgment and have the burden of proving their allegations that vitiate the EMMC's alleged immunity as well as their ultimate claims of conspiracy under *Section 1* and *2*. See *Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 55 (3d Cir. 2007)*.

DISCUSSION

Plaintiffs allege that defendants violated *Sections 1* **[**37]** and *2* of the Sherman Act as well as *Section 7* of the Clayton Act. Phase One discovery was limited to determining the issue of whether defendants are entitled to Capper-Volstead exemption for plaintiffs' conspiracy claims under *Sections 1* and *2* of the Sherman Act. Defendants' motions for summary judgment claim that they are entitled to summary judgment because they are exempt and, even if they were not immune, some defendants claim that plaintiffs have failed to assert any basis for holding them specifically liable. [6] Plaintiffs have filed a cross motion for summary judgment on defendants' affirmative defense of Capper-Volstead exemption.

HN4[] *Section 1* of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. *Section 2* of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *15 U.S.C. § 2*. A related statute, the Clayton Act, provides plaintiffs with the right of private action to vindicate violations of the Sherman Act. *15 U.S.C. §§ 4* and *16*.

HN5[] The Capper-Volstead Act provides agricultural cooperatives a limited exemption from antitrust laws. See *Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 822, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1977)*; **[**39]** *Md. & Va. Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 466-67, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960)*. The Act states, in relevant part:

> ***HN6***[] Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof . . . .

[*283] *7 U.S.C. § 291*. The Capper-Volstead Act clarified and expanded the antitrust exemption for cooperatives found in *Section 6* of the Clayton Act, which states, in relevant part:

> ***HN7***[] Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purposes of mutual help . . . or forbid or restrain individual members of such organizations from lawfully **[**40]** carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

---

[6] Defendants Mushroom Alliance, Kitchen Pride, Basciani & Sons, Inc., JM Farms, Michael Pia, John Pia, Giorgio Foods Inc., Gaspari Bros. Inc., and LRP Mushroom Inc. claim that regardless of the exemption determination their motions for summary judgment on plaintiffs' claims against them should be granted. Because Phase One discovery was narrowly focused on facts implicating the Capper-Volstead exception, I will dismiss without prejudice all of defendants' arguments not pertaining to Capper-Volstead because resolution at this stage would be premature. **[**38]** While some of the discovery may have allowed for plaintiffs to discover facts relating to defendants' individualized arguments, the nature of the Capper-Volstead exemption did not require plaintiffs to do so at this stage and I find sufficient their *Rule 56(f)* affidavit stating that discovery on such issues is still necessary.

15. U.S.C. § 17. In Maryland & Virginia Milk Producers, the Supreme Court recognized that the Act and its legislative history "indicate[] a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." *362 U.S. at 466*. Defendants argue that no genuine issues of material fact exist regarding their qualification for the Capper-Volstead exemption. However, plaintiffs argue that defendants are not entitled to the Capper-Volstead exemption because non-growers are members of the cooperative and that the EMMC and its members conspired with non-members to fix prices. [7]

I. Non-Grower Members

HN8[] As the Supreme Court has made clear, for defendants to be exempt from antitrust liability under the Capper-Volstead Act, they must establish not only that the EMMC was entitled to the Act's protection but also that all of the entities that were members of the EMMC were likewise qualified under the Act. [8] *Nat'l Broiler, 436 U.S. at 822-23*. The Supreme Court held that even one non-farmer member in a cooperative disqualifies a cooperative from claiming the Capper-Volstead exemption. [9] *Id. at 826-828*. This decision was consistent with the Court's previous holding in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc. (Sunkist II), 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*, **[**42]** in which it denied the Capper-Volstead exemption to a citrus growers association because approximately 15% of its members were non-farmer producers. Both cases held that even one "middleman" infiltrated into an **[*284]** otherwise exempt cooperative destroys Capper-Volstead immunity. *Sunkist II, 389 U.S. at 395-96*. Accordingly, if non-producers participate as members in an agricultural cooperative, that cooperative is not entitled to avail itself of the Capper-Volstead exemption. Id.

HN10[] "[W]hen agricultural industries vertically integrate, including non-farmer **[**43]** middlemen such as processors, the economic role of these middlemen exceeds the conduct Congress intended to permit through the Capper-Volstead exemption. *Ripplemeyer v. Nat'l Grape Co-op. Ass'n, Inc., 807 F. Supp. 1439, 1457 (W.D. Ark. 1992)*. In Ripplemeyer, the court held that inclusion of a wholly-owned subsidiary which was a processor as a member of an agricultural cooperative destroyed Capper-Volstead immunity. *Id.* [10]

Thus, while the exemption provides a limited immunity to farm **[**44]** cooperatives from antitrust litigation, the uncontested nature of M. Cutone forecloses application of the Capper-Volstead exemption. In this case, there is no

[7] Plaintiffs also argue that the Capper-Volstead immunity is destroyed because (1) defendants fail to satisfy the 50% rule to qualify as a valid cooperative for Capper-Volstead exemption; (2) defendants entered into multiple agreements **[**41]** with persons or entities not engaged in agricultural production in addition to their actions of fixing prices; and (3) defendants engaged in the types of anticompetitive and predatory practices that fall outside the legitimate objects of an agricultural cooperative. As plaintiffs need only prove one defect that deprives defendant of exemption under Capper-Volstead and genuine issues of material fact exist as to many of these arguments, I need not address each argument and the legal issues they raise if I find one sufficient to destroy the exemption.

[8] ***HN9***[] Specifically, defendants must establish that the EMMC is a valid Capper-Volstead cooperative by showing all of the following: 1) all of the members of the cooperative are producers of agricultural products; 2) each member of the cooperative only gets one vote regardless of its size; 3) the cooperative "does not pay dividends on stock or membership capital in excess of 8 per centum per annum;" and 4) at least 50% of the products dealt with by the cooperative are products of its members. *7 U.S.C. § 291*. The last element is commonly referred to as the 50% Rule.

[9] Thus, some defendants' arguments that they are proper members of the EMMC are irrelevant.

[10] Defendants claims that Ripplemeyer should be read in full. In Ripplemeyer, both the parent and subsidiary were members of the agricultural cooperative and the court found that inclusion of the non-grower processor as a member destroyed Capper-Volstead immunity but that the two entities could not conspire because their parent-subsidiary relationship meant that they were not separate entities capable of conspiring. *Ripplemeyer, 807 F. Supp. at 1459*. I find M. Cutone to be an improper member of the EMMC for the same reason that the processor in *Ripplemeyer* destroyed immunity. And here, unlike in *Ripplemeyer,* the grower entity affiliated with M. Cutone, M & V Enterprises, was not a member of the cooperative.

dispute that M. Cutone Chelsea, an EMMC member, is a non-farmer processor. As such, its presence as a member of the agricultural cooperative destroys Capper-Volstead immunity.

While defendants concede in their reply to plaintiffs' motion for summary judgment that EMMC member M. Cutone is a mushroom distributor and not a grower, they argue that this is a technical, de minimis violation that should not act to destroy the cooperative's Capper-Volstead immunity. Defendants argue that, because there is complete identity of ownership between M. Cutone, which is not a grower, and M & V, which is a grower, M. Cutone is properly a member of the EMMC and that the cooperative should not lose immunity because M. Cutone registered the wrong company owned by his family. Defendants cite *Alexander v. National Farmers Organization, 687 F.2d 1173, 1186 (8th Cir. 1982)*, for the proposition that a technical, de minimis error in record keeping should not preclude application of the Capper-Volstead exemption to an otherwise exempt cooperative organized **[**45]** for the benefit of true agricultural producers. However, this case is distinguishable. In *Alexander*, the court held that a cooperative operating for the protection of dairymen whose bylaws prohibited non-farmers from voting was entitled to Capper-Volstead Act protection though it had received $ 25 membership donations, not fees or dues, from a small number of non-farmers with no connection to the dairy industry, had never been to a meeting and had not exerted any control over the cooperative as the result of careless record keeping. *Id. at 1185-87*. In this context, then, ***HN11***[] a "member" has been held to be a person with voting rights in the association. See also *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, 1994 U.S. Dist. LEXIS 14168, 1994 WL 542203, at *4 (N.D. N.Y. Sept. 22, 1994)*, holding that a "member," for purposes of the Capper-Volstead Act, is someone with the power to participate in the control and policy making of the association through voting or some equivalent form of power **[*285]** and that, "[s]imply put, if a member does not have any input into the affairs of the association, surely, such member should not be able to destroy the immunity which the association would otherwise enjoy."

Though M. Cutone is affiliated **[**46]** with M & V Enterprises, a grower of mushrooms which defendants claim has the same owners as M. Cutone, this cannot be considered a de minimis exception because it is undisputed that M. Cutone was a non-grower member who had the power to participate in the control and policy making of the association through voting. Notably, in Alexander there was no suggestion "that dairy industry processors were members of NFO." *Alexander, 687 F.2d at 1186*. [11] Here, M. Cutone is a mushroom distributor and a middleman, the very type of entity from which Capper-Volstead was designed to protect the interests of farmer/producers. [12]

---

[11] The Alexander Court noted that the NFO was exactly the kind of "populist farm organization contemplated by the Capper Volstead Act." *Alexander, 687 F.2d at 1186-87*. The court cited Justice Brennan's concurrence in Nat'l Broiler, noting that the Capper-Volstead Act was designed to allow farmers to band together "in order to survive against the economically dominant manufacturing, supplier, and purchasing interests with which they had to interrelate" *Nat'l Broiler, 436 U.S. at 830*, and that it would be "cruelly ironic to exempt large co-ops [that are] professionally managed **[**47]** and operated by many non-farmers-while denying exemption to the farmers who banded together in NFO." *Alexander, 687 F.2d at 1186-87*.

However, the EMMC appears to be exactly the kind of cooperative foreseen in Justice Brennan's concurrence and discussed in *United States v. Hinote, 823 F. Supp. 1350, 1358 (S.D. Miss. 1993)*: ***HN12***[] a cooperative made of "fully integrated producer[s] of agricultural products performing its own processing . . . and which hence does not associate for purposes of common handling, processing, and marketing is nevertheless 'engaged in the production of agricultural products as [a] farme (r]' for purposes of *§ 1*'s exemption . . . if also engaged in traditional farming activity." *Nat'l Broiler, 436 U.S. at 834*. I will discuss below whether members of the EMMC are properly integrated so as to be considered a single entity that produces and distributes.

It is troubling that the EMMC appears to have been organized for the benefit of mushroom distributors, whether fully integrated or whether affiliated, rather than for the benefit of the grower members. This is demonstrated by the fact that dues were based not on the pounds grown by the member growers but by the total number **[**48]** of pounds sold by the affiliated or integrated distributors. Under this system, some small growers contributing under 25% of the total pounds of mushrooms sold by their affiliated distributor paid dues based on the distributors' sales, not their own. This cannot but harm growers. Additionally, the price fixing in which the EMMC admits it participated was applied to integrated and affiliated distributors' sales and not at the growers level. Additionally, the EMMC did not have pure growers unaffiliated with a distributor as members; instead, it helped them to organize the EMMCGA which was to benefit pure growers. In combination, these undisputed facts show that protecting true growers was not the purpose of the organization. While the cooperative "give[s] the set-up the color of a producer rather

[*286] As previously noted, ***HN13***[] the existence of even one non-farmer member in an agricultural cooperative is sufficient to destroy Capper-Volstead immunity. *Nat'l Broiler, 436 U.S. at 826-29*. Registering a non-grower as a member of the EMMC is an indication of the EMMC's true purpose: to benefit distributors rather than growers. Thus, I cannot excuse the inclusion of M. Cutone as a participating member of the EMMC as a de minimis technicality. [13]

II. Conspiracy with Non-Members

Even if all EMMC members satisfied the requirements to qualify the cooperative for the Capper-Volstead exemption, the exemption does not extend to protect cooperatives that conspire with non-cooperatives. ***HN14***[] The Capper-Volstead Act was not intended to create an absolute shield from antitrust liability for agricultural cooperatives. Courts have held that where an agricultural cooperative acts in concert or enters into an agreement with persons or entities not engaged in agricultural production the Capper-Volstead exemption does not apply. See e.g., *Nat'l Broiler, 436 U.S. at 827-28*; *United States v. Borden Co., 308 U.S. 188, 204-05, 60 S. Ct. 182, 84 L. Ed. 181 (1939)*, holding that "[t]he right of these agricultural producers thus to unite in preparing for market and in marketing their products, and **[**51]** to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." Cooperatives cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by cooperatives alone. *Alexander, 687 F.2d at 1182 (8th Cir. 1982)*, citing *Borden, 308 U.S. at 207-208*. Additionally, a cooperative "cannot enter into agreements with persons not engaged in agricultural production [] for the purpose of acquiring monopoly power." *Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n, 725 F.2d 564, 569 (10th Cir. 1984)*.

HN15[] To establish a conspiracy in violation of the Sherman Act under *Section 1* and *Section 2*, plaintiffs must allege and eventually prove: (1) concerted action by defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that involved illegal conduct or purpose and (4) that proximately caused injury to plaintiffs. See *Gordon v. Lewistown Hosp., 423 F.3d 184, 207, 207 n.16 (3d Cir. 2005)*, stating that "[c]laims for **[**52]** conspiracy to monopolize under *Section 2* of the Sherman Act also require evidence of a conspiracy"; *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 639 (3d Cir. 1996)*.

Plaintiffs argue that defendants engaged in price fixing with affliated distributors Kaolin/South Mill distribution centers and Manfredini. [14] These affliated distributors **[*287]** are affiliated with member growers Kaolin and LRP-M, respectively.

---

than a handler[,] [t]he plan adopted was ingenious but transparent." See ***United States v. Elm Spring Farm, Inc., 38 F. Supp. 508, 511 (D. Mass. 1941)***.

[12] Defendants also suggest that the Nat'l Broiler line of cases does not apply to distributors like M. Cutone but merely to processors. However, Nat'l Broiler includes both processors and distributors in its conception of the middlemen from whom **[**49]** Capper-Volstead and related exemptions to anti-trust laws were created to protect farmers and producers. *Nat'l Broiler, 436 U.S. at 825-826*, noting that the Capper-Volstead Act was passed because "[f]armers were seen as being caught in the hands of *processors and distributors* who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors," emphasis added.

[13] As I have found that the EMMC is not exempt under Capper-Volstead **[**50]** by including M. Cutone as a member when it is not a grower, it was not necessary that I extend my analysis to other members of the EMMC which plaintiffs allege have problematic memberships including Leone Pizzini and Son, Inc., Brownstone Mushroom Farms, Inc., and LRP-M Mushrooms LLC, I make no determination at this time as to whether genuine issues of material fact exist as to these members

[14] Plaintiffs also argue that defendants engaged in price fixing with affliated distributors Masha and Buona. I will not consider the issue of whether a conspiracy exists with these entities because it appears that genuine issues of material fact may exist. I need

HN16[] Horizontal price fixing is per se illegal. See e.g., U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), declaring per se illegal any agreement "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce;" Alexander, 687 F.2d at 1183. When an action **[**53]** engaged in is per se illegal, further examination of the practice's impact on the market is unnecessary to find that it produced adverse, anticompetitive effects within relevant product and geographic markets. See Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000), stating that "[the per se] standard, which is based on considerations of 'business certainty and litigation efficiency,' allows a court to presume that certain limited classes of conduct have an anticompetitive effect without engaging in the type of involved, market-specific analysis ordinarily necessary to reach such a conclusion."

It is undisputed that from 2001 through 2005, the EMMC adopted and amended various minimum pricing polices and that these prices applied to the sales of mushrooms of the distributors at issue. Because price fixing is per se illegal, whether a conspiracy exists to destroy the EMMC's exemption depends on whether the entities that plaintiffs allege engaged in the conspiracy with the EMMC and its members can be co-conspirators.

HN17[] The essence of concerted action is the existence of an agreement. Gordon, 423 F.3d at 207, citing Mathews, 87 F.3d at 639. "Unilateral action simply **[**54]** does not support liability; there must be a 'unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.'" Id., quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), internal citations omitted. Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff. See Weiss v. York Hosp., 745 F.2d 786, 812 (3d Cir. 1984). The Supreme Court has determined that agricultural cooperatives, like corporations, do not have the plurality of actors necessary for a conspiracy. See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co. (Sunkist I), 370 U.S. 19, 27-29, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962).

Defendants argue that there is no unlawful conspiracy between the EMMC and its members and Kaolin/South Mill distribution centers and Manfrendini even though these distributors sold at EMMC prices. They assert that Copperweld and Sunkist I support that these distributors were a single economic entity with an EMMC grower because each EMMC member and its affiliated distributors are commonly owned and operated. [15] Thus, defendants **[*288]** argue that if the alleged distributor co-conspirators and their affiliated **[**55]** member growers are a single economic unit then price fixing with the EMMC at the distribution level is permissible because as a cooperative the plurality of actors required for a conspiracy is absent.

---

not make such a determination at this time, however, because the relevant facts with regard to with Kaolin/South Mill distribution centers and Manfredini Enterprises are undisputed.

[15] Defendants also claim that they are a proper cooperative because they are set up to allow some of their growers to have the packaging and sale of their produce done through wholly-owned affiliates as was the case in the re-organized Sunkist cooperative examined in Case--Swayne Co. v. Sunkist Growers, Inc.., 355 F. Supp. 408 (C.D. Cal. 1971) and the lettuce producer cooperative in N. Cal. Supermarkets Inc. v. Cent. Cal. Lettuce Producers' Coop., 413 F. Supp. 984 (N.D. Cal. 1976). However, these cases are distinguishable.

First, the reorganized Sunkist cooperative's structure eliminated the non-grower members that were at issue in Sunkist II. Sunkist, 355 F. Supp. at 413, 415. Instead these entities became licensed packing houses with contracts with the growers or local cooperative to provide packaging services. Id. Some growers had their own packaging facilities. Id. However, the licensed packing houses had no vote, control or property rights in Sunkist. Id. at 415. While mushroom **[**56]** growers sold their mushrooms to the distributors who resold them at the cooperative's fixed price, the growers in Sunkist did not sell their product to these packagers. The growers in Sunkist sold their produce through the cooperative. Id. at 412.

Additionally, in N. Cal. Supermarkets Inc. the facts provide no indication that varying ownerships existed in the case and the analysis did not involve the issue of conspiracy and status as a single entity; thus the case was not helpful in my analysis of the organizational structures in this case. N. Cal. Supermarkets Inc., 413 F. Supp. at 985-94. Instead, it appears the member defendants involved were all "growershippers." Id. at 986.

In Sunkist I, the Court held that 12,000 growers organized into three legal entities constituted in practical effect and in the contemplation of the statutory exemption one organization or association incapable of conspiracy under the antitrust laws. *Sunkist I, 370 U.S. at 29*. Unlike *Sunkist I*, the facts here do not involve whether cooperatives in which all the members are growers can conspire with each other. Instead, defendants are arguing the alleged co-conspirators are a single economic unit with member growers **[**57]** being a part of the EMMC. Therefore, Sunkist I is not applicable.

In Copperweld, the Supreme Court held that a firm and its wholly-owned subsidiary are not capable of conspiring in violation of *§ 1* of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. The fundamental question was whether the parent and its wholly-owned subsidiary constituted one economic actor or two. *Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1132 (3d Cir. 1995)*. The Supreme Court held in Copperweld that:

> there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor . . . . A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself . . . . Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants *§ 1* scrutiny.

Copperweld, 467 U.S. at 770-71 (footnote omitted). Similarly, the Court concluded that the control a parent wields over its wholly-owned **[**58]** subsidiary supports their shared "unity of purpose or a common design" that prevents them from being able to conspire together. *Siegel Transfer, Inc., 54 F.3d at 1132*, quoting *Copperweld, 467 U.S. at 771-72*. The Court stated

> [a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one . . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is **[*289]** no justification for *§ 1* scrutiny. . . . [A] parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Copperweld, 467 U.S. at 771-72, internal citations omitted. The *Copperweld* Court limited its holding to a parent and its wholly-owned subsidiary but encouraged courts to analyze the substance, not the form, of **[**59]** economic arrangements when determining whether a separately incorporated entity is cable of conspiring. *Siegel Transfer, Inc., 54 F.3d at 1132*; *Copperweld, 467 U.S. at 773 n.21*.

Courts have extended Copperweld to situations involving sibling-subsidiaries of the same parent corporation, see e.g., *Eichorn v. AT & T Corp., 248 F.3d 131, 139 (3d Cir. 2001)*, and franchisors and franchisees because the plenary control of the franchisor and the common economic goals [16] makes them a single entity, see *Williams v. I.B. Fischer Nevada, 999 F.2d 445 (9th Cir. 1993)*, referencing the application of the facts in *Williams v. Nevada, 794 F. Supp. 1026, 1032 (D. Nev. 1992)*. The Court of Appeals for the Fifth Circuit extended Copperweld to find that separate corporations commonly owned by three men, two of whom owned 30% of each corporation and one of whom owned the remaining 40% of each corporation were incapable of conspiring because each co-owner maintained equal control over each corporation and had an equal interest in their success. *Century Oil Tool, Inc. v. Production Specialties, Inc.., 737 F.2d 1316, 1317 (5th Cir. 1984)*.

---

[16] The common economic goals included the franchisor acting to minimize **[**60]** competition and promote uniformity between franchises, each franchise benefitting from an enhanced reputation for uniformity in quality results and economic unity of interest continuing beyond the payment by the franchisee of the licensing fee to the franchisor receiving a royalty fee and a marketing fee based upon a percentage of the restaurants' gross sales. *Williams, 794 F. Supp. at 1032*.

The Court of Appeals for the Third Circuit extended Copperweld to permit a de minimis deviation of 99.92% ownership from 100% ownership and recognized that courts have deviated in situations where parental ownership was in the 80% to 91.9% range. *Siegel, 54 F.3d at 1133, 1133 n.7*. The Court of Appeals also extended Copperweld to find that a corporation and its agents and two corporations with different ownership could not conspire because they had a unity of interest. *Id. at 1135*. The Court found that a corporation and its agents could not conspire when their economic interests were entirely congruent because the agents received a commission from the corporation and therefore did not compete with it. Id. Additionally, the Court found that the two corporations operated as a single economic unit unable **[**61]** to conspire because the one was contractually obligated to manage the others' affairs and received a percentage of the revenues as its fee for this management so that their economic success was directly congruent and they were not competitors. Id. None of these decisions extend Copperweld "to shelter independent actors having diverse economic interests acting jointly." *Fishman v. Estate of Wirtz, 807 F.2d 520, 541 (7th Cir. 1986)*. I will evaluate the facts of this case as to the substance of the entities to see if they are one economic unit.

Kaolin/South Mill was owned by two men each with a 50% ownership interest. Those two men had a 50% interest in the distribution centers during the relevant **[*290]** period with another man who also had a 50% interest in the distribution centers. This 50% deviation in complete ownership and control is too significant to call de minimis. Moreover, the individuals do not have equal control over each corporation. See *Century Oil Tool, 737 F.2d at 1317*. The lack of unity of interest is particularly evident with this affiliation as a lawsuit ensued between Kaolin/South Mill and a distribution center. It is hard to imagine how interests could have been congruent **[**62]** and control exercised to constitute "one consciousness" when litigation occurred between the entities.

LRP-M was also owned by two men each with a 50% ownership interest, Dominic Mandfredini and his nephew Lucio Pizzini. The affiliated distributor, Manfredini Enterprises, was owned by Dominic Manfredini's wife and Dominic Manfredini served as president and operator. As with Kaolin/South Mill, even if Dominic Manfredini's role as president and operator is sufficient to demonstrate 100% control over Manfredini Enterprises, his 50% interest in LRP-M shows a lack of equal control over both entities. See id.

While some overlap existed in ownership between the affiliated distributors and the member growers, they were not under common control in the same sense as is a corporation and its wholly-owned subsidiary, a corporation and its divisions or as are two corporations owned in identical proportions by the same set of investors. See *Copperweld, 467 U.S. at 770-72*; *Century Oil Tool, 737 F.2d at 1317*. The affiliated distributors do not have 100% ownership or a de minimis deviation from complete ownership and there is no indication that the overlapping owners would have control independent of **[**63]** their co-owners. The varying ownership between the affiliated entities shows they are not controlled by a single decision-maker. See *Healthamerica Pa., Inc., v. Susquehanna Health Sys., 278 F. Supp. 2d 423 (M.D. Pa. 2003)*, holding that the hospitals could not conspire because they were controlled by a single decision-maker, the Alliance.

HN18[] The involvement of family relationships in these varying ownerships is immaterial to determining common ownership and control. That partners in a company or between companies are related by blood or marriage--no matter how closely--does not ensure that they will uniformly agree on how to control the companies. Merely because two people are related does not mean that they have the same views and interests in their family businesses. See e.g., *Doeblers' Pennsylvania Hybrids, Inc. v. Doebler, 442 F.3d 812, 814 (3d Cir. 2006)*; *E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992)*; *Zen Investments, LLC v. Unbreakable Lock Co., 2006 U.S. Dist. LEXIS 37171, 2006 WL 1582333, *4 (E.D. Pa. June 2, 2006)*; *Levy v. Levy, 1992 U.S. Dist. LEXIS 9725, 1992 WL 151779, at *1 (E.D. Pa. June 23, 1992)*; *Platt v. Richardson, 1989 U.S. Dist. LEXIS 7933, 1989 WL 159584, at *5 (M.D. Pa. June 6, 1989)*. To hold otherwise would be to create **[**64]** an untenably blurry test in which courts must investigate the degree of the entities' family connections to determine whether they qualify as a single entity unable to engage in conspiracies.

Further, since ownership is neither complete nor a de minimis deviation from 100%, there can be no unity of interest between the growers and distributors in this case. Unlike the entities in *Siegel* that had separate ownership but shared unity of interest, there is no commission or percentage of revenue fee to make the economic success of either corporation dependent upon the other. Here, the growers are selling to distributors who sell at **[*291]** EMMC prices. The undisputed facts are that LRP-M sells all of its mushrooms to Manfredini, and that Kaolin sells its mushrooms to the distributions centers. [17] In this relationship, the price fixing does not protect the economic interests of the grower and therefore the entities' interests are not congruent. Moreover, the undisputed fact that dues were based on the total sales of the affiliated distributors rather than the mushrooms grown by the member grower shows that the growers were not the focus of the EMMC; the Capper-Volstead Act sought to protect growers. **[**65]** See *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc., 914 F. Supp. 814, 826 (N.D. N.Y. 1996)*. To agree with defendants would be to hold that the Capper-Volstead Act is not designed to protect growers from middlemen. [18] The entities lacked the "complete unity of interest" necessary to find them a "single enterprise." *Copperweld, 467 U.S. at 771*. No case law has been provided to the contrary. Thus, for the EMMC and its members to fix prices with affiliated distributors when the distributors are not a single economic unit with their affiliated member grower constitutes a conspiracy that destroys the EMMC's Capper-Volstead exemption. For the above reasons, I conclude that defendants are not entitled to the Capper-Volstead exemption.

An appropriate Order follows.

ORDER

AND NOW, on this 26th day of March 2009, upon consideration of the motions for summary judgment on the issue of Capper-Volstead exemption filed by the EMMC (Doc. No. 245), the Mushroom Alliance, Inc. (Doc. No. 239), Kitchen Pride Mushrooms (Doc. No. 243 and 251), M.D. Basciani & Sons, Inc. (Doc. No. 244), JM Farms (Doc. No. 246), Franklin Farms, Inc. (Doc. No. 247), plaintiffs' response, and defendants' replies, it is hereby ORDERED that said motions are DENIED. Upon consideration of plaintiffs' cross motion for summary judgment on the issue of Capper-Volstead immunity (Doc. No. 250), defendants **[**67]** responses, and plaintiffs reply, it is hereby ORDERED that such motion is GRANTED. All other motions to dismiss claims against individual defendants unrelated to Capper-Volstead immunity are denied without prejudice. Plaintiffs motion to strike (Doc. No. 270) is DISMISSED as moot.

/s/ THOMAS N. O'NEILL, JR.

THOMAS N. O'NEILL, JR., J.

End of Document

[17] The argument that Kaolin contracted with the distribution centers to sell at EMMC prices does not change the facts that these entities were selling at EMMC prices and that the owners of the member grower were advocating for the benefit of the distribution centers they also partly owned instead of at a level that benefitted their grower entity.

[18] Although I do not so conclude, holding that these entities are a single entity would permit cooperatives to avoid **[**66]** the 50 % rule by counting only the mushrooms of the member growers in the calculations rather than using the affiliated distributors' mushrooms. This would create a loophole to benefit distributors contrary to the Capper-Volstead exemption's stated purpose of benefitting growers. Although in this case the defendants appear to have included affiliated distributor sales in their 50% calculation, the treatment of these entities as a single unit with the member grower for purposes of the 50% rule does not alter the analysis of whether they legally are a single unit.

Flying J, Inc. v. Van Hollen

United States District Court for the Eastern District of Wisconsin

March 27, 2009, Decided; March 27, 2009, Filed

Case No. 08-C-110

Reporter
2009 U.S. Dist. LEXIS 30793 *; 2009-1 Trade Cas. (CCH) P76,645

FLYING J, Inc., Plaintiff, -vs- J.B. VAN HOLLEN, Attorney General of Wisconsin, ROD NILSESTUEN, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection, Defendants, and WISCONSIN PETROLEUM MARKETERS & CONVENIENCE STORE ASSOCIATION, Proposed Intervenor.

Subsequent History: Vacated by *Flying J, Inc. v. Van Hollen, 578 F.3d 569, 2009 U.S. App. LEXIS 18710 (7th Cir. Wis., 2009)*

Prior History: *Flying J, Inc. v. Van Hollen, 597 F. Supp. 2d 848, 2009 U.S. Dist. LEXIS 10306 (E.D. Wis., 2009)*

Core Terms

intervenor, intervene, lawsuit, parties, pricing, post-judgment, motion to intervene, economic interest, injunction, timeliness, motor vehicle fuel, Declaration, predatory, retailers, rights, contingent, sales

Counsel: **[*1]** For Flying J Inc, Plaintiff: John W Mackay, Jonathan A Dibble, LEAD ATTORNEYS, Ray Quinney & Nebeker PC, Salt Lake City, UT; Jon E Fredrickson, LEAD ATTORNEY, Kravit Hovel & Krawczyk SC, Milwaukee, WI.

For J B Van Hollen, Attorney General of Wisconsin, Rod Nilsestuen, Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection, Defendants: Christopher J Blythe, Gwendolyn J Cooley, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

For Wisconsin Petroleum Marketers & Convenience Store Association, Intervenor Defendant: Matthew D Lee, William M Conley, LEAD ATTORNEYS, Foley & Lardner LLP, Madison, WI; Thomas L Shriner, Jr, LEAD ATTORNEY, Foley & Lardner LLP, Milwaukee, WI; Theresa A Andre, Foley & Lardner LLP, Madison, WI.

Judges: RUDOLPH T. RANDA, Chief Judge.

Opinion by: RUDOLPH T. RANDA

Opinion

DECISION AND ORDER

On January 29, 2008, Flying J, Inc. ("Flying J") brought the instant lawsuit to enjoin the defendants, J.B. Van Hollen, Attorney General of Wisconsin, and Rod Nilsestuen, Secretary of the Wisconsin Department of Agriculture (collectively the "State"), from enforcing the motor vehicle fuel provisions of Wisconsin's Unfair Sales Act, *Wis. Stat. § 100.30*. In **[*2]** pertinent part, the Act forbids retailers from selling motor vehicle fuel below cost, which is based on the average posted terminal price plus a minimum markup of 9.18%. *See* *Wis. Stat. §§ 100.30(2)(am)(1m)(c)*; *100.30(2)(a)*; *100.30(3)*.

On February 11, 2009, upon consideration of cross-motions for summary judgment, the Court held that the Act's motor vehicle fuel provisions create an illegal restraint of trade in violation of the Sherman Act, *15 U.S.C. § 1*. The Court also held that this illegal restraint did not meet the active supervision requirement for antitrust immunity under *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. Accordingly, the Court issued an order declaring the motor vehicle fuel provisions of the Act unconstitutional. The Court also enjoined the State from further enforcement of those provisions. On March 10, the State announced that it would not appeal the Court's ruling.

Now before the Court is Wisconsin Petroleum Marketers & Convenience Store Association's ("WPMCA") post-judgment motion to intervene. WPMCA moves to intervene for three purposes. First, WPMCA filed a conditional motion to reconsider the Court's final judgment and permanent injunction. Second, WPMCA filed a conditional **[*3]** motion to stay the Court's judgment pending appeal. Third, WPMCA hopes to pursue a direct appeal of the Court's judgment.

WPMCA lacks a sufficient interest in the outcome of this case to allow intervention. WPMCA's post-judgment application is also untimely. Therefore, WPMCA's motion to intervene is denied in its entirety.

I. WPMCA

WPMCA is an organization consisting of approximately 500 independent businesses. As a group, WPMCA members employ more than 10,000 people, operate more than 2,000 stations and stores and account for more than one-half the entire volume of motor fuel sold in Wisconsin. In addition to convenience stores, truck stops and service stations, WPMCA members own and operate related businesses such as rapid oil change facilities, car washes and card lock fueling outlets.

WPMCA claims that without the threat of enforcement of the Act, predatory pricing will result in lost profits and possibly force many of its members out of business. According to WPMCA president Matthew Hauser ("Hauser"), a "significant number of WPMCA's members do not have the ability that a fully integrated retailer has to offer cost or below-cost prices for the sale of motor vehicle fuel, nor can these **[*4]** WPMCA members realistically compete with retailers who can use lower prices as a loss leader to attract sales to large retail store operations, or other ventures."

II. Intervention as of right

WPMCA moves to intervene as of right. *See* *Fed. R. Civ. P. 24(a)(2)*. In the absence of a statutory right to intervene, a proposed intervenor must claim "an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Rule 24(a)(2)*; *see also* *Heartwood, Inc. v. U.S. Forest Serv., Inc., 316 F.3d 694, 700 (7th Cir. 2003)*. This language boils down to three basic requirements: interest, impairment, and inadequate representation.

A. Interest

"The 'interest' required by *Rule 24(a)(2)* has never been defined with particular precision." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc., 69 F.3d 1377, 1380 (7th Cir. 1995)*. The baseline requirement is that the interest must be a "direct, significant, legally protectable" one. *American Nat'l Bank v. City of Chicago, 865 F.2d 144, 146 (7th Cir. 1989)*. **[*5]** It is "something more than a mere 'betting' interest, but less than a property right." *Schipporeit, 69 F.3d at 1380-81* (internal citations omitted). For example, "an intervenor's interest in a specific fund is sufficient to entitle intervention in a case affecting the fund." _Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366, 33 V.I. 311 (3d Cir. 1995)_.

To establish their interest in this lawsuit, WPMCA submitted declarations from various members who are "concerned that without this law, we may and probably will see predatory pricing of motor vehicle fuels by new competitors that will use this method to eliminate competition." D. 52-5, Declaration of Randy Meffert, P 3. Some WPMCA members are unsure whether their businesses are "strong enough to stay in business and compete effectively during the time the order granting the injunction is considered on appeal." D. 52-7, Declaration of Linda Kaplan, P 12. Others note that predatory pricing has already started in the wake of the Court's decision. *See, e.g.,* D. 52-8, Declaration of Denise Thomas, P 4 ("I am concerned that the ability of Renew, and other similarly situated operators, to offer discounted prices will result **[*6]** in my Mobil stations incurring significant loss of sales").

An "economic interest that might be adversely affected by the outcome of the case alone is insufficient to warrant intervention under _Rule 24(a)(2)_." _NBD Bank, N.A. v. Bennett, 159 F.R.D. 505, 506 (S.D. Ind. 1994)_ (quoting _Getty Oil Co. v. Department of Energy, 865 F.2d 270, 276 (Tem. Em. Ct. App. 1988))_. By "requiring that the applicant's interest be . . . 'legally protectable,' it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant." _United States v. South Fla. Water Mgt. Dist., 922 F.2d 704, 710 (11th Cir. 1991)_ (emphasis in original); *see also* _Mountain Top, 72 F.3d at 366_ ("[i]n general, a mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene"). [1]

WPMCA members are concerned that other gasoline retailers will use predatory pricing to steal business from them. This economic interest in the future loss of business is contingent on the hypothetical actions of third parties. In fact, it is contingent on market forces beyond those that are influenced by the Court's injunction. If the loss of business did occur, inefficient business practices would theoretically be as much to blame as would the use of loss leaders by third parties. WPMCA members are also protected by federal ***antitrust law*** which prohibits predatory pricing. *See, e.g.,* _Bathke v. Casey's General Stores, Inc., 64 F.3d 340, 343-44 (8th Cir. 1995)_ (describing the contours of a predatory pricing claim for gasoline retailers under the Sherman Act [_15 U.S.C. § 2_] and the Robinson-Patman Act [_15 U.S.C. § 13(a)_]). WPMCA's speculative interest in the outcome of this lawsuit is not enough to establish a legally protectable interest for mandatory intervention. *See, e.g.,* _Standard Heating and Air Conditioning Co. v. City of Minneapolis, 137 F.3d 567, 571 (8th Cir. 1998)_ **[*8]** (interests asserted by proposed intervenors are "too speculative to be 'direct, substantial and legally protectable'" because a "sequence of events would have to occur for the interests of the associations to be impacted by a successful challenge to the rules"); _Washington Elec. Co-op, Inc. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990)_ (interest based on double contingency is not sufficiently direct or substantial); _City of Stilwell v. Ozarks Rural Elec. Co-op. Corp., 79 F.3d 1038, 1042 (10th Cir. 1996)_ (contingent financial interest in subject of action was too attenuated to justify intervention).

Even to the extent that WPMCA members are currently losing sales or are likely to lose sales in the near future because competitors are allowed to charge lower prices, WPMCA's interest in this lawsuit is still insufficient to allow intervention. "A claim based only on an indirect economic effect of some action is rarely considered the same as a protectable right or interest sufficient to justify intervention." MOORE'S FED. PRACTICE 3D 24.03[2][b]; *see also* _American Maritime Transport, Inc. v. United States, 15 Cl. Ct. 29, 30 (Cl. Ct. 1988)_ (applicants "have alleged **[*9]** nothing more than an indirect and contingent economic interest in this suit based upon the possibility of increased competition"); _Curry v. Regents of Univ. of Minn., 167 F.3d 420, 422 (8th Cir. 1999)_ ("economic interest in upholding the current fee system simply does not rise to the level of a legally protectable interest necessary for mandatory intervention"). While the Court is "mindful that its decision in the underlying lawsuit may have a

[1] WPMCA cites _Baude v. Heath, 538 F.3d 608 (7th Cir. 2008)_ for the proposition that "an economic interest is by itself enough to allow a trade association to intervene." *Baude* contains no discussion of the interest required for mandatory intervention under _Rule 24(a)(2)_. Judge Easterbrook **[*7]** merely mentioned in passing that a trade association "intervened to protect its economic interest." _Id. at 612_.

significant effect on petitioners' members' livelihoods, they are not entitled to intervention as of right based on this economic interest." *NBD Bank, 159 F.R.D. at 507*. [2]

B. Timeliness

Even if WPMCA had an interest sufficient to support intervention as of right, its motion to intervene is untimely. *See Rule 24(a)*. Courts generally apply a four-factor test to determine whether an application to intervene is timely: (1) the length of time during which the would-be intervenor actually or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *See Stallworth v. Monsanto Co., 558 F.2d 257, 264-66 (5th Cir. 1977)*; *see also Heartwood, 316 F.3d at 701*.

An attempt to intervene "after final judgment is ordinarily looked upon with a jaundiced eye." *McDonald v. E.J. Lavino, 430 F.2d 1065, 1072 (5th Cir. 1970)*. **[*11]** "The rationale which seems to underlie this general principle . . . is the assumption that allowing intervention after judgment will either (1) prejudice the rights of the existing parties to the litigation or (2) substantially interfere with the orderly processes of the court." *Id.* However, the Fifth Circuit later clarified that there are no "absolute measures of timeliness." *Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994)*. "'[W]hether the request for intervention came before or after the entry of judgment [is] of limited significance,' . . . intervention could be allowed post-judgment provided that the rights of existing parties were not prejudiced and intervention did not interfere with the orderly processes of the court." *Ross v. Marshall, 426 F.3d 745, 754 (5th Cir. 2005)* (quoting *Stallworth, 558 F.2d at 266*).

1. Awareness of interest

There can be no doubt that WPMCA was aware of the instant litigation from the very outset of the case. WPMCA does not argue to the contrary. Rather, WPMCA argues that it simply never thought that Flying J would be victorious. The Court finds this hard to believe, especially in light of Judge Callahan's ruling that preceded this lawsuit. *See* ***[*12]*** *Lotus Business Group LLC v. Flying J, Inc., 532 F. Supp. 2d 1011 (E.D. Wis. 2007)*. WPMCA feigns surprise because the Act withstood numerous constitutional challenges in the past, but the Act never withstood the challenge brought against it by Flying J in this case and in *Lotus Business Group.* Even if WPMCA's surprise were justified, "a failure of imagination is not germane to the law governing intervention." *Staley v. Harris County, Tex., 223 F.R.D. 458, 462 (S.D. Tex. 2004)*.

Of course, this discussion slightly misstates the relevant inquiry -- namely, the length of time WPMCA knew or reasonably should have known that its interests were jeopardized by the instant lawsuit. "A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests *might* be adversely affected by the outcome of the litigation." *Heartwood, 316 F.3d at 701*. WPMCA takes particular issue with the nature and scope of the injunction entered by the Court. Once again, this argument rings hollow because WPMCA was actively monitoring this litigation. Therefore, WPMCA was aware that the State of Wisconsin could be enjoined from enforcing the Act when this lawsuit was filed. **[*13]** It should have intervened earlier if it was so concerned that an injunction could be entered.

---

[2] Because WPMCA does not have a an interest sufficient to allow intervention as of right, it is unnecessary to consider whether WPMCA has standing to intervene in this case. "Some disagreement remains among the circuits about how Article III standing rules intersect with the requirements for *Rule 24* intervention. . . . From a pragmatic standpoint, this court has observed that '[a]ny interest of such magnitude [as to support *Rule 24(a)* intervention of right] is sufficient to satisfy the Article III standing requirement as well.'" *Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 946 (7th Cir. 2000)* **[*10]** (internal citations omitted).

2. Prejudice to Flying J

Prejudice to existing parties is the "most important consideration" in determining the timeliness of an application for intervention. *See* *Nissei Sangyo America, Ltd. v. United States, 31 F.3d 435, 439 (7th Cir. 1994)*. "This factor is concerned only with the prejudice caused by the applicants' delay, not that prejudice which may result if intervention is allowed." *Edwards v. City of Houston, 78 F.3d 983, 1002 (5th Cir. 1996)*; *People Who Care v. Rockford Bd. of Educ., 68 F.3d 172, 176 (7th Cir. 1995)*. In other words, the only relevant prejudice is that which "would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." *Schultz v. Connery, 863 F.2d 551, 554 (7th Cir. 1988)* (quoting *Stallworth, 558 F.2d at 265*).

WPMCA argues that there would be no prejudice to Flying J because the State itself could have appealed and moved for reconsideration and to stay the judgment pending appeal. However, this argument conveniently ignores that WPMCA seeks to inject additional evidence **[*14]** and arguments that were not presented by the State in the original litigation of this matter. As discussed above, WPMCA offers numerous declarations from its members regarding the irreparable harm they will allegedly suffer if the Court's injunction is not reversed or stayed pending an appeal. *See* D. 52. WPMCA also provides extensive evidence regarding the mechanics of the minimum markup law as it relates to gasoline in support of its motion for reconsideration. *See* D. 53, 55. Finally, WPMCA argues that the State (and Flying J) failed to cite supposedly controlling Seventh Circuit law in the course of summary judgment briefing. [3]

Therefore, the prejudice to Flying J is not simply the result of the fact that it would have to defend against these motions. WPMCA's proposed intervention is prejudicial because Flying J would be forced to defend against arguments and evidence that it is seeing for the very first time *after* the Court entered its final judgment. For whatever reason, WPMCA waited until now to intervene and to bring this evidence before the Court **[*15]** and Flying J. Assuming that WPMCA's interest was sufficient to intervene as of right (which it wasn't), the foregoing evidence should have been presented much earlier in the normal course of this litigation. *See, e.g.,* *People Who Care, 68 F.3d at 176* (proposed intervenor "is correct that prejudice resulting from delay is the operative issue. However, the prejudice here *does* result from delay") (emphasis in original) (internal citations omitted).

WPMCA's untimely, post-judgment attempt to intervene and completely shift the focus of this lawsuit is prejudicial to Flying J. *See* *Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 949 (7th Cir. 2000)* ("The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal"); *see also* *Sierra Club, 18 F.3d at 1206 n.3* (intervenor must "accept the proceedings as he finds them" and "has no right to relitigate issues already decided"); *Massachusetts Mun. Wholesale Elec. Co., 922 F.2d at 97* (intervenors must take the pleadings in a case as they find them).

3. Prejudice to WPMCA; Unusual Circumstances

WPMCA argues that it will be prejudiced because of the ongoing irreparable harm caused **[*16]** by the Court's injunction. Even taking WPMCA's claims of prejudice at face value, the lateness of WPMCA's request to intervene combined with the prejudice to Flying J outweigh the potential prejudice to WPMCA. "Neither the Federal Rules of Civil Procedure nor the law of equity rewards those who slumber on their rights . . ." *Staley, 223 F.R.D. at 463*.

Moreover, as noted above, WPMCA made a strategic decision to rely upon the State's defense of the Act. When the "representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas v. Maram, 478 F.3d 771, 774 (7th Cir. 2007)*. WPMCA even participated

[3] *See* *Fuchs v. Rural Electric Convenience Cooperative, 858 F.2d 1210 (7th Cir. 1988)*. The Court does not agree that *Fuchs* is controlling.

behind the scenes and made suggestions on how to attack the arguments presented by Flying J's motion papers. *See, e.g.,* D. 59, Ex. H (17-page advocacy memorandum describing what WPMCA "believe[s] to be the problems and weaknesses underlying Flying J's arguments"). Finally, WPMCA affirmatively applauded the State's efforts after the conclusion of this litigation. *See, e.g.,* D. 59, Ex. J ("We appreciate your **[*17]** efforts to defend the constitutionality of this long-standing Wisconsin law as well as the unique role you hold as Attorney General and the defender of state law"). Under these circumstances, WPMCA's interests were adequately represented by the State, and it cannot now complain about the effects of the Court's judgment.

III. Permissive intervention

Permissive intervention is allowed when the application is timely and the applicant "has a claim or defense that shares with the main action a common question of law or fact." *Rule 24(b)*. In exercising its discretion, the Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Rule 24(b)(3)*. The Court considers "any prejudice that the existing parties may incur if intervention is allowed," not the prejudice resulting from the delay in requesting intervention. *See South Dakota ex rel Barnett v. U.S. Dept. of Interior, 317 F.3d 783, 787 (8th Cir. 2003)* (the "principal consideration" in ruling on a *Rule 24(b)* motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights); *see also Stallworth, 558 F.2d at 265* (noting the **[*18]** distinction between prejudice for purposes of permissive intervention and prejudice in the timeliness inquiry).

As discussed above, WPMCA's post-judgment motion to intervene is in many respects untimely. However, post-judgment intervention is normally allowed when the existing parties indicate that they will not pursue an appeal. *See, e.g., Ross, 426 F.3d at 755* (a "common example of post-judgment intervention that satisfies [the timeliness] criteria is intervention for purposes of appealing a decision that the existing parties to a suit have decided not to pursue") (citing *United States v. McDonald, 432 U.S. 385, 395-96, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977))*. In these circumstances, "a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because 'the potential inadequacy of representation came into existence only at the appellate stage.'" *Smoke v. Norton, 346 U.S. App. D.C. 277, 252 F.3d 468, 471 (D.C. Cir. 2001)* (quoting *Dimond v. District of Columbia, 253 U.S. App. D.C. 111, 792 F.2d 179, 193 (D.C. Cir. 1986))*.

If this theory of timeliness applies to an application for permissive intervention, WPMCA's post-judgment motion to intervene for purposes of pursuing an appeal could be considered timely. **[*19]** However, the Court will not allow permissive intervention because it would result in an appeal that is otherwise not forthcoming. Therefore, permissive intervention would cause further delay in the adjudication of Flying J's rights. *See, e.g., Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999)* (relevant factor militating against addition of intervenors was need to expedite resolution of case); *United States v. 36.96 Acres of Land, 754 F.2d 855, 860 (7th Cir. 1985)* (intervention properly denied to avoid prolonging an already lengthy lawsuit). Flying J is also subject to heightened prejudice because it already shouldered the burden of two lawsuits which litigated essentially the same issues pertaining to the constitutionality of the Act. *See, e.g., United States v. Texas Educ. Agency (Lubbock Independent Sch. Dist.), 138 F.R.D. 503, 518 (N.D. Tex. 1991)* (denying intervention where it would require party to incur additional legal fees).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT WPMCA's motion to intervene [D. 52] is **DENIED.**

Dated at Milwaukee, Wisconsin, this 27th day of March, 2009.

SO ORDERED,

/s/ Rudolph T. Randa

HON. [*20] RUDOLPH T. RANDA

Chief Judge

End of Document

LexisNexis

Packaging Supplies, Inc. v. Harley-Davidson, Inc.

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

March 30, 2009, Decided; March 30, 2009, Filed

Case No.: 08-cv-400

Reporter
2009 U.S. Dist. LEXIS 25732 *; 2009 WL 855798

PACKAGING SUPPLIES, INC., Plaintiff, v. HARLEY-DAVIDSON, INC., Defendant.

Subsequent History: Summary judgment granted by, Partial summary judgment granted by *Packaging Supplies, Inc. v. Harley-Davidson, Motor Co., 2011 U.S. Dist. LEXIS 50897 (N.D. Ill., May 12, 2011)*

Core Terms

dealers, bags, Notice, alleges, market power, seller, merchandise, trademark, tied product, antitrust, motion to dismiss, tying product, tie, tortious interference, orders, tying arrangement, free competition, restrain, prices, rights, buyer, Wrap

Counsel: **[*1]** For Packaging Supplies, Inc., an Arizona corporation, Plaintiff: Alan F. Block, Jessica A. Jeffries, Block & Landsman, Chicago, IL.

For Harley-Davidson, Inc., a Wisconsin corporation, Defendant: Barbara O. Bruckmann, PRO HAC VICE, Charles M. Malaise, James G Kress, Howrey LLP, Washington, DC; Romeo S. Quinto, Howrey LLP, Chicago, IL.

Judges: Robert M. Dow, Jr., United States District Judge.

Opinion by: Robert M. Dow, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

This case arises out of a three-count complaint [1] filed by Plaintiff, Packaging Supplies, Inc. ("PSI"), against Defendant, Harley-Davidson, Inc. ("Harley-Davidson"), for violations of state tort law and federal ***antitrust law***. Before the Court is Defendant's motion to dismiss Plaintiffs' complaint [9] for failure to state a claim, pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. For the reasons stated below, Defendant's motion to dismiss is denied.

I. Background [1]

PSI's business is plastic merchandise bags. These bags are not sold **[*2]** in stores; rather they are used by consumers for carrying away their purchases after transactions with PSI's clients. The bags are custom printed, and

[1] For purposes of Defendants' motion to dismiss, the Court assumes as true all well-pleaded allegations set forth in the complaint. See, *e.g.*, *Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 618 (7th Cir. 2007)*.

since 1964 PSI has been selling them to "retailers, manufacturers and franchise operators" throughout the United States. Compl. P 6. Beginning around 2002, numerous Harley-Davidson motorcycle dealerships (125 out of 679) were among PSI's clients. These dealerships are independently owned and licensed, and the bags that PSI made were customized for each dealer-client (a process which, PSI states, could take months). *Id.* at PP 7, 10-12.

PSI alleges that Harley-Davidson sent an "edict" to its dealers directing them not to purchase their bags from PSI and instead to purchase their bags only from Harley-Davidson's merchandising division ("the Notice"). *Id.* at P 1. Plaintiff does not allege when the Notice was distributed, but states that it became aware of the Notice in or around June 2007. *Id.* at P 13. A copy of the Notice was affixed to the complaint and therefore "is a part of the pleading for all purposes." *Fed. R. Civ. P. 10(c)*. Because of its centrality to the case, the pertinent text of the Notice - styled "Notice Regarding PSI Merchandise **[*3]** Bags and That's a Wrap Headwear" - is set out below:

> It has come to our attention recently that numerous dealers have been ordering dealer-customized merchandise bags from Packaging Supplies, Inc. (PSI), in Scottsdale, AZ. Dealers are reminded that all merchandise bags bearing Harley-Davidson's name and/or logo must be obtained through General Merchandise. PSI has received a cease and desist notice requiring them to stop providing these bags.
>
> We have also learned that many dealers are ordering dealer-customized head wraps from That's a Wrap in Madison, WI. As dealers are aware, goods of any nature bearing Harley-Davidson's trademarks, **including as they are incorporated in dealer business names and/or logos,** may be obtained only from sources approved in advance by Harley-Davidson. **This is true whether the goods are sold or given away as a promotion.** That's a wrap has also received a cease and desist letter advising them that dealers do not have the right to authorize the application of our trademarks to That's A Wrap's products.
>
> Harley-Davidson invests considerable resources in exercising quality control measures imposed on it under trademark law. If we fail to exercise these controls, **[*4]** we run the risk of losing our trademark rights. Dealers are asked to respect those rights and assist Harley-Davidson in protecting its most valuable assets for our mutual benefit.

Compl., Ex. A (emphasis in original).

PSI alleges that the letter mandates that the "dealers's (sic) merchandise bags 'must be obtained through [Harley-Davidson.]'" *Id.* at P 14. PSI further alleges that, contrary to the assertion in the Notice, PSI never received a cease and desist notice and that Harley-Davidson had not had contact with PSI for several years. After the Notice was circulated, PSI began losing substantial sums of money, experiencing a more than $ 100,000 decline in revenues from 2006 to 2007. The dealers, many of whom liked PSI bags for their low cost and high quality, "feared repercussions from [Harley-Davidson] if they continued to do business with PSI." *Id.* at PP 15-17.

PSI alleges that "as a direct and proximate result" of the "improper and inaccurate" Notice, PSI has "suffered substantial financial damage." *Id.* at 18. In addition, Harley-Davidson contacted certain dealers to ask them if they bought from PSI. Harley-Davidson informed those dealers "that PSI was not going to take any more **[*5]** orders, or will not be shipping any more current orders to [Harley-Davidson] dealers." *Id.* at P 27. Those statements were false, according to PSI, and intended to interfere with the relationship between PSI and its dealer-customers.

PSI's complaint comprises three counts. Counts I and II are, respectively, state law claims for (i) tortious interference with business relationships and for (ii) tortious interference with prospective business advantage. Count III alleges an illegal tying arrangement in violation of Section 1 of the Sherman Act (*15 U.S.C. § 1*). [2]

II. Legal standard on motion to dismiss

---

[2] Tying claims typically are brought under Section 3 of the Clayton Act (*15 U.S.C. § 14*), whose language explicitly deals with tying, but also may be brought under *Section 1* of the Sherman Act. *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985)*.

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests the sufficiency of the complaint, not the merits of the case. See *Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)*. To survive a *Rule 12(b)(6)* motion to dismiss, the complaint first must comply with *Rule 8(a)* by providing "a short and plain **[*6]** statement of the claim showing that the pleader is entitled to relief" (*Fed. R. Civ. P. 8(a)(2)*), such that the defendant is given "fair notice of what the * * * claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations in the complaint are true. *E.E.O.C. v. Concentra Health Svcs., Inc., 496 F.3d 773, 776 (7th Cir. 2007)* (quoting *Twombly, 127 S.Ct. at 1965, 1973 n.14*). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly, 127 S.Ct. at 1969*. The Court accepts as true all of the well-pleaded facts alleged by the plaintiff and all reasonable inferences that can be drawn therefrom. See *Barnes v. Briley, 420 F.3d 673, 677 (7th Cir. 2005)*.

III. Analysis

A. State Law Tortious Interference Claims (Counts I and II)

At least for purposes of the motion to dismiss, both PSI and Harley-Davidson assume that Illinois law will govern with **[*7]** respect to PSI's claims for tortious interference with business relationships and for tortious interference with prospective business advantage. Harley-Davidson makes two principal arguments with respect to PSI's state law claims. Harley-Davidson alleges that PSI's complaint is deficient as a matter of law because (i) the complaint fails to allege *improper and unjustified* interference as required under Illinois law and (ii) PSI "pleaded itself out of court" by establishing Harley-Davidson's privilege defenses. In executing these arguments, Harley-Davidson actually makes what merges into a single argument: that, by basing its tortious interference claims on the Notice, PSI has not alleged that any alleged "interference" was "improper" because Harley-Davidson merely was making others aware of its trademark rights.

Harley-Davidson cites several district court cases from this circuit in support of the proposition that an intellectual property rights holder has the right to defend itself against infringement and to warn purchasers that they, too, might be liable. See, *e.g., Am. Broadcasting Co. v. Maljack Productions,, Inc., 34 F. Supp. 2d 665, 675-76 (N.D. Ill. 1998)*. PSI responds that **[*8]** the privilege cited by Defendants is not without limits. See, *e,g., HPI Health Care Svcs, Inc. v. Mt. Vernon Hosp., Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 677, 137 Ill. Dec. 19 (Ill. 1989)* (unjustified and malicious exception to a privilege in an interference with contract action).

The Court need not weigh the extent to which Plaintiff has pleaded itself out of Court, however, because PSI's complaint comprises more than the Notice. A fair reading of PSI's complaint includes allegations that, regardless of the Notice, state a claim for relief - one to which Harley-Davidson's privilege arguments do not apply. First, PSI does not allege that any or all of the bags it designed for Harley-Davidson dealers contained trademarked content. [3] See Compl. P 7. Second, Plaintiff alleges that, in addition to the Notice, Harley-Davidson contacted certain dealers, asked if those dealers purchased bags through PSI, and (if they answered in the affirmative) told those dealers that PSI would not be fulfilling their orders - apparently regardless of whether or not the bags contained trademarked content. Compl. P 27. In short, PSI has made allegations to which Harley-Davidson's arguments do not apply (at least given that no factual development **[*9]** has taken place). For that reason, the motion to dismiss with respect to PSI's state law claims is denied.

---

[3] Indeed, it is far from clear, for instance, that Harley-Davidson dealers sell only Harley-Davidson motorcycles, have "Harley-Davidson" in their names, or use Harley-Davidson logos. See, *e.g.,* Compl. P 11 (describing the custom-printed bags as containing the *dealership's* logo).

B. Illegal Tying Claim (Count III)

A "tying" agreement is an agreement in which "a seller conditions the sale of a product or service on the buyer's buying another product or service from or * * * by direction of the seller." *Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 592 (7th Cir. 2008)* (explaining the "traditional antitrust concern" with such agreements). The Supreme Court has explained that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or would have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (examining the validity of an exclusive contract **[*10]** between a hospital and a firm of anesthesiologists). Such coercion restrains "competition on the merits in the tied market" and violates the Sherman Act. *Id.*

Of course, not every tie constitutes an antitrust violation. To successfully bring a tying claim, the Seventh Circuit requires a plaintiff to prove four elements: (1) the tying arrangement is between two distinct products or services; (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product; (3) a not insubstantial amount of interstate commerce is affected; and (4) the alleged tying company must have at least some economic interest in the sales of the tied seller (whose products are favored by the tie-in). *Reifert v. S. Cent. Wisc. MLS Corp., 450 F.3d. 312, 316-17 (7th Cir. 2006)*.

In support of its motion to dismiss, Harley-Davidson argues that PSI failed sufficiently to allege both (i) a tying arrangement and (ii) that Harley-Davidson will acquire market power in the *tied* market. See Def.'s Mem. at 6-10. The crux of Harley-Davidson's first argument is that PSI pleaded itself out of court by attaching the Notice to its complaint. Focusing on the **[*11]** plain language of the Notice, Harley-Davidson argues that "the Notice not only fails to support, but expressly contradicts, any notion that Harley-Davidson tied the sale of motorcycles to its dealers' purchase of merchandise bags." Def.'s Mem. at 6. PSI responds that the first paragraph of the complaint specifically alleges a tie between sales of Harley-Davidson motorcycles (the tying product) and sales of plastic merchandise bags (the tied product). PSI further asserts that dealers feared repercussions from Harley-Davidson if the dealers bought bags from PSI and that the dealers would have preferred to purchase PSI's bags. Pl.'s Mem. at 8; Compl. PP 1, 17. As part of PSI's state law claims, PSI asserts that Harley-Davidson contacted dealers and told them that PSI would not be taking any more orders from dealers for merchandise bags. Compl. P 27.

As a general matter, an antitrust plaintiff need not present direct evidence of an agreement in order successfully to bring an antitrust suit. See, e,g., *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654-55* (price-fixing). And an express, written agreement is not a prerequisite of an illegal tie. For instance, in *Jefferson* ***[*12]*** *Parish* - the seminal Supreme Court tying case - the hospital-defendant was accused of tying surgical services to a particular firm of anesthesiologists. Although the hospital's contract with the anesthesiology firm at one time contained an exclusivity provision, the clause had been deleted by the time of the facts that gave rise to the case. *Jefferson Parish, 466 U.S. at 5* (noting that despite the absence of an exclusivity provision "the hospital nevertheless continued to regard itself as committed to a closed anesthesiology department"). What matters for purposes of the sufficiency of PSI's complaint is that PSI allege that the dealers were coerced. The accompanying analysis, the Seventh Circuit teaches, may "require[] exceeding subtlety" in a tying case. *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985)*. "A tie within the meaning of ***antitrust law*** depends on showing that the buyer did not *want* to take both products from the same vendor." *Id.* (emphasis altered).

Of course, were Plaintiff's complaint predicated solely on the text of the Notice, the case would be a prime candidate for dismissal. The Court agrees that, on its face, the Notice appears to apply only **[*13]** to the use of Harley-Davidson's trademark. And courts have granted motions to dismiss in tying cases where the sole basis for the alleged tie was a deficient document. For example, in *RX Sys., Inc. v. Med. Tech. Sys., Inc.,* the plaintiff's allegations were based on a warranty provision in which a 90-day warranty would be forfeited if purchasers of a machine altered those machines to accept unauthorized parts or accessories. See *1995 U.S. Dist. LEXIS 14214, 1995 WL 577659, at * 5 (N.D. Ill. Sept. 29, 1995)*. Critically, although the document was found insufficient to establish a tie, the plaintiff in that case failed to allege a source of coercion that was extrinsic to the warranty. See

1995 U.S. Dist. LEXIS 14214, [WL] at *6 (explaining that a threat of lawsuits are not ordinarily a basis for antitrust liability unless the threat is a sham). See also Sheridan v. Marathon Petroleum Co. LLC, 2007 U.S. Dist. LEXIS 74022, 2007 WL 2900556, at *6 (S.D. Ind. Sept. 28, 2007) ("Plaintiffs do not allege implicit coercion by Defendants to force lessee-dealers to use particular credit card processing services."), aff'd, 530 F.3d 590 (7th Cir. 2008). PSI's complaint, by contrast, alleges that many of Harley-Davidson's dealers would have preferred to buy bags from PSI but "feared repercussions **[*14]** * * * if they continued to do business with PSI." Compl. P 17. And while a plaintiff at the pleading stage must allege plausible facts, it need not marshal all of its evidence. Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) ("[T]he plaintiff receives the benefit of imagination [at the pleading stage], so long as the hypotheses are consistent with the complaint"). At least at this early stage of the litigation, Plaintiff sufficiently has alleged the existence of a tie. Whether PSI can do so at the summary judgment phase is, of course, a separate question.

Defendant's second argument - that PSI failed to allege that Harley-Davidson will acquire market power in the tied market - fails as well. The parties' dispute on this point centers on whether acquisition of market power in the market for the tied product is an element of a tying claim. Harley-Davidson, citing Carl Sandburg Village Condo. Ass'n v. First Condo. Dev. Co. (758 F.2d 203, 210 (7th Cir. 1985)), argues that market power in the tied good is an element of a tying claim. Def.'s Mem. at 9. PSI points to *Reifert v. S. Cent. Wisc. MLS Corp.,* a more recent Seventh Circuit case whose tying framework **[*15]** is discussed above, to argue that PSI need only present allegations that the tying seller has sufficient economic power in the *tying* market to appreciably restrain free competition in the market for the tied product. Pl.'s Mem. at 10; see also Reifert, 450 F.3d at 316-17. The Court concludes that PSI's allegations suffice under either formulation.

Because not all ties constitute antitrust violations, [4] both parties agree that there must be some effect on the tied product market. Yet, the Seventh Circuit has not spoken with one voice as to what that requisite effect must be. In *Carl Sandburg,* the Seventh Circuit required a showing of substantial danger that the seller will acquire market power over the tied product. 758 F.2d at 210. More recently, in *Reifert,* the Seventh Circuit stated that the requisite effect on the tied market is appreciable restraint on free competition. [5] Either formulation can be viewed as a corollary to the Supreme Court's holding in *Jefferson Parish* that "forcing," or coercion, is an essential characteristic of a tying claim. 466 U.S. at 12. Where "forcing" is present "competition on the merits in the market for the *tied* item is restrained." *Id.* (emphasis added). **[*16]** Courts will "condemn[] tying arrangements when the seller has some special ability * * * to force a purchaser to do something that that he would not do in a competitive market." Id. at 13-14.

To understand why any differences in the parties' formulations do not matter - for present purposes, at least - one need only understand what "market power" means. Market power is the "power to raise prices significantly above the competitive level without losing all of one's business." Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982); see also Sheridan, 530 F.3d at 594 (market power is "significant unilateral power over the market price"); Fishman v. Estate of Wirtz, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting in part) ("Market power means the ability to injure consumers by curtailing output and raising price."). One thus can see why the focus in tying cases generally falls on the market for the tying product: [6] it is only by dint of the market

---

[4] For example, tying sales of right shoes to left shoes generally cannot be said to reduce consumer welfare or restrain trade. See, e.g., HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 10.2 at 399 (West Publishing Co. 2005) (describing the role of judicial tests as devices for producing "an inference that a particular tying arrangement injures consumers as a group"); see also Jefferson Parish, 466 U.S. at 25 (observing that "there is nothing inherently anticompetitive about packaged sales").

[5] The tying formulation in *Reifert* might be viewed as retrenching from the earlier formulation in *Carl Sandburg,* which some commentators have questioned. See HOVENKAMP § 10.4a at 412 & nn.14-16 (concluding that requiring proof of market power in the tied market "seems to be a castoff of [a] generally discredited" economic theory of tying harm). But see Sheridan, 530 F.3d at 592 ("The traditional antitrust concern with [tying] is that * * * the result [of the tie] will be **[*17]** a second monopoly"); A.O. Smith Corp. v. Lewis, Overbeck & Furman, 979 F.2d 546, 549 (7th Cir. 1992) (per *Carl Sandburg,* substantial danger of acquisition of market power over the tied product must be proved in a tying case).

power over the tying product that a seller could have any chance of restraining free competition in the tied product market (*such as* by unilaterally raising the price **[*18]** for the tied good above marginal-cost pricing). If the seller does not have market power over the tying product, consumers may readily substitute away from the seller's goods, ultimately returning prices of the tying product to a competitive level. *Cf.* *Sheridan, 530 F.3d at 594*. By contrast, where a seller has market power over the tying product, other sellers "cannot take up enough of the slack" (*id.*) and return prices to competitive levels.

Yet, the allegations of the complaint combined with the definition of market power show that any distinctions between PSI's formulation and Harley-Davidson's formulation of the elements of a tying claim do not matter. The distinctions, as applied to this case, do not matter because the restraint on free competition in the market for the tied product that PSI alleges (the *Reifert* formulation of the required tied-market effect) is that buyers of plastic merchandise bags are forced to pay above-market prices (the *Carl Sandburg* formulation of the required tied-market effect). In other words, reading the allegations in **[*19]** PSI's complaint (see Compl. PP 1, 17; *cf. id.* at P 27) in the light of the definition of market power shows that PSI has alleged precisely that which Harley-Davidson argues PSI has omitted. [7] See also *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 720 n.7 (7th Cir. 1987)* (the "best way" to show market power "is to establish directly that the price of the tied package is higher than the price of the components sold in competitive markets").

* * * * *

It may be that Harley-Davidson merely was protecting its intellectual **[*20]** property rights; if that is so, this case might easily be resolved at the summary judgment phase. "[I]t is well-established in this circuit that a trademark holder has the right to defend himself against infringement by sending trademark policing letters to alleged infringers." *Thermos Co. v. Igloo Products Corp., 1995 U.S. Dist. LEXIS 18382, 1995 WL 745832, at *5 (N.D. Ill. Dec. 13, 1995)* (internal quotation marks omitted) (listing cases). Yet, because it is not proper to examine the merits of the case on a motion to dismiss, the Court denies Defendant's motion [9].

III. Conclusion

For the reasons stated above, Defendant's motion to dismiss [9] is respectfully denied.

Dated: March 30, 2009

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

End of Document

[6] See *Illinois Tool Works Inc. v. Independent Ink, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (plaintiff must demonstrate market power over the tying product).

[7] Defendant also argues that Plaintiff has failed to allege what the "tied market" is. Def.'s Mem. at 9. It is true that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold." *Jefferson Parish, 466 U.S. at 18*. However, Harley-Davidson has presented no authority for the proposition that Plaintiff's *complaint* must define the market. Part of the confusion on the matter, and accompanying lack of precision in Plaintiff's complaint, seemingly stems from the fact that Plaintiff does not know whether Harley-Davidson makes customized merchandise bags or only non-customized merchandise bags.

Xerox Corp. v. Media Scis., Inc.

United States District Court for the Southern District of New York

March 30, 2009, Decided; March 30, 2009, Filed

06 Civ. 4872 (RJH)

Reporter

609 F. Supp. 2d 319 *; 2009 U.S. Dist. LEXIS 27082 **; 2009-1 Trade Cas. (CCH) P76,638

XEROX CORPORATION, Plaintiff, - against - MEDIA SCIENCES, INC., Defendant.

Subsequent History: Summary judgment granted by *Xerox Corp. v. Media Scis., Inc., 2009 U.S. Dist. LEXIS 91346 (S.D.N.Y., Sept. 30, 2009)*

Prior History: *Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 2007 U.S. Dist. LEXIS 68081 (S.D.N.Y., 2007)*

Core Terms

ink, arbitration, settlement agreement, antitrust, solid, rebate, counterclaims, printers, good faith belief, loyalty, parties, sticks, affirmative defense, antitrust claim, public policy, conditioning, antitrust violation, summary judgment, manufactured, settlement, reseller, refuse to enforce, general release, offer evidence, distributor, alleges, Sherman Act, covenant-not-to-sue, CONTRACTS, discounts

LexisNexis® Headnotes

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

HN1[ ] **Entitlement as Matter of Law, Appropriateness**

Under *Fed. R. Civ. P. 56*, summary judgment is appropriate when the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

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

HN2[ ] **Entitlement as Matter of Law, Materiality of Facts**

On summary judgment, a fact is material if it might affect the outcome of the suit under the governing law.

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

HN3[ ] **Entitlement as Matter of Law, Genuine Disputes**

On summary judgment, a factual dispute is genuine when the evidence is such that a reasonable jury could return a verdict for the non-moving party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

The role of a court in ruling on a summary judgment motion is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN5[] **Entitlement as Matter of Law, Need for Trial**

The moving party bears the burden of proving that no genuine issue of material fact exists, or that because of the paucity of evidence presented by the nonmovant, no rational jury could find in favor of the non-moving party.

Contracts Law > Contract Interpretation > General Overview

HN6[] **Contracts Law, Contract Interpretation**

A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions.

Contracts Law > Defenses > Public Policy Violations

HN7[] **Defenses, Public Policy Violations**

When a court is asked to strike down on grounds of public policy a contractual arrangement on its face consensual cases are not decided, nor the law appropriately understood apart from an informed and particularized insight into the factual circumstances of the case. There is no absolute rule by which to determine what contracts are against public policy, but each case must be determined from all the circumstances thereof, the courts declaring a contract void for such reason only where it is clearly contrary to the public interests.

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

Civil Procedure > Settlements > Releases From Liability > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN8[] **Regulated Practices, Private Actions**

Courts have refused to enforce general releases and arbitration agreements that they have found act to waive or immunize parties from liability for future antitrust violations.

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

Civil Procedure > Settlements > Releases From Liability > General Releases

HN9[] Regulated Practices, Private Actions

Although there is an unquestioned public interest in the vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action, this public interest does not prevent an injured party from releasing his claim and foregoing the burden of litigation. And, courts have enforced even general releases to bar antitrust claims predicated on continuing violations of prerelease conduct.

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN10[] Regulated Practices, Private Actions

Public policy favors the settlement of disputes. Repose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN11[] Alternative Dispute Resolution, Arbitration

There is a federal policy favoring arbitration.

Counsel: [1]** For Xerox Corporation, a New York corporation, Plaintiff: James Gerard McCarney, LEAD ATTORNEY, Howrey LLP (NYC), New York, NY; Jennifer L. Dzwonczyk, Jim W. Ko, Joseph P. Lavelle, LEAD ATTORNEYS, Howrey Simon Arnold & White LLP, Washington, DC.

For Media Sciences International, Inc., a Delaware corporation, Defendant: Anthony P. La Rocco, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ; Hunter D. Keeton, James J. Foster, Lawrence M. Green, LEAD ATTORNEYS, Wolf, Greenfield & Sacks, P.C., Boston, MA; William N. Hebert, LEAD ATTORNEY, Calvo & Clark, LLP, San Francisco, CA; William H. Hebert, Kirkpatrick & Lockhart Preston Gates Ellis LLP, San Francisco, CA.

For Media Sciences, Inc., a Delaware corporation, Defendant: Anthony P. La Rocco, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ; Hunter D. Keeton, James J. Foster, Lawrence M. Green, LEAD ATTORNEYS, Wolf, Greenfield & Sacks, P.C., Boston, MA; Seung Lee, William N. Hebert, LEAD ATTORNEYS, Calvo & Clark, LLP, San Francisco, CA; William H. Hebert, Kirkpatrick & Lockhart Preston Gates Ellis LLP, San Francisco, CA.

For Media Sciences International, Inc., a Delaware corporation, **[**2]** Counter Claimant: Hunter D. Keeton, Lawrence M. Green, LEAD ATTORNEYS, James J. Foster, Wolf, Greenfield & Sacks, P.C., Boston, MA; Seung Lee, LEAD ATTORNEY, Calvo & Clark, LLP, San Francisco, CA; Anthony P. La Rocco, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ.

For Media Sciences, Inc., a Delaware corporation, Counter Claimant: Hunter D. Keeton, Lawrence M. Green, LEAD ATTORNEYS, James J. Foster, Wolf, Greenfield & Sacks, P.C., Boston, MA; Seung Lee, LEAD ATTORNEY, Calvo

& Clark, LLP, San Francisco, CA; Anthony P. La Rocco, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ; William N. Hebert, LEAD ATTORNEY, Calvo & Clark, LLP, San Francisco, CA.

For Xerox Corporation, a New York corporation, Counter Defendant: James Gerard McCarney, LEAD ATTORNEY, Howrey LLP (NYC), New York, NY; Jennifer L. Dzwonczyk, Jim W. Ko, Howrey Simon Arnold & White LLP, Washington, DC.

For Media Sciences International, Inc., a Delaware corporation, Media Sciences, Inc., a Delaware corporation, Counter Claimants: Hunter D. Keeton, Lawrence M. Green, LEAD ATTORNEYS, Wolf, Greenfield & Sacks, P.C., Boston, MA; Seung Lee, LEAD ATTORNEY, Calvo & Clark, LLP, San Francisco, CA; Anthony **[**3]** P. La Rocco, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ.

For Media Sciences International, Inc., a Delaware corporation, Media Sciences, Inc., a Delaware corporation, Counter Claimants: Seung Lee, LEAD ATTORNEY, Calvo & Clark, LLP, San Francisco, CA; Anthony P. La Rocco, Kirkpatrick & Lockhart Preston Gates Ellis, LLP (NJ), Newark, NJ.

For Xerox Corporation, a New York corporation, Counter Defendant: James Gerard McCarney, LEAD ATTORNEY, Howrey LLP (NYC), New York, NY; Jennifer L. Dzwonczyk, Jim W. Ko, Joseph P. Lavelle, LEAD ATTORNEYS, Jennifer L. Dzwonczyk, Jim W. Ko, Howrey Simon Arnold & White LLP, Washington, DC.

For Xerox Corporation, a New York corporation, Counter Defendant: James Gerard McCarney, Howrey LLP (NYC), New York, NY; Jennifer L. Dzwonczyk, Howrey Simon Arnold & White LLP, Washington, DC.

Judges: Richard J. Holwell, United States District Judge.

Opinion by: Richard J. Holwell

Opinion

[*320] MEMORANDUM OPINION AND ORDER

Richard J. Holwell, District Judge:

On September 14, 2007, this Court denied in part Plaintiff-Counterclaim Defendant **[*321]** Xerox Corporation's ("Xerox") motion pursuant to *Federal Rule of Civil Procedure 12(b)(6)* to dismiss Defendant-Counterclaimant Media Sciences, Inc.'s ("Media **[**4]** Sciences" or "MS") counterclaims alleging monopolization and attempted monopolization in violation of § 2 of the Sherman Antitrust Act, *15 U.S.C. § 2 (2006)* (the "Sherman Act"), holding that Media Sciences pleaded facts sufficient to state antitrust claims on its theories challenging: (1) Xerox's redesigning and patenting of its solid ink sticks for use in its phase change color printers, and (2) its loyalty rebate program. See *Xerox Corp. v. Media Sciences, Inc., 511 F. Supp. 2d 372, 387-90 (S.D.N.Y. 2007)*.

Now before the Court is Xerox's motion for partial summary judgment on its first affirmative defense to Media Sciences's antitrust counterclaims as alleged in its Third Amended Answer, Affirmative Defenses, and Counterclaims. For the following reasons, Xerox's motion is GRANTED.

I. BACKGROUND

Years before this lawsuit was filed, these same parties and their predecessors were involved in a series of lawsuits involving similar patent and antitrust issues. (Xerox Mem. Supp. Mot. S.J. at 2.) On May 4, 2001, the parties entered into a Settlement Agreement and Release (the "Settlement Agreement") terminating the litigation in the earlier cases. (Id.; see UltraHue, Inc. v. Tektronix, Inc., **[**5]** No. 99-1664 (W.D. Wash. May 11, 2001); Cadapult Graphic Svs., Inc. v. Tektronix, Inc., No. 00-732 (D. Or. May 14, 2001); and Xerox Corp. v. Media Sciences, Inc., No. 01-0487 (W.D. Wash. July 20, 2001)). A final judgment was entered upon the Settlement Agreement in each case. (Ko Decl. Exh. A:1, 2, & 3.)

Five years later, on June 23, 2006, Xerox filed the complaint in this case, alleging that Media Sciences's manufacture, use, and sale of solid ink sticks for use in Xerox phase change color printers infringes several Xerox patents. *Xerox, 511 F. Supp. 2d at 378*. On January 16, 2007, Media Sciences filed its Second Amended Answer in which it raised for the first time counterclaims alleging antitrust violations under § 2 of the Sherman Act. (Xerox Mem. Supp. Mot. S.J. at 3.) Xerox filed a motion to dismiss Media Sciences's antitrust counterclaims on January 30, 2007, (Docket No. 29), which the Court denied in part, as noted above, on September 14, 2007, *Xerox, 511 F. Supp. 2d 372*. In its September 14 Order, the Court also granted Media Sciences's motion to file a Third Amended Answer that more fully pleaded its antitrust counterclaims, *id. at 390*, which Media Sciences filed on September **[**6]** 19, 2007 (Docket No. 44). On October 3, 2007, Xerox filed its Amended Reply and Affirmative Defense to Media Sciences's counterclaims. (Docket No. 48.) And, on June 20, 2008, Xerox filed the instant motion for partial summary judgment on its first affirmative defense to Media Sciences's antitrust counterclaims as well as a motion for summary judgment on the merits of Media Sciences's monopolization counterclaims. (Docket Nos. 99 & 101.) Only Xerox's motion for partial summary judgment on its first affirmative defense is addressed in this decision. (Docket No. 99.)

A. Media Sciences's Antitrust Allegations Based on Xerox's Rebate Program and Xerox's Affirmative Defense Thereto

In its Third Amended Answer, Affirmative Defenses, and Counterclaims, Media Sciences alleges that Xerox is maintaining an illegal monopoly by engaging in "restrictive and exclusionary conduct, without any legitimate business justification" in violation of § 2 of the Sherman **[*322]** Act, in part through its loyalty rebate program. (MS 3d Amend. Ans. at P 47.) Specifically, Media Sciences contends:

> Xerox has offered loyalty rebates to its resellers, distributors, and wholesalers who agree not to sell [Media Sciences's] replacement **[**7]** solid color ink sticks, which has the purpose and effect of reducing the supply of lower-price [sic] competing products in the relevant market. Because Xerox is the dominant supplier of replacement solid ink sticks with a large and widespread reseller network, these loyalty rebates are coercive and exclusionary. Unlike conventional volume discounts that manufacturers offer to resellers from which consumers benefit by lowering the price and increasing product supply, Xerox's loyalty rebates have the effect of excluding from much of the market the supply of [Media Sciences's] lower-priced replacement solid color ink sticks.

(Id. at P47 (c).)

In its Amended Reply and Affirmative Defense, Xerox raises a provision of the Settlement Agreement as an affirmative defense to Media Sciences's antitrust counterclaims. Xerox alleges:

> Under paragraph eighteen (18) of the Settlement Agreement and Release entered into on May 4, 2001 to conclude litigations between the parties and their predecessors in interest, Media Sciences covenanted that it would not assert or pursue a claim, or offer evidence, under any legal or factual theory that Xerox has engaged in or is engaging in any improper or illegal conduct **[**8]** by conditioning rebates, discounts, or marketing support or benefits on a reseller or distributor not selling solid ink manufactured or sold for Media Sciences, so long as Xerox has a good faith belief that Media Sciences' ink is continuing to cause failures or mechanical problems in Xerox solid printers. Because Xerox has had and continues to have such a good faith belief, Media Sciences cannot bring an antitrust claim based on conditioning rebates, discounts, or marketing support.

(Xerox Amend. Reply at P 57.)

B. The Settlement Agreement

Essentially, Xerox alleges that the provision in P 18 of the Settlement Agreement precludes Media Sciences from relying on its theory that Xerox is maintaining an unlawful monopoly through the loyalty rebate program, without first submitting to arbitration as provided in P 25 of the mutually agreed upon Settlement Agreement. Paragraph 18 of the Settlement Agreement provides:

> 18. [Media Sciences] covenants that subsequent to this Agreement it will not assert or pursue a claim, or offer evidence, under any legal or factual theory that XEROX . . . has engaged or is then engaging in any improper or illegal conduct by conditioning rebates, discounts, or marketing **[**9]** support or benefits on a reseller or distributor not selling solid ink manufactured or sold by or for [Media Sciences] so long as XEROX has a good faith belief that such ink is continuing to cause failures or material problems in XEROX solid ink printers. [Media Sciences] specifically releases any claims it may have against XEROX in any way arising out of or related to . . . XEROX's Peak marketing programs as currently written.

(Ko Decl. Exh. A at P 18.)

Reading the Settlement Agreement as a whole, see *United States v. Hamdi, 432 F.3d 115, 125 (2d Cir. 2005)* (quoting 11 WILLISTON ON CONTRACTS § 32:11), the Court must also consider P 25 of the Settlement Agreement. That paragraph defines the procedure and sets the standard by which Media Sciences may show that Xerox no longer has a good faith belief **[*323]** that Media Sciences's ink sticks "cause failures or material problems in Xerox solid ink printers." (Ko Decl. Exh. A at P 18.) Paragraph 25 provides in relevant part:

> 25. XEROX . . . agree[s] that beginning one year from the anniversary of this Agreement, and not more frequently than once every nine months after the conclusion of any arbitration under this paragraph [Media Sciences] may demand **[**10]** arbitration over whether XEROX continues to have a good faith belief that solid ink sold or manufactured by [Media Sciences] causes problems or failures in XEROX solid ink printers. Arbitration of the issue described in subparagraph 25.1 below shall be [Media Sciences's] exclusive remedy for any claim that XEROX does not have a good faith belief that solid ink sold or manufactured by [Media Sciences] causes problems or failures in XEROX solid ink printers.
>
> 25.1 The only issue to be resolved in any such arbitration is whether during the six month period prior to the date of the arbitration demand, and taking into account the proportionate volume of ink sold, such ink has caused failures or material problems if XEROX solid ink [sic] at a materially higher proportionate rate than such problems or failures were caused, if at all, by use of XEROX solid ink in the applicable models of printers at issue. The factual determination of the arbitration shall be final and binding on the parties and the party demanding arbitration shall have the burden of proof.

(Ko Decl. Exh. A at P 25, 25.1.) Whether PP 18 and 25 of the Settlement Agreement operate to preclude Media Sciences from pursuing its antitrust **[**11]** counterclaims based upon Xerox's rebate program at this time is the subject of the instant motion.

II. DISCUSSION

A. Legal Standard

HN1[] Under *Rule 56 of the Federal Rules of Civil Procedure*, summary judgment is appropriate when the evidence "show[s] that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN2***[] A fact is material if it "might affect the outcome of the suit under the governing law." *Id. at 248*. ***HN3***[] A factual dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. ***HN4***[] The role of a court in ruling on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)*. ***HN5***[] The moving party bears the burden of proving that no genuine issue of material fact exists, or that because of the paucity of evidence presented by the non-movant, no rational jury could find in favor of the non-moving party. See *Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994)*.

B. [**12] Application of the Settlement Agreement

Xerox contends that to the extent that Media Sciences's antitrust counterclaims rely on allegations that Xerox's loyalty rebate program violates § 2 of the Sherman Act, those allegations are presently precluded because Media Sciences has not yet met the agreed upon condition to pursuing a claim or offering evidence based on Xerox's rebate program. (Xerox Mem. Supp. Mot. S.J. at 5-6; Ko Decl. Exh. A at P 25.1.) [1] Paragraph 18 of the Settlement **[*324]** Agreement provides that such a claim may not be initiated provided that Xerox has a good faith belief that Media Sciences's ink sticks are causing failures or other significant problems in Xerox printers. (See Ko Decl. Exh. A at P 18.) Paragraph 25 of the Settlement Agreement then explicitly provides for arbitration as the "exclusive remedy," (Id. at P 25), to resolve any dispute as to Xerox's continued good faith belief. Paragraph 25 and the subparagraphs thereunder also set out an objective standard by which the arbitrator is to conclusively determine whether Xerox continues to have such a good faith belief [2] as well as the consequences of the arbitrator's factual findings. (See id. at PP 25.1-25.3.) Specifically, **[**13]** if Media Sciences prevails, Xerox must: (1) promptly cease distributing communications warning purchasers that Media Sciences's ink causes failures or material problems when used in the Xerox solid ink printers at issue, and (2) "rescind or terminate any condition to benefits or qualification in any marketing incentive program . . . ." (Id. at P 25.2.)

Media Sciences contends that: (1) what it aptly characterizes as an arbitration clause, (see MS Opp. at 2), in PP 18 and 25 of the Settlement Agreement does not apply to its counterclaims because it only applies if Media Sciences challenges Xerox's good faith belief **[**15]** that Media Sciences's ink sticks continue to cause failures and material problems in Xerox printers, which Media Sciences has admittedly not done (id. at 7-8), or (2) to the extent that it applies, the Settlement Agreement is void as against public policy as a "release of prospective antitrust claims." (Id. at 2-7.)

1. Whether the language of the Settlement Agreement applies to Media Sciences's counterclaims

Media Sciences's contention that the arbitration provision of P 25 is inapplicable to the counterclaims because Media Sciences has not specifically sought to litigate the issue of whether Xerox's actions have been taken in good faith ignores the basic tenant of contract law that ***HN6***[] a "contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions." See *Hamdi, 432 F.3d at 125* (quoting 11 WILLISTON ON CONTRACTS § 32:11). The plain language of P 18 of the Settlement Agreement conditions the pursuit **[*325]** of a claim or the offering of evidence that challenges Xerox's loyalty rebate program under any legal or factual theory on Xerox's continued "good faith belief that . . . [Media Sciences's] ink is continuing **[**16]** to cause failures or material problems in XEROX solid ink printers." (Ko Decl. Exh. A at P 18.) Paragraph 25 then provides arbitration as Media Sciences's exclusive means to challenge Xerox's continued good faith belief as referenced in P 18 and sets out a procedure and a substantive standard by which the arbitrator must make her factual determination. (Id. at P 25.)

---

[1] Xerox also argues that Media Sciences's antitrust counterclaims are barred by the specific release provision also contained in P 18 of the Settlement Agreement, which provides: "[Media Sciences] specifically releases any claims it may have against XEROX . . . in any way arising out of or related to . . . XEROX's Peak marketing program[] as currently written." (Xerox Mem. Supp. Mot. S.J. at 7; Ko Decl. Exh. A at P 18.) However, in its Amended Reply and Affirmative Defense, Xerox alleges only that Media Sciences's cannot bring its antitrust counterclaims under P 18 of the Settlement Agreement so long as Xerox continues to have a good faith belief that Media Sciences's ink causes failures and material problems in Xerox solid ink printers. (Xerox Amend. Reply at P 57.) Because the Court decides Xerox's motion on the only ground alleged in **[**14]** its Amended Reply, the Court does not further address the specific release provision of P 18.

[2] As noted above, P 25.1 provides:

> The only issue to be resolved in any such arbitration is whether during the six months period prior to the date of the arbitration demand, and taking into account the proportionate volume of ink sold, such ink has caused failures or material problems in XEROX solid ink [printers] at a materially higher proportionate rate than such problems or failures were caused, if at all, by use of XEROX solid ink in the applicable models of printers at issue. The factual determination of the arbitration shall be final and binding on the parties and thepparty demanding the arbitration shall have the burden of proof.

(Ko Decl. Exh. A at P 25.1.) Thus, contrary to Media Sciences's suggestion, the arbitration does not concern Xerox's subjective state of mind, but rather an objective determination of product performance.

Construing these provisions together to ascertain the intention of the parties, it is clear that the parties intended the arbitration of Xerox's good faith belief that Media Sciences's ink sticks continue to cause failures or material problems in Xerox solid ink printers to act as a precondition to asserting a claim or offering evidence challenging Xerox's loyalty rebate program. Read together, PP 18 and 25 create a conditional covenant-not-to-sue in P 18 coupled with a mandatory arbitration clause in P 25 and its subparagraphs. [3] The Court readily concludes that the provisions of the Settlement Agreement apply to Media Sciences counterclaims at issue.

2. Whether enforcement of the Settlement Agreement violates public policy

Alternatively, Media Sciences argues that even if PP 18 and 25 of the Settlement Agreement apply to its antitrust counterclaims the Court should refuse to enforce the Settlement Agreement because it is void as against public policy.

To begin, at this intersection of contract law and public policy, the Court is mindful that ***HN7***[] "when [a] court[ ] [is] asked to strike down on grounds of public policy a contractual arrangement on its face consensual . . . [c]ases are not decided, nor the law appropriately understood apart from an informed and particularized insight into the **[**18]** factual circumstances of the" case. *Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 421, 79 S. Ct. 1210, 3 L. Ed. 2d 1334 (1959)* (citation omitted); see *Madison Square Garden, L.P. v. NHL, 2008 U.S. Dist. LEXIS 80475, at 21(S.D.N.Y. Oct. 10, 2008)* ("MSG v. NHL") (quoting 17A C.J.S. Contracts § 218 (2008) ("There is no absolute rule by which to determine what contracts are against public policy, but each case must be determined from all the circumstances thereof, the courts declaring a contract void for such reason only where it is clearly contrary to the public interests . . . .")). In making such a determination in this case, the Court must consider competing public policy concerns.

First, Media Sciences is correct in asserting that the Supreme Court has suggested, albeit in dicta, that it would not hesitate to condemn a tandem of a forum-selection clause and a choice-of-law provision that operated "as a *prospective* waiver of a party's right to pursue statutory remedies for antitrust violations." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* ***[*326]*** *Inc., 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (emphasis supplied). Following this suggestion, other ***HN8***[] courts have refused to enforce general releases and arbitration **[**19]** agreements that they have found act to waive or immunize parties from liability for future antitrust violations. See, e.g., *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 324-328, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)* (holding that a prior settlement of an antitrust conspiracy case and the resulting judgment dismissing the suit with prejudice could not have res judicata effect in a later suit against additional parties in which the plaintiffs alleged claims based on new types of antitrust violations that were not contemplated by the earlier settlement when it would have the effect of conferring on defendants partial immunity from civil liability for distinct future antitrust violations); *In re Amer. Express. Merchs.' Litig., 554 F.3d 300, 319-20 (2d Cir. 2009)* (refusing to enforce a class action waiver in an arbitration agreement as against public policy "because to . . . [enforce it] would grant [the defendant] de facto immunity from antitrust liability by removing plaintiffs' only reasonably feasible means of recovery," while affirming the arbitrability of antitrust claims more widely); *Redel's Inc., v. Gen. Elec. Co., 498 F.2d 95, 98-99 (5th Cir. 1974)* (holding that a general release of all claims did not operate, **[**20]** by its terms, to bar prospective antitrust claims, nor could it in view of public policy); *Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173, 179-80 (8th Cir. 1955)* (explaining that claims for new antitrust violations that arise subsequent to a general release of all claims needed no express protection in the release agreement because any "contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would be to that extent void as against public policy").

---

[3] Citing *In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 258 (S.D.N. Y. 2005)*, Media Sciences also argues in one paragraph that "if Xerox truly believed **[**17]** that an arbitration of its good faith belief was a precondition to any suit, Xerox was required to demand such an arbitration," and request a stay in the current litigation to do so. (MS Opp. at 9.) Because the plain language of the Settlement Agreement does not permit Xerox to demand arbitration until nine months after Media Sciences prevailed in a previous arbitration initiated by Media Sciences as provided in P 25, (see Ko Decl. Exh. A at P 25, 25.3), which Media Sciences has admittedly not done, (see MS Opp. at 8), the Court rejects this argument.

But,*HN9*[] "[a]lthough there is an unquestioned public interest in the 'vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action,' this public interest does not prevent the injured party from releasing his claim and foregoing the burden of litigation." *Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 891-92 (3rd Cir. 1975)* (quoting *Lawlor, 349 U.S. at 329*). And, courts have enforced even general releases to bar antitrust claims predicated on *continuing violations of pre-release* conduct, such as "conspiracies alleged to continue post-release." *VKK Corp. v. NFL, 244 F.3d 114, 126 (2d Cir. 2001)*; see *MSG v. NHL, 2008 U.S. Dist. LEXIS 80475 at 23-25, 30-31*.

Further, **[**21]** the Court is also cognizant of the competing policies favoring settlement and the enforcement of arbitration clauses. In general, *HN10*[] public policy favors the settlement of disputes. See *MSG v. NHL, 2008 U.S. Dist. LEXIS 80475 at *24* (citing *Bano v. Union Carbide Corp., 273 F.3d 120, 129-30 (2d Cir. 2001))*; *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 202 (2d Cir. 2006)*. This fact has been specifically noted by a leading antitrust treatise: "Repose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations . . . ." II Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 320a, at 282 (3d ed. 2007). Also, reading PP 18 and 25 together as a mandatory arbitration clause, see *Hamdi, 432 F.3d at 125*, the Court recognizes "a healthy regard for *HN11*[] the federal policy favoring arbitration . . . ." *Mitsubishi Motors Corp., 473 U.S. at 626* **[*327]** (internal quotation marks and citation omitted).

It is against this backdrop that the Court considers whether the Settlement Agreement is enforceable to preclude Media Sciences's antitrust challenge **[**22]** to Xerox's loyalty rebate program at this point in the litigation and concludes, for the following reasons, that its enforcement would not be "clearly contrary to the public interest." *MSG v. NHL, 2008 U.S. Dist. LEXIS 80475 at *21, 30*) (quoting 17A C.J.S. Contracts § 218).

Considering the facts and circumstances particular to this case, see *Southwestern Sugar & Molasses Co., 360 U.S. at 421*, and construing the language of the Settlement Agreement to ascertain "the intentions of the parties . . . in light of the business purposes sought to be achieved," *Newmont Mines Ltd. v. Hanover Ins. Co., 784 F. 2d 127, 135 (2d Cir. 1986)*, the Court observes that the provision in P 18 of the Settlement Agreement is not a general release or waiver of antitrust liability or even a blanket covenant-not-to-sue. Rather, in substance, the provision is a conditional covenant-not-to-sue, conditioned on Media Sciences's ability to establish through the arbitral process a fact that would likely be relevant under § 2 of the Sherman Act, whether Xerox has a legitimate business justification for continuing to condition its rebates on resellers or distributors not selling Media Sciences's solid ink sticks. See, **[**23]** e.g., *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 189-90 (2d Cir. 1992)* (granting summary judgment based on a defendant's uncontroverted assertion of quality control and maintaining a company's goodwill as legitimate business concerns).

It is also clear from the express language of the Settlement Agreement that the parties agreed that, at the time of the settlement, Media Sciences's replacement solid ink sticks had "caused failures or problems in XEROX solid ink printers." (Ko Decl. Exh. A at P 14 & Exh. A:4.) As such, the parties agreed that Xerox could continue distributing notices to that effect to its customers "so long as XEROX continues to have a good faith belief that . . . [Media Sciences's] ink is continuing to cause failures or material problems in XEROX solid ink printers," (id.), as to be determined under P 25 (see id. at P 25). Because of the failures and material problems that Media Sciences's ink had caused in Xerox printers, it is clear from the language of P 18 that the parties also intended to permit Xerox to continue "conditioning rebates, discounts, or marketing support or benefits on a reseller or distributor not selling solid ink manufactured or **[**24]** sold by" Media Sciences as long as it continued to cause such acknowledged failures or material problems in Xerox printers, again as to be determined under P 25 of the Settlement Agreement. (Id. at PP 18, 25.) It is the substance of the conditional covenant-not-to-sue in P 18 read with the arbitration provisions of P 25 that distinguishes this case from those in which courts have refused to enforce releases in the antitrust context for public policy reasons.

For example, in Lawlor, the Court refused to give a previous settlement agreement res judicator effect when it would have forever extinguished the plaintiffs' future antitrust claims alleging disparate types of anti-competitive conduct that was not contemplated by the parties' settlement in the earlier antitrust litigation. *349 U.S. at 324-28*.

Similarly, in In re American Express Merchants' Litigation, the court refused to enforce a class action waiver which, if enforced, would have conferred upon the defendants "de facto immunity from antitrust liability by removing plaintiffs' only reasonably feasible means of recovery." *554 F.3d at* ***[*328]*** *319-20*. And, in Redel's Inc., the court refused to enforce a general release which would have forever **[**25]** waived any liability of the defendant for alleged post-release unlawful price discrimination claims. *498 F.2d at 98-99*.

In contrast, the conditional covenant-not-to-sue in P 18 of the Settlement Agreement does not waive or release any future liability of Xerox, not even liability arising out of its continuing to condition rebates on distributors not selling Media Sciences's ink sticks; nor does it provide Xerox with "de facto immunity" from suit, *In re Am. Express Merchs.' Litig., 554 F.3d at 320*.

The Settlement Agreement merely conditions Media Sciences's asserting such claims based on Xerox's loyalty rebate program, or offering evidence in support thereof, on Media Sciences's first availing itself of the arbitration provisions in P 25. Also, as previously stated, it is not lost on the Court that the mutually-agreed upon arbitration establishes a fact--whether Media Sciences's ink sticks continue to cause "failures or material problems" in Xerox printers--that would likely be of central importance in a future antitrust suit alleging that Xerox's loyalty rebate program constitutes anti-competitive conduct lacking any legitimate business justification. See *Trans Sport, Inc., 964 F.2d at 189-90*. **[**26]** The requirement of submitting a material fact issue to arbitration hardly raises any policy considerations in light of the recognized use of arbitration to resolve antitrust claims. *Mitsubishi Motors Corp., 473 U.S. at 637* (permitting an antitrust to proceed via arbitration in the international commercial context); *In re Am. Express Merchs.' Litig., 554 F.3d at 321* (permitting plaintiffs to pursue their class action antitrust claims in arbitration in the domestic commercial context); *Kristian v. Comcast Corp., 446 F.3d 25, 48 (1st Cir. 2006)* (enforcing a mandatory arbitration clause in the antitrust context in a domestic dispute).

Further, the competing policies favoring settlement, see *MSG v. NHL, 2008 U.S. Dist. LEXIS 80475 at *24* (citing *Bano, 273 F.3d at 129-30*); *In re Tamoxifen Citrate Antitrust Litig., 466 F.3d at 202*, especially in the antitrust context, II Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 320a, at 282, and the enforcement of arbitration agreements, *Mitsubishi Motors Corp., 473 U.S. at 626*, also support the Court's analysis. Weighing the competing policy considerations in light of the specific facts presented in this motion, the Court finds no difficulty **[**27]** in concluding that conditioning suit on the successful arbitration of a relevant fact is not the type of "prospective waiver of a party's right to pursue statutory remedies for antitrust violations," that the Supreme Court contemplated in *Mitsubishi Motors Corp., 473 U.S. at 637 n.19*. Therefore, the Court finds that the provision in P 18 of the Settlement Agreement that conditions Media Sciences's pursuit of its currently pending antitrust counterclaims on arbitration under P 25 is valid and enforceable.

III. CONCLUSION

For the foregoing reasons, Xerox's Motion for Partial Summary Judgment on its First Affirmative Defense is GRANTED. While Xerox requested in its Amended Reply and Affirmative Defense that the Court dismiss with prejudice Media Sciences's antitrust counterclaims to the extent that they challenge Xerox's loyalty rebate program, considering the plain language of PP 18 and 25 of the Settlement Agreement and the policy favoring the availability of a judicial forum for antitrust claims, the motion is GRANTED without prejudice.

SO ORDERED.

Dated: New York, New York

March 30, 2009

/s/ Richard J. Holwell

Richard J. Holwell

United States District Judge

Emigra Group, LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP

United States District Court for the Southern District of New York

March 31, 2009, Decided; March 31, 2009, Filed

07 Civ. 10688 (LAK)

Reporter

612 F. Supp. 2d 330 *; 2009 U.S. Dist. LEXIS 27568 **; 2009-2 Trade Cas. (CCH) P76,705

EMIGRA GROUP, LLC, Plaintiff, -against- FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP, et al., Defendants.

Core Terms

discovery, providers, immigration service, Submarket, relevant market, monopolization, customers, defendants', summary judgment, prices, declaration, admissible evidence, single-source, competitors, monopoly power, allegations, products, firms, alleged service, summary judgment motion, genuine issue of material fact, asserts, immigration, cluster, sellers, vendors, buyers, global, non-moving, antitrust

LexisNexis® Headnotes

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

HN1[] Scope, Monopolization Offenses

Section 2 of the Sherman Act makes it unlawful to monopolize or attempt or conspire to monopolize any part of the trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 2.

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

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

HN2[] Actual Monopolization, Claims

In order to establish monopolization, a plaintiff must prove that the defendant (1) possesses monopoly power in the relevant market, and (2) has wilfully acquired or maintained that power. Monopoly power is the power to control prices or exclude competition. A plaintiff claiming monopolization therefore is obligated to establish the relevant market because the power to control prices or exclude competition only makes sense with reference to a particular market. This requirement applies also to attempts to monopolize, as that offence requires proof of a dangerous probability of achieving monopoly power, which cannot be evaluated without consideration of the relevant market. And while rigorous proof of a relevant market and of a dangerous probability of achieving monopoly power are not, in the United States Court of Appeals for the Second Circuit, essential elements of conspiracy to monopolize, the relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

The costs of modern federal antitrust litigation and the increasing caseload of federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

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

HN4[] **Entitlement as Matter of Law, Appropriateness**

In the context of antitrust cases, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces.

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

HN5[] **Burdens of Proof, Movant Persuasion & Proof**

On a motion for summary judgment, the movant does not have the burden of proving the negative of matters as to which the non-moving party would have the burden of proof at trial.

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

HN6[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

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

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

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

HN7[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment must be entered against a nonmoving party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Indeed, the moving party's burden is only to inform the district court of the basis for its motion and regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment is satisfied.

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

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

HN8[] **Burdens of Proof, Movant Persuasion & Proof**

On a motion for summary judgment, the non-movant has the burden of coming forward with admissible evidence sufficient to raise a genuine issue of fact on a matter as to which non-movant would have the burden of proof at trial, regardless of the existence or adequacy of evidence submitted by the movant.

Antitrust & Trade Law > Sherman Act > Claims

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

Civil Procedure > Discovery & Disclosure > General Overview

HN9[] **Sherman Act, Claims**

Antitrust cases may be dismissed under *Fed. R. Civ. P. 12(b)(6)* on the face of the complaint, without any opportunity for discovery. A Sherman Act *§ 1* complaint will be dismissed absent allegations plausibly suggesting (not merely consistent with) the requisite agreement in restraint of trade. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

HN10[] **Sherman Act, Claims**

An antitrust complaint may be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to allege a relevant product market, where the plaintiff fails to define its proposed relevant market with a reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN11[] **Supporting Materials, Discovery Materials**

While it is true that summary judgment is not often granted prior to discovery, there is nothing in the Federal Rules of Civil Procedure precluding summary judgment -- in an appropriate case -- prior to discovery. To the contrary, *Fed. R. Civ. P. 56* makes clear that a defendant may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN12[] **Summary Judgment, Motions for Summary Judgment**

There are circumstances in which a non-moving party that has not completed discovery has a legitimate need for discovery to meet a motion for summary judgment. But *Fed. R. Civ. P. 56(f)* is the mechanism for addressing that need. If the non-moving party makes a sufficient showing by affidavit, a motion for summary judgment will be denied or delayed to permit discovery that is reasonably expected to create a genuine issue of material fact.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

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

HN13[] **Sherman Act, Claims**

An antitrust case in which proof of a relevant market is an element of the plaintiff's claim will be dismissed unless the complaint alleges facts that properly define the proposed relevant market by reference to the rule of reasonable interchangeability and cross-elasticity of demand. By parity of reasoning, the same is true of a complaint that alleges market or monopoly power in conclusory terms unless the complaint alleges facts that properly give rise to an inference that such power exists. Even if such a complaint is not attacked on its face, a plaintiff whose proposed relevant market or allegation of market power is challenged by a motion for summary judgment must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial as to the market definition or the existence of market power, as the case may be, or a sufficient *Fed. R. Civ. P. 56(f)* affidavit demonstrating, among other things, the need for specific discovery to raise such an issue.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN14[] **Opposing Materials, Memoranda in Opposition**

See S.D.N.Y. & E.D.N.Y. Civ. R. 56.1.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN15[] **Opposing Materials, Memoranda in Opposition**

A proper S.D.N.Y. & E.D.N.Y. Civ. R. 56.1 statement submitted by a non-movant should consist of a paragraph-by-paragraph response to the movant's S.D.N.Y. & E.D.N.Y. Civ. R. 56.1 statement, much like an answer to a complaint. It must cite admissible evidence in support of the non-movant's contention that there is admissible evidence creating a genuine issue for trial or, where the non-movant contends that further discovery is required to enable it to raise a genuine issue with admissible evidence, must be accompanied by a *Fed. R. Civ. P. 56(f)* affidavit that demonstrates such a need with respect to each relevant averment in the movant's S.D.N.Y. & E.D.N.Y. Civ. R. 56.1 statement.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN16[] **Opposing Materials, Memoranda in Opposition**

For purposes of S.D.N.Y. & E.D.N.Y. Civ. R. 56.1, a party's failure to admit or deny a particular averment -- to the extent its *Fed. R. Civ. P. 56(f)* affidavit sufficiently shows a justified failure to come forward with admissible evidence on the point in question -- cannot result in its being deemed to have admitted the averment. In those instances, however, in which the *Fed. R. Civ. P. 56(f)* affidavit makes no such showing, the failure to admit or deny is not justified by a general claim that the party has not had discovery. To that extent, it is deemed to have admitted the averments in question.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN17[] **Opposing Materials, Motions for Additional Discovery**

A *Fed. R. Civ. P. 56(f)* affidavit must show (1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN18[] **Opposing Materials, Memoranda in Opposition**

Just as a moving party will not be heard to advance a new argument for the first time in its reply brief on a motion for summary judgment, a non-moving party should not be heard to advance a new argument in opposition to a motion after the close of briefing and oral argument.

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

HN19[] **Price Fixing & Restraints of Trade, Vertical Restraints**

To establish an unlawful vertical agreement, a plaintiff must show (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) that such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.

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

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

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Non-price vertical restraints are subject to rule of reason analysis.

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

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

HN21[] **Actual Monopolization, Claims**

Proof of the relevant product market is a necessary element of a cause of action for monopolization or attempted monopolization. Similarly, sufficient proof of a relevant market and of a risk of its monopolization is pertinent to permit an inference of the specific intent to monopolize that is essential to a conspiracy to monopolize claim.

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

HN22[] **Market Definition, Relevant Market**

The definition of a relevant market in a Sherman Act *§ 2*, *15 U.S.C.S. § 2*, case serves to identify the area of effective competition in order determine whether a defendant has or threatens to obtain monopoly power. A product market is composed of products that have reasonable interchangeability. Its outer boundaries are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.

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

HN23[] **Market Definition, Relevant Market**

The Federal Trade Commission Horizontal Merger Guidelines recognize buyer substitution as the underlying principle for defining relevant markets. Accordingly, the Guidelines delineate a relevant market as a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (monopolist) likely would impose at least a 'small but significant and nontransitory increase in price. That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow.

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

HN24[] **Market Definition, Relevant Market**

A market is properly defined under the Federal Trade Commission Horizontal Merger Guidelines when a hypothetical profit-maximizing firm selling all of the product in that market could charge significantly more than a competitive price, i.e., without losing so many sales to other products that its price became unprofitable.

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

HN25[] **Market Definition, Relevant Market**

In determining a relevant market, direct evidence of cross-elasticity of demand is rare. In consequence, courts often look to a number of criteria designed to focus, directly or indirectly, on cross-elasticity.

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

HN26[] **Market Definition, Relevant Market**

Any definition of a cluster market must be responsive to the purpose of the market definition process - identification of an area of competition in which variations in price will affect the demand for alternative products. The cluster market approach is inappropriate for market definition because clusters include products and services that are not demand substitutes (or supply substitutes). It can be defended as a matter of analytical convenience: there is no need to define separate markets for a large number of individual hospital services, for example, when market shares and entry conditions are similar for each, or when data limitations will effectively require that the same proxy (such as the number of hospital beds) be employed to estimate the market share for each individual service. Or it could be understood as a way of looking to what the allegedly harmed buyers purchase as a basis for specifying the products and locations in the narrowly defined candidate market with which the market definition algorithm begins. But cluster markets may mislead as to competitive effects when competition from sellers of a partial line of products or services constrains the pricing of the full-line sellers offering the cluster.

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

HN27[] **Market Definition, Relevant Market**

Buyer substitution is a fundamental consideration in evaluating a proposed cluster market. If the nature of competition is such that a full line seller would not be constrained in raising prices by competition from partial line or single product sellers, then a cluster market could be appropriate. If, however, buyers could and would respond to a price increase by a full line seller by shifting all or part of their business to partial line or single product sellers, or by making or providing the product or service themselves, then a cluster market would not be appropriate.

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

HN28[] **Market Definition, Relevant Market**

The existence of one-stop shopping, and a group of customers with a preference or even demand for it, is insufficient to define a relevant market.

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

HN29[] **Market Definition, Relevant Market**

Within the broad market determined by interchangeability of use and cross-elasticity of demand well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

HN30[] **Market Definition, Relevant Market**

The Brown Shoe factors are pertinent to the definition of relevant markets in antitrust cases, regardless of whether they are termed markets or submarkets.

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

HN31[] **Market Definition, Relevant Market**

Evidence of 'industry or public recognition of a proposed market or submarket as a separate economic unit is important in determining its relevance for antitrust purposes because we assume that economic actors usually have accurate perceptions of economic realities.

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

HN32[] **Market Definition, Relevant Market**

Under the Brown Shoe factors, the special characteristics and uses of a product or service can serve as another indicium of the existence of a relevant market.

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

HN33[] **Market Definition, Relevant Market**

Courts consistently find sensitivity to price changes to be a critical factor in evaluating an alleged market.

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

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

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

HN34[] **Market Definition, Relevant Market**

In a case that requires proof of a relevant market, it is not enough to survive even a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss to make bald assertions as to its existence or definition. Such a complaint must define its proposed relevant market with a reference to the rule of reasonable interchangeability and cross-elasticity of demand, or allege a proposed relevant market that encompasses all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor. Where a defendant puts the existence of a plaintiff's alleged market at issue on a motion for summary judgment, the plaintiff must come forward with admissible evidence that, construed in the plaintiff's favor, raises a genuine issue of material fact on the market definition issue or suffer an adverse judgment.

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

HN35[] **Market Definition, Relevant Market**

The Brown Shoe indicia are not to be used in a talismanic fashion whereby their presence or absence are regarded as mechanically dispositive of the issue of market definition. Rather, the object is to use them in a pragmatic fashion with a keen eye on economic reality.

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

HN36[] Actual Monopolization, Monopoly Power

Monopoly power, also referred to as market power, is the power to control prices or exclude competition. It may be proven directly by evidence of control of prices or the exclusion of competition or, as is more common, may be inferred from one firm's large percentage share of the relevant market.

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

HN37[] Actual Monopolization, Monopoly Power

Market power can persist only when entry barriers -- market circumstances, governments, or the defendants -- block rivals' entry or expansion. And the lack of significant entry barriers can defeat a monopolization claim, even in the fact of a defendant's high market share.

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

HN38[] Conspiracy to Monopolize, Elements

A claim of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. And while rigorous proof of a relevant market and the likelihood of monopolization is not required in the United States Court of Appeals for the Second Circuit on a conspiracy to monopolize claim, the relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN39[] Opposing Materials, Motions for Additional Discovery

Fed. R. Civ. P. 56(f) is the safety valve that, when satisfied, prevents the entry of summary judgment against a party where there is good reason to believe that evidence sufficient to defeat the motion for summary judgment exists, but the non-moving party legitimately needs discovery to get that evidence. But *Fed. R. Civ. P. 56(f)* requires far more than simply a claim that the non-moving party has not had or wants more discovery.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN40[] Opposing Materials, Motions for Additional Discovery

See *Fed. R. Civ. P. 56(f)*.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN41[] Opposing Materials, Motions for Additional Discovery

One seeking *Fed. R. Civ. P. 56(f)* discovery must demonstrate a reasonable expectation that the discovery sought would raise a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN42[] **Opposing Materials, Motions for Additional Discovery**

Among the requirements of *Fed. R. Civ. P. 56(f)* is a showing by affidavit not only that the information one seeks would be pertinent, but also of what effort affiant has made to obtain it, and why the affiant was unsuccessful in those efforts.

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

HN43[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A motion for summary judgment places the burden of coming forward on the non-moving party on those issues as to which it would have the burden of proof at trial.

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

HN44[] **Supplemental Jurisdiction, Pendent Claims**

Where a district court has dismissed before trial all claims over which it has original jurisdiction, the district court ordinarily should decline to exercise its supplemental jurisdiction and therefore dismiss pendent state claims without prejudice.

Counsel: [1]** For Plaintiff: Michael D. Pinnisi, PINNISI & ANDERSON, LLP.

For Defendants Other Than Ryan Freel: William D. Phillips, Charles E. Buffon, Andrew A. Ruffino, COVINGTON & BURLING LLP.

For Defendant Ryan Freel: Darnley D. Stewart, GISKAN, SOLOTAROFF, ANDERSON & STEWART LLP.

Judges: Lewis A. Kaplan, United States District Judge.

Opinion by: Lewis A. Kaplan

Opinion

[*336] Table of Contents

LEWIS A. KAPLAN, **[**2]** *District Judge*.

[*337] This is a dispute over the hiring by one competitor of an employee of another that has been dressed in the raiment of an antitrust case. The antitrust claims are the only basis of federal subject matter jurisdiction. The matter is before the Court on the defendants' motion for summary judgment dismissing the antitrust claims on the merits, thus sending the state law tort claims to state court.

Plaintiff has offered very little evidence in support of its allegations. It resists dismissal chiefly by contending that it is entitled to discover defendants' sensitive business information, purportedly to test the reliability of defendants' declarations.

Plaintiff's opposition to the motion rests on at least two fundamental misconceptions. First, it mistakenly asserts that it is defendants' burden to prove conclusively the negative of the allegations of the complaint. Second, it supposes, again wrongly. that summary judgment is categorically improper prior to discovery rather than something that is permissible in the perhaps rare appropriate case. After stripping away these mistaken views and carefully considering both the evidence of record and plaintiff's proposed **[**3]** discovery, the Court has concluded that there is no genuine issue of material fact, that plaintiff has not satisfied the requirements of *Fed. R. Civ. P. 56(f)* and therefore is not entitled to discovery, and that defendants are entitled to judgment as a matter of law. In other words, this is one of those unusual cases in which summary judgment prior to discovery is warranted.

Facts

The Parties

Plaintiff Emigra Group LLC ("Emigra") is a provider of business-related immigration services. It claims to offer a wide range of consultation in immigration matters, document procurement, consular processing, and related services to assist corporations in their movement of employees across national borders. Its business plan is to be a single source provider of immigration services for large corporations around the world.

The defendants are Fragomen, Del Rey, Bernsen & Loewy, LLP ("Fragomen LLP"), Fragomen, Del Rey, Bernsen & Loewy, LLP ("Fragomen II"), Fragomen Global LLP ("Fragomen Global"), Fragomen Global Immigration Services, LLC ("FGIS") (collectively, the "Fragomen Organization"), and Ryan Freel.

Fragomen LLP is a law firm headquartered in New York that specializes in providing legal advice **[**4]** and services concerning U.S. immigration laws to domestic and foreign clients, typically companies seeking to relocate foreign employees to the United States. [1] Fragomen Global is an intermediate holding company owned by the Class A equity partners of Fragomen LLP. It owns 93 percent of FGIS, which is a vehicle for providing information, guidance, and assistance to clients concerning the immigration requirements and procedures of various foreign countries. Thus, the Fragomen Organization offers immigration services with respect to persons seeking to enter the United States from abroad (inbound work) and to persons seeking to enter foreign countries (outbound work), the former principally through Fragomen LLP and the latter principally through FGIS. Defendants say that inbound work accounts for 80 to 85 percent of the revenues of the Fragomen Organization as a whole.

Immigration Services

Within the United States, immigration services generally are considered the practice of law and may be provided only by **[*338]** licensed attorneys or people working under their supervision. Outside the United States, some categories of **[**5]** immigration services are provided by non-lawyers, presumably in competition with lawyers.

There is no internationally uniform set of immigration laws and procedures. Even where regional or supra-national immigration arrangements exist, local implementation varies among member states. However, U.S. firms wishing to meet the outbound immigration needs of corporate clients need not maintain an office in every country where its clients might need to send employees. They can form alliances or working relationships with local firms in relevant foreign countries, enabling them to provide outbound services abroad without maintaining a physical presence in every potential foreign jurisdiction.

The Background of the Dispute

Defendant Ryan Freel is a lawyer who first worked for Fragomen LLP from August 1999, following his graduation from law school, until January 2005. On August 16, 2005, however, he began work at Emigra as its vice president of operations.

---

[1] It is also the successor by merger of Fragomen II, which no longer exists.

During his tenure at Emigra, Freel allegedly was a member of Emigra's highest management team. He reported to the chief executive officer and allegedly had access to all aspects of its business, trade secrets, and confidential information including, **[**6]** among other things, its strategies, customer lists, pricing, profit and loss data, and the like.

Freel resigned from Emigra on or about September 19, 2007, and returned to Fragomen on October 1, 2007. Emigra claims -- on "information and belief" -- that Freel disclosed Emigra confidential information to Fragomen and, after beginning work at Fragomen, began contacting certain Emigra customers on Fragomen's behalf.

This Lawsuit

Companies who feel that their trade secrets and confidential information are being betrayed by former employees hired by competitors typically file suit and promptly seek preliminary injunctions. Such controversies often are quickly resolved, at least on a preliminary injunction basis and often by accelerated plenary trial. [2] Emigra, however, did not follow that path.

It filed this action on November 29, 2007, about two months after Freel began work at Fragomen, and asserted the usual state law claims for misappropriation of trade secrets, unfair competition, and the like. But it did not seek a preliminary injunction. Rather, its complaint asserts also five antitrust claims relating principally to what Emigra claims are relevant markets **[**7]** for immigration services. As will appear, there is reason to believe that Emigra adopted this strategy at least in part to gain access through pretrial discovery to precisely the sort of competitively sensitive information about Fragomen's business that Emigra claims Freel improperly disclosed to Fragomen about Emigra's business. Defendants' motion therefore poses, among other questions to be sure, the issue whether Emigra should be permitted to gain that access by asserting antitrust claims rather than being remitted to state court to pursue its trade secret and unfair competition claims, matters as to which this Court lacks subject matter jurisdiction if there is no substantial federal question.

The Antitrust Claims

The amended complaint contains five antitrust claims:

> . Count I alleges that the Fragomen Organization monopolized an alleged market for immigration services provided **[*339]** to corporations who are employers of U.S. citizens and/or foreign nationals (the so-called "Service Market") and an alleged submarket for business-related immigration services provided by single-source providers to large multinational corporations who are major employers of U.S. citizens and foreign nationals **[**8]** (the so-called "Service Submarket") [3] in violation of *Section 2* of the Sherman Act. [4]
>
> . Count II alleges that two or more of the defendants have conspired to monopolize the Service Market and the Service Submarket, [5] also in violation of *Section 2*.
>
> . Count III asserts that the Fragomen Organization has attempted to monopolize the Service Market and the Service Submarket, [6] also in violation of *Section 2*.

---

[2] *Cf. FED. R. CIV. P. 65(a)(2)*.

[3] Am Cpt PP 10-11, 97-112.

[4] *15 U.S.C. § 2*.

[5] Am Cpt PP 10-11, 114-23.

[6] *Id*. PP10-11, 125-36.

. Count IV contends that "[t]wo or more of the Defendants, not having complete common ownership (upon information and belief)," conspired to restrain trade and commerce in the Service Market and Service Submarket [7] in violation of *Section 1* of the Sherman Act. [8]

. Finally, Count V asserts that the Fragomen Organization violated *Section 1* of the Sherman Act by entering into a vertical arrangement with Emigra's former vendor in Japan. [9]

The Motion for Summary Judgment

At the initial Rule 16 conference, defendants asserted that Emigra's antitrust claims -- the only basis of federal subject matter jurisdiction -- are not viable and indicated a desire to **[**9]** move for summary judgment dismissing those claims. The Court concluded that there was substantial doubt as to whether the case could survive such a motion and that full blown antitrust discovery perhaps would serve only to increase the cost of litigation without any benefit. Accordingly, it stayed discovery pending the filing and disposition of defendants' motion. [10]

1. The Theory of the Motion

(a) The Section 2 Claims

HN1[] *Section 2* of the Sherman Act makes it unlawful to monopolize or attempt or conspire to monopolize "any part of the trade or commerce among the several States, or with foreign nations . . ." [11]

HN2[] In order to establish monopolization, a plaintiff must prove that the defendant (1) possesses monopoly power in the relevant market, and (2) has wilfully acquired or maintained that power. [12] Monopoly power is the power to control prices or exclude competition. [13] "[A] plaintiff claiming monopolization [therefore] is obligated to establish the relevant market because the power to control prices or exclude competition only makes sense with reference **[**10]** to a particular market." [14] This **[*340]** requirement applies also to attempts to monopolize, as that offence requires proof of a "dangerous probability of achieving monopoly power," [15] which cannot be evaluated without consideration of the relevant market. [16] And while rigorous proof of a relevant market and of a dangerous probability of achieving monopoly power are not, in this Circuit, essential elements of conspiracy to monopolize, the

---

[7] *Id*. PP 10-11, 138-48.

[8] *15 U.S.C. § 1*.

[9] Am Cpt PP 150-60.

[10] Plaintiff never sought to proceed with respect to its state law unfair competition, trade secrets, and other claims.

[11] *15 U.S.C. § 2*.

[12] *Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

[13] *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

[14] *Heerwagen v. Clear Channel Communs., 435 F.3d 219, 229 (2d Cir. 2006)*.

[15] *Spectrum Sports v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

[16] *Tops Markets., Inc. v. Quality Markets., Inc., 142 F.3d 90, 100 (2d Cir. 1998)* ("Critical to deciding the dangerous probability prong of plaintiff's attempted monopolization claim is defendant's economic power in the relevant market.") (citing *Spectrum Sports, 506 U.S. at 458-59*).

relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present. [17]

Defendants seek summary judgment dismissing the *Section 2* claims. They tacitly accept for purposes of the motion the existence of a market for immigration services provided to corporations, but dispute that Emigra's alleged Service Submarket is a relevant market for antitrust purposes. They maintain also that the Fragomen Organization **[**12]** manifestly lacks anything approaching monopoly power, or a dangerous probability of acquiring it, in either the alleged Service Market or Service Submarket.

(b) The Section 1 Claims

Count IV of the complaint purports to allege a classic conspiracy in restraint of trade among "[t]wo or more of the Defendants, not having complete common ownership." Defendants seek summary judgment of dismissal on the ground that the Fragomen Organization is incapable as a matter of law of conspiring with itself in light of the intra-enterprise conspiracy doctrine.

Finally, defendants seek dismissal of Count V, which purports to allege an unlawful vertical agreement with one local service provider in Japan not to do business with Emigra, on the ground that Emigra cannot establish the requisite adverse effect on competition.

2. The Evidence

Defendants' motion is supported by two declarations, one by Fragomen partner Lance Kaplan and the other by Darryl Buffenstein, a partner in a large law firm with broad experience in the practice of immigration law and a past president of the American Immigration Lawyers Association.

Mr. Kaplan's declaration sets out the structure of the Fragomen Organization, which is pertinent **[**13]** to the intra-enterprise conspiracy claim in Count IV, and describes its immigration practice. It contains **[*341]** also a description, in broad terms, of competition and pricing in the provision of global immigration services.

Mr. Buffenstein's declaration describes the business of providing business-related immigration services, including the roles of Fragomen and Emigra. His declaration also denies the existence of the Service Submarket alleged by Emigra.

Defendants' motion is accompanied by a detailed Rule 56.1 Statement setting forth the material facts that defendants maintain are undisputed and citing the evidence that they maintain support those facts, all as required by the local rules. [18]

3. Emigra's Response

Emigra's response to the motion includes declarations of Emigra's president, A. Pendleton DePuis, and a retained expert, economist Fredrick A. Flyer, Ph.D. It is accompanied by a purportedly responsive Rule 56.1 Statement. The

---

[17] *E.g., Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1144 (2d Cir. 1975)*.

There **[**11]** is a circuit split on the necessity of rigorous proof of a relevant market on a conspiracy to monopolize claim. Some circuits hold that it is required. *Compare Doctor's Hosp. of Jefferson, Inc. v. S. E. Medical Alliance, 123 F.3d 301, 311 (5th Cir. 1997)* ("To establish *Section 2* violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market."); *Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983)* ("In this circuit it is clear that relevant market is a necessary element of a conspiracy to monopolize."), *with Salco Corp. v. General Motors Corp., Buick Motor Div., 517 F.2d 567, 576 (10th Cir. 1975)* ("Specific intent to monopolize is the heart of a conspiracy charge, and a plaintiff is not required to prove what is the relevant market."). The Second Circuit's position falls between these positions.

[18] *S.D.N.Y. CIV. R. 56.1*.

response as whole is notable for the extent to which it fails to engage defendants as to the facts that are material to the motion, largely resting instead on the propositions that (1) Emigra should not be required to respond to the motion **[**14]** without extensive discovery, and (2) defendants have not conclusively proved their contentions.

(a) The DuPuis Declaration

Mr. DuPuis's declaration begins with the statement that his primary areas of disagreement with defendants' declarations include (a) the nature of relevant services offered by the two firms, (b) customer requirements for single-source services and competitors of the two firms for their provision -- i.e., whether there is a relevant Service Submarket, and (c) barriers to entry thereto. [19] He states that his disagreement is based on an alleged lack of factual basis for defendants' declarations which, he says, "is made more difficult to expose because of Emigra's inability to complete, or even commence, discovery." [20] This is followed by a list, based on the Flyer declaration, of "[e]videntiary matters requiring Fragomen disclosure" including:

> "a. Information regarding Fragomen competition for work, including content of request for proposals from potential customers, identities of competing bidders and their characteristics as service providers, specific services required by potential customers, specific services offered to customers in proposals from competing vendors, **[**15]** identity of winning bidders, prices in winning bids, margins earned on winning bids, Fragomen internal documents regarding competitors and market share and pricing policies, and related information (Flyer Decl. P 11-17);
> "b. Information regarding Fragomen customers, including customer lists, annual revenue per customer, customer size, number of customer employees serviced annually, and related information (Flyer Decl. P 18);
> "c. Information regarding Fragomen sales, including aggregate sales revenue, aggregative volume of transactions, sales by location, market share, and comparable data regarding competitor sales (Flyer Decl. P 19);
>
> "d. Information regarding Fragomen vendor relationships and dealings, including whether any such relationships are exclusive and whether vendor alternatives are available to **[*342]** Emigra if Fragomen requires exclusivity (Flyer Decl. P 22)." [21]

According to Mr. DuPuis, Emigra sought "many" of these facts from public record sources and says that "[c]ertain" of them formed the basis for its complaint, [22] although he does not tell us what those are. He claims that these efforts were largely unsuccessful, in part because some are **[**16]** "within Fragomen's sole knowledge," including information regarding Fragomen's (a) ownership, structure and staffing, (b) contractual relationships, (c) revenues and market share, and (d) bidding activity and resultant contracts. [23]

Having thus begun with an attempt to make a case for discovery of commercially sensitive material from Fragomen, Mr. DuPuis's declaration proceeds briefly to the merits. He begins with the assertion that Emigra's strategy "is to be a single-source provider for large corporations . . . for . . . global immigration services," [24] a goal it seeks to achieve without primary reliance on U.S. in-bound immigration work and without lawyers. [25] Mr. DuPuis asserts that Fragomen offers similar services "with the additional ability, unlike Emigra, to provide legal services in house." [26]

---

[19] DuPuis Decl. P 6.

[20] *Id*. P 7.

[21] *Id*. P 9.

[22] *Id*. P 12.

[23] *Id*. P 15.

[24] *Id*. PP 20-21.

[25] *Id*. P 23.

The DuPuis declaration then asserts that only Fragomen, Emigra and the Littler Mendelson law firm, much of the immigration practice of which recently was acquired by Fragomen, have provided a similar range of immigration services worldwide and argues, based on a Fragomen press release, that the alleged Service Submarket is a **[**17]** relevant market for antitrust purposes. [27] It passes then to a contention that there are substantial barriers to entry into that market. [28]

(b) The Flyer Declaration

The Flyer declaration states that Dr. Flyer was retained "to assess (1) whether Emigra's allegations . . . , if supported, would result in harm to competition; and (2) whether the evidence put forth by . . . Fragomen . . . constitutes a reliable evidentiary basis to dismiss Emigra's claims. [29] On the latter point, it purports to assess whether the evidence "contradicts Emigra's claims that: (1) the competitors in their relevant market are geographically dispersed 'single-source' providers of business related immigration services, (2) the customers in this market are major employers with workforces comprised of citizens of many countries; (3) Fragomen possesses monopoly power in the market for immigration services; and (4) Fragomen used this monopoly power to diminish competition in this market." [30] The first two of these claims are said to be significant because, if they are correct, "they would indicate that the relevant market for the services provided by Fragomen and Emigra is limited **[**18]** to geographically dispersed providers of services," i.e., to firms with large multi-region services networks with clients consisting of large corporations with diverse work forces. [31] The declaration then goes on to say that it is impossible to evaluate **[*343]** Fragomen's claim that there are not significant barriers to entry absent "information on the ease with which firms have been able to enter the market for immigration services and quickly establish geographically dispersed network[s] in a short period of time." [32] With this prelude, the declaration lays out a detailed list of information that Dr. Flyer claims would be necessary to answer the questions he raises. [33]

Plaintiff's memorandum asserts that Dr. Flyer's declaration "opines that Emigra has alleged valid antitrust claims" and that defendants' position "at its very best, . . . presents only a clash of expert opinion regarding market definition and dominance, and thus cannot possibly justify summary judgment." [34] In fact, however, this assertion takes significant liberties because Dr. Flyer in fact said no such thing. Rather than offering expert opinion that supports **[**19]** Emigra's allegations, he expresses only the view that the allegations of the complaint, *if true*, would result in harm to competition and that defendants' evidence, in his view, is not a reliable basis for rejecting those allegations. [35] So what Dr. Flyer in fact said -- as opposed to the spin Emigra's memorandum places on it -- proceeds from the assumption that defendants have the burden of negating plaintiff's allegations, an assumption that is incorrect for reasons shown below -- and adds nothing of an evidentiary nature to plaintiff's opposition to the motion.

---

[26] *Id*. P 24.

[27] *Id*. PP 26-30.

[28] *Id*. PP 31-39, 46-52.

[29] Flyer Decl. P 4.

[30] *Id*. P 7.

[31] *Id*. P 8.

[32] *Id*. P 9.

[33] *Id*. PP 11-23.

[34] Pl. Mem. 2.

[35] Flyer Decl. PP 4, 10 ("insufficient evidence to . . . dismiss the allegations made by Emigra"), 17 (insufficient "evidence to refute Emigra's claim of a geographically dispersed relevant market served by 'single-source' providers"), 20 (defendants' measure of market share "unreliable"), 24.

Discussion

Emigra maintains that summary judgment rarely, if ever, should be granted in an antitrust case before extensive discovery. But "rarely" does not mean "never." And, as discussed below, this case arises in a singular posture for several reasons that, both individually and collectively, counsel careful consideration **[**20]** of granting summary judgment in this case.

First, there is reason to suppose that the antitrust claims are insubstantial. The Court assumes that Fragomen and Emigra have built networks of subcontractors in foreign nations and, in the case of Emigra, perhaps outside lawyers in the United States -- through which both offer immigration services across broad geographical areas. It assumes further that some corporate clients use one or the other organization, rather than dealing directly with several individual service providers, for the convenience of "one-stop shopping." But thousands of American lawyers provide in-bound immigration services, and thousands of foreign nationals doubtless provide immigration services for those seeking to enter their countries. The likelihood that any one provider or provider network has or threatens to have market power seems remote.

Second, the genesis and conduct of this lawsuit suggests that Emigra's purpose is at least as much to use the discovery process to get at Fragomen's competitively sensitive information for business reasons as to litigate the antitrust claims on their merits.

Third, a great deal of information that Emigra claims it needs to meet **[**21]** Fragomen's motion is in Emigra's hands. Emigra, after all, claims to be the only other single-source provider in the business. It therefore must know who the customers **[*344]** are. It must have copies of their requests for proposals or comparable evidence It must know at least most of the instances in which it or Fragomen obtained the business. It must know the identities of any local service providers who have declined to serve it as a result of relationships with Fragomen. And it must have a host of other information pertinent to the present motion. Indeed, it must have each of the items on Mr. DuPuis's list of discovery that Emigra wants from Fragomen save that it presumably lacks details concerning Fragomen's profit margins and similar matters confidential to Fragomen. Yet it has come forward with none of that data on this motion.

As the Supreme Court said only recently in *Bell Atlantic*, ***HN3***[] "the costs of modern federal antitrust litigation and the increasing caseload of federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." [36] And while *Bell Atlantic* was a **[**22]** pleading case, the concern it expressed is at least as applicable here as on a motion to dismiss. As the Second Circuit said in *PepsiCo, Inc. v. Coca-Cola Co*., [37] ***HN4***[] "[i]n the context of antitrust cases, . . . summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces." [38]

---

[36] *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)* (internal quotation marks omitted).

[37] *315 F.3d 101 (2d Cir. 2002)*.

[38] *Id. at 104*. *Accord, Tops Markets, Inc., 142 F.3d at 95*.

> *Celotex, PepsiCo*, and *Tops Markets*, among other cases, effectively have overruled a large number of earlier cases that indicated that summary judgment was disfavored, especially in antitrust cases. *See, e.g., Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458(1962)* ("Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977)* **[**23]** ("[b]ecause antitrust actions so integrally involve motive and intent to conspire and injure, they have been said to be particularly inappropriate for summary judgment treatment.").

I. The Law Governing Summary Judgment

A. General Principles

Plaintiff's brief begins with the proposition that "[t]he movant has the burden of adducing proof sufficient to show its entitlement to judgment as a matter of law, even assuming all factual disputes and inferences in favor of the party opposing the motion." [39] That assertion, which underlies plaintiff's entire position, is wrong in one critical respect. ***HN5***[] The movant does not have the burden of proving the negative of matters as to which the non-moving party would have the burden of proof at trial. Indeed, the Supreme Court rejected precisely the argument plaintiff makes here in *Celotex Corp. v. Catrett*. [40]

The basic principle, of course, is uncontroversial. ***HN6***[] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [41] **[*345]** Plaintiff's assertion, however, goes to a different question, viz. the allocation of the burdens of coming forward **[**24]** with evidence on a motion for summary judgment.

In *Celotex Corp*., the D.C. Circuit had held, as plaintiff contends is the rule, that "the party opposing the motion . . . bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." [42] The Supreme Court, however, reversed. It held that ***HN7***[] summary judgment must be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [43] Indeed, it went on to say quite explicitly that the moving party's burden is only to "inform[] the district court of the basis for its motion" and that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment . . . is satisfied." **[**25]** [44]

The fact that ***HN8***[] the non-movant has the burden of coming forward with admissible evidence sufficient to raise a genuine issue of fact on a matter as to which non-movant would have the burden of proof at trial, regardless of the existence or adequacy of evidence submitted by the movant, has important consequences for Emigra's reliance on Dr. Flyer's declaration. It proceeds from the premise that the movant is obliged to put forward "a reliable evidentiary basis to dismiss Emigra's claims." [45] In other words, he proceeds on the assumption that defendants are not entitled to summary judgment unless their evidence "contradicts Emigra's claims." [46] But that premise is incorrect. Once defendants put in issue Emigra's ability to get to the jury on essential elements of its claims, the

---

[39] Pl. Mem. 2-3.

[40] *477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

[41] *E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *White v. ABCO Eng'g Corp., 221 F.3d 293, 300 (2d Cir.2000)*; *see also FED. R. CIV. P. 56(c)*.

[42] *Catrett v. Johns-Manville Sales Corp., 244 U.S. App. D.C. 160, 756 F.2d 181, 184 (D.C. Cir. 1985)* (emphasis in original), *rev'd, Celotex Corp., 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265*.

[43] *Celotex Corp., 477 U.S. at 322-23. Accord, Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 273 (2d Cir. 2001)*.

[44] *Celotex Corp., 477 U.S. at 323*.

[45] Flyer Decl. PP 4, 7, 10.

[46] *Id*. P 7.

burden fell on Emigra to produce admissible evidence to meet that burden. In consequence, much of Dr. Flyer's declaration **[**26]** has little if any significance on this motion.

Emigra then makes the assertion that "a party must be afforded reasonable opportunity for discovery before judgment can be imposed." [47] That proposition is incorrect as well.

First, ***HN9***[] antitrust cases may be dismissed under *Rule 12(b)(6)* on the face of the complaint, without any opportunity for discovery. In *Bell Atlantic*, for example, the Supreme Court held that a Sherman Act Section 1 complaint will be dismissed absent "allegations plausibly suggesting (not merely consistent with) [the requisite] agreement" in restraint of trade. [48] Nor is *Bell Atlantic* limited to allegations of conspiracy. [49] Indeed, just a few months ago, our Circuit held that ***HN10***[] an antitrust complaint **[*346]** may be dismissed pursuant to *Rule 12(b)(6)* for failure to allege a relevant product market, most notably "[w]here the plaintiff fails to define its proposed relevant market with a reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's **[**27]** favor.'" [50]

Second, ***HN11***[] while it is true that summary judgment is not often granted prior to discovery, there is nothing in the Federal Rules of Civil Procedure precluding summary judgment -- in an appropriate case -- prior to discovery. [51] To the contrary, *Rule 56* makes clear that a defendant "may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." [52] District courts in our Circuit have recognized this, granting summary judgment prior to discovery in a few appropriate cases. [53]

To be sure, ***HN12***[] there are circumstances in which a non-moving party that has not completed discovery has a legitimate need for discovery to meet a motion for summary judgment. But *Rule 56(f)* is the mechanism for

[47] Pl. Mem. 3.

[48] *Bell Atl ., 127 S.Ct. at 1966*; *see also* *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*.

[49] *See* *Pac. Bell Tel. Co. v. LinkLine Communs., Inc., 129 S. Ct. 1109, 1123, 172 L. Ed. 2d 836 (2009)* (applying Bell Atlantic to *Section 2* claim). See also *Iqbal, 490 F.3d at 157* ("We are reluctant to assume that all of the language of *Bell Atlantic* applies only to section 1 allegations based on competitors' parallel conduct.").

[50] *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)* (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir.1997))*; *accord,* *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)*.

[51] *See, e.g.,* *South Austin Coalition Community Council v. SBC Comm's Inc., 274 F.3d 1168, 1171 (7th Cir. 2001)* **[**28]** ("District courts may mitigate the expense of litigation by resolving motions for summary judgment early in the case--in advance of discovery, if appropriate."); ***Alholm v. Am. Steamship Co., 144 F.3d 1172, 1177 (8th Cir. 1998)*** ("A defendant may move for summary judgment 'at any time,' and the rules do not require that discovery be completed before the motion is heard."); *Duffy v. Wolle, 123 F.3d 1026, 1040 (8th Cir. 1997)* ("*Rule 56 of the Federal Rules of Civil Procedure*, which governs summary judgment, does not require trial courts to allow parties to conduct discovery before entering summary judgment.") (quoting *United States Through Small Bus. Ad. v. Light, 766 F.2d 394, 397 (8th Cir. 1985)* (internal quotation marks omitted)); *Chambers v. Am. Trans Air, Inc., 17 F.3d 998, 1002 (7th Cir. 1994)* ("The 'fact that discovery is not complete--indeed, has not begun-need not defeat the motion. A defendant may move for summary judgment at any time.'") (quoting *Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 729 (7th Cir. 1986))*; *Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1991)* ("*Rule 56* does not require that any discovery take place before summary judgment can be granted.").

[52] *FED. R. CIV. P. 56(b)* **[**29]** (emphasis added). *Accord,* ***Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 274 (2d Cir. 1968)***; *Aniero Concrete Co. v. New York City Constr. Auth., Nos. 94 Civ. 9111, 95 Civ. 3506, 1997 U.S. Dist. LEXIS 22, 1997 WL 3268, at *17 (S.D.N.Y. Jan. 3, 1997)* ("Summary judgment may be sought at any time after a pleading is served."), *aff'd sub nom.,* *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566 (2d Cir. 2005)*.

[53] E.g., *Gray v. Garlock Sealing Technologies, LLC, No. 06-CV-6028 (CJS), 2006 U.S. Dist. LEXIS 89233, 2006 WL 3680567, *8-10 (W.D.N.Y. Dec. 11, 2006)*; *Natsource LLC v. GFI Group, Inc., 332 F. Supp.2d 626, 637-38 (S.D.N.Y. 2004)*.

addressing that need. [54] If the non-moving party makes a sufficient showing by affidavit, a motion for summary judgment will be denied or delayed **[*347]** to permit discovery that is reasonably expected to create a genuine issue of material fact. [55]

The structure of *Rule 56* therefore is clear. A defendant may move for summary judgment of dismissal at any time. In many cases, the need for discovery will be evident and a defendant will await the discovery process before doing so. But where a defendant elects to seek summary judgment, even at an early stage, on the ground that the plaintiff cannot get to a jury on an essential element as to which the plaintiff would have the burden of proof at trial, the plaintiff should suffer dismissal unless it comes forward with either (1) admissible evidence sufficient to raise a genuine issue of fact for trial, or (2) a *Rule 56(f)* affidavit sufficient to warrant denial **[**31]** or deferral of the motion pending necessary discovery.

* * *

In sum, then, ***HN13***[] an antitrust case in which proof of a relevant market is an element of the plaintiff's claim will be dismissed under *Bell Atlantic and Chapman* unless the complaint alleges facts that properly define the proposed relevant market by "reference to the rule of reasonable interchangeability and cross-elasticity of demand." By parity of reasoning, the same is true of a complaint that alleges market or monopoly power in conclusory terms unless the complaint alleges facts that properly give rise to an inference that such power exists. Even if such a complaint is not attacked on its face, a plaintiff whose proposed relevant market or allegation of market power is challenged by a motion for summary judgment must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial as to the market definition or the existence of market power, as the case may be, or a sufficient *Rule 56(f)* affidavit demonstrating, among other things, the need for specific discovery to raise such an issue.

B. S.D.N.Y. CIV. R. 56.1

There is another factor relevant to the proper disposition of this motion. It is well to state **[**32]** it specifically.

Local Civil Rule 56.1 of this Court, which is substantially similar to antecedents that have been in effect for many years, provides in relevant part as follows:

> ***HN14***[] "(a) Upon any motion for summary judgment . . . , there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.
> "(b) The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
> "(c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.
>
> "(d) Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by *Federal Rule of Civil Procedure 56(e)*."

The purpose of the rule "is to assist the Court in understanding the scope of the summary judgment motion **[**33]** by highlighting those facts which the parties contend are in dispute." [56]

---

[54] *E.g., Allstate Ins. Co., 901 F.2d at 1285* ("*Rule 56* does not require that any discovery take place before summary judgment can be granted; if a party **[**30]** cannot adequately defend such a motion, *Rule 56(f)* is his remedy."); *Avia Group Int'l, Inc. v. L.A. Gear Calif., Inc., 853 F.2d 1557, 1561 (Fed. Cir. 1998)* ("A litigant's right to discovery is fully protected by *Fed.R.Civ.P. 56(f)*, which allows a court to refuse summary judgment if a litigant shows, 'by affidavit,' that additional discovery is necessary to uncover 'facts essential to justify his position.'"), *abrogated on other grounds, Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008)*.

[55] *See infra*, page 22-23.

[*348] In order for a Rule 56.1 statement in opposition to a motion for summary judgment to serve this purpose, it must respond appropriately to the movant's statement. Thus, ***HN15***[] "[a] proper Rule 56.1 statement submitted by a non-movant should consist of a paragraph-by-paragraph response to the movant's 56.1 statement, much like an answer to a complaint." [57] It must cite admissible evidence in support of the non-movant's contention that there is admissible evidence creating a genuine issue for trial [58] or, where the non-movant contends that further discovery is required to enable it to raise a genuine issue with admissible evidence, must be accompanied by a *Rule 56(f)* affidavit that demonstrates such a need with respect to each relevant averment in the movant's **[**34]** Rule 56.1 Statement.

In this case, both sides have submitted Rule 56.1 Statements. Emigra's responses to defendants' averments, however, frequently do not simply admit or deny defendants' averments. Many fall instead into two categories that bear preliminary consideration.

First, Emigra in many instances neither admits nor denies defendants' averment. It responds instead by saying that Emigra does not dispute a proposition that is not fully responsive to the averment in question. [59] To the extent that the defendants' averments go beyond these partially responsive answers and are supported by evidence, defendants' averments are deemed admitted in light of Emigra's failure explicitly to deny them and to adduce admissible evidence in support of the contrary proposition. [60]

Second, Emigra in many cases has responded that it is without sufficient knowledge to admit or deny defendants' averment because it has not had discovery. Of course, ***HN16***[] its failure to admit or deny a particular averment -- to the extent its *Rule 56(f)* affidavit sufficiently shows a justified failure **[**35]** to come forward with admissible evidence on the point in question -- cannot result in its being deemed to have admitted the averment. In those instances, however, in which the *Rule 56(f)* affidavit makes no such showing, the failure to admit or deny is not justified by a general claim that Emigra has not had discovery. To that extent, it is deemed to have admitted the averments in question. [61]

II. The Section 1 Claims

A. Intra-enterprise Conspiracy

Count IV alleges a conspiracy in restraint of trade among "[t]wo or more of the Defendants, not having complete common ownership." Defendants seek summary judgment on the ground that the Fragomen Organization is incapable, under the intra-enterprise conspiracy doctrine, of conspiring with itself. They principally rely on *Copperweld Corp. v. Independence Tube Corp*. [62] and its progeny. [63]

---

[56] *Archie Comic Publ'ns, Inc. v. DeCarlo, 258 F. Supp. 2d 315, 317 (S.D.N.Y. 2003)* (citing *Rodriguez v. Schneider, No. 95 Civ. 4083 (RPP), 1999 U.S. Dist. LEXIS 9741, 1999 WL 459813, at *1 n.3 (S.D.N.Y. June 29, 1999)*. *Accord, e.g., Goldstick v. The Hartford, Inc., No. 00 Civ. 8577 (LAK), 2002 U.S. Dist. LEXIS 15247, 2002 WL 1906029, at *1 (S.D.N.Y. Aug. 19, 2002)*; *Fernandez v. DeLeno, 71 F. Supp.2d 224, 227-28 (S.D.N.Y. 1999)*.

[57] *Archie Comics, 258 F. Supp. 2d at 317-18*.

[58] *Id*.

[59] *See, e.g.*, Pl. Rule 56.1 St. PP 20, 26, 27, 31.

[60] Pl. Rule 56.1 St. PP 3, 5,11, 36.

[61] Pl. 56.1 St. PP 6-7, 12-19, 25, 37, 57-60, 62, 64, 66-68,70.

[62] *467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Emigra's memorandum in opposition to the motion did not contest the propriety of **[*349]** dismissal of Count IV. At oral argument, it explicitly conceded the point. [64] Nevertheless, in a letter submitted following oral argument, plaintiff's counsel sought to "clarify" **[**36]** that concession by contending that (1) defendants' allegations of common ownership among the constituents of the Fragomen Organization have not been tested by discovery and (2) Count IV in any event states a sufficient claim on the theory that it alleges a conspiracy between Mr. Freel and the Fragomen Organization during the period prior to the commencement of Mr. Freel's employment at Fragomen. These belated contentions are without merit.

First, Emigra's *Rule 56(f)* submission, whatever its other merits, is of no avail with respect to the defendants' claim of common ownership. This is a matter on which the Fragomen Organization plainly is competent to testify. Emigra has not shown that discovery is "reasonably expected to create a genuine issue of material fact" on this point. It therefore has failed **[**37]** to satisfy at least one element of the standard articulated in *Concourse Rehab. & Nursing Ctr. Inc. v. Whalen*, [65] *Gurary v. Winehouse* [66] and other cases. [67]

Second, the contention that Count IV alleges an actionable horizontal conspiracy between Mr. Freel and the Fragomen Organization was not advanced by Emigra in its memorandum in opposition to this motion. [68] ***HN18***[] Just as a moving party will not be heard to advance a new argument for the first time in its reply brief, [69] a non-moving party should not be heard to advance a new argument in opposition to a motion after the close of briefing and oral argument. In any case, the Court sees no reason to relieve Emigra of the consequences of its express concession that **[*350]** Count IV fails in light of *Copperweld* and its progeny.

Accordingly, defendants are entitled to summary judgment dismissing Count IV.

B. Vertical Restraint

---

63 Def. Mem. 29-30.

64 Tr., Nov. 19, 2008, at 13:11-17 ("THE COURT: Your Count Four alleges a Section 1 claim, based on the allegation that two or more of the defendants entered into a contract[,] combination or agreement to damage your client. Now, that alleged conspiracy is said to be only among defendants. And do you agree that that count has to be dismissed on its face under Copperweld? MR. PINNISI: Yes.")

65 *249 F.3d 136, 146 n.3, (2d Cir. 2001)*.

66 *190 F. 3d 37, 44 (2d Cir. 1999)* (***HN17***[] *Rule 56(f)* affidavit must show "(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) *how those facts are reasonably expected to create a genuine issue of material fact*, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts) (emphasis added)).

67 Any suggestion that Emigra is entitled to discovery for the purpose of attempting to challenge the credibility of defendants' statements concerning the legal structure of their intra-enterprise relationship would be without merit because there is no basis here for suggesting any substantial question as to their veracity on this point. *See, e.g., Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983)*; *Desia v. GE Life & Annuity Assur. Co., No. 3:05 CV 1395 (MRK), 2008 U.S. Dist. LEXIS 86407, 2008 WL 4724080, at *10 (D. Conn. Oct. 24, 2008)*; *Wantanabe v. City of New York, 315 F.Supp.2d 375, 393 n.110 (S.D.N.Y. 2003)* (citing 10A CHARLES ALAN WRIGHT, ARTHUR R. **[**38]** MILLER &MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2726, at 445-47 (1998)), *aff'd*, *159 Fed. Appx. 235 (2d Cir. 2005)*.

68 Nor does the amended complaint properly allege such a conspiracy. Count II, the conspiracy to monopolize claim, specifically alleges that Mr. Freel and the Fragomen Organization conspired to monopolize the Service Market and the Service Submarket. Am Cpt P 117. But Count IV, in contrast, alleges only that "[t]wo or more of the Defendants, not having complete common ownership (upon information and belief)" entered into a horizontal agreement in restraint **[**39]** of trade and makes no reference to Mr. Freel. *Id*. P 138.

69 *See, e.g., Ernst Haas Studio, Inc. v. Palm Press, Inc., 164 F.3d 110, 112 (2d Cir. 1999)*; *Playboy Enters. v. Dumas, 960 F. Supp. 710, 720 (S.D.N.Y. 1997)*.

Count V asserts that the Fragomen Organization violated *Section 1 of the Sherman Act* by entering into an unspecified vertical arrangement with Emigra's former vendor in Japan, whom the parties agree is a firm called ILS Shimoda ("Shimoda"). [70]

HN19[] To establish an unlawful vertical agreement, a plaintiff must show "(1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) [that] such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the rule of reason." [71] ***HN20***[] Non-price vertical restraints are subject to rule of reason analysis. [72]

Here, Emigra claims that there is some unspecified but nonetheless anticompetitive arrangement between the Fragomen Organization **[**40]** and Shimoda. But it has offered no evidence to support that claim. Defendants, moreover, although it was not their burden to do so, have come forward with competent evidence that FGIS's relationship with Shimoda is non-exclusive and that Shimoda is only one of three local providers with which FGIS does business. [73] They have shown also that Shimoda in fact provides services to other customers, including at least one other U.S. immigration law firm. [74] Finally, they have pointed to a significant number of other Japanese entities that are available to provide local immigration services to foreign firms such as Emigra. [75] Thus, there is no reason to suppose that there is any anticompetitive arrangement between FGIS and Shimoda, much less an arrangement that violates the rule of reason.

Emigra's response is deficient. It has offered no evidence of the substance of (1) the Fragomen Organization's relationship with Shimoda, let alone that it is an exclusive relationship, (2) that Shimoda does not provide services to others, including at least one competing **[**41]** U.S. law firm, or (3) that there are not many other Japanese firms available to provide the local immigration services in question. Its conclusory contention that defendants have not shown that the many other Japanese providers that they have identified "could undertake the same services and pricing and relationship that Emigra obtained from [] Shimoda" [76] misses the mark because, as we have seen, that was not defendants' burden. Rather, as plaintiff would bear the burden at trial of proving that any arrangement between FGIS and Shimoda is an unreasonable restraint of trade, it is plaintiff's burden to come forward with admissible evidence that the Fragomen Organization has foreclosed Shimoda as a provider to Emigra and that there are not sufficient alternatives to Shimoda for foreign firms seeking local immigration services in Japan. They have not done so. In any case, even if the burden were on defendants on this point, their evidence, **[*351]** which Emigra has not undermined in this respect, would have satisfied that burden. Emigra therefore has not raised a genuine issue of material fact as to whether the Fragomen Organization's relationship with Shimoda, whatever it may be, unreasonably **[**42]** restrains trade in immigration services in Japan. *A fortiori* it has not done so with respect to either of the alleged markets at issue in this case. Accordingly, defendants are entitled to summary judgment dismissing Count V unless Emigra has shown an adequate basis for discovery on this point under *Rule 56(f)*, a matter discussed below.

III. Monopolization and Attempted Monopolization -- Relevant Markets

---

[70] Pl. 56.1 St. P 55.

[71] *Tops Markets, 142 F.3d at 95-96*.

[72] *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995)*.

[73] Kaplan Decl. PP 18-20.; Def. 56.1 St. PP 57-59.

[74] Buffenstein Decl. P 50; Def. 56.1 St. P 60.

[75] Buffenstein Decl. P 51; Def. 56.1 St. P 61.

[76] Pl. 56.1 St. P 61.

HN21[] "Proof of the relevant product market is a necessary element of a cause of action for monopolization or attempted monopolization." [77] Similarly, sufficient proof of a relevant market and of a risk of its monopolization is pertinent to permit an inference of the specific intent to monopolize that is essential to a conspiracy to monopolize claim. [78]

In **[**43]** this case, the amended complaint alleges the existence of (1) a Service Market, consisting of "immigration services provided to corporations who are employers of U.S. citizens and/or foreign nationals," [79] and (2) a Service Submarket, consisting of "business-related immigration services provided by single-source providers to larger multinational corporations who are major employers of U.S. citizens and foreign nationals." [80] A heading in defendants' memorandum contends that Emigra has not properly defined the relevant market. [81] In fact, however, the memorandum argues only that alleged Service Submarket is not a relevant market for antitrust purposes. Accordingly, the Court assumes for purposes of this motion that the so-called Service Market is a relevant market. It therefore passes to defendants' contention that the alleged Service Submarket is not.

HN22[] The definition of a relevant market in a *Section 2* case serves to identify the area of effective competition in order determine whether a defendant has or threatens to obtain monopoly power. [82] As the Supreme Court said in a classic definition, a product "market is composed of products that have **[**44]** reasonable interchangeability." [83] Its "outer boundaries. . .are determined by the reasonable interchangeability of use or the cross-elasticity **[*352]** of demand between the product itself and substitutes for it." [84]

HN23[] The same fundamental principle is recognized in the Justice Department -- Federal Trade Commission Horizontal Merger Guidelines [85] (the "Guidelines"), another tool used to define a relevant market. [86] The Guidelines

---

[77] *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., Inc., 614 F.2d 832, 840 (2d Cir. 1980)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976)*, *cert. denied*, ***429 U.S. 1097, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977))***. *Accord*, *Reisner v. General Motors Corp., 671 F.2d 91, 98 (2d Cir. 1982)*, *cert denied*, ***459 U.S. 858, 103 S. Ct. 130, 74 L. Ed. 2d 112 (1982)***.

[78] *See* *Hudson Valley Asbestos Corp., 510 F.2d at 1144*.

[79] Am Cpt P 10.

[80] *Id*. P 11.

[81] Def. Mem. 17.

[82] Defining the relevant market serves essentially the same purpose in cases brought under *§ 7 of the Clayton Act*. *See, e.g.,* *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act . . . because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantiality can be determined only in terms of the market affected. The area of effective competition must be determined by reference to a product market and a geographic market").

[83] *E.I. du Pont de Nemours & Co., 351 U.S. at 404*.

[84] *Brown Shoe, 370 U.S. at 325* (footnote omitted).

[85] *See* *United States Dep't. of Justice & Federal Trade Comm'n, HORIZONTAL MERGER GUIDELINES, 57 Fed. Reg. 41,552 (Sept. 10, 1992)* **[**46]** (hereinafter "MERGER GUIDELINES").

[86] *See, e.g.,* *United States v. Visa U.S.A., Inc., 163 F. Supp.2d 322, 336 (S.D.N.Y. 2001)* (applying Merger Guidelines to find that a five percent price increase by a hypothetical monopolist of "general purpose" credit cards would be profitable and that such cards therefore constitute a relevant product market), *aff'd*, *344 F.3d 229 (2d Cir. 2003)*.

recognize "buyer substitution as the underlying principle for **[**45]** defining relevant markets." [87] Accordingly, the Guidelines delineate a relevant market as:

> "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price. That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow." [88]

Thus, ***HN24***[] a market is properly defined under the Guidelines "when a hypothetical profit-maximizing firm selling all of the product in that market could charge significantly more than a competitive price, *i.e*., without losing so many sales to other products that its price became unprofitable." [89]

HN25[] Direct evidence of cross-elasticity of demand is rare. [90] In consequence, courts often look to a number of "criteria designed to focus, directly or indirectly, on cross-elasticity." [91] And the problem is more complex in this case because Emigra alleges a submarket consisting of a cluster of different services, few if any of which are interchangeable. As the propriety of this aggregation is a logical antecedent of any discussion of the sufficiency of its evidence of market **[**47]** definition, the Court begins with that question.

A. Cluster Markets

The Supreme Court's statement that the outer boundaries of a product market are fixed by interchangeability of use or cross-elasticity of demand implied that a market invariably consists of a single product or service. But that conclusion has proved unwarranted.

In a long line of cases dating back to 1960"s and 1970"s challenges to bank mergers, courts in appropriate cases have defined relevant markets of clusters of non-interchangeable goods and services. Accordingly, it is necessary first to explore **[*353]** the boundaries of this cluster market concept beginning analysis of the alleged Service Submarket.

Certainly it is possible to describe any number of related and even unrelated products or services as a single line of business provided only that one adopts a sufficiently high level of generality. The term "transportation vehicles" for example, reasonably might include such diverse products as planes, automobiles, golf carts, locomotives, horse-drawn carts, submarines, and other conveyances. But the fact that our language permits such generalization does not justify the uncritical **[**48]** aggregation of distinct products and services into relevant markets for antitrust purposes. Someone interested in an automobile to run local errands and drive four miles to work will not buy an airplane instead, no matter how high the price of automobiles. So ***HN26***[] any definition of a cluster market must

---

[87] 1 ABA SECTION OF ***ANTITRUST LAW***, ***ANTITRUST LAW*** DEVELOPMENTS: SIXTH 593(6th ed. 2007) ("***ANTITRUST LAW*** DEVELOPMENTS").

[88] MERGER GUIDELINES at §1.11.

[89] *Visa U.S.A., Inc., 163 F. Supp. 2d at 335-336*.

The Guidelines state that a "small but significant and non-transitory" price increase generally is assumed to be five percent. MERGER GUIDELINES at §1.11.

[90] *See* ***ANTITRUST LAW*** DEVELOPMENTS at 566.

[91] *Id*.

be responsive to the purpose of the market definition process - identification of an area of competition in which variations in price will affect the demand for alternative products. [92] As one commentator recently put it:

> "The cluster market approach is inappropriate for market definition because clusters include products and services that are not demand substitutes (or supply substitutes). It can be defended as a matter of analytical convenience: there is no need to define separate markets for a large number of individual hospital services, for example, when market shares and entry conditions are similar for each, or when data limitations will effectively require that the same proxy (such as the number of hospital beds) be employed to estimate the market share for each individual service. Or it could be understood as a way of looking to what the allegedly harmed buyers purchase as a basis **[**49]** for specifying the products and locations in the narrowly defined candidate market with which the market definition algorithm begins. *But cluster markets may mislead as to competitive effects when competition from sellers of a partial line of products or services constrains the pricing of the full-line sellers offering the cluster*.
>
> "A similar type of market definition problem could arise when sellers produce both bundled and unbundled products, for example, if software firms sell suites of products (such as an office productivity suite that includes a word processor, spreadsheet, and presentation program) and also sell the individual component programs on a standalone basis. Suppose suites sell for less than the sum of the prices of the components. If two suite suppliers merge, should the product market for analyzing it be limited to suites?
>
> "The answer to this question, as always with market definition issues, turns on the economic force of buyer substitution. If at current prices, one group of buyers (e.g., corporate) purchases office software only as a bundle, and would not consider components, while other buyers (mass market) seek selected software products, the merger might reasonably **[**50]** be analyzed in both a suite market and in markets for the individual components. *But if enough suite buyers would respond to a higher suite price by purchasing instead some components individually, thereby making it unprofitable for a hypothetical suite monopolist to raise price, then the competitive effect of the merger would not be captured by defining a suite market* ***[*354]*** *and the transaction should be analyzed in individual component markets only. Here a competitive effects analysis limited to a suites market could mislead by ignoring the competitive constraint imposed by sellers of individual components, particularly if some sellers offer only some components and not suites*." [93]

Thus, ***HN27***[] buyer substitution is a fundamental consideration in evaluating a proposed cluster market. If the nature of competition is such that a full line seller would not be constrained in raising prices by competition from partial line or single product sellers, then a cluster market could be appropriate. If, however, buyers could and would respond to a price increase by a full line seller by shifting all or part of their business to partial line or single product sellers, or by making or providing the product or **[**51]** service themselves, then a cluster market would not be appropriate. [94]

This is the approach taken by the Ninth Circuit in *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc*. [95] The plaintiff there argued for markets consisting of (a) original equipment major brand vintage tires, and (b) a range of different sizes of vintage tires. The Court of Appeals held that there was an issue of fact as to the existence of the alleged original equipment vintage tire market in light of evidence that a significant fraction of the purchasers **[**52]** of tires for vintage vehicles "insists on replacement tires which are duplicative of the tires that

---

[92] *See, e.g.,* Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 767 (9th Cir. 2001).

[93] Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J. 129, 157-59 (2007) (emphasis added).

[94] *See* IIB PHILLIP AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** PP 560 ("A product grouping constitutes a market if a hypothetical defendant controlling its output could maximize profits by charging significantly more than the competitive price for a significant period."), P 530a ("[A] market is the arena within which significant substitution in consumption or production occurs.") (2007) (hereinafter "AREEDA & HOVENKAMP").

[95] *275 F.3d 762*.

were originally on their particular vehicle[s]" and "is generally not concerned with price." [96] On the other hand, it upheld summary judgment dismissing the plaintiff's claim with respect to the proposed cluster market of a range of different sizes of vintage tires because there was no evidence that "the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately." [97]

In this case, Emigra aspires to provide one-stop shopping for large corporations for immigration services all over the world. It attempts to define a relevant market in identical terms. But the fact that **[**53]** Emigra seeks to provide a broad array of immigration services does not mean that the market necessarily or even probably is limited to similar providers. The fundamental question is whether Emigra has offered any admissible evidence that demand by large corporations for immigration services provided by firms that offer one-stop shopping for services all over the world is sufficiently inelastic to make that a distinct market. In other words, assuming for the sake of argument that there are some buyers of immigration services that buy all or most of their global needs from full line providers like Emigra, **[*355]** would those buyers continue to do so in the face of price increases by such providers - or would they instead shift their purchases to the broad array of providers of particular kinds of services or of services in particular countries and areas?

Emigra has offered no proof that defendants could charge significantly more than a competitive price for any or all of its immigrations services without losing too many sales to other service providers to make its price unprofitable. For that matter, it has offered no evidence that Emigra itself charges more for immigration services than providers **[**54]** who do not offer one-stop shopping. Indeed, as discussed in more detail below, Emigra has produced no evidence whatsoever regarding pricing. Nor has Emigra made any showing regarding the cost of switching services from a single-source to individual providers or any other measure typically used to define a market under Guidelines. [98] Hence, while some customers might prefer a single source provider, Emigra has failed to adduce proof that such customers would not surrender that preference rather than pay a significantly higher price. ***HN28***[] The existence of one-stop shopping, and a group of customers with a preference or even demand for it, is insufficient to define a relevant market.

B. The Brown Shoe *Criteria*

Hard data concerning cross-elasticity is not the only means of proving a relevant market. In *Brown Shoe Co. v. United States*, [99] the Supreme Court famously observed that, ***HN29***[] within the broad market determined by interchangeability of use and cross-elasticity of demand:

> "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. [citation omitted] The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [100]

---

[96] *Id. at 767-68*.

[97] *Id. at 768* (quoting *J.B.L. Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011, 1016-17 (9th Cir.)*, *cert. denied*, ***464 U.S. 829, 104 S. Ct. 106, 78 L. Ed. 2d 109 (1983)*** (internal quotation marks omitted)). *See also* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1204-05 (9th Cir. 1997)*, *cert. denied*, ***523 U.S. 1094, 118 S. Ct. 1560, 140 L. Ed. 2d 792 (1998)***; *Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216, 1220-21 (10th Cir. 1986)*.

[98] *See* MERGER GUIDELINES at § 1.1. The Guidelines use the following factors: (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;(2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables; (3) the influence of downstream competition faced by buyers in their output markets; and (4) the **[**55]** timing and costs of switching products.

[99] *370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510*.

[100] *Id. at 325*.

As a preliminary matter, it is relevant to note that the Supreme Court's use of the submarket terminology does not make its criteria irrelevant here. In the years since *Brown Shoe*, the Department of Justice, the Federal Trade Commission, and many courts have come to recognize that the distinction between markets and submarkets is confusing and unhelpful because it obscures **[**56]** the real inquiry. [101] Indeed, the Second Circuit has observed that "[t]he term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market." [102] Hence, ***HN30***[] the *Brown Shoe* factors are pertinent to the definition of relevant markets in antitrust **[*356]** cases, regardless of whether they are termed markets or submarkets. The Court therefore turns to the evidence pertaining to these considerations.

1. Industry or Public Recognition

HN31[] "[E]vidence of 'industry or public recognition of [a proposed market or] submarket as a separate economic unit'" is important in determining its relevance for antitrust purposes 'because we assume that economic actors usually have accurate perceptions of economic realities.'" [103] In *Brown Shoe*, for example, the Supreme Court upheld the lower court's finding that men's, women's, and children's shoes were separate submarkets based in part on the public's clear recognition of these categories as individual submarkets. [104]

Emigra has adduced no evidence suggesting industry or public recognition of a distinct market consisting of large multinational corporations that insist upon or prefer providers offering one-stop shopping for immigration services. The only arrow in its quiver is a press release statement by Fragomen founder Austin Fragomen, Jr., in which Mr. Fragomen, in announcing the Fragomen Organization's acquisition of another immigration practice, said that the organization could provide "comprehensive world-wide immigration services to large clients with complex needs who benefit from the delivery of consolidated global immigration services across multiple regions." [105] The Fragomen statement suggests that the Fragomen Organization seeks to sell its services on the basis, perhaps among others, that its global capabilities **[**59]** offer a benefit to certain large clients, a proposition that some prospective clients may find convincing. But it does not support the notion that there is industry or public recognition of a distinct market for a broad line of immigration services provided by single firms to large corporations. It thus falls considerably short of raising a genuine issue of material fact with respect to this *Brown Shoe* criterion.

2. Special Characteristics and Uses

---

[101] *See, e.g.*, *Allen-Myland v. IBM Corp., 33 F.3d 194, 208 n. 16 (3rd Cir. 1994)*, *cert denied*, ***513 U.S. 1066, 115 S. Ct. 684, 130 L. Ed. 2d 615 (1994)***; *FTC v. Staples, 970 F. Supp. 1066, 1080 n. 11 (D.D.C. 1997)*.

[102] *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)*. *See also, e.g.*, *United States Anchor Mfg. Co. v. Rule Indus., 7 F.3d 986, 995 (11th Cir. 1993)* ("As the Supreme Court's language [in *Brown Shoe*] itself suggests, defining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes."), *cert. denied*, ***512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994)***; *AD/SAT v. Assoc. Press, 920 F. Supp. 1287, 1296 n.6 (S.D.N.Y. 1996)* ("The required analysis does not change whether a **[**57]** particular product market is deemed a market or a submarket."), *aff'd*, *181 F.3d 216 (2d Cir. 1999)*.

[103] ***FTC v. Whole Foods Market., Inc., 548 F.3d 1028, 1045, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)*** (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986))*.

[104] *Brown Shoe, 370 U.S. at 326*.

Whole Foods Market, Inc. is instructive. There, the D.C. Circuit focused on the "enormous amount" of evidence adduced by the Federal Trade Commission ("FTC") showing industry or public recognition of the natural and organic markets as a distinct economic entity. The evidence included "dozens of record studies" - including some prepared **[**58]** by Whole Foods and Wild Oats, the companies proposing to merge - that distinguished between "conventional" grocery stores and "natural food" or "organic" stores. The Court relied also on clear statements from the parties to the proposed merger indicating that "both believed that their companies occupied a market separate from the conventional grocery store industry." *Id. at 1045*.

[105] Flyer Decl. P 8 n.6.

HN32[] Under *Brown Shoe* and its progeny, the special characteristics and uses of a product or service can serve as another indicium of the existence of a relevant market. Indeed, the district court in *FTC v. Staples* credited the FTC's evidence of special characteristics of office superstores that **[*357]** distinguish them from other purveyors of office supplies, including the superstores' significant differences in appearance, physical size, format, the variety of products they offered, and the type of customers they targeted and served. [106] The proof, which included the court's own visits to several superstores and other office supply sellers, led the court to conclude, "You certainly know an office superstore when you see one." [107] **[**60]**

Emigra's main evidence on this point is Mr. DuPuis's declaration regarding what Emigra calls its "Global Case Management," which includes "document gathering assistance, document conditioning, consular processing, and internet status monitoring." [108] According to Mr. DePuis, Emigra's "intention is to provide a complete immigration services solution . . . with end-toend case management, home country support, and host country services." [109] The shortcoming of this evidence, however, is that it does no more than restate as a proposed market Emigra's own business plan without addressing the question whether that business plan reflects competitive realities in the marketplace. This is an important distinction.

By way of illustration, consider the automobile industry of years gone by. General Motors sold five different car lines, Ford three and Chrysler two, all attempting in varying degrees to offer brands that would appeal to different groups of consumers at different **[**61]** but overlapping price points. But to define the market, for antitrust purposes, as consisting only of multi-brand automobile manufacturers would have ignored the reality that single brand suppliers -- think Toyota, Honda, Nissan, Volvo and others -- could and did provide very meaningful competition. Similarly, Emigra's attempt to define the market by reference only to a description of the activities in which it and the Fragomen Organization engage ignores the pivotal question -- whether the activities of providers who offer narrower ranges of services offer meaningful competition to the full line providers.

Emigra attempts to deal with this problem by asserting that "local and regional providers cannot meet the service needs of major international customers due to their limitations of range and reach and capacity." [110] But there is no admissible evidence to support that contention. To be sure, Mr. DePuis states his *belief* "that small departments of large global firms can [not] compete effectively for such work, as they have not developed global networks or combinations of local expertise necessary to provide geographically diverse services." [111] He maintains also that smaller providers **[**62]** of immigration services, including those identified by defendants as existing within accounting firms, relocation firms, and law firms, cannot compete in the single source market because they lack "global reach in the provision of single-source immigration services." [112] And he would conclude, therefore, that the potential competitors identified by Fragomen "simply are not competition for single-source work provided by Fragomen and Emigra." [113] But **[*358]** these statements of belief and conclusory statements are not supported by admissible evidence.

---

[106] *Staples, 970 F. Supp. at 1078*.

[107] *Id. at 1079*, (citing to *Bon-Ton Stores, Inc. v. May Department Stores*, '*881 F. Supp. 860, 870 (W.D. N.Y. 1994)* ("Customers know a department store when they see it.").

[108] DePuis Decl. P 21.

[109] *Id*.

[110] *Id*. P 36.

[111] *Id*. at P 37.

[112] *Id*. at P 38.

[113] *Id*. at P 398.

3. Distinct Customers

Emigra asserts that its "prime customers" -- in other words, some unspecified subset of its entire customer base -- "have needs for placement throughout the world, in sufficient volume that internal management or even monitoring is impractical for the customer" and that "such customers want a single-source option, which currently is provided primarily, if not solely, by Emigra and Fragomen." [114] This statement thus has three elements -- claims that (1) *some* of Emigra's customers have needs "throughout the world," and (2) those customers (a) have such needs in sufficient **[**63]** volume that internal management and monitoring, presumably of multiple outside providers, is impractical, and (b) therefore "want a single-source option." As each of these elements is essential to Emigra's argument, it is important to look at each.

Mr. DuPuis, giving him the benefit of the doubt to which a non-movant is entitled, presumably is in a position to know that some of his customers have global needs for the simple reason that Emigra fills at least some of them, so the Court assumes the accuracy of that statement. But the assertion that it is impractical for those customers to satisfy their needs either internally, or by hiring, managing and monitoring multiple outside providers, is an *ipse dixit*, unsupported by any competent evidence. And the claim that such customers -- that is to say, some undefined portion of Emigra's business -- "want a single-source provider" -- is a matter as to which Mr. DuPuis lacks personal knowledge and thus is not competent to testify. Conspicuously absent, it bears noting, is even a single affidavit from a single Emigra customer supporting this assertion.

4. Distinct Prices

Emigra likewise has provided no evidence whatsoever **[**64]** regarding prices for immigration services generally or in its alleged Service Submarket in particular. There is, then, no basis for concluding that there is any price differential between the single-source providers and those who offer narrower lines of services. This cuts against Emigra's position. [115]

5. Sensitivity to Price Changes

HN33[] Courts consistently find sensitivity to price changes to be a critical factor in evaluating an alleged market. [116] In *FTC v. Staples*, for example, the FTC successfully established a narrow submarket for office superstores (as opposed to sellers of office supplies generally) based largely on a "compelling showing that a small but significant increase in Staples' prices will not cause a significant number of consumers to turn to non-superstore alternatives for purchasing their consumable office supplies." [117] In other words, the pricing evidence led the court to conclude **[**65]** that "office superstore prices are affected primarily by other office superstores and not by non-superstore competitors." [118]

Emigra has provided no evidence regarding sensitivity to price changes in its alleged Services Submarket. Indeed, Emigra's **[*359]** position resembles that of the plaintiff in *Thurman Industries, Inc. v. Pay 'N Pak Stores Inc*. [119] The plaintiff there alleged a narrow cluster market of home center stores that offered one-stop shopping for home

---

[114] DePuis Decl. P 35.

[115] *See, e.g.,* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 713 (7th Cir. 1979) ("[o]ne of the most important indicia suggested in Brown Shoe is whether drive-thru photo processing is offered at prices distinct from other methods of photo processing"), *cert. denied*, ***445 U.S. 917, 100 S. Ct. 1278, 63 L. Ed. 2d 601 (1980)***.

[116] *See, e.g.,* *Staples, 970 F. Supp. at 1078*.

[117] *Id. at 1078*.

[118] *Id. at 1077*.

[119] *875 F.2d 1369 (9th Cir. 1989)*.

improvement tools in which only it and a handful of other stores competed. It asserted that "the convenience of one-stop shopping and the presence of trained sales staffs at home centers appeal to consumers on a different level than the products individually." [120] In upholding the district court's grant of summary judgment dismissing the complaint, the Ninth Circuit rejected the plaintiff's narrow market definition, focusing on the lack of evidence of price differentials between the "home center stores" that offered one-stop-shopping and other retailers that offered narrower ranges of the same products. [121] The court held that the factors identified by Thurman **[**66]** -- that home centers are perceived as distinguishable from other stores by their variety of products and trained sales staff, and that customers engaged in home repairs/remodeling patronize home centers because of this distinction --

> "are wholly inadequate to allow a finding that specialty stores selling house paint are unable through price reductions or other marketing strategies to lure significant numbers of do-it-yourself builders into buying paint at a specialty store even if they purchase all their other supplies at a home center." [122]

Emigra suffers from a similar lack of evidence.

6. Specialized Vendors

Emigra's central claim in this case is that itself and Fragomen are specialized vendors offering one-stop shopping for global immigration services to large corporations that seek such one-stop shopping. The fact that such vendors exist lends some support to its position. As will appear, however, it is not controlling.

C. Conclusion - Market Definition

As noted above, ***HN34***[] in a case that requires proof of a relevant market, it is not enough to survive even a Rule 12(b)(6) motion to dismiss to make bald assertions as to **[**67]** its existence or definition. Such a complaint must "define its proposed relevant market with a reference to the rule of reasonable interchangeability and cross-elasticity of demand, or allege[] a proposed relevant market that . . . encompass[es] all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor.'" [123] Where a defendant puts the existence of a plaintiff's alleged market at issue on a motion for summary judgment, the plaintiff must come forward with admissible evidence that, construed in the plaintiff's favor, raises a genuine issue of material fact on the market definition issue or suffer an adverse judgment. Indeed, our Circuit and other courts have approved summary judgment dismissing antitrust cases for failure to come forward with sufficient evidence to define and raise a genuine issue of fact material to the definition of a relevant market. [124] Emigra has not satisfied **[*360]** that requirement by any applicable standard.

---

[120] *Id. at 1377*.

[121] *Id. at 1376*.

[122] *Id*.

[123] *Chapman, 546 F.3d at 238 (2d Cir. 2008)* (quoting *Queen City Pizza, Inc., 124 F.3d at 436*).

[124] *E.g., PepsiCo, Inc., 315 F.3d at 107* (summary judgment affirmed where there was "no discrete class of customers that has **[**68]** such a strong preference for [product] that it would not consider substitutes if other factors (especially price) changed"); *Golan v. Pingel Enter., Inc., 310 F.3d 1360, 1369 (Fed. Cir. 2002)* (antitrust plaintiff "failed to provide sufficient evidence to establish a relevant market . . . only conclusory allegations); *Levine v. Cent. Florida Med. Affiliates, 72 F.3d 1538, 1551-53 (11th Cir. 1996)* (plaintiff's "narrow definition of the relevant product market does not satisfy his burden of presenting prima facie evidence of the relevant market"), *cert. denied* ***519 U.S. 820, 117 S. Ct. 75, 136 L. Ed. 2d 34 (1996)***; *Rebel Oil Co. v. Atl. Richfield Col, 51 F.3d 1421, 1435 (9th Cir. 1995)* (summary judgment appropriate if plaintiff's "evidence cannot sustain a jury verdict on the issue of market definition") *cert. denied*, ***525 U.S. 1017, 119 S. Ct. 541, 142 L. Ed. 2d 450 (1998)***; *Disenos Artisticos E Industriales, S.A. v. Work, 714 F. Supp. 46, 48-49 (E.D.N.Y. 1989)* (summary judgment granted where market definition was "unsupported by any probative or credible evidence"); *Jules Jurgensen/Rhapsody, Inc. v. Rolex Watch U.S.A., Inc., Civ. A. No. 85-5605, 1987 U.S. Dist. LEXIS 2844, 1987 WL 9276, at *2 (E.D. Pa. Apr. 9, 1987)*; *see also* *Belfiore v. New York Times Co., 826 F.2d 177, 180 (2d Cir. 1987)*, **[**69]** *cert. denied*, ***484 U.S. 1067, 108 S. Ct. 1030, 98 L. Ed. 2d 994 (1988)***

Emigra has not defined with any specificity what particular services it contends make up its proposed Service Submarket. Nor has it has offered any admissible evidence to support the view that full line sellers of whatever bundle of services it has in mind would be unconstrained in raising prices by competition from partial line or single product sellers.

Nor has Emigra raised a genuine issue of fact even under the more generous *Brown Shoe* criteria. There is no admissible evidence of (1) industry or public recognition of a distinct market for providers of one-stop shopping for immigration services sought by large multinational corporations, (2) distinct pricing, or (3) sensitivity to price changes. There is no evidence that the end result of the efforts of both providers of one-stop shopping and providers of more limited ranges of services is different in any way -- a work or residence permit or entry visa procured by either necessarily is identical, affording **[**70]** the holder no greater or lesser privileges. The most that can be said for Emigra's evidentiary showing is that there is some evidence that (1) both Emigra and the Fragomen Organization seek to offer a broad array of immigration services to big companies and that some big companies patronize them. This perhaps gives rise to inferences that Emigra and the Fragomen Organization in a sense are specialized vendors and that there may be distinct customers, although the latter inference is questionable and in any case weak because there is no evidence that even the companies that patronize Emigra or defendants do so to the exclusion of other, narrower-gauged vendors.

In the last analysis, ***HN35***[] "the *Brown Shoe* indicia are not to be used in a 'talismanic fashion' whereby their presence or absence are regarded as mechanically dispositive of the issue" of market definition. [125] Rather, the object is to use them in a pragmatic fashion with a keen eye on economic reality. [126] So the ultimate question here is whether the mere existence of two full line sellers of immigration services to large multinational corporations would permit a rational jury to find that Emigra's Service Submarket is a relevant **[**71]** market, consistent with economic reality, for antitrust purposes in the absence of any evidence of industry or public recognition of such a market, of distinct pricing, of sensitivity to price changes, or of any of the other indicia of a relevant market. To state the **[*361]** question is to answer it in the negative. Emigra has offered insufficient evidence to create a genuine issue of material fact as to the definition or existence of the proposed Service Submarket. The monopolization and attempted monopolization claims with respect to it therefore must be dismissed.

IV. Monopolization and Attempted Monopolization -- Monopoly Power

In view of the dismissal of the monopolization and attempted monopolization claims as to the Service Submarket, it is unnecessary to consider whether Emigra has offered sufficient evidence as to the existence or dangerous probability of monopoly power in that area of business. As defendants have not challenged the existence of a Service Market, consisting of "immigration **[**72]** services provided to corporations who are employers of U.S. citizens and/or foreign nationals," however, the Court must determine whether Emigra has raised a genuine issue of material fact as to whether the Fragomen Organization has monopoly power, or a dangerous probability of acquiring monopoly power, in that alleged market.

HN36[] Monopoly power, also referred to as market power, is the power to control prices or exclude competition. [127] It may be proven directly by evidence of control of prices or the exclusion of competition or, as is more common, may be inferred from one firm's large percentage share of the relevant market. [128]

(summary judgment affirmed and plaintiffs' narrowly defined market rejected on grounds that the definition was "implausible" and "an awkward attempt to conform their theory to the facts they allege").

[125] *Kaplan v. Burroughs Corp., 611 F.2d 286, 292 (9th Cir. 1979)* (quoting *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Co., 518 F.2d 913, 932 (9th Cir. 1975))*, *cert. denied* ***447 U.S. 924, 100 S. Ct. 3016, 65 L. Ed. 2d 1116 (1980)***.

[126] *Id*.

[127] *E. I. Du Pont de Nemours & Co., 351 U.S. at 396*.

Emigra has offered no evidence of control of prices or the exclusion of competition. The fact that the Fragomen Organization hired Mr. Freel from Emigra and through him allegedly gained access to Emigra commercially sensitive information falls far short of raising a genuine issue of fact as to the exclusion of competition both because (a) Emigra has not been excluded, and (b) a contrary conclusion would turn many disputes over the hiring by one competitor of an employee of another, **[**73]** the stuff of everyday commercial tort claims, into monopolization or attempted monopolization cases. Nor do Emigra's allegations regarding Shimoda fill the gap, either standing alone or in combination with the Freel hiring. Emigra has not even alleged, let alone provided evidence, of anything that the Fragomen Organization did in relation to Shimoda that disadvantaged Emigra. And it has offered no admissible evidence that it lacks an abundance of alternatives in Japan to using Shimoda.

Emigra fares no better with respect to market share. It has offered no evidence of the total sales of "immigration services provided [by all providers] to corporations who are employers of U.S. citizens and/or foreign nationals" or any basis for concluding that the share of those services provided by the Fragomen Organization approaches the levels necessary to permit an inference of monopoly power or a dangerous probability thereof. Indeed, it has not even tried. Mr. Depuis' declaration focuses almost exclusively on attempting to create a material issue of fact regarding the alleged single source Submarket. [129] The broader Service Market is barely mentioned.

Emigra's **[**74]** silence on the issue of monopoly power in the broader Service Market is particularly striking in the face of the Fragomen Organization's identification of a host of competitors and potential competitors in the provision of immigration services to large companies, including accounting firms, relocation service firms, **[*362]** immigration consulting firms, and in-house legal and human resource departments of large corporations. [130] Although defendants discussed these other providers mainly in response to Emigra's alleged single source Service Submarket, the existence of these competitors and potential competitors certainly is relevant to question of Fragomen market power -- or lack thereof -- in the overall Service Market for immigration services, which is not confined to single source providers. And while Emigra challenges whether these firms can compete within the alleged single-source Service Submarket, it says nothing about their ability to compete in the broader market for immigration services. [131]

Emigra has failed also to confront Fragomen's assertions regarding the lack of significant entry barriers in the **[**75]** Service Market. [132] ***HN37***[] Market power can persist only when entry barriers -- market circumstances, governments, or the defendants -- block rivals' entry or expansion. [133] And the lack of significant entry barriers can defeat a monopolization claim, even in the fact of a defendant's high market share. [134] Emigra's only arguments regarding entry barriers focus on alleged barriers to the Service Submarket -- not to the broader Service Market. [135]

Emigra has offered no admissible evidence that the defendants enjoy power over prices, have excluded of competitors, or have the market share necessary to give rise to an inference of market power, actual or dangerously probable, in the alleged Service Market. Even if it had done so, the abundant, unrebutted evidence of lack of barriers to **[**76]** entry and additional potential competition would require the conclusion that it had failed to

---

[128] *Tops Markets, 142 F.3d at 92*.

[129] *See, e.g.*, Depuis Decl. PP 20-22, 35-41.

[130] Buffenstein Decl. PP 22-29, 33-38, 39-41, 42-44, 45-48.

[131] Pl. 56.1 St. P 34.

[132] *See* Kosiski Decl. PP 23-24; Buffenstein Decl. PP 30-31, 62; Kaplan Decl. PP 22-25.

[133] IIB AREEDA & HOVENKAMP P 501 at 110.

[134] *See, e.g., Tops Markets., 142 F.3d at 99* (rejecting a claim of market power despite a market share of over 70 percent; "[w]e cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry").

[135] *See, e.g.*, Pl. 56.1 St. PP 32, 33.

raise a genuine issue of material fact as to this indispensable element of a monopolization or attempted monopolization claim. Accordingly, the monopolization and attempted monopolization claims relating to the alleged Service Market will be dismissed unless Emigra's *Rule 56(f)* application is sufficient to warrant discovery prior to a final disposition of these claims.

V. The Conspiracy to Monopolize Claim

Emigra alleges in conclusory terms that Mr. Freel and the Fragomen Organization conspired to monopolize the Service Market and Service Submarket. [136] It goes on to claim that Mr. Freel, while still employed by Emigra, negotiated for a new job with the Fragomen Organization and, in the course of those negotiations, disclosed Emigra trade secrets and confidential information. [137] This disclosure during the pre-employment stage is specifically said to have been in furtherance of the alleged conspiracy to monopolize. [138]

Defendants seek summary judgment on this claim on the ground that Mr. Freel, under *Copperweld*, was incapable as a matter **[**77]** of law of conspiring with his employer, the Fragomen Organization. To the extent the complaint purports to allege that the alleged conspiracy hatched during the **[*363]** pre-employment negotiations continued once Mr. Freel became a Fragomen employee, they are unmistakably correct for the reasons stated above. But the complaint is not so limited, as it implicitly contends that the conspiracy to monopolize began before Mr. Freel was hired by the Fragomen Organization and that the pre-employment trade secret disclosures were acts in furtherance of the conspiracy. *Copperweld* does not dispose of that aspect of the conspiracy claim. But that does not mean that even this narrow aspect of Emigra's claim survives summary judgment.

The alleged conspiracy is one to monopolize the Service Market and Submarket. The Court already has held that the record does not raise a genuine issue of material fact as to (1) the existence of the alleged Service Submarket, or (2) the existence, or dangerous probability of, market power in the alleged Service Market.

HN38[] A claim of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize. **[**78]** [139] And while rigorous proof of a relevant market and the likelihood of monopolization is not required in this Circuit on a conspiracy to monopolize claim, the relevant market and the likelihood of its monopolization may have a significant bearing on whether the requisite specific intent to monopolize is present.

Given the record before this Court, no reasonable jury could find that Mr. Freel's alleged disclosure of Emigra's confidential information during his pre-employment negotiations with the Fragomen Organization, assuming that occurred, was undertaken with the requisite specific intent to monopolize. There quite plainly is no admissible evidence supporting the existence of the alleged Service Submarket, so the very notion of a conspiracy to monopolize it is an oxymoron -- one cannot monopolize something that does not exist. Likewise, the fact that there is no admissible evidence to suggest that the Fragomen Organization enjoys, or has any realistic hope of gaining, monopoly power in the far broader Service Market is fatal to the conspiracy to monopolize that alleged market for a **[**79]** similar reason. It makes little sense to say that the Fragomen Organization pried Emigra's confidential information out of Mr. Freel before hiring him with the specific intent to monopolize the Service Market -- as opposed to doing so, if it did, for the simple purpose of competing more effectively, if perhaps tortiously.

VI. The Rule 56(f) Application

---

[136] Am Cpt P 117.

[137] *Id*. PP 49, see PP 113-23.

[138] *Id*. P 49.

[139] *Volvo North America Corp. v. Men's Int'l Prof. Tennis Council, 857 F.2d 55, 58-59 (2d Cir. 1988)*.

This brings us to Emigra's *Rule 56(f)* contentions.

As noted above, ***HN39***[] *Rule 56(f)* is the safety valve that, when satisfied, prevents the entry of summary judgment against a party where there is good reason to believe that evidence sufficient to defeat the motion for summary judgment exists, but the non-moving party legitimately needs discovery to get that evidence. But *Rule 56(f)* requires far more than simply a claim that the non-moving party has not had or wants more discovery. Our Circuit has made clear what is necessary to open the door in such circumstances:

> "*Rule 56(f)* provides:
>
> ***HN40***[] "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition [to a motion for summary judgment], the court may refuse the application for judgment **[**80]** or may order a continuance to permit affidavits to **[*364]** be obtained or depositions to be taken or discovery to be had or may make such other order as is just.'
>
> "Thus, as we often have said, a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing (1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts. *Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir.1995)* (quoting *Hudson River Sloop Clearwater, Inc. v. Department of Navy, 891 F.2d 414, 422 (2d Cir.1989))*; *accord, Paddington Partners v. Bouchard, 34 F.3d 1132, 1137-38 (2d Cir.1994)*; *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 926 (2d Cir.1985)*." [140]

Thus, the Court must determine whether Emigra's declarations satisfy each of these criteria with respect to two questions: (1) the existence and relevance of the alleged Service Submarket, and (2) whether the Fragomen Organization enjoys, or is dangerously likely **[**81]** to procure, market power in the Service Market. Moreover, it is quite important to understand at the outset exactly why Emigra claims it needs discovery to resist this motion, apart from its incorrect assertion that summary judgment never is appropriate before at least some discovery.

Emigra relies on the declarations of Dr. Flyer and Mr. DuPuis. The premise of Dr. Flyer's declaration is that it is defendants' burden to prove that Emigra's allegations. [141] He claims that it is impossible to tell whether they have done so without discovery. [142] This premise is the basis also of Mr. DuPuis's argument in support of discovery. [143] And it is quite explicit in Emigra's memorandum in opposition to the motion for summary judgment, which asserts that "[d]efendants' papers are insufficient to permit adequate economic analysis of their contentions, **[**82]** much less to justify dismissal of Emigra's claims as a matter of law." [144]

As discussed above, this premise, which underlies Emigra's opposition to defendants' motion and its *Rule 56(f)* arguments, is incorrect. Defendants were not obliged to come forward with any evidence on those matters. As these were matters as to which plaintiff would have the burden of proof at trial, they were entitled to seek summary judgment merely by contending that plaintiff cannot prove its allegations. By doing so, with or without supporting

---

[140] *Concourse Rehab. & Nursing Ctr., Inc., 249 F.3d at 146 n.3* (quoting *Gurary, 190 F.3d at 43-44 (2d Cir. 1999)* (internal quotation marks omitted)). *Accord, Boomer v. Goord, 283 Fed. Appx. 855, 857 (2d Cir. 2008)*; ***Haran v. Dow Jones, Inc., 216 F.3d 1072*** (table), *2000 U.S. App. LEXIS 14114, 2000 WL 777982, at *3 (2d Cir. 2000)*; *Feingold v. Hankin, 91 Fed. Appx. 176, 178 (2d Cir. 2004)*.

[141] Flyer Decl. PP 4, 7, 10.

[142] *E.g., id*. PP 10-24, especially paragraph 24, which concludes that "[t]he evidence put forth by Fragomen is insufficient to fully evaluate and much less to dismiss the allegations made by Emigra").

[143] DuPuis Decl. PP 6-8 and *passim*.

[144] Pl. Mem. 2.

evidence, they shifted the burden to Emigra to come forward with admissible evidence in support of *Emigra's* allegations. In consequence, it does not matter whether discovery might yield a basis for questioning defendants' factual assertions concerning the definition of the relevant market(s) or the existence of market power. What matters is whether Emigra has satisfied [Rule 56(f)]() with respect to **[*365]** its **[**83]** ability to support *its own allegations* with admissible evidence, not with respect to challenging defendants' contentions. With that in mind, the Court proceeds to whether there is anything in plaintiff's papers that satisfies [Rule 56(f)]() and therefore warrants discovery before a definitive ruling on defendants' motion.

A. Section 1 Claims

The bases for the proposed dismissal of the Section 1 claims are that (1) *Copperweld* requires the rejection of the intra-enterprise conspiracy claim as a matter of law and (2) Emigra has offered no admissible evidence of any anticompetitive arrangement between FGIS and Shimoda, much less an arrangement that violates the rule of reason. Emigra has offered no reason to question defendants' assertions as to their corporate interrelationships and thus no basis for discovery as to whether *Copperweld* applies to require dismissal of the conspiracy claim. [145] And while it makes a *pro forma* assertion that it cannot admit defendants' averments with respect to the alleged arrangement with Shimoda absent discovery, [146] the contention is unpersuasive.

Emigra has an office and offers services in Japan. It formerly used **[**84]** Shimoda to assist it in providing those services. It therefore has knowledge of the Japanese marketplace, knowledge of which in any case is not peculiar to the defendants. There is no reason to suppose that it is unable to procure evidence concerning the availability in Japan of providers other than Shimoda or, indeed, that it made any effort to do so. Nor has it demonstrated that discovery would be likely to demonstrate that there are not sufficient alternatives.

Accordingly, there is nothing in Emigra's papers that warrants discovery prior to dismissal of its Section 1 claims.

B. The Service Submarket -- Market Definition

On the present state of the record, Emigra has failed to raise a genuine issue of material fact as to the definition and existence of its alleged Service Submarket because it has failed to offer admissible evidence that (a) the customers of single-source providers buyers would not shift their business to others offering narrower lines in the face of price increases by such providers, or (b) a consideration of the *Brown Shoe* factors could justify a conclusion that the Service Submarket is a relevant market for antitrust purposes.

Most of the discovery proposed in Emigra's **[**85]** declarations would be directed at obtaining confidential Fragomen information such as customer lists, vendor relationships, revenues per customer, internal strategic documents, bid documents, and pricing. [147] None addresses the first of these questions.

Some of the proposed discovery might yield information relevant to some of the *Brown Shoe* criteria. For example, it contends, quite reasonably, that defendants' internal strategic documents might identify the firms that defendants regard as their main competitors. [148] This in fact would be pertinent to the existence, or lack thereof, of industry recognition of single-source providers as a market distinct from other providers. [149] Similarly, internal **[*366]**

---

[145] *See* supra note 65.

[146] Pl. 56.1 St. PP 57-60.

[147] *E.g.*, DuPuis Decl. P 9; Flyer Decl. P 11, 14, 18.

[148] *Id*. P 14.

Fragomen Organization documents might reveal information showing "that Fragoment's competitors for pertinent work are primarily single-source providers" [150] and that its major customers are large corporations that buy coordinated and geographically diverse services. [151] Such evidence could support an argument that Emigra and the Fragomen Organization are, as plaintiff claims, specialized vendors of immigration services, which would be a **[**86]** consideration relevant under *Brown Shoe*. Whether these and any other examples of discovery from defendants might yield evidence relevant to one or more of the *Brown Shoe* criteria, however, is not the only consideration in determining whether Emigra has satisfied Rule 56(f).

As an initial matter, ***HN41***[] one seeking Rule 56(f) discovery must demonstrate a reasonable expectation that the discovery sought would raise a genuine issue of material fact, in this case as to the existence of the Service Submarket alleged by Emigra. Evidence that defendants regard single-source providers as their primary competition, for example, would not carry the day in the absence of proof that single-source providers have the ability to raise prices without losing sufficient business to others to make price increases unprofitable. But the Court does not rely on this concern alone, as there is a more compelling basis for rejecting Emigra's **[**87]** position.

Emigra claims to be one of only two competitors in its alleged Service Submarket. It therefore necessarily knows with whom it competes, whether it is able to price materially higher than providers who offer only a narrower line of services, whether it and others in the industry recognize single-source providers as a distinct market, its own profit margins, the nature of its own customer base, the details of its own vendor relationships, the details of bidding on requests for proposals, and the like. In other words, it knows whatever is public information about those who buy and sell in this line of endeavor, and it knows about its own operations, everything that it seeks to learn about defendants' operations. [152] Every bit of that information, whether public or internal to Emigra, is just as relevant to determining whether the Service Submarket indeed is a relevant market for antitrust purposes as the same information that is in defendants' hands. Thus, by way of example, if it would be important to know from defendants' internal documents that the Fragomen Organization regards Emigra as its only or principal competitor, it would be equally important to know that Emigra's **[**88]** internal documents, created *ante litem modem*, show that Emigra regarded the Fragomen Organization is its only or principal competitor. Likewise, if it would be relevant to know that a high proportion of defendants' revenues come from large corporations who regularly use defendants in many countries rather than using many local providers, it would be equally relevant to know that this is true of Emigra's customers. Yet the singular fact about this motion is that Emigra has come forward with *none* of the information concerning its own operations that might be expected either to support or to undercut its allegations concerning the relevant market.

This failure is telling. As the Court of Appeals has said, ***HN42***[] among the requirements of Rule 56(f) is a showing by affidavit not only that the information one seeks would be pertinent, but also of "what effort affiant has made to obtain [it], and . . . why the affiant was unsuccessful in those efforts." [153] **[*367]** Here, Emigra has offered no explanation for why its failure to come forward with the relevant information so obviously residing in its own files. This not only casts doubt on its *bona fides* in seeking this information **[**89]** from defendants and suggests an inference (which, given that this is a motion for summary judgment, this Court does not draw) that Emigra's files would not help its position, but demonstrates that it has failed to satisfy the Rule 56(f) requirements because it has not shown a sufficient effort to offer the evidence that it does have. Similarly, it has not claimed that it has sought any information whatever from buyers of immigration services -- all of whom are in a position to say whether they regard single-source providers as a distinct market, whether those that use single-source providers would shift to

---

[149] Indeed, the D.C. Circuit in *Whole Foods* cited emails from Whole Foods and Wild Oats officials as significant proof of industry recognition of a distinct organic food submarket. ***Whole Foods Market, Inc. 548 F.3d at 1045***.

[150] Flyer Decl. PP 11, 16-17.

[151] *See id*. at 18.

[152] *See* DuPuis Decl. P 11.

[153] *See supra* note 131 and accompanying text.

other providers in the face of price increases by single-source providers, and to provide a host of other relevant data -- let alone indicated that efforts to obtain information from buyers had been unsuccessful.

In short, what Emigra seeks to do here is akin to engaging in a game of stud poker in which it would require its adversary disclose its hole card before Emigra places its bet. The problem with that gambit is the rules. The rules -- *Celotex* and its progeny -- say that ***HN43***[] a motion for summary judgment places the burden of coming forward **[**90]** on the non-moving party on those issues as to which it would have the burden of proof at trial. Emigra, for whatever reason, has elected to withhold the evidence in its possession concerning whether its alleged Service Submarket is a relevant market for antitrust purposes. Having done so, it cannot insist on its competitor revealing its competitively sensitive information. That would put Emigra in a "heads-I-win, tails-you-lose." *Rule 56(f)* does not countenance such gamesmanship.

C. The Service Market -- Monopoly Power

On the present state of the record, defendants appear to be entitled to summary judgment dismissing the monopolization and attempted monopolization claims on the ground that there is no evidence that they have, or are likely to attain, market or monopoly power. The remaining question is whether Emigra has satisfied the requirements of *Rule 56(f)* in respect of proposed discovery addressed to that question.

Nothing in Emigra's proposed discovery is directed at obtaining evidence likely to raise a genuine issue of material fact as to whether defendants have the power to control prices or exclude competition. That leaves the matter of market share.

Market share typically is **[**91]** the proportion of the total dollar sales in a particular market accounted for by one competitor. [154] In other words, it is a fraction of which the numerator would be the sales of the competitor in question and the denominator would be the total of all sales by all competitors.

A very small aspect of the discovery proposed by Emigra might, and probably would, elicit the numerator of this fraction -- defendants' revenues from the sale of immigration services. [155] But the numerator **[*368]** alone would be meaningless without the denominator, and Emigra has not proposed any discovery of other industry participants, providers or customers, that would be necessary to establish the denominator -- total sales in the Service Market. Thus, the proposed discovery can not reasonably be expected to yield evidence sufficient to create a material issue of fact even as to defendants' market share. But there is a more basic problem.

Defendants have placed in issue Emigra's ability to prove that its market share in the alleged Service Market -- which includes all sales of immigration services provided to all corporations who are employers of U.S. citizens and/or foreign nationals -- is sufficient to give rise to an inference of actual or dangerously probable market power, i.e., a share certainly no lower than 20 percent and probably no lower than 30 percent. [156] Emigra thus has the

[154] On occasion, it is determined by other measures such as production capacity, none of which is pertinent here. *See generally* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ***ANTITRUST LAW*** § 6.10, at 182-83. (1985).

[155] Emigra seeks a list of customers with total revenue by customer by year. **[**92]** Flyer Decl. P 18. This might prove to be the numerator of the market share fraction. The qualification inherent in the use of the word "might," however, reflects the fact that revenues by customer by year could include payment for services that do not fall within the proposed Service Market.

[156] Judge Learned Hand famously said in *United States v. Alum. Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)* (sitting as a court of last resort pursuant to *15 U.S.C. § 29*, which at the time authorized the designation of a court of appeal as the final stop in certain antitrust actions), that market share of 90 percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." Our Circuit subsequently held that a market share of 20 percent, standing alone, is presumptively inadequate to permit a finding of dangerous probability of success and that even a share of 30 percent might be insufficient. *H.L. Hayden Co. of N.Y. v. Siemens Med. Systs., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*.

burden of showing, for Rule 56(f) purposes, among other things, that there is a reasonable expectation that its proposed discovery would show that defendants' share of the alleged Service Market -- that is, its share of all revenues from provision of immigration services to corporations who are employers of U.S. citizens and/or foreign nationals *by all providers, all over the world* -- exceeds 20 percent. Emigra has not even attempted to do so, even **[**93]** for the United States. It therefore has failed to show a reasonable expectation that the proposed discovery would raise a genuine issue of material fact as to the existence of a market share that might, if all other considerations favored Emigra, give rise to an inference of market or monopoly power.

VII. The Pendent State Law Claims

HN44[] Where a district court has dismissed before trial all claims over which it has original **[**94]** jurisdiction, the district court ordinarily should decline to exercise its supplemental jurisdiction and therefore dismiss pendent state claims without prejudice. [157] All that remains of this case are Emigra's state law claims arising from the defendant's hiring of Ryan Freel. As there is no independent basis of federal jurisdiction over those claims, the proper place for their adjudication is in state court. Accordingly, those claims will be dismissed without prejudice.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment dismissing the complaint [Docket Item 19] is granted. The federal claims are dismissed on the merits and with prejudice. The state law claims are dismissed for lack of subject matter jurisdiction.

SO ORDERED.

Dated: March 31, 2009

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

End of Document

[157] *Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*; *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)*.

Graco, Inc. v. PMC Global, Inc.

United States District Court for the District of New Jersey

March 31, 2009, Decided; March 31, 2009, Filed

Civil Action No. 08-1304 (FLW)

Reporter

2009 U.S. Dist. LEXIS 26845 *; 73 Fed. R. Serv. 3d (Callaghan) 52

GRACO, INC., et al., Plaintiffs, v. PMC GLOBAL, INC., et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by Graco, Inc. v. Pmc Global, 2009 U.S. Dist. LEXIS 154669 (D.N.J., Oct. 23, 2009)

Injunction granted at, Sanctions allowed by Graco Inc. v. PMC Global, Inc., 2010 U.S. Dist. LEXIS 147714 (D.N.J., Aug. 16, 2010)

Core Terms

customers, products, trade secret, allegations, Counterclaim, Defendants', Plaintiffs', distributors, argues, confidential, motion to dismiss, tortious interference, affiliation, parties, damages, unfair competition, antitrust, employees, reasonable expectation, unjust enrichment, soliciting, goodwill, manufacture, breached, Lanham Act, non-disclosure, denies, obligations, Disclosure, subsidiary

Counsel: **[*1]** For GRACO INC., a Minnesota Corporation, GRACO MINNESOTA INC., a Minnesota Corporation, Plaintiffs: KAREN A. CONFOY, LEAD ATTORNEY, ERICA SUSAN HELMS, MARSHALL D. BILDER, STERNS & WEINROTH, PC, TRENTON, NJ.

For PMC GLOBAL, INC., a Delaware Corporation, PMC EUROPE INVESTMENTS, S.L., a Spanish Limited Liability Company, PMC, INC., a Delaware Corporation, DENIS S. COMMETTE, a New Jersey Resident, GAMA MACHINERY USA, INC., a Delaware Corporation, Defendants: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; JAMES S. RICHTER, LEAD ATTORNEY, WINSTON & STRAWN, LLP, NEWARK, NJ.

For GARRAF MAQUINARIA S.A., a Spanish Corporation, Defendant: STEVEN MARK KAPLAN, LEAD ATTORNEY, KAPLAN & LEVENSON LLP, NEW YORK, NY.

For DENIS S. COMMETTE, a New Jersey Resident, GAMA MACHINERY USA, INC., a Delaware Corporation, Counter Claimants: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

For GRACO INC., a Minnesota Corporation, GRACO MINNESOTA INC., a Minnesota Corporation, Counter Defendants: KAREN A. CONFOY, LEAD ATTORNEY, STERNS & WEINROTH, PC, TRENTON, NJ.

Judges: The Honorable Freda L. Wolfson, United States District Judge.

Opinion by: Freda L. Wolfson

Opinion

WOLFSON, [*2] United States District Judge:

Presently before the Court is a motion by Defendants PMC Global, Inc. (" PMC Global"), PMC Inc. ("PMC"), PMC Europe Investments ("PMC Europe"), S.L., Denis S. Commette ("Commette"), and Gama Machinery USA, Inc. ("Gama") (collectively "PMC Defendants"), to dismiss Plaintiffs', Graco Inc. and Graco Minnesota Inc. (collectively "Plaintiffs" or "Graco"), Complaint pursuant to *Fed. R. Civ. P. 19* and *12(b)(6)*. Defendant Garraf Maquinaria S.A. ("Garraf") joins in that Motion and asserts additional reasons to dismiss Plaintiffs' Complaint. Finally, Graco filed a motion to dismiss or, in the alternative, stay the counterclaims of Defendants Commette and Gama.

This case has its genesis in Graco's purchase of Gusmer Corporation and Gusmer Europe S.L. (collectively "Gusmer"), from Defendants PMC Global and PMC Europe for $ 65 million. Thereafter, former Gusmer (then Graco) employees ceased working for Graco, and started working for Gama and Garraf, which compete in the same in-plant polyurethane processing equipment ("IPPE") industry. Graco claims that Gama is owned by PMC, a subsidiary of PMC Global and Garraf is owned, at least in part, by PMC Europe, and that, these **[*3]** Defendants, acting individually or in concert, are, *inter alia,* breaching their contractual duties of the sale by promoting a new competitor company, Gama. Graco sues Defendants to recoup what it argues is the full benefit of the contracts and damages arising from the loss of value of the Gusmer trade name, technology, customer relationships, and goodwill, resulting from Defendants having hired former Gusmer and Graco employees, using Graco trade secrets, and misleading customers as to the identities of the companies. Defendants argue that there is no agency relationship between their companies, that they are entitled to compete in the IPPE industry because Plaintiffs did not contract for a non-compete agreement, the former employees are not using trade secrets, but rather knowledge and skill they developed throughout their careers, and neither Defendant companies nor their employees are misleading customers. Defendants Gama and Commette have also filed counterclaims against Graco for antitrust and tort violations. This Court has jurisdiction over this action pursuant to *28 U.S.C. §§ 1331*, *1332*, *1367* and *1338*.

For the reasons that follow, Defendants' Motions are granted in part and **[*4]** denied in part, and Plaintiffs' Motion is granted in part and denied in part. Specifically, the Court grants Defendants' requests to dismiss Count Three of Plaintiffs' Complaint without prejudice and Graco's Motion to dismiss Counts One and Two of Commette and Gama's Counterclaims without prejudice, and grants Defendants' requests to dismiss Count Nine of the Complaint. The Court denies Defendants' requests to dismiss Count Six and Graco is directed to re-plead its Lanham Act claims under *15 U.S.C. § 1125(a)(1)* within ten (10) days. Further, the Court denies the parties' Motions with respect to all remaining claims.

I. Background and Procedural History

Since PMC Defendants and Garraf move to dismiss Plaintiffs' claims pursuant to *Fed. R. Civ. P. 12(b)(6)*, the following version of events assumes Plaintiffs' allegations to be true. Similarly, Defendants Gama and Commette's allegations will be taken as true on their counterclaims. The Court will only recount facts that are relevant for the purposes of deciding these Motions.

The Parties

Graco Inc., a Minnesota corporation, manufactures and distributes industrial equipment, including fluid-handling systems and components that move, measure, **[*5]** control, dispense, and apply fluids and viscous materials used in vehicle lubrication and commercial and industrial settings. Compl. P 1. Graco Minnesota Inc. ("Graco Minnesota"), also a Minnesota corporation, is a wholly-owned subsidiary of Graco, Inc. *Id.* P 2.

PMC Global, a Delaware corporation, has its principal place of business in California. *Id.* P 3. PMC Global's founder and Chief Executive Officer is Philip E. Kamins ("Philip Kamins"), its President is Mr. Kamins's son Gary E. Kamins ("Gary Kamins"), and its Executive Vice President is T.C. Cheong ("Cheong"). *Id.* PMC Europe, a Spanish corporation, is an affiliate of PMC Global. *Id.* P 4. Philip Kamins is the President of PMC Europe, and Gary Kamins and Cheong sit on PMC Europe's Board of Directors. *Id.* Philip Kamins is an executive of PMC, which is incorporated in Delaware and has its principal place of business is in California. *Id.* P 5. PMC is allegedly a subsidiary of PMC Global. *Id.*

Gama, incorporated in Delaware on July 12, 2007, has its principal place of business in New Jersey. *Id.* P 6. Gama allegedly has acted as an agent for, an instrumentality of, or in active concert and participation with Defendants PMC Global, PMC **[*6]** Europe, PMC, and Garraf. *Id.* Gary Kamins is Gama's President. *Id.* Gama allegedly does business as Gama-Europe and Garraf. *Id.* Gama is owned by PMC Global's subsidiary, PMC. *See* Commette & Gama Disclosure Statement. According to PMC Defendants, Gama was created by Commette, a former employee of Gusmer (later Graco), in October 2006 and incorporated in July 2007. PMC Dfs. Mot. at 2; Compl. P 6.

Garraf, incorporated in Spain in August 2007, is an affiliate of Gama; PMC Europe has an ownership or financial interest in Gama. Compl. P 7. Garraf allegedly "acted as an agent for, an instrumentality of, or in active concert and participation with" PMC Global, PMC Europe, PMC, and Gama. *Id.* Garraf manufactures and sells spare parts for Gusmer products, as well as spray and pour equipment for the applications of polyurethane foam and polyurea. *Id.* P 54.

Commette, a New Jersey citizen, was formerly employed by Graco's subsidiary, Gusmer, and worked for Graco under an employment and consulting agreement. *Id.* P 8. Thereafter, Commette commenced work with Gama and Garraf. *Id.* Charles Royo ("Royo") is alleged to have also signed an employment contract while working as a Gusmer and Graco employee. *Id.* P 26. **[*7]** After Royo's employment with Gusmer ended, he too was retained by Gama and Garraf as an employee or consultant. *Id.* P 58. [1]

Sale of Gusmer

PMC Global, through its wholly-owned subsidiary, Gusmer Machinery Group, Inc. ("GMG"), owned Gusmer. *Id.* P 19. PMC Europe owned Gusmer Europe, S.L. ("Gusmer Europe"), an affiliate of Gusmer. *Id.* P 20. Gusmer Corporation and Gusmer Europe (collectively "Gusmer") were two businesses involved in the manufacturing and sale of polyurethane and polyurea handling equipment. *Id.* P 21.

In 2004, PMC Global and its affiliate entities, GMG and PMC Europe ("affiliate entities"), offered Gusmer for sale. *Id.* P 24. "Gusmer was at the time the world's leading designer and manufacturer of specialized two-component dispensing equipment systems." Counterclaim P 10. In June 2004, the investment bank Greif & Co., representing PMC Global and its affiliate entities, provided a Confidential Memorandum to Graco that highlighted Gusmer's "Key Investments Considerations," which included information about Gusmer's revenue model, superior customer **[*8]** service, experienced management team, and strong relationships with customers. Compl. P 24. Gusmer Corporation had employment contracts with certain key employees that prohibited the employees from disclosing its trade secrets and confidential business information, and Commette allegedly signed such a contract on September 2, 2003. *Id.* P 25. Similarly, Gusmer Europe had employment contracts with certain key employees, which prohibited them from competing with Gusmer Europe or disclosing its trade secrets and confidential business information. *Id.* P 26. Royo allegedly signed an employment contract with Gusmer Europe on September 1, 2004. *Id.*

On February 4, 2005, Graco acquired Gusmer Corporation from PMC Global, pursuant to a Stock Purchase Agreement ("Agreement 1"), for $ 45 million in cash; Graco also acquired Gusmer Europe from PMC Global's

[1] According to PMC Defendants, Royo co-founded Garraf.. PMC Dfs. Mot. at 2. Garraf disputes this allegation. *See* Garraf Reply at 6 n. 1.

subsidiary, PMC Europe, pursuant to a Stock Purchase Agreement ("Agreement 2"), for $ 20 million in cash. Compl. PP 28-29, Exs. A & B; Dfs. Disclosure Statement. In Agreement 1, PMC Global "absolutely and unconditionally" guaranteed all of PMC Europe's obligations to Graco in Agreement 2, including the "timely observance and performance of covenants **[*9]** and agreements of such parties herein and therein" ("PMC Guaranty"). Compl. P 30, Ex. A, 10.20. Both Agreements allegedly contained a provision in which New Jersey law would apply. *Id.* PP 31-32, Exs. A & B, 10.13. [2] Pursuant to the Agreements, Graco allegedly "acquired all of Gusmer's tangible assets and all of its intangible assets, including without limitation: (a) all of the Gusmer's trade names, trademarks and copyrights identified in Section 4.14 of the Disclosure Schedules attached to and incorporated in Agreements 1 and 2 ('the Disclosure Schedules'); (b) all of the Gusmer patents, patent rights, and trade secrets identified in Section 4.15 of the Disclosure Schedules; (c) the employment agreements and confidentiality agreements identified in Section 4.15 and 4.19 of the Disclosure Statements; and (d) the goodwill of Gusmer." *Id.* P 33.

PMC Global and PMC Europe allegedly warranted that they had taken precautions to preserve Gusmer trade secrets, that Gusmer's proprietary rights "are valid and enforceable," and that Gusmer obtained confidentiality **[*10]** agreements from all persons who had access to material proprietary rights, including any trade secrets. *Id.* PP 35-36, Exs. A & B, 4.16A. Allegedly, PMC Global and its affiliates represented in their Disclosure Schedule 4.15 that all but two Gusmer employees (neither of whom is at issue here) had signed agreements to comply with company policies regarding these trade secrets. Compl. P 37. Royo had signed a Confidentiality Agreement, and pursuant to Article 4.19 of both Agreements, Graco allegedly acquired certain employment contracts, Royo's included. *Id.* PP 38-39. The assets at the heart of the transaction included Gusmer's goodwill, customer and distributor relationships, trade names and trademarks, and intellectual property. *Id.* PP 33-41. According to Graco, the parties assigned a sum certain to specific assets, including (1) $ 6,500,000 to customer relationships, (2) $ 2,740,000 to trademarks and trade names, and (3) $ 6,130,000 to proprietary technology and engineering drawings. *Id.* P 41. PMC Global and PMC Europe allegedly warranted that "no customers, distributors, sales representatives or vendors intend to cease doing business with [Gusmer] or materially alter the amount of **[*11]** the business that they are presently doing with [Gusmer]," *Id.* P 40, Exs. A & B, and Gusmer's trade names and trademarks were "valid and in full force and effect." *Id.* Exs. A & B, 4.14.

Post-Acquisition of Gusmer

Following Graco's acquisition of Gusmer in February 2005, many of Gusmer's former employees began working for Graco, including Commette and Royo. Compl. P 43. Commette and Royo became important members of Graco's management team and thus allegedly participated in and received confidential communications relating to Graco's confidential strategy, planning meetings and conversations, which were designed to transform and integrate Gusmer operations into Graco's existing business. *Id.* Commette and Royo also allegedly had access to highly sensitive, confidential, non-public, proprietary information belonging to Graco and its subsidiaries, including information regarding customers, prospective customers, business relations with customers, sales reports, strategic plans, marketing plans, product information and designs, pricing information, customer discounts and rebates, profit margins, financial reports and data, sales programs, and product engineering and design plans ("Graco Trade **[*12]** Secrets and Confidential Business Information"). *Id.* P 44. Graco "exerted considerable effort and expended significant money" to develop this information -- all of which gave Graco "an opportunity to obtain an advantage over competitors who do not know or use [it]." *Id.* P 45. This information was allegedly not well known outside of or even within Graco's businesses and Graco took steps to guard its trade secrets and confidential business information by requiring employees like Commette to confirm their confidentiality obligations by signing non-disclosure agreements. *Id.* PP 46-47. Commette allegedly signed a Non-Disclosure Agreement with Graco on May 16, 2006. *Id.* P 47. His employment and/or consulting relationships with Graco and Gusmer Corporation ended on October 20, 2006. *Id.* P 49. Royo allegedly stopped working with Graco's subsidiary, Gusmer Europe, on February

---

[2] For the purposes of this Motion, Garraf does not dispute the application of federal and New Jersey law. *See* Garraf Mot. at 2 n. 1.

9, 2006. *Id.* P 48. Royo allegedly signed an agreement not to compete with Gusmer Europe until February 9, 2008. *Id.* P 72.

Gama and Garraf Enter the Marketplace

After Commette's employment with Graco and Gusmer ended, Commette allegedly headed up Gama, the principal distributor for equipment and spare parts manufactured by **[*13]** Garraf. Compl. PP 53-54, 60. PMC Global, PMC Europe, and PMC allegedly have ownership, financial and/or business relationships with Gama and Garraf. *Id.* PP 55-56. Graco alleges that PMC Global, PMC Europe, PMC, Gama, and Garraf all knew or should have known that Commette has contractual and common-law obligations to maintain the confidentiality of the Graco Trade Secrets and Confidential Business Information, but that Defendants, through their agent, Commette, are misusing the Graco Trade Secrets and Confidential Business Information to solicit and obtain customers, some of whom were Gusmer's customers. *Id.* PP 64, 82. The same claims are made against Defendants with regard to Garraf's employment of Royo. *Id.* PP 65, 72-74. Graco, however, does not sue Royo directly in this action, and does not contend that the Court has jurisdiction over Royo, a foreign citizen.

Gama and Garraf allegedly manufacture spare parts for Gusmer products, which requires highly specialized knowledge relating to Gusmer's products' engineering and design. *Id.* P 75. Graco alleges that Gama and Garraf are using the Graco Trade Secrets and Confidential Business Information to market and sell these spare parts, and **[*14]** are directly soliciting the trade of current Graco customers, some of whom were doing business with Gusmer at the time Graco acquired Gusmer from PMC Global and its affiliates. *Id.* PP 59, 61-62, 65-71, 75, 80-83. Graco also alleges that Defendants are attempting to recapture former Gusmer business by representing that Gama and its products are the "successors" to Gusmer and the "real Gusmer," and claiming a false affiliation with the Gusmer brand, goodwill, and legacy, which belongs to Graco. *Id.* PP 84-85.

Plaintiffs' Claims

On March 14, 2008, Plaintiffs filed their Complaint. On July 24, 2008, Plaintiffs filed an Amended Complaint ("Complaint") alleging: (1) PMC Global and PMC Europe breached their contractual and related duties; (2) Commette breached his non-disclosure agreement; (3) Commette breached his duty of loyalty; (4) Defendants PMC Global, PMC Europe, PMC, Gama, and Garraf engaged in tortious inference with a prospective economic advantage and with a contract, namely Commette's alleged non-disclosure agreement; (5) PMC Global, PMC Europe, PMC, Gama and Garraf misappropriated trade secrets and misused confidential business information; (6) Defendants directly made or acted **[*15]** in concert with those making directly false or misleading statements that are likely to cause confusion as to the affiliation of Gusmer with Gama and Garraf in violation Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)(1)*; (7) Defendants directly made, or acted in concert with those making, false or misleading statements that are likely to cause confusion as to the affiliation of Gusmer with Gama and Garraf in violation the New Jersey Fair Trade Act, *N.J.S.A. § 56:4-1*; (8) Defendants engaged in unfair competition; and (9) Defendants have been unjustly enriched from their breach of their contractual and legal obligations to Graco. *Id.* at 19-26.

Plaintiffs seek, *inter alia,* damages, an injunction, return of documents and records and forensic examination of Defendants' computers, an accounting to determine profits and damages caused by unlawful conduct, exemplary and punitive damages, costs and disbursements for this action, attorneys fees pursuant to the Agreements and the Lanham Act, treble damages, and prejudgment and post-judgment interest. *Id.* at 26-29.

On June 30, 2008, PMC Defendants filed a motion to dismiss Plaintiffs' Complaint pursuant to *Fed. R. Civ. P. 19* and *12(b)(6)*. **[*16]** On July 25, 2008, Defendant Garraf filed a motion to dismiss Plaintiffs' Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, joining in with PMC Defendants' Motion and supplementing it.

Counterclaims

On June 30, 2008, Defendants Commette and Gama ("Counterclaimants") filed an Answer and Counterclaims against Plaintiffs. The Counterclaimants allege that Graco, founded in 1926, is the "world leader" in fluid handling systems and components for use in vehicle lubrication and commercial and industrial settings. Counterclaim P 8; Ex. 1. In December 2004, Graco allegedly acquired Liquid Control Corporation and its subsidiary Decker Industries, a leader in lubricants and lubricant dispensing equipment. Counterclaim P 9. At the time Graco acquired Gusmer Corporation, in February 2005, Gusmer was allegedly the world's leading designer and manufacturer of specialized two-component dispensing equipment systems. *Id.* P 10. In December 2007, Graco allegedly acquired Glas-Craft, an internationally-recognized manufacturer of mixing, metering, and proportioning equipment for dispensing coating, foam, and composite materials. *Id.* P 11. Counterclaimants allege that Plaintiff, through its acquisition of these **[*17]** companies, has built a monopoly position in the IPPE market. *Id.* P 12. Counterclaimants allege that although there is a distinct market for IPPE materials and equipment, with substantial technical barriers to entry, Graco has a nearly 100% market share, with annual revenues of approximately $ 100 million per year, and no significant competitors in the IPPE space. *Id.* PP 12-14. Counterclaimants allege that Graco's conduct has had a substantial effect upon interstate trade and commerce. *Id.* P 14.

Garraf, the only other company operating within the IPPE area, asked Gama, in 2007, to assist with the distribution of Garraf's products in the United States. *Id.* PP 15-16, 18. Thereafter, Gama hired Commette, who had not received a severance package from Graco nor had he agreed that he would stay out of the IPPE market. *Id.* P 17. In October 2007, Graco allegedly sent a letter ("Letter") to all IPPE distributors carrying Graco products, which Counterclaimants claim are all IPPE product distributors nationwide, announcing a pre-emptive unilateral refusal by Graco to deal with any distributor that considers carrying Garraf products as well as its own. *Id.* P 20. Graco allegedly intended this Letter **[*18]** to deter distributors from carrying Garraf products or from doing business with Gama or Garraf. *Id.* P 21. Counterclaimants allege that since the Letter was sent, even though Garraf allegedly has a high quality product line, it has been nearly impossible for Garraf to identify distributors for its products, and existing Gama customers have stopped buying from it. *Id.* P 22. Counterclaimants aver that distributors said that they would have carried or continued to carry Garraf products but for Graco's refusal to deal with any distributor carrying competing products. *Id.* P 23. Counterclaimants allege that this Letter has directly affected Garraf's ability to distribute its products in the United States because "no IPPE distributor could risk losing the ability to sell Graco products unless the distributor intended to exit the market altogether." *Id.* P 24.

Counterclaimants further allege that Graco has engaged in other false and predatory communications intended to block Garraf products from being distributed in the United States and to destroy Gama's business, including statements questioning the viability of Gama's continued existence and the quality of Gama's product line, specifically **[*19]** that "Gama's products are based on 'old' or outmodeled Gusmer technology." *Id.* PP 26-27. In June 2008, Graco allegedly told current Gama customers and individuals within the trade that it was going to close Gama down by the end of 2008, and, as a result, if customers buy anything from Gama, they would be "stuck with it." *Id.* PP 29-31. A Graco manager allegedly contacted at least one distributor that sold both Graco and Gama products demanding that the distributor elect between the two lines, claiming that Graco does not permit its current distributors to also sell Gama's line of products; as a result, at least one distributor has dropped Gama's products. *Id.* PP 32-33. Thus, Counterclaimants allege that Graco has abused its monopoly position in the IPPE market by, *inter alia,* sending this Letter, which allegedly constitutes an illegal unilateral refusal to deal because it was sent to Graco's prospective and current customers, "including customers who were, at the time, carrying both Graco and Garraf products." *Id.* P 36. Commette and Gama allege that Graco is preventing them from competing in the IPPE market, and that consumers will be forced to pay monopoly prices because Graco is preventing **[*20]** competitors from entering the IPPE marketplace. *Id.* PP 39-40.

Commette and Gama claim that Plaintiffs (1) violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*; (2) attempted and conspired to monopolize the market place; (3) engaged in tortious interference with Commette's livelihood and Gama's business; and (4) violated the New Jersey Fair Trade Act, *N.J.S.A. § 56:4-1*; (5) engaged in unfair competition; and (6) committed trade libel and disparagement. *Id.* at 53-56. Commette and Gama seek, *inter alia,* an injunction from the anticompetitive behavior and ***antitrust law*** violations, and damages, including treble actual damages under *§ 4* of the Clayton Act, *15 U.S.C. § 15*. *Id.* at 57.

On August 19, 2008, Plaintiffs filed a Motion to Dismiss the Counterclaims on the grounds that Commette and Gama do not have standing and have not adequately plead their antitrust counterclaims under *§ 2* of the Sherman Act, *15 U.S.C. § 2*. In addition, Plaintiffs move to dismiss all of the remaining state law claims pursuant to *Rule 12(b)(6)*. In the alternative, Plaintiffs move to bifurcate and stay the Counterclaim.

II. Standard of Review

When reviewing a motion to dismiss on the pleadings, courts "accept all factual allegations **[*21]** as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)* (citation and quotations omitted). Recently, in *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court "retired" the language contained in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id. at 1968* (quoting *Conley, 355 U.S. at 45-46*). Instead, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Id. at 1965*. As the Third Circuit has stated, "[t]he Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability **[*22]** requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips, 515 F.3d at 234* (quoting *Twombly, 127 S.Ct. at 1965*).

III. Discussion

A. Defendants' Motion to Dismiss Plaintiffs' Claims

1. Rule 19 Analysis

As a preliminary matter, PMC Defendants argue that Plaintiffs' Complaint must be dismissed in its entirety, pursuant to *Fed. R. Civ. P. 19*, for failure to join Royo as a party. PMC Defendants claim Royo is necessary and indispensable, because "[e]ach cause of action focuses on Mr. Royo's alleged misappropriation and sharing of trade secrets in active concert with other defendants" and "Royo is named directly in 20 separate paragraphs and referenced indirectly throughout the Complaint." PMC. Dfs. Br. at 3. Royo, a Spanish citizen, is not subject to personal jurisdiction in New Jersey.

Fed. R. Civ. P. 19 involves a two-step process to determine when joinder of a particular party is compulsory. *See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993)*. First, a court must "determine whether a party should be joined if 'feasible' under *Rule 19(a)*." **[*23]** *Id.* If the party should be joined, but joinder is not feasible because it would destroy diversity, or the court lacks personal jurisdiction over the absentee, then the court must "determine whether the absent party is 'indispensable' under *Rule 19(b)*." *Id.* If the party is "indispensable," the action cannot proceed. *Id.; see also Wilson v. Canada Life Assurance Co., No. 08-1258, 2009 U.S. Dist. LEXIS 16714, at *7 (E.D. Pa. Mar. 3, 2009)*.

The Court must first determine whether Royo, a former Gusmer and Graco employee and current Garraf employee is a "necessary" party who must be joined under *Rule 19(a)*, if joinder is feasible. [3] *Rule 19(a)* provides that:

---

[3] *Rule 19* no longer uses the word "necessary," but rather refers to parties who should be joined if feasible. *See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116 n. 12, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* ("Where the new

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial **[*24]** risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Under *Rule 19(a)*, the Court determines whether its can provide complete relief to the parties to the action in the absence of the party not joined. *Fed. R. Civ. P. 19(a)(1)*. "Under *Rule 19(a)(1)*, the Court must consider whether--in the absence of an un-joined party--complete relief can be granted to the persons already parties to the lawsuit. The effect that a decision may have on an absent party is immaterial." *Huber v. Taylor, 532 F.3d 237, 248 (3d Cir. 2008)*.

PMC Defendants argue that complete relief cannot be afforded because Royo, who is not a party to this action, could continue to use Graco's trade secrets by "simply seek[ing] another distributor or import his products into the United States directly." PMC Dfs. Mot. at 5. In addition, PMC Defendants argue that the requested injunction will not stop the continued use of alleged trade secrets by Royo. *Id.* at 3-6 (relying largely on *Synygy, Inc. v. ZS Associates, Inc., No. 07-3536, 2008 U.S. Dist. LEXIS 33285, 2008 WL 1820936, at *2 (E.D. Pa. Apr. 23, 2008)*, *appeal docketed,* No. 08-2355 (3d Cir. May 22, 2008), and *Torrington C. v. Yost, 139 F.R.D. 91 (D.S.C. 1991))*. Plaintiffs, however, argue that their current claim is not that Royo is *personally* manufacturing or distributing any products, but that Garraf and Gama are engaging in such activity. Pl. Opp. at 48. Thus, whether Graco can get relief against Royo if he ever personally engages in future conduct that would give rise to a new and independent claim is not at issue here. *Cf. Huber, 532 F.3d at 251* (holding that concern about **[*26]** possible issue preclusion in a potential future lawsuit against joint tortfeasor was "too speculative"). Moreover, because Royo is not a party, the "complete relief" inquiry must focus exclusively on those who are parties to the action. *Id. at 248*.

Plaintiffs argue that they can obtain complete relief against the current parties because only one of their nine claims is for misappropriation of trade secrets and most claims focus on Defendants' alleged violations of their obligations to Plaintiffs, such as breach of contract and misrepresentation, and do not depend on Royo's actions. Pl. Opp. at 49. Graco further claims that Royo's future conduct is irrelevant to whether complete relief may be afforded based on Defendants' use of its trade secrets because, if Graco wins, then it can be granted an injunction and damages against Royo's employer, Garraf, and other Defendants, thereby enjoining these Defendants' employees, including Royo, from further divulging and exploiting Graco's trade secrets. *See* Pl. Opp. at 49; *Huber, 532 F.3d at 248*. Because Plaintiffs can get complete relief for their claims against the named Defendants in this action, Royo is not a necessary party under *Rule 19(a)(1)(A)*. **[*27]** *Cf. Rosenzweig v. Brunswick Corp., No. 08-807, 2008 U.S. Dist. LEXIS 63655, 2008 WL 3895485, at *6 (Aug. 20, 2008)* (finding that the absent party -- a party to the disputed contract -- was necessary, and ultimately, indispensable because the court could not provide complete relief in the signatory's absence).

The Court must then consider the effect, if any, that resolution of the dispute among the named parties may have on an absent party, in this case Royo, under *Rule 19(a)(1)(B)*. *Huber, 532 F.3d at 248*. Plaintiffs assert, and Defendants do not dispute, that Defendants are liable individually and as principals under *respondeat superior* for their agents' misconduct within the course and scope of the agents' employment. Courts have determined that under a theory of *respondeat superior,* "there is no requirement that the plaintiff join as a defendant the individual upon whose act or failure to act vicarious liability is predicated. Indeed, the plaintiff has the option to sue the party vicariously liable for the conduct of an agent in one lawsuit and thereafter, pursue the agent in a separate suit. In such cases, the concept of mandatory joinder does not apply." *Marion v. Borough of Manasquan, 231 N.J. Super.*

---

version (of the Rule) emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize classification of parties as 'necessary' or 'indispensable.'"'); *Janney, 11 F.3d at 404 n. 4* ("The term necessary in referring to a *Rule 19(a)* analysis harks back to an earlier version of *Rule 19*. It survives in case law at the price of **[*25]** some confusion."). The parties, however, discuss Royo's joinder in this action in terms of whether he is "necessary" and "indispensable."

320, 327-28, 555 A.2d 699 (App. Div. 1989). **[*28]** Moreover, in their reply, Defendants do not dispute that Royo is not necessary where there is *respondeat superior* liability. Therefore, Plaintiffs argue, Royo need not be joined with regard to Plaintiffs' claims grounded in vicarious liability.

The inquiry for the Court focuses on Rule 19(a)(1)(B)(i), whether a decision in this case will, as a practical matter, impair or impede Royo's ability to protect his interest. Plaintiffs argue that Royo lacks sufficient interest in this litigation that would require him to be joined if feasible under Rule 19(a)(1)(B)(i). Plaintiffs state that any frustration of Royo's personal business expectations based on an agreement to which his company (Garraf) is a party, is not enough to satisfy this prong of Rule 19. *See* Pl. Opp. at 50 (citing to Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 387 (2d Cir. 2006) ("It is not enough under [Rule 19(a)(1)(B)(i)] for a third party to have an interest, even a very strong interest, in the litigation."); Janney Montgomery Scott, Inc., 11 F.3d at 407). PMC Defendants argue that Royo is necessary because he maintains an interest that would not be represented in this action, and his ability **[*29]** to protect his interest would be impaired or impeded if he is not joined here. PMC Dfs. Mot. at 5. Specifically, PMC Defendants argue that for a finding of liability against them, the Court first will need to assess the validity and enforceability of Royo's employment agreements and then determine whether Royo is guilty of trade secret theft. PMC Dfs. Mot. at 5 (citing to Synygy, 2008 U.S. Dist. LEXIS 63655, 2008 WL 1820936, at *2).

Similar to this case, where Plaintiff, in addition to this action, has separately sued Royo in Spain, in the *Synygy* case, Synygy sued a former employee's U.S.-based employer, claiming misappropriation of Synygy trade secrets, and also sued the employee in India. There, the court dismissed the action for failure to add an indispensable party citing the possibility of inconsistent or double obligations. PMC Defendants argue that Graco's claims implicate Royo and that absent Royo's participation in this case, there is a significant possibility that his acts will be construed differently in U.S. and Spanish courts and "a judgment against his U.S. distributor would brand him an 'infringer' without ever affording him his day in court." PMC Dfs. Mot. at 5-6. In addition, Defendants claim that **[*30]** a resolution of the Spanish case in favor of Royo could be dispositive here, eviscerating Graco's theft allegations and granting Garraf freedom to operate. Defendants also rely on *Torrington,* where the court dismissed the action in which the plaintiff sued the ex-employee and not his new company on a trade secret dispute because both were necessary parties to the resolution. Torrington, 139 F.R.D. at 92-93. Defendants argue that the distribution agreement between Royo's company and Gama is similar to the agreement in dispute in *Torrington;* however, in this case, Royo's company, Garraf, is a named defendant and will have the opportunity to defend the case.

In sum, PMC Defendants assert that Royo would be unable to protect his "employment with defendants in its current form and [his] interest in the resolution of the charges that [he] allegedly removed and converted trade secrets." Home Am. Credit, Inc. v. Vermillion, No. 97-2139, 1997 U.S. Dist. LEXIS 19561, 1997 WL 793047, at *4 (E.D. Pa. Dec. 10, 1997) (dismissing the complaint on the grounds that employees alleged to have misappropriated trade secrets are necessary parties so they may protect their interests). Similarly, in this case, Royo's conduct will be at **[*31]** issue because Graco's trade secret claims against Defendants are based, at least in part, on Royo's actions.

However, the Third Circuit, in *Huber,* has already determined that it is inappropriate for a court to look at privity, for issue preclusion purposes, and the collateral estoppel effect on, or of, a potential future action when making a determination of the necessity of a party that is based on the absent party's interest, under Rule 19(a)(1)(B)(i). Huber, 532 F.3d at 250-51 ("[T]he *Janney* court noted that, given the highly factual nature of a privity analysis, courts engaging in Rule 19 analysis should not 'theorize' as to whether an absent party is in privity with a party to an action because such an analysis would be premature."). Moreover, in *Huber,* the Third Circuit emphasized that as it had already held in *Janney,* where the preclusive effect of an action on any related litigation is speculative -- as it is in the instant case -- joinder of an absent party is not compulsory under this provision of Rule 19. *Id.* Thus, this Court cannot speculate on the preclusive effect this litigation might have on an action in Spain. In addition, Royo's employment itself would not necessarily **[*32]** be jeopardized based on an outcome of this action. [4] Therefore, Royo does not have an interest that will be impaired or impeded requiring him to be joined, if feasible, in this case.

Further, Plaintiffs argue that Defendants cannot demonstrate that any of the current parties will be subject to inconsistent obligations if Royo is not joined. *Fed. R. Civ. P. 19(a)(1)(B)(ii)*. Defendants do not argue that resolution of this action could subject them to double, inconsistent, or multiple legal obligations. Defendants, relying on *Torrington* and *Synygy,* assert that Royo could be subject to a substantial risk of inconsistent obligations given Graco's suit against Royo in Spain. PMC Dfs. Mot. at 5. However, this misconstrues *Rule 19(a)(1)(B)(ii)*, which considers the risk to the "*existing part[ies]*" of "incurring double, multiple, or otherwise inconsistent obligations because of the [absent person's] interest", **[*33]** not the risk to the absent party. *See also* *Am. Home Mortgage Corp. v. First Am. Title Ins. Co., No. 07-1257, 2007 U.S. Dist. LEXIS 83337, 2007 WL 3349320, at *7 (D.N.J. Nov. 9, 2007)* (explaining that "*Rule 19(a)(2)(ii)* [now *Rule 19(a)(1)(B)(ii)*] calls for the Court to examine whether proceeding without joining the absent parties will leave *the parties* 'subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.'"). There is no contention that any Defendants would be subject to inconsistent obligations in this case. Indeed Defendants would not. Therefore, the Court finds that Royo is not a necessary party under *Rule 19(a)*, and the Court need not conduct a *Rule 19(b)* inquiry to determine if Royo is indispensable. [5] Accordingly, the Court denies PMC Defendants' request to dismiss Plaintiffs' Complaint pursuant to *Rule 19*.

---

[4] Royo's non-compete agreement with Graco ended on February 9, 2008. Compl. P 72. Thus, there is no current bar to his employment in the IPPE group of products. Hence, Garraf may continue to employ Royo so long as he works in a lawful manner, and does not disclose Graco trade secrets, if any.

[5] However, even if Royo is necessary under *Rule 19(a)*, he is not indispensable under *Rule 19(b)*. In this case, the parties agree that there is no personal jurisdiction over Spanish employee Royo, *see* Pl. Opp. at 52-54; therefore, joinder is not feasible and the Court "determine[s] whether, in equity and good conscience, the action should proceed among the existing **[*34]** parties or should be dismissed" pursuant to *Rule 19(b)*. *Fed. R. Civ. P. 19(b)*. The Rule lists four non-exhaustive factors that the Court should weigh, including: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." *Fed. R. Civ. P. 19(b)*; *see* *Gardiner v. Virgin Islands Water & Power Authority, 145 F.3d 635, 640, 39 V.I. 519 (3d Cir. 1998)*.

With respect to the first factor, PMC Defendants claim that Royo would be prejudiced by exposure to inconsistent obligations if judgment were rendered in his absence. Plaintiffs, however, contend that resolution of "this action would not subject Royo to inconsistent obligations due to the action pending in Spain against him[because: (1)] the Spanish action deals only with Royo's obligations under his severance agreement with Graco/Gusmer and not whether his **[*35]** company used Graco's trade secrets or violated the rights at issue in this lawsuit[; and (2)] *Rule 19* is simply not supported by 'the real possibility that one court could find [Defendants] liable while another court was finding [the absent party] not liable in separate proceedings to which the rules of claim or issue preclusion do not apply.'" Pl. Opp. at 52-53 (quoting *General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 318 (3d Cir. 2007)* (internal quotations and citations omitted)). Plaintiffs, however, do not provide the Court with a copy of the Complaint or Certification with regard to the subject matter of the Spanish action. The Court cannot rely on Plaintiffs' limited allegations in its Opposition. Therefore, the Court is unaware of what the implications are of the Spanish action.

In addition, PMC Defendants contend that Royo's and Garraf's interests may or may not align, so "there is no certainty that the interests of [Royo] will be adequately represented" if this litigation proceeds. *See* *Home Am. Credit, 1997 U.S. Dist. LEXIS 19561, 1997 WL 793047, at *4*. However, if a potential defendant does not wish to intervene and be a party to the suit, this fact "strongly suggest[s] that its interests **[*36]** will not be impeded if the suit goes forward without [him]." *Gardiner, 145 F.3d at 641*. Royo has not sought to intervene here. Accordingly, "there is little danger of prejudice to [Royo]." *Id.* Thus, the first factor weighs against indispensability.

With respect to the second and third factors, Graco asserts that it is interested in obtaining relief against the named parties, including "Royo's company" in the form of an injunction and monetary relief. Graco contends this remedy will be adequate. PMC Defendants, however, argue that an injunction against Garraf would similarly enjoin Royo, without providing him the opportunity to defend himself with regard to any disclosed trade secrets. Defendants rely on *Home Am. Credit* for support. If, however, Royo

2. Agency Relationship: PMC as a Party & Non-Contract Claims Against Defendants PMC Global and PMC Europe

PMC Defendants move to dismiss PMC as a party in this suit because: PMC is not a party to any of the allegedly breached contracts, it is not in privity with Commette or Royo, and Plaintiffs do not allege any acts or omissions by PMC. *See* PMC Dfs. Mot. at 9; Compl. PP 28-29. PMC Defendants argue that although Graco attempts to implicate PMC by claiming Royo, Commette, Gama, or Garraf acted as PMC's agents, Graco fails to allege any facts that suggest PMC "control[led] the day-to-day time, manner, and method of executing the work" of any other Defendant. *Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 610 (D.N.J. 2004)*. PMC Defendants contend that unless an agency relationship is established, PMC cannot be held liable for the tortious acts of any parent corporation, subsidiary, sister corporation, or person. *Id. at 609-610*.

Similarly, PMC Defendants argue that Graco has not alleged any acts or omissions directly committed by PMC Global or PMC Europe that are unrelated to the breach of contract claim, (Counts Four-Nine), nor has Graco alleged **[*39]** any facts suggesting an agency relationship between Royo, Commette, Gama and/or Garraf and PMC Global. *See* PMC Dfs. Mot. at 10. In its Reply, Garraf also complains that Graco has failed to allege any facts to support its conclusory allegations that Garraf is working in "active concert and participation" with the other defendants. Garraf Reply at 15. [6]

An agency relationship exists when one party consents to have another act on its behalf, with the principal or master controlling and directing the acts of the agent. *Seltzer, 339 F. Supp. 2d at 609*; *Sears Mortgage Corp. v. Rose, 134 N.J. 326, 634 A.2d 74 (1993)*. The Third Circuit has recognized that a "servant" and an "independent contractor" are distinct under the agency doctrine. *AT & T v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1435 (3d Cir. 1994)*. "A master-servant relationship is created if the employer assumes the right to control **[*40]** the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. On the other hand, an independent contractor is not subject to that degree of physical control, but is only subject to the general control and direction by the principal . . . ." *Id.* (internal citations and quotations omitted). A principal is vicariously liable for the tortious acts of the servant, but is not similarly liable for those of the independent contractor. *See Id.*

"To hold a principal liable for the acts of its subsidiaries under general agency law, total domination over the subsidiary need not be proven." *Expediters Int'l of Washington, Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F.*

---

finds that he needs to "defend himself" in this action with respect to disclosing any alleged trade secrets, he may intervene. *Gardiner, 145 F.3d at 641*. Otherwise, the Court can shape the relief here, because Royo's agreement not to compete ended on February 9, 2008. Compl. P 72. Therefore, proceeding here will not affect Royo's employment on these grounds. Therefore, the second and third factors weigh against indispensability.

With respect **[*37]** to the fourth factor, the Plaintiff argues that when there is a lack of a practical "assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible," this consideration "counsels strongly against dismissal." *Gen. Refractories Co. v. First State Ins. Co., 500 F.3d at 306, 321 (3d Cir. 2007)* (citing *Gardiner, 145 F.3d at 642*). In this case, there are multiple parties domestic and foreign, who have contracted to apply New Jersey law, and thus, it appears that there is not another more effective, appropriate, or practical forum where better joinder would be possible. This factor weighs strongly against dismissal and against indispensability. *See Id.*

Moreover, PMC Defendants fail to put forth any persuasive arguments for a finding that Royo is indispensable. In light of Third Circuit precedent, the Court agrees that the indispensability factors pursuant to *Rule 19(b)* weigh against dismissal for failure to join an indispensable party. Accordingly, because the action can proceed in equity and good conscience, Royo is not necessary or indispensable under *Rule 19(a)* or *19(b)*, respectively, the Court denies PMC Defendants' motion to dismiss **[*38]** Plaintiffs' Complaint pursuant to *Rule 19*.

[6] Garraf asserts that allegations that Garraf is an "affiliate" of Gama, that PMC Europe has an ownership or other financial interest in Garraf, or that PMC Europe is a partial owner of the real estate where Garraf's headquarters is located, insufficient to establish an agency relationship. Compl. PP 7, 57.

Supp. 468, 481-82 (D.N.J. 1998) (citing *Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988))*. However, there must be "a relationship between the corporations and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing." *Phoenix Canada Oil Co., 842 F.2d at 1477*. **[*41]** Whether there are sufficient relationships with and control over affiliates for the purposes of proving agency is a question of fact. *Expediters Int'l, 995 F. Supp. at 481-82* (denying summary judgment on misappropriation of trade secret claims where the defendant argued it should not be held liable for actions of its related company, because the court could not decide, as a matter of law, that the defendant did not act as a principal to influence or control the business practices of its affiliates, where the "self-characterized 'family of companies,' jointly participated in freight dealings and shared both stock ownership and employees").

In this case, Plaintiffs allege that Gama, Garraf, and Commette are acting as agents for, instrumentalities of, or in active concert and participation with PMC Global, PMC Europe, and PMC. Compl. PP 6, 7, *see also Id.* PP 58, 59-65, 74, 82, 85, 102. Plaintiffs allege that PMC Global, PMC Europe, and PMC are directly related or affiliated with Gama, Garraf, and Commette. *Id.* PP 3-7, 55-57. Graco has alleged facts to show that PMC Global, PMC Europe, and PMC dominate the activities of their subsidiaries or affiliate companies, Garraf and Gama. *See, e.g.,* ***[*42]*** *Id.* PP 3-7 (detailing overlapping officers and financial interests and alleging that Gama and Garraf are instrumentalities of PMC Global, PMC Europe, and PMC); *Id.* PP 55-57 (explaining that PMC Europe is the owner of the real estate where Garraf is located and that PMC Global or PMC own the real estate where Gama is located). Plaintiffs argue that "reasonable inferences lead to the conclusion that PMC Global's use of its subsidiaries and affiliates is integral to its scheme to inappropriately take back what it has sold." Pl. Opp. at 43. On a motion pursuant to Rule 12(b)(6), the Court must accept the allegations in Plaintiffs' Complaint as true. Throughout their Complaint, Plaintiffs describe a scheme in which these related corporate defendants allegedly worked closely with one another to accomplish a common goal of promoting a new business called "Gama." Plaintiffs argue that Gama represents a contraction of the first two letter of Garraf Maquinaria, which manufactures Gama products in Spain. *Id.* at 41. Because the determination of whether there is a sufficient relationship with or control over affiliates for the purposes of proving agency is a question of fact, the Court must deny **[*43]** Defendants' request to dismiss PMC as a Defendant and the non-contractual claims, Counts Four-Nine, against PMC Global and PMC Europe. *See Expediters Int'l, 995 F. Supp. at 481-82*. Moreover, it would be inappropriate for the Court to make a finding regarding the agency relationship, or lack there of, with respect to any of the defendants on this motion based on Plaintiffs' allegations.

In their Opposition, Plaintiffs further claim that they have sufficiently alleged a scheme in which PMC Global, PMC Europe, and PMC may also be liable under the doctrine of alter ego and civil conspiracy, in addition to agency principles. *See* Pl. Opp. at 42. Plaintiffs, however, did not plead theories of alter ego or conspiracy in their Complaint. Thus, they are not bases for liability in this case and the Court need not address them further.

3. Count One: Breach of Contract and Related Duties Against PMC Global and PMC Europe

Defendants move to dismiss Plaintiffs' claims that Defendants PMC Global and PMC Europe breached their contractual obligations and related duties on the grounds that Defendants' alleged acts did not violate the PMC Guaranty or covenants of the Stock Purchase Agreements ("SPAs"). PMC **[*44]** Defendants argue that Graco's claims are based on SPAs that are fully integrated and their "terms relate to the transfers of assets; real property leases; intercompany accounts; employee benefit plans; access to records; domain name; transition services in China; and management agreements." PMC Dfs. Mot. at 11. Defendants assert that the SPAs do not mention anything about the right of PMC Global or PMC Europe to re-enter the IPPE business. Therefore, Defendants posit that even if Graco's allegations that PMC Global or PMC Europe solicited customers, retained former Gusmer employees, and used trade secrets and other proprietary information, Compl. P 88, were true, nothing in the SPAs prevent such behavior. Instead, Defendants argue that Graco is unable to identify how the PMC Guaranty or covenants of the SPAs were allegedly breached.

Plaintiffs complain that Defendants launched Gama, with the explicit objective of recapturing Gusmer's brand identity and trade, which Graco had purchased from PMC Global and PMC Europe for $ 65 million. In so doing, Plaintiffs contend that PMC Global and PMC Europe failed to perform material obligations required under the contracts, and thus, they breached **[*45]** the SPAs. Specifically, Plaintiffs also argue that Defendants breached New Jersey's implicit contractual obligation of good faith and fair dealing.

To state a claim for breach of contract, the plaintiff must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations. *Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)*. Furthermore, "every contract imposes on each party the duty of good faith and fair dealing in its performance and its enforcement." *Pickett v. Lloyd's & Peerless Ins. Agency, Inc., 131 N.J. 457, 467, 621 A.2d 445 (1993)*. This implicit duty requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420, 690 A.2d 575 (1997)* (internal citations and quotations omitted). A defendant who acts with improper purpose or ill motive may be found liable for breaching the implied covenant if the breach upsets the plaintiff's reasonable expectations under the agreement. *See Intarome Fragrance & Flavor Corp. v. Zarkades, No. 07-873, 2008 U.S. Dist. LEXIS 97631, 2008 WL 5109501, at *6 (D.N.J. Dec. 2, 2008)* **[*46]** (citing *DiCarlo v. St. Mary Hosp., 530 F.3d 255, 267 (3d Cir. 2008))*. The defendant need not violate an express term of a contract to be held liable for a breach of the covenant of good faith and fair dealing. *See DiCarlo, 530 F.3d at 267*.

In this claim, Plaintiffs allege that Defendants PMC Global and PMC Europe continued to use Gusmer's assets that should have been transferred to Graco, such as Gusmer's customer relationships, goodwill, trade names, trade secrets, and key employment agreements, which Defendants allegedly now use to promote Gama. Compl. PP 8, 33-41, 47, 64-65, 75, 77, 79, 80-85, 88. Defendants do not contest the validity of the underlying contract. Rather, PMC Defendants argue that the Sale Agreements are silent as to the right of PMC Global and PMC Europe's to re-enter the IPPE business. Graco responds that Defendants create a straw man that the Court should reject because, simply put, Defendants cannot use assets for Gama that they previously sold to Graco. Plaintiffs contend that Defendants' conduct violates their implied contractual duties as sellers by soliciting former Gusmer distributors and customers, and deceiving customers by asserting an affiliation with **[*47]** Gusmer. Plaintiffs rely on *Reardon Laundry Co. v. Reardon, 97 N.J. Eq. 356, 357-58, 2 N.J. Misc. 550, 128 A. 482 (E. & A. 1925)* and *Hilton v. Hilton, 89 N.J. Eq. 182, 186-87, 104 A. 375 (E. & A. 1918)* for the proposition that New Jersey has long prohibited the seller of a business from soliciting the trade of previous customers.

Defendants counter that these cases actually reject overly broad and unreasonably implied restrictions on competition; *Hilton* and *Reardon* only addressed a seller's duty not to solicit former customers when the goodwill of a business is sold. PMC Defendants argue that a seller has no non-compete obligation unless the buyer bargained for one and that Graco did not bargain for one here. PMC Dfs. Reply 1-2. [7] Defendants claim that PMC Global and PMC Europe, the "sellers" in the Graco-Gusmer acquisition, are not soliciting former Gusmer customers, but rather the seller about which Graco complains is Gama. Defendants contend that Gama is a distinct legal entity that had nothing to do with the Graco-Gusmer acquisition. Nonetheless, Plaintiffs assert that Gama is an agent for or works in active concert and participation with PMC Global, PMC Europe, and PMC. *See* Part III.A.2., *supra.* Whether Gama was or is working **[*48]** as an agent for PMC Global and PMC Europe or independently from them is a question of fact, which the Court will not address on a motion to dismiss. *See Id.*

First, Plaintiff alleges a breach of contract because Defendants, individually or through their agents, are re-entering the IPPE business. Defendants correctly argue that even if they were engaged in such behavior, Plaintiffs did not contract for a non-compete agreement and the SPAs are fully integrated. *See* Ex. A, 10.7 & Ex. B, 10.7 ("10.7 Entire Agreement. This Agreement, including the Disclosure Schedule and Exhibits hereto, contains the sole, only, and entire agreement of the parties hereto relating to the subject matter hereof and correctly sets forth the rights,

[7] Defendants also argue that any attempt to restrain Commette should be summarily rejected because a "former employee cannot be enjoined from using his or her experience in the industry as a basis for earning a living." *Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 643, 691 A.2d 876 (App. Div. 1997)*. This argument, however, is irrelevant to Count One of Plaintiff's Complaint.

duties, and obligations of each to the other of this date. Any prior agreements, promises, **[*49]** negotiations, practices, or representations not expressly set forth in this Agreement are of no force or effect."). [8] Therefore, Plaintiffs cannot allege a breach of contract claim based solely on Defendants' alleged re-entering of the IPPE market.

Second, Plaintiffs allege that Defendants breached their Guaranty by soliciting customers, retaining former Gusmer employees, and using trade secrets and other proprietary information. Defendants argue that even if these contentions were true, this does not violate their SPAs. The Court agrees. The representations in the SPAs in that regard were made by Defendants PMC Global and PMC Europe at the time the contract was signed. *See, e.g.,* Ex. A 4.14-4.16A, 4.18-4.20. Plaintiffs do not allege or even argue that at the time Defendants PMC Global and PMC Europe entered into the Agreements with Plaintiffs, that **[*50]** Defendants knew of any customers that intended to cease doing business with Gusmer, that any employees intended to leave Gusmer, that the Gusmer name would have in any way been devalued, or that Defendants intended to compete with Graco. Therefore, Plaintiffs cannot allege a breach of contract claim based on the PMC Guaranty.

Third, Plaintiffs' breach of contract claim is based on whether Plaintiffs contracted with Defendants for the sale of Gusmer's "goodwill." Specifically, Plaintiffs argue Defendants failed to transfer Gusmer's goodwill because Defendants are riding on the coattails of the Gusmer name. However, the SPAs are silent as to goodwill. The Supreme Court has defined goodwill as "the expectancy of continued patronage." *Newark v. Morning Ledger Co. v. United States, 507 U.S. 546, 555, 113 S. Ct. 1670, 123 L. Ed. 2d 288 (1993)* (citations omitted). In addition, the Supreme Court of New Jersey has stated that goodwill consists of:

> . . . the right to continue the business at the same place in which it has been established and where its reputation has been made, carrying with it the probability that old customers will continue to resort to the old place for the purpose of making their purchases, notwithstanding the **[*51]** change in the name under which the business has been carried on, so long as the service remains satisfactory and the standard of the goods sold is maintained . . .

Dugan v. Dugan, 92 N.J. 423, 430, 457 A.2d 1 (1983). Recently, in *Gettinger v. Magnetic Services, Inc., No. 07-3015, 2008 U.S. Dist. LEXIS 80055, 2008 WL 4559758, at *2-3 (D.N.J. Oct. 8, 2008)*, another court in this District found that summary judgment was inappropriate because there was a genuine issue of material fact as to whether goodwill existed or had value where the agreement was silent on the issue. In *Gettinger,* the court held that whether or not goodwill existed was fact specific, and based on the pleadings, a reasonable jury could find that the purchaser, who provided the same services as the seller, at the same location, to the same customer, had an expectation of continued patronage from that customer. *See Id.* (relying on the stated elements of the *Dugan* court). Thus, the court determined that goodwill could exist even where a contract is silent on the issue.

Similarly, in the instant case, Graco has pled that it purchased the goodwill of Gusmer in its Agreements with PMC Global and PMC Europe. Compl. P 33. PMC Defendants, however, argue that goodwill **[*52]** was not part of the fully integrated contract and thus Plaintiffs are unable to make out a breach of contract claim here. However, the Agreements include provisions that no customers, distributors, sales representatives or venders intend to cease doing business with Gusmer, that all of the Gusmer's trade names, trademarks and copyrights are in full force and effect with no pending or threatened lawsuits, that all of the Gusmer patents, patent rights, and trade secrets are protected and that employees have signed agreements and confidentiality agreements and that none intend to leave. Complaint P 33; Exs. A & B, Disclosure Schedules 4.14-4.15, 4.18-4.20. Taking Plaintiffs' allegations as true,

---

[8] When a plaintiff's claims are based upon documents that are expressly relied upon or integral to the complaint, the court may consider such documents on a motion to dismiss. *See Adamson v. Ortho-McNeil Pharm., Inc., 463 F. Supp. 2d 496, 500 (D.N.J. 2006)* (citing *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997))*.

Plaintiffs allege the expectancy of continued patronage with Gusmer customers and thus, state a claim for breach of contract based on goodwill here. [9]

The only remaining issue with respect to this count is whether the manner in which Defendants competed can constitute a violation by PMC Global and PMC Europe of their implied duties of good faith and **[*53]** fair dealing. Plaintiffs argue that "it is reasonable to infer that one who buys a business for $ 65 million (including its protected trade secrets, a product line, a distribution network, a customer base, and the right to control a well-known brand) would reasonably expect the seller not to devalue the acquisition (by utilizing trade secrets in order to launch a competitive business that features a knock-off product line with a claimed affiliation to the sold company's brand and by targeting the sold company's customer base)." Pl. Opp. at 17-18. Plaintiffs plead that "the Sale Agreements expressly transferred to Graco the following assets of that company, among others: (1) Gusmer's customer relationships; (2) Gusmer's employment agreements; and (3) Gusmer's intellectual property and proprietary information." Compl. PP 33-41. Graco alleges that Defendants are now soliciting Gusmer's customers, *see Id.* PP 80-83; employing persons bound by non-disclosure agreements, *see Id.* PP 8, 47, 64; and using Gusmer's intellectual property and proprietary information to produce and distribute competing products. *See Id.* PP 75, 77, 79, 82.

Plaintiffs argue that they have adequately pled a claim for **[*54]** violating the implied contractual obligation of good faith and fair dealing because PMC Global and PMC Europe deny Graco the value of its purchase, by "keep[ing] for [themselves] the essential thing [they] sold, and also keep the price [they] got for it . . ." *Levitt Corp. v. Levitt, 593 F.2d 463, 468 (2d Cir. 1979)*. While the duty of good faith and fair dealing cannot alter the clear terms of an agreement, *see* *DiCarlo, 530 F.3d at 267*, defendants who act with improper purpose or ill motive may be found liable for breaching the implied covenant if the breach upsets the plaintiff's reasonable expectations under the agreement. *See* *Intarome, 2008 U.S. Dist. LEXIS 97631, 2008 WL 5109501, at *6*. Mere competition alone, however, cannot constitute improper purpose or ill motive.

In this case, Plaintiffs plead that Defendants Gama and Garraf are "marketing their products to customers in a manner that is intended to lead customers to believe that Defendants Gama and Garraf are the successors to Gusmer or that they are the real Gusmer." Compl. P 84. In addition, Plaintiffs allege that Commette, as an agent for and in concert with other Defendants, is erroneously "informing customers that Plaintiff Graco did not purchase **[*55]** Gusmer Europe." *Id.* P 85. Thus, Plaintiffs' allegations of Defendants' breach of good faith and fair dealing stems from Defendants' alleged trading off on the Gusmer name and product affiliation, which sufficiently constitutes improper purpose or ill motive for purposes of this motion. Therefore, Plaintiffs have stated a claim for breach of implied duty of good faith and fair dealing on this basis. Accordingly, the Court denies PMC Defendants' request to dismiss this claim.

4. Count Two: Breach of Non-Disclosure Agreement

PMC Defendants argue that because Plaintiffs failed to allege facts sufficient to establish an enforceable employment contract, Plaintiffs' allegations that Defendant Commette breached his non-disclosure agreement should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*. PMC Defendants argue that Graco cannot allege that Graco had a non-disclosure agreement with Commette based on a provision in an employee handbook in this case. Graco, however, contends that its claim is not based on a provision in an employee handbook. Rather, Plaintiffs allege that Commette breached a written "Non-Disclosure Agreement" that he entered into with Graco, dated May 16, 2006. Compl. PP **[*56]** 47, 95.

To state a claim for breach of contract, the plaintiff must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations. *Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)*. Graco, here, alleges: (1) it had a valid,

[9] PMC Defendants' arguments that goodwill was not part of the contract is a defense that will not be entertained by the Court on a motion to dismiss.

existing contract with Commette, *see* Compl. P 47; (2) Commette breached his obligations under that contract by disclosing Graco's and Gusmer's confidential information to Gama, *see Id.* P 82; and (3) that Graco had been damaged as a result of Commette's defective performance. *See Id.* P 96. Commette allegedly signed an agreement on May 16, 2006 that prohibits him from using or disclosing "Confidential Information of Graco Inc., Gusmer Corp., their subsidiaries or others to whom members of Graco/Gusmer owe an obligation of confidentiality, to any person not authorized to receive such Confidential Information" either "during [his] employment with Graco/Gusmer or after such employment is terminated." *Id.* P 47.

PMC Defendants do not argue that Plaintiffs fail to state a claim based on this Non-Disclosure Agreement. Rather, they complain that **[*57]** they did not receive fair notice of this claim because Graco did not attach a copy of the agreement to its Complaint or Opposition. Citing *Adamson v. Ortho-McNeil Pharm., Inc., 463 F. Supp. 2d 496, 500 (D.N.J. 2006)*, PMC Defendants argue that the Court need not credit Plaintiffs' conclusory allegations and bald assertions about this alleged contract, which Plaintiffs failed to attach. [10] PMC Defendants inappropriately cite to *Adamson.* In that case, this Court found that if documents relied on in the complaint are attached, the Court may review them. Indeed, this Court did not require the plaintiff to attach proofs for all its allegations, which Defendants contend is necessary here. Graco correctly argues that it was not required to attach the Non-Disclosure Agreement to its Complaint. Pl. Opp. at 19 n. 5 (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig., 975 F. Supp. 584, 596 (D.N.J. 1996)* ("failure to attach specific documents to which the complaint refers, or to quote from them verbatim, [was not] fatal to their claims")). Plaintiffs have alleged sufficient facts to raise a reasonable expectation that discovery will reveal evidence of the nondisclosure agreement. *See* ***[*58]*** *Phillips, 515 F.3d at 234* (citing *Twombly, 127 S.Ct. at 1965*). Accordingly, the Court denies Defendants' request to dismiss this claim. [11]

5. Count Three: Duty of Loyalty Claim

Defendants move to dismiss Plaintiffs' duty of loyalty claim against Commette **[*60]** pursuant to *Rule 12(b)(6)* on the ground that Graco failed to allege any misconduct by Commette during his employment. PMC Defendants point out that according to Graco's own allegations, Commette, a former Graco employee, began doing business with Gama "after [his] employment and consulting relationships with [Plaintiffs] ended." Compl. PP 50, 53. Defendants claim that all of Commette and Royo's alleged misconduct and breach of duty of loyalty occurred after they were fired by Graco and such post-employment conduct cannot support Graco's claim.

---

[10] Defendants also claim that the Court is not "constrained to accept the allegations of the complaint in respect of the construction of the Agreement." *Int. Audiotext Network, Inc. v. AT&T Co., 62 F.3d 69, 72 (2d Cir. 1995)*. Plaintiffs correctly argue, however, that *Int. Audiotext Network* holds only that a court has the ability to review a document mentioned in -- but not attached to -- the complaint, without converting the motion to dismiss into a summary judgment action. *Id.*

[11] Because the Court does not dismiss this claim, PMC Defendants request a more definite statement pursuant to *Rule 12(e)*. PMC Defendants claim that the documents Plaintiffs expressly rely on are integral to their claims, and without these documents, Plaintiffs' allegations are too vague and ambiguous for Commette and other PMC Defendants to respond. Defendants request that Plaintiffs clearly state which contracts are valid or in effect, which contracts have been superseded or void, and which contracts it is seeking to enforce because in their Complaint, Plaintiffs allege that **[*59]** there were contracts with Commette and Royo from 2003 and 2004, and a subsequent contract with Commette in 2006. PMC Dfs. Mot. at 9; Compl. PP 26, 47. In their Opposition, Plaintiffs make clear that their claim against Commette for breach of his nondisclosure agreement is based on the May 16, 2006 Non-Disclosure Agreement. *See* Pl. Opp. at 18.

The Court denies PMC Defendants' request at this time because these records can be provided in discovery. "It is not the function of *12(e)* to provide greater particularization of information alleged in the complaint or which presents a proper subject for discovery. The basis for granting such a motion is unintelligibility, not lack of detail." *MK Strategies, LLC v. Ann Taylor Stores Corp., 567 F. Supp. 2d 729, 737 (D.N.J. 2008)* (internal citations and quotations omitted). In this case, Graco sufficiently alleges a claim of breach of a non-disclosure agreement and its allegations are not so vague, ambiguous or unintelligible that PMC Defendants cannot respond in good faith. Accordingly, Defendants' request pursuant to *Rule 12(e)* is denied.

The duty of loyalty owed by "an employee to an employer consists of certain very basic and common sense obligations. An employee must not *while employed* act contrary to the employer's interest." *Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 302, 770 A.2d 1158 (2001)* (citations omitted) (emphasis added). Specifically, during the period of employment, an employee has a duty not to compete with his employer. *Id.* (citations omitted). "[A]n employer may prove a *prima facie* case of an employee's breach of the duty of loyalty not only by showing that the employee directly competed with the employer while employed, but also by showing that the employee while employed **[*61]** assisted the employer's competitor." *Id.* (citations omitted). In addition, an employee who takes legally protected information from his employer to seek a competitive advantage upon resignation also breaches his duty of loyalty. *Id. at 304*. However, "later competition with a current employer may eventually prove harmful to the former employer. That sort of harm is not actionable; it is called free enterprise." *Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 645, 691 A.2d 876 (App. Div. 1997)* (internal quotations and citations omitted).

Graco contends that it sufficiently alleges that Commette breached his duty of loyalty based on its allegations that Commette had an undisclosed arrangement with PMC Global regarding the disposition of unsold inventory "that was contrary to Graco's interests during the time he was employed by, and providing consulting services to Plaintiff Graco . . .". Compl. P 99. Plaintiffs, however, do not allege in their Complaint that Commette had this undisclosed arrangement with PMC Global *while he was employed* with Graco. [12] In addition, Plaintiffs do not dispute Defendants' assertions that Graco fired Commette nor does Graco accuse Commette of taking legally **[*62]** protected information from Graco while an employee of Graco for the purpose of seeking a competitive advantage upon resignation or even in anticipation of his termination by Graco. *See Lamorte Burns, 167 N.J. at 304*.

Graco also argues that Commette gained access to trade secret information while employed at Graco that he "inevitably has or will have to disclose." Compl. PP 44, 63-64. This allegation alone, however, is not actionable and insufficient to establish a *prima facie* claim of an employer's breach of duty of loyalty, since Plaintiffs have not alleged that Commette took such protected information for the purposes of seeking a competitive edge upon his leaving Graco's employ. *See Lamorte Burns, 167 N.J. at 303*; *Subcarrier, 299 N.J. Super. at 645*. Because Plaintiffs have failed to allege sufficient facts that Commette breached his duty of loyalty because either he directly competed with his employer or he assisted the employer's competitor *while employed* by Graco or that he took trade secrets from Graco in order to seek a competitive advantage upon his separation from Graco, the Court grants Defendants' Motion to dismiss with respect to this claim without prejudice.

6. Count Four: Tortious Interference

Defendants argue that Graco has failed to state a claim based on tortious interference with a prospective **[*64]** economic advantage [13] because Graco does not allege that Defendants interfered with any of Graco's customers, solicited any of its current customers, or that Graco suffered a loss. PMC Dfs. Mot. at 13-14.

---

[12] Graco asserts that after Commette's employment with it ended in March 2007, Commette visited Gusmer's Lakewood, New Jersey facility and asked a Graco employee about the status of the inventory of Gusmer's "Mighty Mite" products, which Graco had acquired from PMC Global. *Id.* P 50. PMC Global and Graco allegedly had an agreement in which PMC Global was to reimburse Graco for any inventory not sold in three years. *Id.* P 51. Commette allegedly told a Graco employee that he was interested in the status of this inventory because PMC Global owed him compensation for it. *Id.* P 52. Graco asserts that any agreement by Commette to sell the Mighty-Mite inventory was 'contrary to the interests of Graco.'" Pl. Opp. at 20-21 (quoting Compl. P 99). Plaintiffs do not allege that Commette actually had an agreement with anyone during his employment with Graco nor that he intended to purchase this inventory while he was employed. Rather its allegations that Commette was acting as a speculator **[*63]** for this inventory in March 2007 was well after he stopped working for Graco on October 20, 2006.

[13] Graco argues that PMC Defendants do not dispute its tortious interference with contract claim, specifically, Commette's alleged non-disclosure agreement, and therefore it should be deemed admitted. Pl. Opp. at 21 n. 6. Thereafter, however, in their Reply, PMC Defendants clearly dispute the sufficiency of the allegations for this claim. They do not request dismissal of this claim on its own. Rather they dispute that Graco sufficiently pled the existence of the underlying agreement with which they allegedly interfered. PMC Dfs. Reply at 8 n. 3.

New Jersey recognizes tortious interference with a prospective economic advantage as separate and distinct from tortious interference with an existing contract. *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-52, 563 A.2d 31 (1989)*. To prevail on a claim for tortious interference with a prospective economic advantage, a plaintiff must demonstrate (1) that it had a reasonable expectation of an economic advantage; (2) that was lost as a direct result of Defendants' malicious interference; and (3) that it suffered losses thereby. *See Pinnacle Choice, Inc. v. Silverstein, No. 07-1379, 2007 U.S. Dist. LEXIS 55291, 2007 WL 2212861, at *3 (D.N.J. July 31, 2007)* (citing *Lamorte Burns, 167 N.J. at 305-06*). "When a business targets its competitor's customers, it exercises a valid business judgment and that alone does not constitute tortious interference with prospective economic advantage." *Foxtons, Inc. v. Cirri Germain Realty, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7 (App. Div. 2008)* (internal quotations and citations omitted). A plaintiff must set forth facts surrounding Defendants' intentional conduct that goes beyond healthy competition. *Id.* Interference must be done intentionally and **[*66]** with malice, such that the harm was inflicted intentionally and without justification or excuse. *Id.*

Plaintiffs allege that Graco had a "reasonable expectation of economic advantage derived from the tangible and intangible assets of the Gusmer businesses that [they] purchased from Defendant PMC and its Affiliated Entities", Compl. P 108, including their customer relationships, intellectual property, proprietary technology, trademarks, and trade names. *Id.* P 41. Graco alleges that "Defendants' conduct, practices, and activities have intentionally and unjustifiably interfered with the reasonable expectation of advantage [Graco] derived from the[se] tangible and intangible assets . . . ." *Id.* P 109. Graco further alleges that it would have received the benefit of these assets if Defendants had not engaged in the conduct described throughout the Complaint, *Id.* P 110, and that it suffered injuries as a result. *Id.* P 111.

Defendants do not dispute that Plaintiffs had a reasonable expectation of economic advantage. Garraf, however, unpersuasively argues that the allegations of interference with a prospective economic advantage are only against Commette and Royo, and not Garraf, *see* Garraf Mot. **[*67]** at 7, and thus, this claim against them should be dismissed. Taking the allegations as a whole, Plaintiffs do allege that Garraf, either individually or acting in concert with PMC Defendants, intentionally interfered with its reasonable expectation of advantage. *See, e.g.,* Compl. P 109. PMC Defendants, citing to *Foxtons,* dispute that Plaintiffs sufficiently allege that Defendants intentionally interfered with or solicited any of Graco's current customers. Rather, PMC Defendants argue that Graco's allegation that they solicited business from customers in the trade is insufficient to plead the intentional or malice element of the claim. *Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7*. However, because Plaintiffs' claim that Defendants solicited Graco customers by casting doubt on the origin of Graco-Gusmer products, Compl. PP 84-85, Plaintiffs allege sufficient facts surrounding Defendants' conduct that demonstrate intentional interference with an economic advantage. *See Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7*.

In addition, Plaintiffs assert that they "need not allege specific lost business opportunities in support of [their] tortious interference claim." *D&D Assocs. Inc. v. Bd. of Ed. Of N. Plainfield, No. 03-1026, 2007 U.S. Dist. LEXIS 93867, 2007 WL 4554208, at *22 n. 15 (D.N.J. Dec. 21, 2007)* **[*68]** (citing *Floorgraphics, Inc. v. News Am. Marketing In-Store Servs., Inc., No. 04-3500, 2006 U.S. Dist. LEXIS 70834, 2006 WL 2836268, at *6 (D.N.J. Sept. 29, 2006))*. Rather, Plaintiffs claim that they "adequately alleged that [the unlawful conduct] caused consumers, distributors and other customers to stop purchasing its products." *Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1279 (10th Cir. 2000)* (citing *Cook v. Winfrey, 141 F.3d 322, 327-28 (7th Cir. 1998))*. Plaintiffs claim that their general factual allegations regarding causation, which state the injury resulting from Defendant's conduct, are sufficient pursuant to *Rule 8*, and Defendants seek to impose a heightened pleading standard that is not required here. Pl. Opp. at 23. [14] Moreover, they argue that they have adequately alleged Defendants' efforts to divert

---

On the other hand, Garraf outrightly disputes that Plaintiffs have sufficiently pled a claim for tortious interference with a contract. Garraf Mot. at 7-8. However, Garraf contends that Plaintiffs do not address why this claim should be dismissed with respect to Garraf. *See* Garraf Reply at 8 n. 3. The Court will address the sufficiency of Plaintiffs' tortious interference claims, with respect to both a contractual relationship and prospective **[*65]** economic advantage, as to all Defendants.

[14] The Court notes that the Third Circuit has rejected a heightened evidentiary requirement for tortious interference claims, and it follows that there would be no heightened pleading standard for such claims. *See* ***Fineman, 980 F.2d at 186-87***.

business from Graco to "Gama" by interfering with Graco's then-existing customers or distributors. Compl. PP 67, 69.

Plaintiffs argue that they have sufficiently **[*69]** pled that Defendants' misconduct has interfered with specific prospective economic opportunities, *see Id.* PP 108-110, including the opportunity to sell replacement parts or new equipment to former Gusmer (now Graco) customers whose trade had been solicited and obtained by Defendants. *Id.* PP 65, 80-82. Plaintiffs state that they would have realized their reasonable expectation of economic benefit absent Defendant's conduct, and argue that they are not further required to identify and allege lost sales or damages more specifically. Pl. Opp. at 24. Defendants maintain that Plaintiff has not alleged any actual losses, as required for a tortious interference claim. *See Matrix Essentials, Inc. v. Cosmetic Gallery, Inc., 870 F. Supp. 1237, 1249 (D.N.J. 1994)*. Defendants assert that Graco has not alleged that any of its current customers stopped doing business with it or that there were any lost sales as a consequence of Gama's alleged misconduct. However, even in *Matrix,* the case cited by Defendants, the court noted that Plaintiffs must allege that the injury caused damages to plead a claim for tortious interference; Plaintiffs need not specify what the actual damages were at this stage of **[*70]** litigation. *Id.* While Plaintiffs will have to prove damages to succeed on this claim, they have sufficiently alleged that Defendants' actions injured them, causing damages here. Therefore, Graco has sufficiently plead the elements of a claim of tortious interference with a prospective economic advantage, including that it had reasonable expectation of economic benefit that was lost as a direct result of Defendants' malicious interference and damages.

Plaintiffs also allege that Defendants engaged in tortious interference with a contract, specifically, Commette's Non-Disclosure Agreement. Compl. PP 102-104. To sufficiently pled a claim of tortious interference with a contract, Plaintiffs must allege the same elements as a claim for tortious interference with a prospective business advantage plus the additional element of a contract. *Med Alert Ambulance, Inc. v. Atlantic Health System, Inc., 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335, at *14 (D.N.J. 2007)*. A tortious interference with contract claim cannot be directed at a person or entity that is a party to the contract. *See Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 173 (3d Cir. 2001)*.

PMC Defendants argue, taking as true all factual allegations in **[*71]** Plaintiffs' Complaint, Graco has failed to allege tortious interference with a contract. Rather, they argue that "Graco asserts only that Gama and Commette solicited business from customers 'in the trade' who previously had done business with Gusmer three years earlier, 'at the time Plaintiff Graco acquired Gusmer.'" PMC Reply at 8; Pl. Opp. at 23. Plaintiffs, however, do allege that Defendants PMC Global, PMC Europe, PMC, Gama, and Garraf are intentionally and unjustifiably interfering with Commette's non-disclosure agreement. Compl. P 102. The Court has already determined that Plaintiffs have sufficiently pled a non-disclosure agreement existed. *See* Part III.A.4., *supra.* Because the Court has determined herein that Plaintiffs adequately pled a claim for tortious interference with a prospective economic advantage and the additional element of Commette's non-disclosure agreement, Plaintiffs have sufficiently pled a tortious interference with a contract claim. Accordingly, Defendants' request to dismiss Plaintiffs' tortious interference claims are denied.

7. Count Five: Misappropriation of Trade Secrets & Misuse of Confidential Business Information

Pursuant to *Rule 12(b)(6)*, Defendants **[*72]** move to dismiss Plaintiffs' trade secret claims because Graco has not alleged the existence of actual trade secrets or that Defendants used such secrets to Graco's detriment. PMC Dfs. Mot. at 12-13; Garraf Mot. at 2-3.

"A trade secret claim in the federal courts is governed not by federal common law but by state law." *Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424, 429 (3d Cir. 1982)*. "To prevail in New Jersey upon a claim for misappropriation of a trade secret, a trade secret owner must establish that: (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret." *Rycoline Prods., Inc. v. Walsh, 334 N.J. Super. 62, 71, 756 A.2d 1047 (App. Div. 2000)* (citing *Rohm, 689 F.2d at 429-30*; *Stone v. Goss, 65 N.J. Eq. 756, 759-60, 55 A. 736 (E. & A. 1903))*.

Significantly, information **[*73]** need not rise to the level of a trade secret to be protected. *See* *Lamorte Burns, 167 N.J. at 299*. Rather, the Supreme Court of New Jersey has held that, to be legally protected, the information may even be otherwise publicly available because it is the relationship of the parties at the time of disclosure and the intended use of the information that controls whether there has been a misuse of confidential business information. *See* *Id. at 299-301* ("specific information provided to defendants by their employer, in the course of employment, and for the sole purpose of servicing plaintiff's customers, is legally protectable as confidential and proprietary information").

Plaintiffs allege that when selling Gusmer, Defendants PMC Global and PMC Europe expressly transferred Gusmer trade secrets and confidential business information to Graco and represented to Graco that they had taken steps to protect these trade secrets, Compl. PP 34-36, including requiring employees to sign confidentiality agreements. *Id.* PP 37-39. The parties allegedly allocated over $ 4 million to the transfer of Gusmer "proprietary technology." *Id.* P 41. After the sale, former Gusmer employees, including Commette, joined **[*74]** Graco and had access to Graco's own trade secrets, and confidential business and technical information. *Id.* PP 43-44. Plaintiffs allege that Gama and Garraf have improperly accessed and are now using the Graco and/or Gusmer trade secrets and confidential business information to to manufacture, market and sell spare parts for Gusmer equipment and new equipment to solicit former Gusmer customers and others. *Id.* PP 58-62, 65-71, 75-79. Thus, Plaintiffs argue, they have sufficiently stated cognizable claims for misappropriation of trade secrets and misuse of confidential business information.

Garraf argues that "Graco fails to allege any facts supporting their claim that any trade secrets were ever taken, used or disclosed by Garraf." Garraf Reply at 6. [15] Rather Garraf states that Graco's allegations are conclusory and nonsensical. Moreover, Garraf complains that Graco fails to allege that "any defendant actually took any corporate material or data," and that Plaintiffs' allegation that Defendants had access to and then used Graco Trade Secrets and Confidential Business Information to manufacture spare parts for Gusmer's products is insufficient. The Court disagrees. [16]

Garraf contends that Plaintiffs rely on the "inevitable disclosure" theory because Garraf was "founded by a group of former Gusmer employees (none of whom are Royo), most of whom have over 20 years of experience in the industry and were dismissed by Graco shortly after the acquisition," and that Graco does not allege any facts to show why these people could not make and sell products using their own and public information. Garraf Mot. at 6. But "[u]nder the inevitable disclosure doctrine, a former employer is entitled to enjoin even *anticipated* employment

---

[15] Garraf disputes **[*75]** Graco's assertion that Royo, former Gusmer employee, co-founded Gama. Further Garraf asserts the PMC Defendants' statement to that effect in their brief, PMC Dfs. Mot. at 2, is inaccurate and is not binding on it. *See* Garraf Reply at 2 n. 1.

Garraf also contends that Graco's claim that Royo and Commette's attendance at trade shows was improper does not support Graco's claims against them. Garraf Reply at 6 n. 2; Compl. PP 61-62, 66-71.

[16] Citing *Sun Dial Corp. v. Rideout, 25 N.J. Super. 591, 598, 96 A.2d 788 (N.J. Super. Ch. 1953)*, *rev'd,* *29 N.J. Super. 361, 365, 102 A.2d 90 (App. Div. 1954)*, *aff'd,* *16 N.J. 252, 108 A.2d 442 (1954)*, Garraf argues that the "knowledge and skill which is obtained through experience is not a trade secret, that sound public policy favors employees bettering themselves, and that employees may carry away and use the skill acquired during the course of an employment either in business for themselves or in the service of other employers." Plaintiffs, however, contend that its "desire to protect its trade secrets and confidential information is not an attempt to hold its former employees 'hostage' because they are 'cursed' with the skill and knowledge of being competent at their chosen profession." Pl. **[*76]** Opp. at 28 (quoting Garraf Mot. at 6). Rather, Graco's claims against Commette (and other employees working for Defendants) are based on more than disclosure of "mere skill and knowledge of the trade generally, but technical and business trade secrets imparted to them in confidence," which Defendants are obliged to honor. Pl. Opp. at 28-29 (citing *Sun Dial Corp., 16 N.J. at 260-61*). Because these arguments go beyond sufficiency of the pleadings and are not appropriately addressed on a motion to dismiss, the Court will not consider them here.

or other business activity that would result in inevitable disclosure in order to protect the **[*77]** former employer's confidential and proprietary information from disclosure." *Orthovita, Inc. v. Erbe, No. 07-2395, 2008 U.S. Dist. LEXIS 11088, 2008 WL 423446, at *10 (E.D. Pa. Feb. 14, 2008)* (emphasis in original). Graco argues that it has gone further and is not bringing this action to prevent a "mere plan," but to enjoin Defendants' previous actions and actual disclosures evidenced by "Defendants' ongoing solicitation of its customers and the marketing, production and sale of spare parts for its products," including the use of Graco's pricing information. Pl. Opp. at 29-30. [17]

First, PMC Defendants argue that any alleged use of Graco's trade secrets by incorporating features claimed in one of Graco's patent applications are matters of public record, and thus, defeat Graco's claim to trade secrets. *See On-Line Techs., Inc. v. Bodenseewerk Perkin-Elmer GmbH, 386 F.3d 1133, 1141 (Fed. Cir. 2004)* ("information that is disclosed in a patent or contained in published materials reasonably accessible to competitors does not qualify for protection (as a trade secret)") (internal quotation marks and citations omitted); Compl. PP 75-79. Second, PMC Defendants argue that the two-year-old customer and distributor information that had been publicly disclosed by Graco cannot be considered secret. PMC Dfs. Mot. at 13. Third, PMC Defendants argue that Commette's use of his own knowledge with his new employer, Gama, is not a misappropriation of trade secrets because "[t]o catalogue the employee's own knowledge of his employer's [costs and profit margins] . . . as a 'trade secret' or 'confidential information' and thus perpetually enjoin the employee from thereafter honestly soliciting business . . . [is] an unreasonable restraint **[*79]** on trade unsupported by any dominant social or economic justification." *Abalene Exterminating Co. v. Egles,* 36 Backes 1, 3 (N.J. Ch. 1945). Therefore, PMC Defendants assert that "Graco has not alleged any other misuse of any other trade secret." PMC Dfs. Reply at 7.

Graco, however, asserts that its trade secret claims are based on the "confidential, nonpublic, propriety information regarding customers, sales reports, strategic marketing plans, product information and designs, pricing information, customer discounts and rebates, profit margins, financial reports and data, sales programs, and product engineering and design plans." Pl. Opp. at 17; Compl. P 44. [18] Garraf argues that Plaintiffs' "litany is wholly insufficient under *Twombly* and *Phillips* to provide fair notice to Garraf of what the purported trade secrets it is accused of misappropriating are." Garraf Reply at 4. However, other courts in this circuit have previously found that a "plaintiff alleging misappropriation of trade secrets need not plead the details of its trade secrets in a publicly filed complaint, inasmuch as such disclosure would destroy the essential 'secrecy' of the claimed trade secret." *Orthovita, 2008 U.S. Dist. LEXIS 11088, 2008 WL 423446, at *9*. **[*80]** Because Plaintiffs have met the "minimal standard" required for pleading misappropriation of trade secrets and misuse of confidential business information here, the Court denies Defendants' request to dismiss these claims. *See Oswell v. Morgan Stanley Dean Witter & Co., Inc., No. 06-5814, 2007 U.S. Dist. LEXIS 44315, 2007 WL 1756-027, at *7 (D.N.J. June 18, 2007)* (stating that the defendant will have the opportunity to argue that "no genuine issue of material fact exists regarding whether the information was publicly known or readily available and therefore not protectible as a trade secret" at the summary judgment phase, *Id.* n. 7). [19]

---

[17] Plaintiffs contend that despite Garraf's suggestion that a preliminary injunction may not be available to Plaintiffs because they did not move for such relief at the outset of the case, *see* Garraf Mot. at 3, this should not be addressed at this time because it is not currently moving for that relief. *See* Pl. Opp. at 29-30. The Court agrees and will not address this issue at this time.

Further, Garraf discusses the relief available when relying on the inevitable disclosure doctrine. *See* Garraf Reply at 7. In this case, Graco does not assert or plead reliance on a theory of inevitable discovery to satisfy its pleading requirement, *see* Pl. **[*78]** Opp. at 29, and thus, such a discussion is unnecessary.

[18] Graco states that despite Defendants' allegations, it does not claim that the price of steel, *see* Garraf Mot. at 5, the pending patent on the Hybrid Heater, *see Id.* at 3-4; PMC Dfs. Mot. at 12, or customer information posted on the Internet, *see* PMC Dfs. Mot. at 13, are trade secrets or the bases of Plaintiffs' trade secret claim. Pl. Opp. at 27.

[19] Moreover, at least one court in this District has held that "[i]n appropriate circumstances, information on pricing, discounts and other relevant customer data may enable an agent to take unfair advantage of its principal and therefore **[*81]** constitute protectible trade secrets." *See Apollo Techs. Corp. v. Centrosphere Indus. Corp., 805 F. Supp. 1157, 1204 (D.N.J. 1992)* (internal citations omitted). In addition, in *Global Transp. Logistics, Inc. v. Dov Transp.,* the court denied summary judgment where the facts were "hotly controverted" and the plaintiff claimed that its "pricing, customer preferences, customer contacts,

8. Counts Six-Eight: Violations of the Lanham Act, the New Jersey Fair Trade Act, and New Jersey's Prohibition Against Unfair Competition

In its Opposition, Graco appears to argue that in Count Six of its Complaint it sufficiently alleges two claims against Defendants under the Lanham Act, specifically false advertising under *15 U.S.C. § 1125(a)(1)(B)* and false designations of origin under *15 U.S.C. § 1125(a)(1)(A)*. [20] Plaintiffs assert that Defendants' conduct violates the Lanham Act's prohibition of unfair competition by way of false advertisements, false designation of origin, and misleading representations or descriptions of fact in an effort **[*82]** to unlawfully capitalize on Gusmer's reputation for which Plaintiffs paid millions of dollars for exclusive ownership and control. Further, Plaintiffs argue that they have sufficiently plead that Defendants' misrepresentations and other unfair acts violate the New Jersey Fair Trade Act and amount to unfair competition in Counts Seven and Eight, respectively.

Defendants move to dismiss all three of these counts on the grounds that Plaintiffs have failed to allege sufficient facts to support any of these claims. PMC Defendants argue Graco's pleading with respect to these three Counts, which PMC Defendants group together as Graco's "unfair competition claims," is insufficient because Graco fails to allege that Defendants used Graco's marks or otherwise suggested an affiliation sufficient to create a likelihood of consumer confusion. PMC Dfs. Mot. at 14-15. Garraf contends that **[*83]** an intermediate standard of pleading is required for Plaintiffs' Lanham Act claims and Plaintiffs' "unidentified statements" are inadequate to meet the requisite specificity. [21] Garraf Reply at 11-13.

a. False Advertising Claims

To state a claim for false advertising under *§ 1125(a)(1)(B)*, a plaintiff must allege that: (1) the defendant made false or misleading statements about the nature, characteristics, qualities, geographic origins of his or another's goods, services, or commercial activities in commercial advertising or promotion; (2) there is actual deception or a tendency to deceive a substantial portion of the intended audience; (3) the deception is material in that it is likely to influence purchasing decisions; (4) the advertised goods traveled in interstate commerce; and (5) there **[*84]** is a likelihood of injury to the plaintiff. *15 U.S.C. § 1125(a)(1)(B)*; *United States Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922-23 (3d Cir. 1990)*.

Garraf argues that the Court should apply an "intermediate" standard of pleading for Plaintiffs' Lanham Act claims because they require more specificity than the traditional notice pleading under *Rule 8*. *See* *Fed. R. Civ. P. 8(a)*; Garraf Reply at 11-13. Some district courts in the Third Circuit have recognized that pleading false advertising under the Lanham Act requires an intermediate pleading standard, which strikes a balance "between application and outright rejection of *Rule 9(b)*." *See* *Wellness Publ'g v. Barefoot, No. 02-3773, 2008 U.S. Dist. LEXIS 1514, 2008 WL 108889, at *15 (D.N.J. Jan. 8, 2008)* (quoting *EVCO Tech. & Dev. Co., LLC v. Buck Knives, Inc., No. 05-6198, 2006 U.S. Dist. LEXIS 68549, 2006 WL 2773421, at *15 (E.D. Pa. Sept. 22, 2006))*; *see also* *Trans USA Products, Inc. v. Howard Berger Co., No. 07-5924, 2008 U.S. Dist. LEXIS 25370, 2008 WL 852324, at *5 (D.N.J. Mar. 28, 2008)*. In *Max Daetwyler Corp. v. Input Graphics, Inc., 608 F. Supp. 1549 (E.D. Pa. 1985)*, where this intermediate approach was first applied, the court required more particularity than traditional notice pleading **[*85]** under *Rule 8*, but something less than the specificity required under *Rule 9*, because the claim involved the

---

profit margin, vendors and 'methods of operation' [we]re proprietary and confidential." No. BER-C-79-05, 2005 WL 1017602, at *1-5 (N.J. Super. Ct. Apr. 5, 2005).

[20] Problematically, Plaintiffs do not clearly allege pursuant to which provisions of the Lanham Act they are suing citing generally to *15 U.S.C. § 1125(a)(1)*. *See* Compl. PP 118-123. The Court looks to its Opposition for clarity, but relies on Plaintiffs' Complaint to determine the sufficiency of Graco's allegations.

[21] Garraf states that it does not analyze Plaintiffs' claims under the New Jersey Fair Trade Act and common law unfair competition separately because under New Jersey law the pleading requirements for these claims are the same as the analysis for unfair competition under the Lanham Act. *See* Garraf Mot. at 8 n. 3 (citing *Primepoint, L.L.C. v. PrimePay, Inc., 545 F. Supp. 2d 426, 431-32 (D.N.J. 2008))*.

making of false statements even though it was not a "pure 'fraud' claim." *Max Daetwyler, 608 F. Supp. at 1556*. "In litigation in which one party is charged with making false statements, it is important that the party charged be provided with sufficiently detailed allegations regarding the nature of the alleged falsehoods to allow him to make a proper defense." *Id.* The Court finds that this intermediate standard should be applied in this case, where Plaintiffs charge Defendants with making false statements about Defendants' products; Plaintiffs meet this requirement.

Plaintiffs argue that they have sufficiently plead a claim under *Rule 8(a)* [22] that Gama and Garraf are making false or misleading representations when marketing their products to customers because they are "marketing their products to customers in a manner that is intended to lead customers to believe that Defendants Gama and Garraf are the successors to Gusmer or that they are the real Gusmer." Compl. P 84. Plaintiffs allege that Commette, as an agent for and in concert with other Defendants, is erroneously "informing **[*86]** customers that Plaintiff Graco did not purchase Gusmer Europe." *Id.* P 85. [23] Plaintiffs allege that these statements are "likely [or intended] to cause confusion or mistake or to deceive" and "have influenced and [are] likely to continue to influence customers' purchasing decisions." *Id.* PP 84-86, 119-120. Further, Plaintiffs allege that the products have traveled in interstate commerce, *Id.* P 121, and that there is a likelihood of injury to the Gusmer goodwill that it purchased and damages from the name's dilution. *Id.* PP 33, 41, 122.

Taking Plaintiffs' allegations as a whole, they do identify Defendants' allegedly false statements **[*88]** with enough specificity to satisfy even the intermediate pleading requirement. Compl. PP 84-85. Similarly, even though Garraf argues that Plaintiffs only allege that the statements were "intended" to deceive, not that the supposed misstatements actually caused any deception or there was a tendency to deceive, the Court disagrees. *See Id.* PP 84-86, 119-120. Rather, Plaintiffs identify the allegedly false and misleading statements Defendants made and plead that customers were deceived. However, the Court will grant Graco leave to amend its Complaint to state clearly which provisions of the Lanham Act Defendants allegedly violated. *See* n. 20, *supra.* Accordingly, the Court denies Defendants' motion to dismiss with respect to Plaintiffs' false advertising claim.

b. Claims of False Designations of Origin

Plaintiffs also claim that Defendants' marketing statements amount to false and misleading designations of origin and affiliation and false descriptions of fact under the Lanham Act. *15 U.S.C. § 1125(a)(1)(A)*. PMC Defendants move to dismiss these claims, pursuant to *Rule 12(b)(6)*, for the same reasons they move to dismiss Plaintiffs' false advertising claims. Garraf argues that these claims **[*89]** are based on the same unidentified statements as Plaintiffs' claims of false advertising and Plaintiffs' allegations here merely recite the language of the elements in the statute, which are "wholly insufficient to provide Garraf with sufficiently detailed allegations regarding the nature of the alleged falsehoods to allow it to make a proper defense." Garraf Reply at 13-14.

---

[22] Plaintiffs argue that the Honorable Joel A. Pisano, U.S.D.J., in *Wellness* and *Trans USA* incorrectly required an intermediate standard for allegations of false statements under the Lanham Act and, for support, cites to district court cases outside of the Third Circuit. Pl. Opp. 36-38. Plaintiffs also contend that Garraf cites to "unreported decisions [that] are at odds with contemporaneous published opinions [from district courts in other circuits] that categorically reject the suggestion that Lanham Act claims must contain more detail than would be required by *Fed. R. Civ. P. 8(a)*." Pl. Opp. at 36-37. This distinction, however, is irrelevant. None of **[*87]** these decisions, cited by Plaintiffs or Defendants, are binding on this Court. Thus, in conducting its own analysis, the Court finds the decisions in the district courts within the Third Circuit, which are post-Twombly, are persuasive, and the Court applies an intermediate pleading standard here.

[23] Plaintiffs argue that a liberal interpretation of the "commercial advertising or promotion" requirement applies under *Rule 12(b)(6)*, and therefore, their pleadings regarding Defendants' concerted, intentional, and false marketing communications is sufficient "advertising." Pl. Opp. at 32-33 & n. 9 (citing to cases which found that even a single promotional statement suffices as an advertisement for purposes of the Lanham Act). The crux of Defendants' argument, however, is not that Plaintiffs have insufficiently plead an advertisement, but that Plaintiffs fail to sufficiently allege that any false or misleading statements were ever made by Defendants. And even if there were such statements, there are no allegations that they caused deception or had a tendency to deceive. *See, e.g.,* Garraf Reply at 13.

To prevail on such a claim, a plaintiff must prove that: (1) the defendant uses a false designation of origin, false or misleading description of fact, or false or misleading representation; (2) such improper use occurs in interstate commerce in connection with goods and services; (3) such improper use is likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval of defendant's goods or services by another person; and (4) that plaintiff has been or is likely to be damaged. *15 U.S.C. § 1125(a)(1)(A)*.

In arguing that it has adequately alleged that Defendants misrepresented the origin of Gama's products to consumers and created the likelihood that consumers will be confused about the origin of Gama's products, Graco cites to the same statements it offers to support its false advertising **[*90]** claim. *See* Part III.A.8.a., *supra.* Plaintiffs allege that Defendants' misleading statements also constitute false or misleading statements of fact made in conjunction with efforts to sell Garraf and Gama's products in interstate commerce. Compl. P 121. Plaintiffs argue that a false designation of origin claim is properly stated where a competitor seeks to "instill the impression that its line is the same as, or a continuation of the [Plaintiffs'] line." *777388 Ontario Ltd. v. Lencore Acoustics Corp., 105 F. Supp. 2d 56, 63 (E.D.N.Y. 2000)*. Finally, Plaintiffs contend that they have suffered damages because they are losing control of "the Gusmer name" and the associated goodwill that they purchased. *Id.* PP 33, 41, 122.

Thus, much like Plaintiffs' false advertising claim, Plaintiffs set forth adequate facts to show a reasonable expectation that discovery will reveal evidence that Graco uses a false designation of origin, false or misleading description of fact, or false or misleading representation. Although Gama's allegations that Graco made false or misleading statements of fact are adequately plead, the specific provisions of the Lanham Act upon which Plaintiffs are suing are not and **[*91]** the Court directs Graco to amend its Complaint with respect to this allegation. *See* n. 20, *supra.* Accordingly, the Court denies Defendants' Motions to dismiss Plaintiffs' claims of false designations of origin.

c. Claims under the New Jersey Fair Trade Act and New Jersey's Prohibition on Unfair Competition

Plaintiffs allege that Defendants' violated the New Jersey Fair Trade Act and New Jersey common law of unfair competition. *See* *N.J.S.A. § 56:4-1*; *Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92, 775 A.2d 92 (App. Div. 2001)*. Graco argues that it has adequately plead these claims because it alleges that Defendants breached their duties of good faith and fair dealing, *see* Compl. PP 87-93, and engaged in false advertising and false designation of product origin. *Id.* PP 118-123.

PMC Defendants argue that their alleged actions do not amount to unfair competition and thus Plaintiffs do not sufficiently plead these claims. PMC Defendants argue that Royo's alleged use of "a product comparison sheet that focused exclusively on head-to-head comparisons between Plaintiff Graco's and Defendants Gama and Garraf's products," Compl. P 69, suggests no more than ordinary comparative advertising, **[*92]** which is not unfair competition. PMC Dfs. Mot. at 15. PMC Defendants also argue that Plaintiffs fail to allege any confusion, actual or likely. PMC Reply at 9. They argue that even if Commette told "customers that Plaintiff Graco did not purchase Gusmer Europe," Compl. P 85, it would "not have the reasonable likelihood of confusing sophisticated consumers concerning the 'affiliation, connection, and/or association of Gusmer with Defendants Gama and Garraf' or 'the origin, sponsorship, and/or approval of Defendants Gama and Garraf's products.' Compl. PP 119, 120, 125[-26]." PMC Dfs. Mot. at 15.

New Jersey's prohibition against unfair competition provides relief for a breach of the duty of good faith and fair dealing and violations of the Lanham Act. "A *prima facie* case of unfair competition . . . requires evidence of bad faith or malicious conduct." *Wellness, 2008 U.S. Dist. LEXIS 1514, 2008 WL 108889, at *20*. In *Versa Prods. Co., Inc. v. Bifold Co. (Mfg.) Ltd., 50 F.3d 189, 207 (3d Cir. 1995)*, the Third Circuit found that unfair competition exists where there is an effort to "deceive consumers as to the origin of one's goods and thereby trade off the good will of a prior producer." The test of unfair competition **[*93]** under New Jersey law is identical to the test for unfair competition under *§ 1125* of the Lanham Act. *See* *AT&T Co., 42 F.3d at 1433*. Therefore, because the Court already determined that Plaintiffs' claims, as alleged, are adequately plead for the purpose of this motion, the Court need not conduct a separate analysis here. *See* Part III.A.8.a. & b., *supra.* Accordingly, the Court denies Defendants' motion to dismiss these claims.

9. Count Nine: Unjust Enrichment

Defendants move to dismiss Plaintiffs' claim for unjust enrichment. PMC Defendants contend that Plaintiffs fail to state a claim because (1) unjust enrichment is not an independent tort and is only "quantum recovery for breach of a quasi-contact properly pled under New Jersey law" and (2) Plaintiffs do not allege any quasi-contract nor that Defendants have been unjustly enriched or received any illegitimate benefit. PMC Dfs. Mot. at 15-16. Garraf argues that Plaintiffs' claim for unjust enrichment is inadequately plead because Graco fails to allege "(i) any direct relationship between it and Garraf or (ii) that [Graco] conferred any benefit to, or reasonably expected any remuneration from Garraf." Garraf Mot. at 11. Plaintiffs allege **[*94]** that "Defendants have been unjustly enriched by reason of their foregoing breach of their contractual and legal obligations to Plaintiff Graco." Compl. P 134.

As a preliminary matter, this Court has previously held that an unjust enrichment claim may be sustained independently as an alternative theory of recovery. *Torres-Hernandez v. CVT Prepaid Solutions, Inc., No. 08-1057, 2008 U.S. Dist. LEXIS 105413, 2008 WL 5381227, at *9 (D.N.J. Dec. 17, 2008)* (citing *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 544 (D.N.J. 2004)* (finding defendant's motion to dismiss plaintiff's unjust enrichment claim as premature even where other remedies at law were available to plaintiff); *United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)* (allowing plaintiff to assert an unjust enrichment claim as an alternative theory of recovery when plaintiff had asserted a cognizable contract claim in the same complaint)). An unjust enrichment claim requires plaintiff to allege "(1) at plaintiff's expense (2) defendant received benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d at 544* (quoting *Restatement of Restitution 1* **[*95]** (1937)). Further, "[t]he unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994)*. While New Jersey law does not recognize unjust enrichment as an independent *tort* cause of action, it does sound in quasi-contract. *Cafaro v. HMC, No. 07-2793, 2008 U.S. Dist. LEXIS 71724, 2008 WL 4224801, at *12 (D.N.J. Sept. 8, 2008)* (finding that the plaintiffs' unjust enrichment claim should be dismissed because the allegations sounded in tort and not in quasi-contract). Thus, where Plaintiffs' unjust enrichment claim is based on a quasi-contractual or implied contractual relationship with the expectation of remuneration, the Court must determine whether the claim is adequately plead.

The doctrine of unjust enrichment is "typically invoked . . . when [the] plaintiff seeks to recover from [the] defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999)* (internal **[*96]** citations omitted). In such an instance, the law implies a quasi-contract and requires that the defendant compensate the plaintiff in quantum meruit for the value of the benefit conferred. *See* *Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987)*. "To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust . . . . [and the plaintiff] expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp., 135 N.J. at 554* (internal citations omitted).

Garraf argues that Graco fails to allege any direct relationship between the parties or that Garraf conferred any benefit to, or reasonably expected any remuneration from Garraf. Graco does not argue that it adequately plead these two elements. Rather, it says "[i]t would be inappropriate, or premature at best, to resolve this unjust enrichment claim against Garraf before Graco has had the benefit of discovery to fully understand and prove the relationship between Garraf, which manufactures **[*97]** and markets 'Gama' products, and its co-defendants." Pl. Opp. at 40 n. 11. By Graco's own admission, it fails to adequately plead this claim.

More fundamentally, however, Graco does not allege recovery for a benefit conferred under an unconsummated or void contract. Instead, Graco alleges Defendants, acting in active concert with one another, have been unjustly enriched as a result of their violations of the obligations they owe to Graco, after PMC Global and PMC Europe sold Gusmer and its intangible assets to Graco for $ 65 million. Compl. PP 28-29, 33, 134. Graco further alleges that

Defendants are now interfering with the previously sold assets by soliciting Gusmer's customers, retaining employees bound by non-disclosure and non-competition agreements with Gusmer, using Gusmer's intellectual property and proprietary information, while retaining the full $ 65 million purchase price, and thus, causing damage to Graco. *Id.* PP 7, 88, 135. The entire thrust of Graco's allegations is that Defendants, working in concert, are retaining or seeking to recapture the intangible assets that comprised a substantial portion of Gusmer's value. There is, therefore, no basis for applying a quasi-contractual **[*98]** remedy and Plaintiffs' claims for unjust enrichment cannot stand. Accordingly, the Court grants Defendants' request to dismiss Graco's unjust enrichment claim.

B. Plaintiffs' Motion to Dismiss Defendants Gama and Commette's Counterclaims

1. Antitrust Counterclaims

Defendants Gama and Commette (collectively Gama or "Counterclaimants") [24] plead violations of *Section 2* of the Sherman Act for monopolization (Count 1) or attempted monopolization (Count 2), based on allegations of "unlawful acquisition and maintenance of monopoly power in the [in-plant polyurethane processing equipment and materials ("IPPE")] market," through Graco's purported "unilateral[] refus[al] to deal with distributors that carry products from competing manufacturers." Counterclaim PP 42, 44. [25]

Graco moves to dismiss Gama's antitrust claims on the grounds that Counterclaimants do not have antitrust standing because Gama is only a distributor and not a participant, *i.e.* a competitor or consumer, in the market. Thus, Graco argues, since Gama does not directly compete against Graco in the relevant market, it cannot suffer injury of the type the antitrust laws were designed to prevent. [26] Graco also argues that Gama is neither an efficient nor proper enforcer of the antitrust laws.

Gama alleges that "Graco has a nearly 100% market share and no significant competitors" in the "distinct market for plural component pump and spray and in-plant polyurethane processing equipment market ('IPPE') materials

---

[24] As both parties refer to Commette and Gama as Gama on this motion, the Court does the same.

[25] Counterclaimants also allege conspiracy to monopolize the IPPE market, however, the Supreme Court has clearly held that under the Sherman Act, *15 U.S.C. § 1*, a parent company and its wholly owned subsidiary are incapable of conspiring with each other. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776-77, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In *Copperweld,* **[*99]** the Court determined that "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id. at 771*. As the parent and subsidiary always have a "unity of purpose or a common design," *Id.,* the Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. *Id. at 777*. Similarly, Counterclaimants fail to state a claim of conspiracy because Graco Inc. and its wholly-owned subsidiary Graco Minnesota cannot conspire with each other because they too have a unity of purpose or a common design. *See Id.*

Gama, however, argues that it did adequately plead a conspiracy claim under the Sherman Act because Graco's boycott conspiracy implicates both Graco and its top-tier American distributors who effectively became coerced coconspirators against Gama. *Otto, 388 F.2d at 797*. However, I find that Gama's allegations that "Graco and Graco Minnesota and/or others . . . conspired to monopolize the IPPE market" are too vague under *Twombly*. Counterclaim **[*100]** P 50. Because counterclaimants fail to allege with specificity that any other conspirator was involved, the Court dismisses Gama's claims of conspiracy to violate antitrust laws. Moreover, Gama lacks standing to bring its antitrust claims. *See* Part III.B.1., *infra.*

[26] Graco argues that as an agent of Gama, Commette's injury and standing are necessarily derivative of Gama's. Thus, if Gama lacks antitrust standing, then Commette also lacks standing. *See* *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987)* (denying a corporate officer of the plaintiff company challenging anticompetitive conduct standing); *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710-711 (11th Cir. 1984)*. **[*101]** Gama does not dispute this.

and equipment, with substantial technical barriers to entry". Counterclaim PP 12-13. Gama's counterclaims refer only to "IPPE;" however, according to Gama, IPPE encompasses the "plural component pump and stay and in-plant polyurethane processing equipment market in which Gama and Graco compete." Gama Opp. at 1 n. 2. Gama claims that it intends to amend its counterclaims to more clearly describe the pump and spray industry, but this change will be explanatory and not substantive. *See Id.* Gama, however, has not plead this definition at this time. The Court must consider Gama's allegations as plead. *Id.* Graco argues that due to this admission, Gama concedes that its pleading of market definition is insufficient, but asserts that even if Gama amended its Counterclaims, Gama would not have standing.

Gama alleges that Garraf, located in Spain, is the only company that makes competing products and that as Garraf's sole manufacturer's representative **[*102]** and exclusive distributor in the United States, Gama is the only link in commerce between Garraf and the American market. Counterclaim PP 15-16, 18; Gama Opp. at 1. According to Gama, Graco threatened all of its IPPE product distributors with the loss of the right to sell Graco products if those distributors were also to sell competing products distributed by Gama. Further, those distributors are the only realistic conduit for Gama to sell Garraf products in the United States, and Graco's threats have proved successful in cutting off Gama's sales, as distributors are refusing to carry Gama's Garraf product line. Counterclaim PP 20, 24.

"Because of the infinite variety of claims that arise under the antitrust statutes, [the Supreme Court] has refused to fashion a black-letter rule for determining standing in every case." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 922 (3d Cir. 1999)* (quoting *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 (3d Cir. 1983))*. When assessing a Plaintiff's standing to bring antitrust claims, "[t]he [Supreme] Court has emphasized that lower courts should avoid applying bright-line rules and instead should **[*103]** analyze the circumstance of each case, focusing on certain key factors." *Id. at 922*. In *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Supreme Court articulated a five-factor balancing test for antitrust standing. The Third Circuit has expressed these factors as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 320 (3d Cir. 2007).

Gama analyzes these five factors, arguing that it does meet the standing requirements. Graco contends that only a narrow class of persons and injuries have antitrust standing **[*104]** and *Associated General Contractors* requires more than a but-for theory of harm. First, Graco argues that its alleged monopolization of IPPE manufacturing does not directly harm Gama because Gama does not manufacture such products or buy Graco's products. Gama, however, asserts that there is a causal connection between the antitrust violation, the harm to Gama, and Graco's intent because Graco sought to prevent "all IPPE product distributors nationwide" from purchasing Garraf products from Gama and that these IPPE distributors are "the only realistic conduit for Garraf products in the United States." Counterclaim PP 20, 24. In addition, Gama alleges that Graco sent a Letter to all IPPE distributors nationwide that unilaterally threatened Graco's refusal to deal, which had its intended effect because "existing Gama customers have stopped buying." *Id.* P 22. According to Gama, distributors "would have carried or continued to carry Garraf products but for Graco's refusal to deal with any distributor carrying competing products." *Id.* P 23. Thus, there appears to be a causal connection between Graco's intent to harm competition by sending its Letter and Gama's injury from the loss of sales **[*105]** and potential sales.

In its Motion, Graco focuses heavily on the second factor, which deals with the concept of antitrust injury. "If the injury is not of the requisite type, even though the would-be plaintiff may have suffered an injury as a result of conduct that violated the antitrust laws, he or she has no standing to bring a private action under the antitrust laws to recover for it." Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997). "Antitrust injury is a necessary but not insufficient condition of antitrust standing." Id. at 182 (citation omitted). "Even a plaintiff who can show antitrust injury may lack antitrust standing, because the remaining . . . factors may weigh against allowing him or her to sue under the antitrust laws." *Id.*

Graco argues that Gama is not a competing manufacturer in the alleged market and therefore cannot suffer an antitrust injury. Pl. Mot. at 9-13. In Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405 (3d Cir. 1997), the Third Circuit explained that plaintiffs "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from **[*106]** that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 113 F.3d at 413 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). Further, in *Schuylkill,* the court stated:

> The antitrust laws are intended to preserve competition for the benefit of consumers in the market in which competition occurs . . . . The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors . . . . A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury.

Id. at 415 (quoting Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376 (9th Cir. 1996)). An antitrust injury reflects an activity's anti-competitive effect on the competitive market. Casper v. SMG, No. 00-3465, 2006 U.S. Dist. LEXIS 79267, 2006 WL 3111132, at *4 (D.N.J. Oct. 31, 2006). "The **[*107]** requirement that the alleged injury be related to anti-competitive behavior requires . . . that the injured party be a participant in the same market as the alleged malefactors." Schuylkill Energy Resources, 113 F.3d at 415.

In order for a reasonable factfinder to determine if Gama competed in the market in which trade was allegedly restrained -- the alleged antitrust injury -- the answer depends on how that market is defined. Barton, 118 F.3d at 182. In Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), the Third Circuit discussed the definition and boundaries of the relevant market in antitrust actions. It wrote:

> Plaintiffs have the burden of defining the relevant market. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted **[*108]** in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza, 124 F.3d at 436 (internal citations and quotations omitted). Further, the court stated:

> Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively. . . . When assessing reasonable interchangeability, (f)actors to be considered include price, use, and qualities. Reasonable interchangeability is also indicated by cross-elasticity of demand between the product itself and substitutes for it. As we explained in Tunis Brothers Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991), products in a relevant market are characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market.

Id. at 437-38 (internal citations and quotations omitted).

Gama contends that the relevant product market is a "distinct market for IPPE materials and equipment." Counterclaim PP 1, 7. "Graco denies that **[*109]** 'the IPPE space,' Counterclaim P 12, defines a relevant product market under ***antitrust law***." Pl. Mot. at 10 n. 7. Graco asserts that Gama's claims should be dismissed because it has failed to identify any product in the alleged market and its interchangeability with other products. *Id.* It is unclear what exactly defines the IPPE market "materials and equipment" or the "pump and spray industry." As pled, Gama does not define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand nor does it allege a proposed relevant market, as pled, that clearly encompasses all interchangeable substitute products. *See* Queen City Pizza, 124 F.3d at 437-38. Despite granting all factual inferences in Gama's favor, the relevant market is legally insufficient, and Gama cannot demonstrate that its alleged injury is of the type for which the antitrust laws were intended to provide redress. *See* Barton, 118 F.3d at 182. Thus, the Court dismisses Gama's antitrust claims. *See Id.* (citing numerous cases that dismissed the plaintiff's antitrust claims for failure to sufficiently plead a relevant market). [27]

Because Gama fails to sufficiently define the relevant market and thus lacks **[*111]** standing, the Court need not address the individual arguments the parties raise with regard to the sufficiency of Graco's pleading regarding its monopolization and attempted monopolization claims. Accordingly, the Court grants Graco's request to dismiss Gama's antitrust claims without prejudice.

2. Gama' State Law Claims

a. Tortious Interference with Business Advantage

The Court has already determined that to state claim for tortious interference with prospective economic advantage, a plaintiff must establish (1) that it had a reasonable expectation of an economic advantage; (2) that was lost as a direct result of Defendants' malicious interference; and (3) that it suffered losses thereby. *See* Part III.A.6., *supra.* Graco argues that Gama fails to allege that it had a reasonable expectation of business advantage or that Graco acted intentionally and with malice. Graco also contends that because Gama is only a start-up with no established customers, it cannot plead generic expectations of business advantage. [28]

Gama, however, argues that it has a reasonable expectation to continue its sales of Garraf products to its existing customers and distributors, and to sell its products to other members of the trade. Counterclaim PP 22-24. Gama contends that Graco knew of Gama's business expectations when it took deliberate steps to wrongfully undermine those expectations by allegedly sending a Letter to "all IPPE distributors carrying Graco products -- which is to say, all IPPE product distributors nationwide[,] . . . announc[ing] a pre-emptive unilateral refusal by Graco to deal with any distributor . . . that considers carrying Garraf products as well." Counterclaim PP 20-21. Gama alleges that Graco knowingly made false and disparaging comments about Gama's business and products to customers in the trade and gave its customers ultimatums not to carry Gama's products. *Id.* PP 25-27, 29-33. Due to Graco's conduct, Gama's customers stopped buying products and dropped the Gama line. *Id.* PP 23, 32. Thus, Gama argues, it sufficiently pleads that "but for [Graco's] interference, there was a reasonable probability that [it] **[*113]** would have received the anticipated economic benefit." *Slim CD, Inc. v. Heartland Payment Sys., Inc., No. 06-2256, 2007 U.S. Dist. LEXIS 62536, 2007 WL 2459349, at *3 (D.N.J. Aug. 24, 2007)*. [29] The Court agrees.

---

[27] With regard to Gama's alleged antitrust **[*110]** injury, depending on how Gama defines the relevant market, Gama may be able to demonstrate that it, at least at times, directly competes with Graco, as Graco admits that sometimes it acts as a distributor selling to end-users. In addition, Gama may be able to show that it forges the link between Garraf and the top-tier American distributors and competes directly with Graco, which sells its products directly to the same distributors, and thus Gama's harm is inextricably intertwined with Graco's alleged refusal to deal and its forced group boycott. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n Inc., 227 F.3d 62, 77 (3d Cir. 2000)*. Even if, however, Gama adequately defines the relevant market and demonstrates Gama's alleged injury is of the type for which the antitrust laws were intended to provide redress, balancing the five factors in *Associated General Contractors,* Gama will have to demonstrate that it has standing with regard to the factors of directness of the injury, the existence of more direct victims, and, most troubling, the potential for duplicative recovery or complex apportionment of damages.

[28] The Court notes that this argument contradicts Graco's claim that Gama has successfully entered the market as evident from "Gama's own website [that] identifies at least 12 distributors **[*112]** for Garraf products, acquired in Gama's one year of business." Pl. Mot. at 25 n. 12.

Accepting all of Gama's allegations as true, Gama alleges a reasonable expectation of an economic benefit from selling products to customers in the trade with which Graco intentionally and wrongfully interfered. *See* Id., 116 N.J. at 753-51 (finding that courts easily find a reasonable expectation of economic benefit even where the sale is to the public at large).

Graco also argues that Gama fails to allege any action constituting malice because **[*114]** nothing about its Letter or actions was "wrongful" and Gama fails to plead any factual allegations to support its claim that Graco "intentionally and unjustifiably interfer[ed] with Gama's business." Pl. Mot. at 29-32; Counterclaim P 53. Graco asserts that exercising control over one's own distribution network cannot constitute tortious interference. For support, Graco relies on Frank Brunckhorst Co., L.L.C. v. Coastal Atlantic, Inc., 542 F. Supp. 2d 452 (E.D. Va. 2008). In that case, after the termination of its contract with Brunckhorst, Coastal alleged it had a business expectancy to sell competitive products to its former customers, but "Brunckhorst interfered with that expectancy by 'threatening' Coastal's former customers in order to prevent them from buying [a competing product line] from Coastal." Frank Brunckhorst, 542 F. Supp. 2d at 464. Under Virginia law, the court dismissed the claim because "[even though] perhaps unsavory, Brunckhorst tactics in threatening to withdraw supplies of Boar's Head products to those retailers who decided to purchase [the competiting] products from Coastal were within its legal rights." *Id.* The court further found that apart from Coastal's conclusory **[*115]** allegation the counterclaim did not allege any reference to "illegal or independently tortious" means or methods that "violate an established standard of a trade or profession, or involve unethical conduct." *Id.* Thus, Graco argues that its Letter simply informed its distributors that it preferred that they carry only Graco products because taking on an additional competitive product line may significantly reduce the best efforts of a Graco distributor to sell Graco products. Thus, Graco contends that its conduct was a justifiable method of protecting its business interests, and not "transgressive of generally accepted standards of common morality." Lamorte Burns, 167 N.J. at 306. Graco also asserts that Gama failed to sufficiently allege malice because Gama merely recited that Graco "acted intentionally and without justification." Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7. The Court disagrees.

Gama argues that sending such a Letter or literature is not simply dismissed as "a lawful method of competition" or "at most mere puffing." Buono Sales, Inc. v. Chrysler Motors Corp., 363 F.2d 43, 49 (3d Cir. 1966). Rather, the Third Circuit has found that, under New Jersey law, a "defendant's carefully planned **[*116]** method of enticing" a plaintiff's customers away from plaintiff and to defendant constitutes tortious interference with plaintiff's business. *Id.* Similarly, Gama argues and the Court agrees that Gama has sufficiently pled a claim of tortious interference here.

Moreover, Gama contends that it sufficiently stated a claim even without the Letter because Graco does not contest that it has knowingly made false and disparaging comments about Gama's businesses and products to customers in the trade. Counterclaim PP 26, 30-31. In addition, Graco allegedly gave its customers ultimatums not to carry Gama's products. *Id.* P 32. Courts applying New Jersey law have permitted claims of such "sharp dealing", where neither the normal nor the expected course of practice is followed and a defendant strays from "the rules of the game." Print Mart-Morristown, 116 N.J. at 757-58. [30] Gama alleges a similar type of activity to that held actionable in *Print Mart-Morristown,* **[*117]** and thus, accepting all of Gama's allegations as true, Gama alleges the malice

---

[29] Graco argues that Gama "implicitly conceded that it has failed to 'establish with reasonable certainty a prospective economic relation." Pl. Reply at 8-9. However, Gama states that it intends to amend its counterclaims with the actual dollar amount it allegedly lost due to Graco's conduct. Gama Opp. at 23 & n. 4. Because a plaintiff must only allege that the injury caused damages to state a tortious interference cause of action, and need not specify what the actual damages were at this stage of litigation, Graco's argument is unavailing. Matrix, 870 F. Supp. at 1249.

[30] Citing, e.g., Harris v. Perl, 41 N.J. 455, 461, 197 A.2d 359 (1964); Buono Sales, Inc. v. Chrysler Motors Corp., 363 F.2d 43, 49 (3d Cir. 1966) (holding that under New Jersey law an automobile manufacturer could be held liable for tortious interference with prospective economic relations, where an auto maker wrote to DeSoto purchasers and recommended that buyers have their cars serviced at dealerships that did not handle DeSoto in an effort to phase out dealerships of discontinued DeSoto model), *cert. denied,* ***385 U.S. 971, 87 S. Ct. 510, 17 L. Ed. 2d 435 (1966)***, appeal after remand, 449 F.2d 715 (1971); Somers Constr. Co. v. Bd. of Ed., 198 F. Supp. 732 (D.N.J. 1961) (permitting a tortious interference claim where the complaint alleged that architects had maliciously advised board of education to accept a higher bid for construction of new high school).

element. Accordingly, Gama has stated a claim for tortious interference with business advantage and thus the Court denies Graco's request to dismiss this claim.

b. Trade Libel Claim

To assert a claim of trade libel or disparagement, the plaintiff must demonstrate (1) publication, **[*118]** (2) with malice, such as knowingly making false statements or with reckless disregard for their falsity, (3) of false allegations concerning its property, product or business, and (4) special damages. *See* *Floorgraphics, Inc. v. News America Marketing in-Store Services, Inc., No. 04-3500, 2008 U.S. Dist. LEXIS 34143, 2008 WL 1901107, at *3 (D.N.J. Apr. 24, 2008)*; *Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362, 378 (D.N.J. 2004)* (citing *Sys. Operations Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140 (3d Cir. 1997))*.

Graco argues that Gama fails to state a claim for trade libel and product disparagement because it does not identify any publication that could be verified and proven false nor has it plead special damages. First, Graco contends that Gama fails to identify an actionable statement and specifically, the following allegations in Gama's Counterclaim are not actionable: Graco's Letter to distributors informing them of Graco's intention to review their business relationship should they add a competing product line, Counterclaim P 20; Graco's statements that Gama is selling "old" or "outmodeled" Gusmer technology, *Id.* P 26; and Graco personnel's false statements concerning Gama's continued viability **[*119]** and the quality of Gama's product line. *Id.* P 27. Graco argues that each of these statements either do not contain false statements or cannot be proven false. Graco further contends that Gama's allegations that Graco representatives falsely claimed to customers that Gama would cease to be in operation by the end of 2008 and that the customers would be "stuck with [Garraf products] when Graco forces Gama out of business," *Id.* PP 29-31, are merely predictions about future market conditions and not actionable statements of fact. Pl. Mot. at 37. Graco argues that these statements are merely an expression of Graco's business opinion and intentions and truth is a defense; thus, Gama fails to plead an actionable statement. [31] Second, Graco argues that Gama fails to plead special damages with particularity, as required by New Jersey law.

Gama, however, argues that it did adequately plead trade libel, and more specifically actionable statements. Gama asserts that Graco's false statements are sufficient allegations of trade libel because **[*120]** the statements are "publication[s] of [] matter[s] derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with plaintiff's relations with others." *Patel v. Soriano, 369 N.J. Super. 192, 246-47, 848 A.2d 803 (App. Div. 2004)*. Much like the parties here dispute every claim and allegation, the parties also argue about one another's reliance on specific case law relating to trade libel and defamation claims and whether Gama's allegations constitute actionable statements under trade libel. Specifically, Gama argues that Graco relies on cases that focus on defamation rather than trade libel. *See* Gama Opp. at 26. On the other hand, Graco argues that Gama never actually contends that it pleads actionable statements of fact, but rather only disputes the law. Pl. Reply at 10. Although there are some significant differences between trade libel and defamation claims, "[m]any statements effectuate both harms." *Patel, 369 N.J. Super. at 247*. "[O]ne may disparage plaintiff's business by reflecting upon its character, the manner in which it is conducted, or its popularity or danger, and not affect any property." *Id. at 248* (internal **[*121]** citations omitted). Further, in a disparagement action, the plaintiff must show "proof of publication of material derogatory to the quality of a plaintiff's business, or to his business in general, of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others." *Id.*

In the instant case, Gama alleges that Graco knowingly made false statements to the public and members of the trade about Gama's business and product lines, including statements about its business, products, product offerings, technology, operations, and business plans. Counterclaim PP 25-27, 29-33. Thus, Gama alleges that Graco made false statements derogatory to Gama's property or business, of a kind designed to prevent others from dealing with Gama or otherwise to interfere with Grama's relations with others. *See* *Patel, 369 N.J. Super. at 246-47*. Accordingly, Gama has properly plead a claim for trade libel.

---

[31] The Court notes that such defenses are inappropriate at this stage of litigation -- on a motion to dismiss when all factual allegation are accepted as true.

A trade libel or disparagement claim also requires that a prevailing plaintiff prove special damages by establishing pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers. *See* Patel, 369 N.J. Super. at 248 **[*122]** (noting that traditionally a plaintiff was required to identify particular business interests who have refrained from dealing with him, or explain the impossibility of doing so, but where requiring such identification is unreasonable, proof of lost profits resulting from breach of contract may suffice, particularly where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded. Id. at 248-49). At this stage of the litigation, however, Gama adequately pleads special damages. Gama alleges that it was damaged by Graco's conduct because it lost sales to established customers, existing distributors dropped its product lines, and it was prevented from acquiring new customers that were also recipients of the Letter. Counterclaim PP 24, 32-33. While these allegations are sufficient here, to ultimately prevail on this claim, Gama must identify the businesses who stopped dealing with it, or explain why it cannot prove lost profits with reasonable certainty while excluding the other factors that could cause the loss. *See* Patel, 369 N.J. Super. at 248-49. Accordingly, the Court denies Graco's request to dismiss this claim **[*123]** pursuant to Rule 12(b)(6).

c. New Jersey Fair Trade Act & Unfair Competition Claims

Graco contends that Gama fails to state a claim under the New Jersey Fair Trade Act, N.J. Stat. Ann. § 56:4-1, and for unfair competition, and thus, the Court should dismiss these claims. Courts have repeatedly held that § 56:4-1 is the state statutory equivalent of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and thus the same pleading standard is required. *See, e.g.,* SK & F, Co. v. Premo Pharm. Labs., Inc., 625 F.2d 1055, 1066 (3d Cir. 1980). Graco argues that Gama does not provide any facts or explanation as to how it violated the New Jersey Fair Trade Act, allege any practices that constitute false advertising or misdesignation of origin, nor plead the elements of a claim.

In addition, New Jersey and federal unfair competition claims are measured by identical standards. *See* Primepoint, L.L.C. v. PrimePay, Inc., 545 F. Supp. 2d 426, 431-32 (D.N.J. 2008) (citing A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., (" A&H V"), 237 F.3d 198, 210 (3d Cir. 2000)). Graco argues that Gama has failed to adequately allege a claim for unfair competition or provide any explanation regarding the grounds **[*124]** of its claim.

Gama, however, contends that it has adequately pled these claims because Graco's conduct "falls below any standards of fair play or business fairness." Gama Opp. at 28. Gama argues that Graco has employed improper tactics to stifle competition in the IPPE industry, has monopolized the IPPE market, and has exerted its influence to exclude Gama from competing against it. For support that it has adequately pled these claims, Gama argues that it adequately pled trade libel and disparagement under Section 43(a) of the Lanham Act, and "Graco does not dispute that its other conduct supports the unfair competition claims." Gama Opp. at 28-29. Because Gama has pled actionable conduct under Section 43(a) of the Lanham Act, *see* Part III.B.2.b., *supra.,* and thus, the elements of a New Jersey Fair Trade Act or unfair competition claim, Gama has sufficiently alleged these claims. Accordingly, the Court denies Graco's request to dismiss these claims.

3. Graco's Request to Stay Claim

If the Court denies Graco's motion to dismiss Gama's counterclaims, Graco requests, in the alternative, that the Court bifurcate Gama's claims. Gama argues that Graco has made such a request to keep competition **[*125]** out of the domestic market as long as possible and tie Gama in round after round of trials and discovery. Courts may bifurcate trials for "convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b). Moreover, bifurcation "remains the exception rather than the rule" even though "courts have generally been more willing to bifurcate patent trials than other types of cases." Innovative Office Prods. v. SpaceCo, Inc., No. 05-4037, 2006 U.S. Dist. LEXIS 29439, 2006 WL 1340865, at *1 (E.D. Pa. May 15, 2006) (citation omitted). In this case, however, Graco's contract and tort claims are not dispositive of Gama's remaining counterclaims and all of the claims focus on the business practices and conduct of all the parties. It is senseless to try Graco's claims first and Gama's thereafter. The Court does not see a need to bifurcate the Counterclaim. Accordingly, the Court denies Graco's request.

IV. Conclusion

For the foregoing reasons, Defendants' Motions are granted in part and denied in part, and Plaintiffs' Motion is granted in part and denied in part. Specifically, the Court grants Defendants' requests to dismiss Count Three of Plaintiffs' Complaint without prejudice and Graco's Motion **[*126]** to dismiss Counts One and Two of Commette and Gama's Counterclaims without prejudice, and grants Defendants' requests to dismiss Count Nine of the Complaint. The Court denies Defendants' requests to dismiss Count Six and Graco is directed to re-plead its Lanham Act claims under *15 U.S.C. § 1125(a)(1)* within ten (10) days. Further, the Court denies the parties' Motions with respect to all remaining claims.

/s/ Freda L. Wolfson

The Honorable Freda L. Wolfson

United States District Judge

Date: March 31, 2009

Guimerfe, Inc. v. Perez-Perdomo

United States District Court for the District of Puerto Rico

March 31, 2009, Decided; March 31, 2009, Filed

CIVIL 08-1243CCC

Reporter
2009 U.S. Dist. LEXIS 28758 *; 2009 WL 918933

GUIMERFE, INC., Plaintiff vs ROSA PEREZ-PERDOMO in her official capacity as Secretary of the Puerto Rico Health Department, RYDER MEMORIAL HOSPITAL and HOSPICIO SAN LUCAS, Defendants

Core Terms

dormant, docket entry, abstention, antitrust, motion to dismiss, home care, competitor, facilities, Movants

Counsel: **[*1]** For Guimerfe, Inc., Plaintiff: Miguel Oppenheimer, LEAD ATTORNEY, Oppenheimer Rios & Assoc, Carolina, PR.

For Rosa Perez-Perdomo, in her official capacity Secretary of the Puerto Rico Health Department, Defendant: Anabelle Quinones-Rodriguez, Department of Justice, San Juan, PR.

For Ryder Memorial Hospital, Hospicio San Lucas, Defendants: Lee Sepulvado-Ramos, LEAD ATTORNEY, Sepulvado & Maldonado, PSC, San Juan, PR; Leila S. Castro-Moya, LEAD ATTORNEY, Rovira-Rodriguez Attorneys and Counsellors at Law, Hato Rey, PR.

Judges: CARMEN CONSUELO CEREZO, United States District Judge.

Opinion by: CARMEN CONSUELO CEREZO

Opinion

OPINION AND ORDER

Now before the Court is a challenge to the constitutionality of Puerto Rico's regulatory scheme regarding the establishment and relocation of home health care facilities, created pursuant to *24 L.P.R.A. §334, et. seq.,* which requires the issuance of Certificates of Necessity and Convenience [1] (CNC) by the Puerto Rico Department of Health.

According to the allegations of the complaint, in March, 2004, plaintiff Guimerfe, Inc. (Guimerfe) applied for a CNC to establish a pediatric home care facility to serve the eastern region of Puerto Rico (P3). The application for the

---

[1] Title ***24 L.P.R.A. §334(e)*** defines a Certificate of Necessity and Convenience as:

> A document issued by the Secretary of Health authorizing a person to carry out any of the activities covered by *§§334-334j* of this title, certifying that the same is necessary **[*2]** for the population it is to serve and that it will not unduly affect the existing services, thus contributing to the orderly and adequate development of health services in Puerto Rico.

certificate, the issuance of which was opposed by defendants Ryder Memorial Hospital (Ryder) and Hospicio San Lucas (San Lucas), was denied in July, 2007.

Guimerfe in this suit alleges that the application of the CNC requirement to home care facilities in Puerto Rico violates the *Supremacy Clause*, the dormant *Commerce Clause* and its substantive due process. Plaintiff further alleges that Ryder and San Lucas "have entered into a common collusive agreement to utilize the CNC certification system to prevent newcomers from entry into the home care market in Puerto Rico and perpetuate a market monopoly," (P51) in violation of the Sherman Act, *15 U.S.C. §1, et seq.*, and the Clayton Act, *15 U.S.C. §§12-27*.

The action is now before us on Ryder and San Lucas' Motion to Dismiss and/or **[*3]** for Abstention filed May 1, 2008 (**docket entry 19**) [2] , which plaintiff opposed (docket entries 23 and 24), and to which movants replied (docket entry 27). Defendant Secretary of Health Rosa Perez-Perdomo (Perez-Perdomo) joined the motion (**docket entry 28**). [3] Defendants seek dismissal or abstention on the basis of a myriad of reasons, of which they discuss the following:

(1) This court should abstain from entertaining this case under the Burford Abstention Doctrine or dismiss it in deference to the expertise of the Department of Health;

(2) There is no dormant *Commerce Clause* claim because all parties are local entities and it is not a protectionist measure; and

(3) There is no Sherman Act claim because movants are protected by the Noerr-Pennington Immunity Doctrine for actions taken to further their business interests.

The Burford Abstention

Movants provide a considerable discourse on the factual and procedural administrative agency proceedings leading up to this suit. Flowing from that history, they request that we dismiss the action pursuant to the abstention doctrine developed in *Burford v. Sun Oil Co., 319 U.S. 315, 333-34, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)*, and its progeny, by which the United States Supreme Court set forth the policy that a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies when: 1) there are difficult policy problems of substantial public import whose importance transcends the result in the case at bar; or 2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial state concern. Defendants state that the Burford abstention seeks to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that **[*5]** are committed, in the first instance, to expert administrative solution. (Memorandum of law, docket entry 21, page 8). That is, federal courts should not intervene with cases when a party has a judicial review remedy available in order to seek revision of a determination by a state administrative agency.

A review of Guimerfe's complaint, however, demonstrates that it is not challenging in this Court the specifics of the denial of its application for a CNC or asking that we intervene in the proceedings. Rather, it is challenging the constitutionality of the entire regulatory scheme of the CNC Act and its regulations for implementation, on its face and as it is applied to home healthcare facilities. It claims that the requirement violates the *Supremacy Clause*, Sec I, p. 5; the dormant *Commerce Clause*, Sec. II, p.6; and Substantive Due Process, Sec. III, p.10.

---

[2] The memorandum of law was filed separately (docket entry 21). In support of its motion, defendants have also included as exhibits the Department of Health's Notice of Resolution, Resolution, and the Report from Hearing Examiner (docket entry 20). (*See, also,* English translation (docket entry 26)). Inasmuch as the motion is one for dismissal and not summary judgment, only **[*4]** their existence, and not the specific content, has been considered.

[3] The Motion Joining and Supplementing Request for Dismissal (**docket entry 28**) is NOTED.

Therefore, a *Burford* abstention is inappropriate in this case.

The Dormant *Commerce Clause*

Many of the same issues were raised in a similar challenge to the CNC Act and were was addressed by the Court of Appeals for the First Circuit in *Walgreen Co. v. Rullan, 405 F.3d. 50, (1st Cir. 2005)*. That case focused on the law's application **[*6]** to pharmacies. Plaintiff Walgreen Co., an out of state retail pharmacy chain, asserted that the statute impermissibly discriminates against or excessively burdens interstate commerce and violates due process.

In its opinion in *Walgreen,* the Court stated:

> Under the dormant *Commerce Clause*, if a state law has either the purpose or effect of significantly favoring in-state commercial interests over out-of-state commercial interests, the law will "routinely" be invalidated "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." If the state law regulates in state and out-of -state interests evenhandedly, the statute will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

Id., p.55 (citations omitted).

The dormant *Commerce Clause* prohibits protectionist state regulation designed to benefit in-state interests by burdening out-of-state competitors. *Grant's Dairy--Maine, LLC v. Commissioner of Maine Dept. of Agriculture, 232 F.3d. 8, 18-19 (1st Cir. 2000)*.

While the possibility for a dormant *Commerce Clause* conflict such as the one present in *Walgreen* exists, the controversy **[*7]** is not now before us. As stated in the complaint at P12: "Plaintiff, Guimerfe, Inc., is a corporation duly incorporated under the laws of the Commonwealth of Puerto Rico with its principal place of business at . . . Caguas, Puerto Rico?." Plaintiff is not an out-of-state competitor. Inasmuch as the Constitution confines the jurisdiction of the federal courts to actual cases and controversies, *U.S. Const. Art. III, §2, cl.1*. *Connectu LLC v. Zuckerberg, 522 F.3d. 82, 88 (1st Cir. 2008)*, the unconstitutionality of the CNC Act, in its application to home healthcare facilities, as violating the dormant *Commerce Clause* would have to be raised by an out-of-state entity. [4]

The Antitrust Claims

Plaintiff seeks actual and treble damages as well as other relief from **[*8]** Ryder and San Lucas for their allegedly unlawful efforts to exclude Guimerfe from entering the home care market (P9). It alleges that these defendant have consciously committed to a common and collusive scheme of opposing every CNC application for the establishment of home care facilities in order to exclude competition and perpetuate its market monopoly (P12), in violation of the Sherman and Clayton Acts, *15 U.S.C. §§1-27*.

In their motion to dismiss, defendants contend that there is no Sherman Act claim because their actions are "protected by the Noerr-Pennington Immunity Doctrine and/or are not an attempt to monopolize since they were sought in order to further their business interests." Defendants' Memorandum of Law, Docket entry 21-2, page 24. Movants cite *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir. 1986)*, for their argument that the mere intention to exclude competition and to expand one's business are not sufficient to show specific intent to monopolize, an essential element in private, antitrust litigation. That is, to present a prima facie case of attempt tp monopolize, plaintiff must show evidence of a specific intent to monopolize any part of commerce, **[*9]** plus

---

[4] Guimerfe, in its memorandum in opposition, refers to the spirit of *Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)* to convince us that intrastate players are reliable plaintiff that may raise dormant *Commerce Clause* challenges where there the discriminatory ordinance harms both intrastate and interstate commerce. This argument, however, still fails to overcome the absence of a case or controversy that is ripe for adjudication.

anticompetitive conduct directed to the accomplishment of that unlawful purpose. *Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488, 504 (9th Cir. 1977)*.

Movants further rely on the *Noerr Pennington* antitrust immunity doctrine, which evolved from two Supreme Court cases, *United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, and *Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S. 127, 135-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*.

> That doctrine, which derives from the *First Amendment's* guarantee of "the right . . . to petition the government for redress of grievances," *U.S.Const. Amend. I*, shields from antitrust liability entities who join together to influence government action --even if they seek to restrain competition or to damage competitors. The doctrine applies to "petitions" before legislatures, administrative agencies and courts. Even false statements presented to support such statements are protected.

Davric Maine Corporation v. Rancourt, 216 F.3d. 143, 147 (1st Cir. 2000)(citations omitted).

> The federal antitrust laws [ ] do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine . . . rests ultimately **[*10]** upon a recognition that the ***antitrust law***, "tailored as they are for the business world, are not at all appropriate for application in the political arena." That a private party's political motives are selfish is irrelevant:"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S.365, 379-80, 111 S. Ct. 1344, 113 L. Ed. 2d 382(1991). (Citations omitted.)

The *Noerr-Pennington* immunity doctrine, however, does have a "sham" exception, which withholds immunity when a party's resort to governmental process from antitrust immunity when such resort is objectively baseless and intended only to burden a rival with the governmental-decision making process itself. *Davric Maine Corporation, 216 F.3d. at 147*.

> The "sham" except encompasses situation in which persons use the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities **[*11]** are not genuinely aimed at procuring favorable government action at all, not one genuinely seeks to achieve his governmental result, but does so through improper means.

City of Columbia, 499 U.S. at 380 (citations omitted).

It is exactly the type of conduct in the above-cited example--preventing a competitor from entering the market by barricading the way with an expensive, time-consuming web of unwarranted, governmental processing--which Guimerfe avers. Whether this is, in fact, the case, and whether or not defendant fall within the immunity provided by the *Noerr-Pennington* doctrine, are highly factual determinations inappropriate for a dismissal motion.

For the above-stated reasons, defendants' Motion to Dismiss and/or for Abstention (**docket entry 19**) is GRANTED in part and DENIED in part. The motion to dismiss is GRANTED as to the claim under the dormant *Commerce Clause*, which is DISMISSED. The remainder of the motion to dismiss or abstain, is DENIED in all respects.

SO ORDERED.

At San Juan, Puerto Rico, on March 31, 2009.

/S/ CARMEN CONSUELO CEREZO

United States District Judge

End of Document

LexisNexis®

In re Flash Memory Antitrust Litig.

United States District Court for the Northern District of California, Oakland Division

March 31, 2009, Decided; March 31, 2009, Filed

Case No: C 07-0086 SBA

Reporter

643 F. Supp. 2d 1133 *; 2009 U.S. Dist. LEXIS 38941 **; 2010-1 Trade Cas. (CCH) P77,050

IN RE FLASH MEMORY ANTITRUST LITIGATION; This Document Relates to All Actions.

Subsequent History: Motion granted by, in part, Motion denied by, in part *In re Flash Memory Antitrust Litig., 2010 U.S. Dist. LEXIS 12866 (N.D. Cal., Jan. 25, 2010)*

Prior History: *In re Flash Memory Antitrust Litig., 2008 U.S. Dist. LEXIS 40433 (N.D. Cal., Apr. 21, 2008)*

Core Terms

memory, flash, prices, Purchaser, allegations, Plaintiffs', motion to dismiss, Defendants', Indirect, conspiracy, unfair, price fixing, antitrust, products, consumer protection, antitrust claim, practices, deceptive act, collusion, courts, concentration, deceptive, pleadings, consumers, stabilize, unjust enrichment, trade practice, communications, unconscionable, competitors

LexisNexis® Headnotes

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

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

Under *Fed. R. Civ. P. 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, the plaintiff must allege enough facts to state a claim to relief that is plausible on its face. Specific facts are not necessary; the statement need only give the defendants fair notice of what the claim is and the grounds upon which it rests. In general, the inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff.

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

HN2[] **Complaints, Requirements for Complaint**

Under *Fed. R. Civ. P. 8* specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

Evidence > Judicial Notice > General Overview

HN3[] **Motions to Dismiss, Failure to State Claim**

If dismissal under *Fed. R. Civ. P. 12(b)(6)* is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. In resolving a motion to dismiss, a court may take judicial notice, upon request, as provided by *Fed. R. Evid. 201*, without transforming a motion to dismiss into one for summary judgment.

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

HN4[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] **Sherman Act, Claims**

A *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. That is, there must be enough facts presented to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Sherman Act, Claims**

For pleading purposes, allegations of antitrust conspiracy need not be detailed on a defendant by defendant basis.

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Sherman Act, Claims**

Information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, under a rule of reason analysis.

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

HN8[] **Sherman Act, Scope**

Market concentration and market shares are insufficient, standing alone, to establish a Sherman Act violation.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] **Sherman Act, Claims**

Rising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing. Prices may rise due to market forces, and that it is entirely possible that increases in price and output could occur simultaneously where there is growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.

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

HN10[] **Cartels & Horizontal Restraints, Price Fixing**

As a general proposition, it is true that agreements between competitors may be entirely benign.

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

Evidence > Admissibility > Circumstantial & Direct Evidence

HN11[] **Cartels & Horizontal Restraints, Price Fixing**

Direct evidence will rarely be available to prove the existence of a price fixing conspiracy. It is for that reason that circumstantial evidence is the lifeblood of ***antitrust law***.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Admissibility > Circumstantial & Direct Evidence

HN12[] **Sherman Act, Claims**

Ambiguous evidence should be considered in antitrust claims because most cases are constructed out of a tissue of such statements and other circumstantial evidence.

Antitrust & Trade Law > Sherman Act > Claims

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

HN13[] **Sherman Act, Claims**

Generally, there is nothing particularly nefarious in attending industry functions. Nor is there anything necessarily improper with their participation or membership in industry trade associations. Indeed, trade associations serve a beneficial and legitimate function. That notwithstanding, courts have recognized that trade association affiliations and attendance at industry events may be alleged to show that putative conspirators had the opportunity and means to develop and/or further their alleged collusive scheme. And while such allegations cannot alone support price fixing conspiracy claims, such participation demonstrates how and when defendants had opportunities to exchange information or make agreements.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14[] **Sherman Act, Claims**

Evidence concerning a prior conspiracy may be relevant and admissible to show the background and development of a current conspiracy.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN15[] **Remedies, Damages**

The U.S. Supreme Court has held that indirect purchasers generally may not sue for money damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. In response to that holding, a number of states passed "repealer" statutes which expressly allow indirect purchasers to recover money damages for antitrust violations under state law.

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

HN16[] **Standing, Requirements**

Certain factors for determining whether a plaintiff who has borne an injury has antitrust standing include: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor. Instead, courts are to balance the factors, giving great weight to the nature of the plaintiff's alleged injury.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Governments > Courts > Judicial Precedent

HN17[] **Preliminary Considerations, Federal & State Interrelationships**

In analyzing questions of state law, federal courts are bound by the decisions of the state's highest court. It is settled that where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it. If there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it. Relevant decisions of courts in other jurisdictions also should be considered.

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

HN18[] **Standing, Requirements**

The first factor for determining whether a plaintiff who has borne an injury has antitrust standing is whether the injury alleged by plaintiffs is the type the antitrust laws are intended to prevent. A plaintiff may only pursue an antitrust action if it can show antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors. The anticompetitive effects must be felt in the relevant market. To determine whether an injured plaintiff is indeed a market participant, the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the product or services involved.

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

HN19[] **Standing, Requirements**

The second factor for determining whether a plaintiff who has borne an injury has antitrust standing looks to whether the alleged injury was the direct result of defendants' allegedly anticompetitive conduct. To assess the directness of this injury, courts look to the chain of causation between the injury and the alleged restraint in the market.

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

HN20[] **Standing, Requirements**

The final third and fifth factors for determining whether a plaintiff who has borne an injury has antitrust standing--the speculative nature of the harm and the complexity in apportioning damages--may be considered together.

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

HN21[] **Standing, Requirements**

The risk to be avoided under the duplicative recovery factor for determining whether a plaintiff who has borne an injury has antitrust standing is that potential plaintiffs may be in a position to assert conflicting claims to a common fund thereby creating the danger of multiple liability for the fund. Such a concern, however, generally is inapposite in the context of indirect purchaser state law antitrust claims.

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

HN22[] **Trade Practices & Unfair Competition, State Regulation**

The Arkansas Deceptive Trade Practices Act (ADTPA), Ark. Code Ann. § 4-88-101 et seq., prohibits deceptive and unconscionable trade practices, including engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade. Ark. Code Ann. § 4-88-107(a)(10); Ark. Code Ann. § 4-88-108 prohibits deception, fraud, and false pretense. Arkansas courts have construed the statute broadly. In addition, several district courts interpreting the ADTPA have found that the term "unconscionable trade practices" is sufficiently broad to encompass price fixing.

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

HN23[] Trade Practices & Unfair Competition, State Regulation

The Arkansas Supreme Court's view is that an unconscionable act is one that is an act that affronts the sense of justice, decency, or reasonableness, including acts violative of public policy or a statute.

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

HN24[] Trade Practices & Unfair Competition, State Regulation

The District of Columbia's Consumer Protection Practices Act, D.C. Code § 28-3901, is intended to assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices. D.C. Code § 28-3901(b)(1). The Act defines its terms comprehensively so that it can provide a remedy for all improper trade practices.

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

HN25[] Trade Practices & Unfair Competition, State Regulation

The District of Columbia's Consumer Protection Practices Act (DCCPPA), D.C. Code § 28-3901, proscribes the imposition of prices that are unconscionably high, i.e., prices that are unreasonably favorable to the seller, where the buyer did not have a meaningful choice of alternatives under the circumstances. The DCCPPA subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether defendants have engaged in deceptive conduct.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN26[] Trade Practices & Unfair Competition, State Regulation

Haw. Rev. Stat. § 480-2 prohibits (1) unfair methods of competition and (2) unfair or deceptive acts or practices. Haw. Rev. Stat. § 480-2(a), (d) and (e). Under Haw. Rev. Stat. § 480-13.3(a)(1), a class action for claims for a violation of chapter 480 other than claims for unfair or deceptive acts or practices may be filed, and may be prosecuted on behalf of indirect purchasers by a person other than the attorney general, provided that the class plaintiffs first serve a copy of the complaint on the attorney general. The attorney general has sole discretion as to whether the state will proceed with the action or file its own action. § 480-13.3(a)(4). If the attorney general declines to so proceed, the class plaintiff shall have the right to proceed with the action. § 480-13.3(a)(5)(C). Subdivision (b) states that § 480-13.3 shall not limit the rights of consumers to bring class actions against any person based on unfair or deceptive acts or practices declared unlawful by section 480-2.

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

HN27[] **Trade Practices & Unfair Competition, State Regulation**

The Maine Unfair Trade Practices Act prohibits unfair methods of competition as well as unfair or deceptive conduct of any trade. *Me. Rev. Stat. Ann. tit. 5, § 207* (2008). The Maine Supreme Court has held that in pricing cases under the Act the inquiry is whether the price has the effect of deceiving the consumer, or inducing her to purchase something that she would not otherwise purchase.

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

HN28[] **Trade Practices & Unfair Competition, State Regulation**

The New Mexico Unfair Practices Act, *N.M. Stat. Ann. § 57-12-1 et seq.*, prohibits both unfair deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce. *N.M. Stat. Ann. § 57-12-3*. Under New Mexico law, an unconscionable trade practice is an act or practice which to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid. *N.M. Stat. § 57-12-2(E)*.

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

HN29[] **State Regulation, Claims**

Federal courts generally permit actions under the New Mexico Unfair Practices Act, *N.M. Stat. Ann. § 57-12-1 et seq.*, in price-fixing cases provided that the plaintiff alleges a gross disparity between the price paid for a product and the value received.

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

HN30[] **Trade Practices & Unfair Competition, State Regulation**

See *N.Y. Gen. Bus. Law § 349*.

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

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

HN31[] **State Regulation, Claims**

N.Y. Gen. Bus. Law § 349 is directed at wrongs against the consuming public. A plaintiff asserting a *§ 349* claim must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.

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

HN32[] **Trade Practices & Unfair Competition, State Regulation**

R.I. Gen. Laws § 6-13.1-2 provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. To determine whether a practice is "unfair" under the statute, the court is to consider: (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

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

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

HN33[] **Cartels & Horizontal Restraints, Price Fixing**

Price fixing is not within the ambit of the Unfair Trade Practices and Consumer Protection Act, *R.I. Gen. Laws § 6-13.1-1 et seq.* The statute defines "unfair methods of competition and unfair or deceptive acts or practices" to consist of 19 separately enumerated practices, none of which includes price fixing. *R.I. Gen. Laws § 6-13.1-1(6)(i)-(xix)*.

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

HN34[] **Trade Practices & Unfair Competition, State Regulation**

See *W. Va. Code § 46A-6-101(1)*.

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

HN35[] **Trade Practices & Unfair Competition, State Regulation**

Price fixing is not among the 16 enumerated definitions of unfair methods of competition and unfair or deceptive acts or practices. *W. Va. Code § 46A-6-102*. Rather, on their face, each of these definitions pertains to misrepresentations or deceptive practices relating to goods and services. For example, the statute prohibits acts such as passing off goods or services as those of another; using deceptive representations or designations of geographic origin in connection with goods or services; making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions; and engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding. *W. Va. Code § 46A-6-102*. In short, price fixing or similar anticompetitive conduct cannot be reasonably construed to fall within the scope of the West Virginia Consumer Credit and Protection Act, *W.V. Code § 46A-6-101 et seq.*

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN36[] **Class Actions, Class Members**

A class cannot assert a claim on behalf of an individual that they do not represent. Where a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal.

Counsel: [1]** For Trong Nguyen, on behalf of himself and all other similarly situated, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Christopher Thomas Micheletti, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann

Voelbel & Mason LLP, San Francisco, CA; Allan Steyer, D. Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; John James Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Jon T. King, Hausfeld LLP, San Francisco, CA; Kelly Ann Horne, Cooper & Kirkham, San Francisco, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, LLP., La Quinta, CA; Nimish Ramesh Desai, Lieff Cabraser Heimann & Bernstein LLP, San Francisco, CA.

For Laura Young, on behalf of herself and all others similarly situated, Plaintiff: Reed R. Kathrein, LEAD ATTORNEY, Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Anthony D. Shapiro, Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Ilan Joel Chorowsky, Chorowsky Law Offices, Progressive Law **[**2]** Group LLC - Of Counsel, Chicago, IL; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, San Francisco, CA; Mark Reinhardt, PRO HAC VICE, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Michael D. Hausfeld, Hausfeld LLP, Washington, DC; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Steven A. Kanner, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Calif-Coast Investigative Services, Plaintiff: Neil Swartzberg, Steven Noel Williams, LEAD ATTORNEYS, Nancy L. Fineman, Cotchett Pitre & McCarthy, Burlingame, CA; Allan Steyer, D. Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Joseph W. Cotchett, Cotchett, Pitre & McCarthy, Burlingame, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, LLP., La Quinta, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Dan Harrison, Plaintiff: Aaron M. Sheanin, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; Allan Steyer, D. Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San **[**3]** Francisco, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, LLP., La Quinta, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Alva Dee Cravens, on behalf of himself and all others similarly situated, Plaintiff: Scott Justin Yundt, LEAD ATTORNEY, Murray & Howard, LLP, Larkspur, CA; Allan Steyer, D. Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Derek G. Howard, Gilmur Roderick Murray, Murray & Howard, LLP, Oakland, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, LLP., La Quinta, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Stuart Go, on behalf of himself and all others similarly situated, Plaintiff: Brian Mark Fong, Jack Wing Lee, LEAD ATTORNEYS, Brad Yamauchi, Hugo Alexander Zia, Minami Tamaki LLP, San Francisco, CA; Allan Steyer, D. Scott Macrae, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel Joseph Mulligan, Jenkins Mulligan & Gabriel LLP, San Francisco, CA; Larry Gabriel, Jenkins, Mulligan & Gabriel, LLP., La Quinta, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, **[**4]** CA.

For Richard Thal, on behalf of himself & all others similarly situated, Plaintiff: Joseph Richard Saveri, LEAD ATTORNEY, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Daniel Bruce Allanoff, Joel Cary Meredith, Steven J. Greenfogel, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA; Eric B. Fastiff, Nimish Ramesh Desai, Michele Chickerell Jackson, Robert Jay Nelson, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Joseph G. Sauder, Michael D. Gottsch, PRO HAC VICE, Chimicles & Tikellis LLP, Haverford, PA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Scott Carlson, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Karol Juskiewicz, Plaintiff: Joseph Marid Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Russell, Mario Nunzio Alioto, Trump, Alioto, Trump & Prescott, LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Westell Technologies, Inc., on behalf of itself & all others similarly situated, Plaintiff: Douglas A. Millen, LEAD ATTORNEY, Freed Kanner London & Millen LLC, Bannockburn, IL; Harry Shulman, Harry Shulman, LEAD ATTORNEYS, The Mills Law Firm, San Rafael, **[**5]** CA; Allan Steyer, Jill Michelle Manning, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Michael J. Freed, Steven A. Kanner, William H. London, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Jems Software and Consulting, Inc., on behalf of itself and all others similarly situated, Plaintiff: Mark John Tamblyn, LEAD ATTORNEY, Wexler Wallace LLP, Sacramento, CA; Bernard Persky, Hollis L. Salzman, Kellie Lerner, Morissa R. Falk, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For James Burt, on behalf of himself and all others similarly situated, Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Christopher Thomas Micheletti, Henry A. Cirillo, LEAD ATTORNEYS, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; John James Bogdanor, Josef D. Cooper, Cooper & Kirkham, P.C., San Francisco, CA; Jon T. King, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Judith **[**6]** A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Kelly Ann Horne, Tracy R. Kirkman, Cooper & Kirkham, San Francisco, CA; Mila F Bartos, PRO HAC VICE, Finkelstein Thompson LLP, Washington, DC.

For Sandra Green, Plaintiff: Jerry K. Cimmet, LEAD ATTORNEY, Jerry K. Cimmet, Attorney at Law, San Mateo, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Travis Richardson, Plaintiff: John M. Kelson, LEAD ATTORNEY, Law Office of John M. Kelson, Oakland, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For A Computer Place, Inc., a corporation, Plaintiff: Ashlei Melissa Vargas, Pearson Simon Warshaw Penny LLP, San Francisco, CA; Bruce Lee Simon, Pearson Simon Warshaw & Penny, LLP, San Francisco, CA; Clifford H. Pearson, Daniel L. Warshaw, Pearson Simon Warshaw & Penny LLP, Sherman Oaks, CA; Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Jonathan Mark Watkins, Pearson Simon Warshaw & Penny LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Timothy Chanda, an individual, on behalf of themselves and all others similarly situated, Plaintiff: Bruce Lee Simon, Esther L Klisura, Pearson, Simon, **[**7]** Warshaw & Penny, LLP, San Francisco, CA; Cadio R. Zirpoli, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; James Matthew Morgan, Stephen H. Garcia, The Garcia Law Firm, Long Beach, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For TechToysForLess, on behalf of itself and all others similarly situtated, Plaintiff: Henry A. Cirillo, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; John James Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Jon T. King, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Kelly Ann Horne, Cooper & Kirkham, San Francisco, CA.

For Thomas Y. Huh, on behalf of himself and all others similarly situated, Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Bryan Matthew Kreft, Steyer Lowenthal Boodrookas **[**8]** Alvarez & Smith, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; Jason Kilene, PRO HAC VICE, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Lynn Sweatman, Plaintiff: Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Jean McClellan-Chambers, on behalf of herself and all others similarly situated in the state of Arkansas, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Steyer Lowenthal Boodrookas Alvarez & Smith, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San

Francisco, CA; Michael L. Roberts, Roberts Law Firm, Little Rock, AR; Richard Quintus, PRO HAC VICE, Roberts Law Firm, PA, Little Rock, AR.

For Jamac Enterprises, a sole proprietorship and all others similarly situated in the state of Arkansas, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Steyer Lowenthal Boodrookas **[**9]** Alvarez & Smith, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Michael L. Roberts, PRO HAC VICE, Roberts Law Firm, Little Rock, AR; Richard Quintus, PRO HAC VICE, Roberts Law Firm, PA, Little Rock, AR.

For GeorgeJon, Inc., Plaintiff: Cadio R. Zirpoli, David Nathan-Allen Sims, Guido Saveri, Richard Alexander Saveri, Saveri & Saveri, Inc., San Francisco, CA; Gary Laurence Specks, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP, Highland Park, IL; Gregory K. Arenson, PRO HAC VICE, Kaplan Fox & Kilsheimer LLP, New York, NY; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Samsung Electronics Company Ltd., Plaintiff: Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Peter Burke, on behalf of himself and all others similarly situated, Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San **[**10]** Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Mila F Bartos, Finkelstein Thompson LLP, Washington, DC.

For Jason Perkins, Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Henry A. Cirillo, LEAD ATTORNEY, Christopher Thomas Micheletti, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith LLP, San Francisco, CA; John James Bogdanor, Josef D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, P.C., San Francisco, CA; Jon T. King, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Kelly Ann Horne, Cooper & Kirkham, San Francisco, CA; Mila F Bartos, PRO HAC VICE, Finkelstein Thompson LLP, Washington, DC.

For Fred W. Krahmer, on behalf of himself and all others similarly situated, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith, LLP, San Francisco, CA; Daniel E. Gustafson, Daniel C. Hedlund, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Garrett D. Blanchfield, Jr., PRO HAC VICE, **[**11]** Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jason Kilene, PRO HAC VICE, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Keith Alderman, on behalf of himself and all others similarly situated, Plaintiff: Nimish Ramesh Desai, LEAD ATTORNEY, Eric B. Fastiff, Michele Chickerell Jackson, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; James Andrew Quadra, Moscone Emblidge & Quadra, LLP, San Francisco, CA; Joseph Richard Saveri, Lieff Cabraser Heiman & Bernstein, LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Jacob Greenwell, on behalf of himself and all others similarly situated, Plaintiff: C. Donald Amamgbo, LEAD ATTORNEY, Amamgbo & Associates, APC, Oakland, CA; Judith Blackwell, Blackwell & Blackwell, Oakland, Ca; Lawrence Dumzo Nwajei, Law Offices of Lawrence D. Nwajei, Los Angeles, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Reginald Von Terrell, The Terrell Law Group, Richmond, CA.

For Lynn Sweatman, Plaintiff: Daniel E. Gustafson, LEAD ATTORNEY, Gustafson Gluek PLLC, Minneapolis, MN; Allan Steyer, Bryan Matthew Kreft, Steyer Lowenthal Boodrookas Alvarez & Smith, LLP, San Francisco, CA; Jason **[**12]** Kilene, Minneapolis, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Carman Pellitteri, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith, LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Kevin's Computer and Photo, on behalf of itself and all others similarly situated, Plaintiff: Joseph C. Kohn, PRO HAC VICE, Kohn Swift & Graf P.C., Philadelphia, PA; Joseph J. Tabacco, Jr., Berman DeValerio, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; William E. Hoese, PRO HAC VICE, Kohn Swift & Graf PC, Philadelphia, PA.

For Joseph P. Theisen, on behalf of himself and all others similarly situated, Plaintiff: Monique Alonso, LEAD ATTORNEY, Adam C. Belsky, Terry Gross, Gross & Belsky LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For George Davis, Plaintiff: Bryan Matthew Kreft, LEAD ATTORNEY, Allan Steyer, Steyer Lowenthal Boodrookas Alvarez & Smith, LLP, San Francisco, CA; Garrett D. Blanchfield, Jr., PRO HAC VICE, Reinhardt Wendorf & Blanchfield, St. Paul, MN; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Christopher Rippel, **[**13]** on behalf of himself and all others similarly situated, Plaintiff: James Jonathan Rosemergy, Michael J. Flannery, PRO HAC VICE, Carey & Danis, LLC, St. Louis, MO; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Ryan Skorstad, Plaintiff: Christine Pedigo Bartholomew, LEAD ATTORNEY, Finkelstein Thompson LLP, San Francisco, CA; Marvin Alan Miller, PRO HAC VICE, Miller Law LLC, Chicago, IL; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Shpetim Ademi, PRO HAC VICE, Ademi & O'Reilly LLP, Cudahy, WI.

For Andrew Kindt, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Craig Essenmacher, Keith Essenmacher, PRO HAC VICE, Lovell Stewart Halebian LLP, New York, NY; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Tristen Woods, Plaintiff: Qianwei Fu, LEAD ATTORNEY, Craig C. Corbitt, Francis Onofrei Scarpulla, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Christopher Lovell, Lovell Stewart Halebian LLP, New York, NY; Craig Essenmacher, **[**14]** Keith Essenmacher, PRO HAC VICE, Lovell Stewart Halebian LLP, New York, NY; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Thomas Nigro, Plaintiff: Marwa Elzankaly, LEAD ATTORNEY, James McManis, McManis Faulkner, San Jose, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Christopher Bessette, Anthony Cardinale, Michael Chek, Kelly Fahner, Donna Jeanne Flanagan, Lindsey Morgan, Martha Mulvey, Joanne Myles, Benjamin Northway, Jai Paguirigan, on behalf of themselves and all others similarly situated in the States of the District of Columbia, Florida, Iowa, Kansas, Maine, Michigan, Minnesota, New Mexico, New York, North Carolina, South Dakota, Vermont, West Virginia and Wisconsin, Plaintiffs: Daniel Edward Birkhaeuser, LEAD ATTORNEY, Jennifer Susan Rosenberg, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Donna Fahner, Plaintiff: Daniel Edward Birkhaeuser, LEAD ATTORNEY, Bramson, Plutzik, Mahler & Birkhaeuser, **[**15]** Walnut Creek, CA; David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Jennifer Susan Rosenberg, PRO HAC VICE, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Travis Wiebe, Plaintiff: Daniel Edward Birkhaeuser, Jennifer Susan Rosenberg, LEAD ATTORNEYS, Bramson, Plutzik, Mahler & Birkhaeuser, Walnut Creek, CA; Robert M. Bramson, LEAD ATTORNEY, Bramson Plutzik Mahler & Birkhaeuser LLP, Walnut Creek, CA; David Boies, III, Ian Otto, Nathan Cihlar, Timothy D. Battin, PRO HAC VICE, Straus & Boies, LLP, Fairfax, VA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Fred J. Gentile, Plaintiff: Jon T. King, LEAD ATTORNEY, Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA; Jayne Arnold Goldstein, PRO HAC VICE, Shepherd Finkelman Miller & Shah, LLP, Weston, FL; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA.

For Robin McEntee, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, Lingel H. Winters, Esq., San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For Robin McEntee, Plaintiff: Lingel Hart Winters, LEAD ATTORNEY, **[**16]** Law Offices of Lingel H. Winters, San Francisco, CA.

For James Knowles, Plaintiff: Michael Andrew McShane, Audet & Partners LLP, SAN FRANCISCO, CA.

For Joshua Steele, Plaintiff: Joseph W. Cotchett, LEAD ATTORNEY, Nancy L. Fineman, Steven Noel Williams, Cotchett Pitre & McCarthy, San Francisco Airport Office Center, Burlingame, CA; Christopher Thomas Micheletti, Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Douglas Yongwoon Park, Cotchett Pitre & McCarthy, Burlingame, CA; Joshua Aaron Jones, Esq., PRO HAC VICE, Aylstock Witkin Kreis & Overholtz, Pensacola, FL; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA.

For Eric Ferguson, Plaintiff: Joseph W. Cotchett, LEAD ATTORNEY, Douglas Yongwoon Park, Cotchett Pitre & McCarthy, Burlingame, CA; Christopher Thomas Micheletti, Craig C. Corbitt, Francis Onofrei Scarpulla, Qianwei Fu, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA; Judith A. Zahid, Zelle Hofmann Voelbel Mason & Gette, LLP, San Francisco, CA; Nancy L. Fineman, Steven Noel Williams, Cotchett Pitre & McCarthy, San Francisco Airport Office Center, Burlingame, CA.

For Samsung Electronics **[**17]** Co., Ltd., Defendant: Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA.

For Samsung Semiconductor, Inc., Defendant: Gary L. Halling, LEAD ATTORNEY, Mona Solouki, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA.

For Hynix Semiconductor, Inc., Defendant: Michael Frederick Tubach, Ryan James Padden, LEAD ATTORNEYS, O'Melveny & Myers LLP, San Francisco, CA; Christopher Stanton Hales, O'Melveny & Myers, San Francisco, CA.

For Hynix Semiconductor America, Inc., Defendant: Michael Frederick Tubach, Ryan James Padden, LEAD ATTORNEYS, O'Melveny & Myers LLP, San Francisco, CA; Peter Bruce Nemerovski, LEAD ATTORNEY, O'Melveny & Myers LLP, Los Angeles, CA; Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Christopher Stanton Hales, O'Melveny & Myers, San Francisco, CA.

For Renesas Technology Corporation, Hitachi America, Ltd, Defendants: Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Daniel E. Alberti, McDermott, Will & Emery LLP, Palo Alto, CA.

For Renesas Technology America, Inc., Defendant: Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Craig P. Seebald, Pamela J. Marple, McDermott **[**18]** Will & Emery LLP, Washington, DC; Daniel E. Alberti, McDermott, Will & Emery LLP, Palo Alto, CA; Peter J. Drobac, McDermott Will & Emery LLP, Menlo Park, CA.

For Toshiba Corporation, Defendant: Belinda S. Lee, LEAD ATTORNEY, Latham & Watkins LLP, Los Angeles, CA; Daniel Murray Wall, LEAD ATTORNEY, Latham & Watkins LLP, San Francisco, CA; Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Casandra Leann Thomson, Latham & Watkins, Los Angeles, CA.

For Toshiba America Electronic Components, Inc., Defendant: Belinda S. Lee, LEAD ATTORNEY, Latham & Watkins LLP, Los Angeles, CA; Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Casandra Leann Thomson, Latham & Watkins, Los Angeles, CA; Daniel Murray Wall, Latham & Watkins LLP, San Francisco, CA.

For Winbond Electronics Corporation America, Inc., Defendant: Steven H. Morrissett, LEAD ATTORNEY, Finnegan, Henderson, Farabow, Garrett &, Palo Alto, CA.

For Hitachi Ltd., Defendant: Daniel E. Alberti, McDermott, Will & Emery LLP, Palo Alto, CA.

For Mosel Vitelic Inc., Defendant: David C. Brownstein, Orrick Herrington & Sutcliffe, San Francisco, CA.

For Sandisk Corporation, Defendant: Amy Elise Keating, Amy Cathleen Melaugh, Frank **[**19]** Hinman, Haywood S. Gilliam, Jr., Bingham McCutchen LLP, San Francisco, CA; Craig P. Seebald, McDermott Will & Emery LLP, Washington, DC; Donald R. Harris, Jenner & Block LLC, Chicago, IL; Gary L. Halling, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA; Krystal N. Bowen, Bingham McCutchen, San Francisco, CA; Richard S. Taffet, PRO HAC VICE, Bingham McCutchen, New York, NY.

For Mitsubishi Electronic Corporation, Defendant: Michael David Lisi, LEAD ATTORNEY, Krieg Keller Sloan Reilley & Roman, San Francisco, CA; Daniel E. Alberti, McDermott, Will & Emery LLP, Palo Alto, CA; Donald R. Harris, PRO HAC VICE, Jenner & Block LLC, Chicago, IL; Margaret J. Simpson, Michael T. Brody, PRO HAC VICE, Jenner & Block LLP, Chicago, IL.

For Toshiba America Inc., Defendant: Belinda S. Lee, LEAD ATTORNEY, Latham & Watkins LLP, Los Angeles, CA; Amy Elise Keating, Bingham McCutchen LLP, San Francisco, CA; Casandra Leann Thomson, Latham & Watkins, Los Angeles, CA; Daniel Murray Wall, Latham & Watkins LLP, San Francisco, CA; Michael Paul Lehmann, Hausfeld LLP, San Francisco, CA.

For State of California, Amicus: Charles M. **[**20]** Kagay, LEAD ATTORNEY, Spiegel Liao & Kagay, LLP, San Francisco, CA; Sangeetha M. Raghunathan, LEAD ATTORNEY, Office of the Attorney General, California Department of Justice, San Francisco, CA.

For U.S. DOJ, Antitrust Antitrust Division, Department of Justice, Intervenor: Lara Meredith Kroop, US Department of Justice, Antitrust Division, San Francisco, CA.

Judges: Honorable Saundra Brown Armstrong, United States District Judge.

Opinion by: Saundra Brown Armstrong

Opinion

[*1138] ORDER DENYING DEFENDANTS' MOTION TO DISMISS DIRECT PURCHASER COMPLAINT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS INDIRECT PURCHASER COMPLAINT

[Docket 370-374, 376, 379, 382, 454]

This consolidated antitrust class action arises from an alleged horizontal price fixing conspiracy between various manufacturers, sellers and distributors of flash memory. Flash memory is a type of electronic memory chip that has become commonplace in a variety of electronic products, such as USB drives, digital cameras, iPhones and similar products. Two separate civil Complaints are pending. The first is the Consolidated Direct Purchaser Class Action Complaint ("Direct Purchaser Complaint"), brought by those who purchased flash memory directly **[**21]** from Defendants. The second is the Indirect-Purchaser Plaintiffs' Consolidated Class Action Complaint ("Indirect Purchaser Complaint"), filed by individuals and entities who purchased both stand-alone flash memory products and products that contain flash memory as a component. Both Complaints allege violations of section 1 of the Sherman Act, *15 U.S.C. § 1*. The Indirect Purchaser Complaint also includes antitrust, consumer protection and equitable claims under the laws of various states.

The parties now are before the Court on: (1) the Motion by All Defendants to Dismiss Direct Purchasers' Sherman Act Claims (Docket 371); and (2) the Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint (Docket 374). [1] Having read and considered the papers submitted, and being fully informed, the Court DENIES Defendants' motion to dismiss the Direct Purchaser Complaint and GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss the Indirect Purchaser Complaint.

I. BACKGROUND

[1] Although Defendants have filed joint motions to dismiss, the following Defendants have filed their own motions to dismiss: Sandisk (Docket 370); Hitachi (Docket 372); Renesas (373); Hynix (Docket 376); and **[**22]** Toshiba (Docket 382).

A. OVERVIEW OF THE DEVELOPMENT OF THE FLASH MEMORY MARKET

There are several types of memory used in or with electronic devices; most notably, **[*1139]** flash memory, dynamic random access memory ("DRAM") and static random access memory ("SRAM"). Flash memory was initially developed in the 1980s by Defendant Toshiba. (Direct Purchaser ("DP") Compl. P 40.) [2] Unlike DRAM and SRAM, flash memory is "non-volatile," meaning that no power is needed to maintain the information stored in the chip. (Id. P 39.) The first generation of flash memory was known as NOR flash memory. (Id.) In 1987, Toshiba developed a second type of flash memory -- NAND flash memory -- which provided greater functionality at a lower cost. (Id. PP 41-43.) NAND flash memory is sold and marketed as a memory device, i.e., flash memory cards, USB drives, etc., and as a component part in other electronic devices, like Apple iPods or iPhones. (Id.)

According to Plaintiffs, the NAND flash **[**23]** memory industry exhibits a number of characteristics that have facilitated the alleged conspiracy to control pricing. (Id. P 44.) The NAND flash memory market is highly concentrated and is dominated by a "handful" of suppliers, i.e., Samsung, Toshiba, Renesas, Hynix and Micron. (Id. P 45.) Over 90 percent of the worldwide market for flash memory is controlled by three companies, Samsung, Toshiba and Hynix. (Id. P 46.) In addition, there are significant barriers to entry, as the cost to develop a modern NAND flash memory production facility can range from $ 4 to $ 5 billion. (Id. P 48.) The flash memory industry also is notable for its numerous cross-licensing and joint venture agreements that have spanned from the mid-1990s at least through the end of 2007. (Id. P 49.) These agreements, along with the Defendants' participation in various trade associations and meetings, ostensibly have facilitated their ability to collude and control flash memory prices. (Id. P 50-59.)

B. COLLUSION IN THE MARKET FOR ELECTRONIC MEMORY

Apparent price fixing in the memory market has caught the attention of the United States Department of Justice ("DOJ") which has launched investigations into the DRAM and **[**24]** SRAM markets. (Id. PP 60-65.) In the DRAM matter, Hynix and Samsung, who also are Defendants in this case, have pleaded guilty to price fixing, and have paid fines in the amount of $ 300 million and $ 185 million, respectively. (Id. P 60.) Defendants Hynix, Mitsubishi, Renesas, Samsung and Toshiba also are under investigation by the DOJ and/or are the subject of civil lawsuits relating to SRAM. (Id. P 62.)

Plaintiffs allege that the illegal pricing activity with respect to DRAM and SRAM is probative of and intertwined with Defendants' allegedly illegal activities in the market for NAND flash memory. (Id. PP 65, 78.) Like the DRAM/SRAM schemes, the purpose and goal of the conspiracy was to (a) coordinate pricing among competitors, (b) stabilize prices to ensure that they did not fall too low, and (c) raise prices when opportunities arose. (Id. PP 72-74.) In terms of its impact, the alleged conspiracy has artificially impacted prices for both NAND flash memory and products using such technology. (Id. PP 75-77.) As a commodity item, NAND flash memory is "highly price elastic" and subject to steep price declines as technology continues to advance. (Id.) Despite these market forces, manufacturers **[**25]** have been able to maintain their margins through artificially controlling the market. (Id.)

[*1140] In terms of overlap, Plaintiffs aver, *inter alia,* that the same employees of the Defendant companies (including those who pleaded guilty to criminal felonies in the DOJ's DRAM investigation) were responsible for pricing DRAM, SRAM and flash memory sold in the United States. (Id. PP 67-69.) These persons allegedly communicated with one another on a regular basis, which helped them to coordinate and control pricing across memory product lines. (Id. PP 79-81.) For instance, in 2001, the price for NAND flash memory, like DRAM pricing, experienced a decline in demand. (Id. P 86.) But through their continuing communications and contacts, in the next quarter Defendants were able to increase DRAM and NAND flash memory prices. (Id.) These "intercompetitor contacts" continued during the 2002 to 2006 time period, as evidenced by a number of emails from Samsung and

[2] These facts are taken from both the Direct Purchaser Complaint and Indirect Purchaser Complaint filed on February 7, 2008. For purposes of the Background section, the references are to the Direct Purchaser Complaint only.

other Defendants suggesting ways to maintain pricing. (Id. PP 89, 91-95.) Defendants allegedly continued their practice of entering into joint venture and cross-licensing agreements as yet another means to control the market. (Id. PP 106-108.)

In **[**26]** or about September 2007, the DOJ confirmed that it was investigating potential antitrust violations with respect to the NAND flash memory market. (Id. P 116.) Toshiba, Renesas and Samsung are among the entities that have received grand jury subpoenas in connection with the investigation. (Id. P 117.)

C. PROCEDURAL SUMMARY

Plaintiffs are individuals and entities who purchased NAND flash memory directly or indirectly from one or more Defendants from 1999 to the present (the "Class Period"). Defendants are alleged to have manufactured, sold, or distributed flash memory to customers throughout the United States during the Class Period. (Id. PP 3-20.) Plaintiffs allege Defendants and unnamed "coconspirators conspired to fix, raise, maintain and stabilize the price of NAND flash memory sold in the United States." (Id. P 1.) [3]

On February 7, 2008, Plaintiff Timothy Chanda filed a Consolidated Direct Purchaser Class Action Complaint ("Direct Purchaser Complaint") against the following Defendants: Samsung Electronics Company Ltd.; Samsung Semiconductor, Inc.; Hitachi, Ltd.; Renensas Technology Corporation; Renesas Technology America, Inc. (formerly known as Hitachi Semiconductor (America) Inc.; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Mitsubishi Electric Corporation; Mitsubishi Electric and Electronics USA, Inc.; SanDisk Corporation; Toshiba Corporation; Toshiba America, Inc.; and Toshiba America Electronic Components, Inc. (Id. PP 3-20.) Plaintiffs allege that they purchased NAND flash memory from one or more of the Defendants. (Id. P 2.) The Direct Purchaser Complaint alleges a single claim under *section 1 of the Sherman Act*. (Id. PP 130-135.)

On the same date, Plaintiffs filed their Indirect Purchaser Complaint against essentially the same Defendants named in the Direct Purchaser Complaint. (Docket 310, Indirect Purchaser ("IP") Compl. PP 50-66.) [4] Indirect Purchasers are 33 individuals and entities who claim they purchased stand-alone NAND flash memory **[*1141]** products **[**28]** (i.e., CompactFlash, SmartMedia, MultiMedia Card, Secure Digital Card, Memory Stick and USB flash drives) and products in which NAND flash memory is a substantial component. (Id. PP 48-49.)

The Indirect Purchaser Complaint alleges four claims for relief:

(1) Violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*;

(2) Unjust Enrichment and Disgorgement of Profits under the laws of Arizona, Arkansas, California, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Tennessee, West Virginia and Wisconsin;

(3) Violation of State Antitrust and Unfair Competition Laws of Alabama, Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Tennessee, West Virginia and Wisconsin; and

---

[3] On January 5, 2007, Plaintiff Trong Nguyen, on behalf of himself and others similarly situated, sued Defendants for violating section 1 of the Sherman Act, *15 U.S.C. § 1*. The Court later related and consolidated 23 cases with the Nguyen action. The Court appointed interim lead counsel for the Direct Purchaser Plaintiffs and Indirect Purchaser Plaintiffs on November 15, **[**27]** 2007. (Docket 256, 257.)

[4] The Indirect Purchaser Complaint adds Hitachi America, Ltd. and Hitachi Semiconductor America as defendants. (Indirect Purchaser ("IP") Compl. PP 60-61.)

(4) Violation of State Consumer Protection and Unfair Competition Laws of Arkansas, California, the District **[**29]** of Columbia, Florida, Hawaii, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, Nevada, New Mexico, New York, North Carolina, Rhode Island and West Virginia. (Id. PP 176-222.)

II. LEGAL STANDARD

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what … the claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (internal quotation marks omitted); *Johnson v. Riverside Healthcare System, LP, 534 F.3d 1116, 1122 (9th Cir. 2008)*. [5] "In general, the inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

HN3[] If dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. See *Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005)*; *Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002)*. In resolving a motion to dismiss, a Court may take judicial notice, upon request, as provided by *Federal Rule of Evidence 201*, without transforming a motion to dismiss into one for summary judgment. See *MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 503 (9th Cir. 1986)*.

[*1142] III. [**31] DIRECT PURCHASER COMPLAINT

A. SUFFICIENCY OF THE CONSPIRACY ALLEGATIONS

The Sherman Act, section 1, states in part that, ***HN4***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. In Twombly, the Supreme Court held that ***HN5***[] a section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *550 U.S. at 556*. That is, there must be enough facts presented "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id. "Asking for *plausible grounds* to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. (emphasis added, footnote and citations omitted).

Defendants assert that allegations in the Direct Purchaser Complaint are **[**32]** too vague and conclusory to comport with the pleading requirements of Twombly. As an initial matter, Defendants complain that the pleadings fail to allege the specific time, place, or person who had any meetings or communications regarding flash memory pricing or output. (Docket 371, Mot. at 11.) The Court disagrees. Among other things, the pleadings identify the companies and/or individuals who were directly involved in setting prices for NAND flash memory. (E.g., DP Compl.

---

[5] Two weeks after issuing Twombly, the Supreme Court clarified in Erickson that **[**30]** Twombly did not signal a switch to fact-pleading in the federal courts. Erickson reaffirmed that ***HN2***[] under *Rule 8* "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *127 S.Ct. at 2200* (quoting *Twombly, 550 U.S. at 555*); see also *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667-668 (7th Cir. 2007)* ("[t]aking Erickson and Twombly together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under *Rule 8*.").

PP 68, 69, 81-85, 88-93, 103, 106.) In particular, the Complaint alleges that many of the same employees in various companies (some of whom have pled guilty to price fixing in the DOJ's DRAM investigation) were responsible for setting prices for different types of memory, including DRAM/SRAM and flash memory. (See id.)

In addition, the Complaint alleges the time frame of such alleged conduct, along with facts pertaining to the coordination of production as a means to control pricing. (E.g, id. PP 86-88, 94, 96, 98, 101-105). [6] For example, there are allegations of specific instances where output was reduced following meetings by Defendants - that, in turn, led to "implausible" price increases. (Id.) Similarly, the **[**33]** marketplace is alleged to have been conducive to coordinated pricing, as demonstrated by the existence of a concentrated market dominated by a few entities, with significant barriers to entry. (See id. PP 45-59.) Courts addressing analogous pleadings have concluded that these types of conspiracy allegations are sufficient to meet the pleading standards of Twombly. E.g., *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 901-02 (N.D. Cal. 2008)* ("SRAM") ("general allegations of a conspiracy, price fixing and the susceptibility of the SRAM market to such violations" sufficient under Twombly); *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1115 (N.D. Cal. 2008)* ("TFT-LCD") (finding that allegations that price stability in flat panel market was inconsistent with natural market forces were sufficient to survive a motion to dismiss). The Court finds that the facts alleged by Plaintiffs are sufficient to give rise to "a plausible suggestion of conspiracy." *Twombly, 550 U.S. at 566*. [7]

[*1143] B. EXCHANGE OF INFORMATION BETWEEN COMPETITORS

The Supreme Court has recognized the danger of collusion posed by the exchange of pricing information. *Great Atlantic & Pacific Tea Co., Inc. v. F.T.C., 440 U.S. 69, 80, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*; see also *United States v. U.S. Gypsum Co., 438 U.S. 422, 457, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* **[**35]** ("the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices"); *United States v. Container Corp., 393 U.S. 333, 337, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)* ("[t]he inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition."). Nevertheless, there is nothing inherently improper with competitors communicating with one another. See *In re Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)* ("communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"). "Accordingly, ***HN7***[] information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 n.13 (9th Cir. 1990)* ("Petroleum Prods.").

Here, Defendants **[**36]** contend that the Plaintiffs' allegations concerning the exchange of information are too "ambiguous" and "sporadic" to suggest the existence of an agreement to fix prices. They claim that the pleadings allege only "three discrete episodes over an eight-year period in which a non-defendant shared an unspecified snippet of 'flash' information…." (Mot. at 12.) That is not accurate. The Complaint specifically alleges that Defendants routinely exchanged highly sensitive competitive information, including pricing and production data, to

---

[6] The references to "Complaint" and "Plaintiffs" in this section refer to the Direct Purchaser Complaint and the Direct Purchaser Plaintiffs, respectively.

[7] In addition **[**34]** to the joint motion to dismiss, Toshiba, Mitsubishi, Hitachi, SanDisk and Hynix filed their own, separate motions to dismiss. The arguments adduced in those motions overlap with those presented in the joint submission. Their central point of contention appears to be the lack of specific allegations directed at their particular company. This argument fails. ***HN6***[] For pleading purposes, allegations of antitrust conspiracy need not be detailed on a "defendant by defendant" basis. See *SRAM, 580 F. Supp. 2d at 903-907* (rejecting argument plaintiffs must allege each defendant's specific role in an antitrust conspiracy); accord *In re Fine Paper Antitrust Litig., 685 F.2d 810, 822 (3rd Cir. 1982)*; *In re Market-Makers Antitrust Litig., 894 F. Supp. 703, 712 (S.D.N.Y. 1995)*. Defendant Hitachi America Ltd.'s separate argument that Plaintiff's claims are time-barred is unsupported by any evidence which, in any event, would be impermissible on a *Rule 12(b)(6)* motion.

facilitate and monitor their price fixing conspiracy. For example, the Complaint alleges that in August 1998, Samsung advised Hynix (both of which are alleged to be key market players) "that it would be attempting to raise memory prices 'across the board in September.'" (Id. PP 46, 80). Samsung also "reportedly told Hynix that it would '*coordinate with Japanese suppliers, asking them to raise, or at least not to lower from August prices.*'" (Id. (emphasis added).) Similarly, there are allegations that Micron and Samsung communicated with one another to discuss pricing and inventory on their respective products. (Id. P 82.)

More recent communications also support **[**37]** a plausible inference of an ongoing pattern of collusion. In late 2001, Samsung's Vice President of Marketing sent an internal email to the various heads of the company's regional memory sales groups. **[*1144]** (Id. P 86.) The email instructed the recipients to contact their *competitors* to urge them that they "*must not retreat from the last quoted price.*" (Id. (emphasis added).) Separately, in 2001, officials from Hynix and Samsung met in Korea to ensure that they were "in the same boat with pricing." (Id. P 88.) These types of contacts continued in the years that followed. For instance, in early 2007, as prices for NAND memory continued to decline, Defendants were making efforts "to reduce NAND supply relative to expected demand growth." (Id. P 101.) Thus, in March 2007, Samsung announced to industry analysts that it had stabilized "price erosion" as a result of "[s]upply constraints due to cautious supply[.]" (Id. P 102.) Notably, Samsung emphasized its expectation that there would continue to be a "severe shortage" with inventories that, in turn, would bolster its margins. (Id.) In the absence of insider knowledge gleaned from communications with its competitors, Samsung allegedly "would **[**38]** have no way of making such a confident prediction." (Id.)

Taken as a whole, these and similar allegations in the pleadings are sufficient to suggest that Defendants routinely exchanged highly sensitive competitive information, including pricing and production data, to facilitate and monitor their alleged price fixing conspiracy. See *SRAM, 580 F. Supp. 2d at 902* (allegations regarding internal emails that discussed competitor's pricing were germane in terms of meeting the Twombly standard); see also *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 662 (7th Cir. 2002)* ("High Fructose") (documents discussing coordination of pricing with competitors probative of price fixing); *Flying J Inc. v. TA Operating Corp., 2007 U.S. Dist. LEXIS 85613, 2007 WL 3254765, *1 (D. Utah 2007)* (price fixing agreement could be inferred from email between competitors even if such an agreement was not discussed expressly).

C. MARKET CONCENTRATION

"[T]he Sherman Act reflects an important federal policy in preventing excessive concentration in relevant markets." *Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 202 (4th Cir. 1990)*; *Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 510 (9th Cir. 1989)*. "Significant **[**39]** market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level." *FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 724 (D.C. Cir. 2001)* (internal quotation marks omitted); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("Tacit collusion … describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."). On the other hand, ***HN8***[] market concentration and market shares are insufficient, standing alone, to establish a Sherman Act violation. See *In re Late Fee and Over-Limit Fee Litig., 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007)* ("Late Fee").

Defendants argue that "plaintiffs' market concentration allegations demonstrate that any alleged 'parallel' conduct is at least as consistent with independent decision-making and vigorous competition as with conspiracy." (Id.) Irrespective of whether that is correct, Defendants ignore that Plaintiffs **[**40]** rely on more than mere allegations of high market concentration to show that the flash memory market is prone to collusion. Rather, in addition to market concentration, they allege the existence of multiple and on-going business relationships, cross-licensing and joint venture **[*1145]** agreements, high barriers to entry, and homogeneity in products. (E.g., DP Compl. P 43, 44, 48, 49, 93, 106-107.) When these allegations are considered in tandem, allegations of high market concentration can appropriately be relied upon as a factor to suggest price collusion. *SRAM, 580 F. Supp. 2d at 903* (denying motion to dismiss where market concentration allegations accompanied by allegations concerning an ongoing agreement to exchange price information for the purpose of stabilizing or increasing prices). While Defendants' assertion that high market concentration was attributable to "independent decision-making and vigorous competition" ultimately may prove to be valid, the Court cannot resolve this issue on the merits at this juncture.

Defendants' secondary contention is that "rapidly shifting market shares" of the various Defendants exemplifies "vigorous competition." (Mot. at 14.) [8] In support, Defendants **[**41]** cite *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1318 (11th Cir. 2003)*, where the court noted that shifts in market share between competitors undermined a showing of collusion. In reaching that conclusion, the court focused on the fact that "[t]hese sharp market share shifts were at least as great as those that occurred between 1980 and 1991, *an unquestionably competitive period.*" Id. (emphasis added). This case is distinguishable, however. Unlike Williamson, there is nothing in the pleadings that would enable the Court to make such comparisons. Perhaps more fundamentally, Defendants' argument relies on inferences being drawn in *their* favor which, of course, is the antithesis of the standard of review applicable to a motion to dismiss. Indeed, Williamson involved the review of a motion for summary judgment, not a motion to dismiss.

D. SUPPLY SHORTAGES

Defendants next contend that the Complaint fails to allege any facts supporting an inference of an express agreement **[**42]** to limit the supply of NAND flash memory, and that the market forces of supply and demand -- not collusion -- explain the alleged supply shortages. (Mot. at 14-16.) In support of its argument, Defendants rely on *In re Citric Acid Litig., 191 F.3d 1090, 1100-101 (9th Cir. 1999)* ("Citric Acid"), where the court held that the defendant's failure to increase production more rapidly did not establish a price fixing conspiracy because "[t]he timing of this decision … does not fit with [plaintiff]'s theory of the conspiracy." Unlike Citric Acid, the Complaint in this case alleges that the supply shortage was orchestrated by Samsung which, in turn, had the effect of controlling prices in the time period that followed. (See DP Compl. PP 94-98.) Defendants also overlook that Citric Acid involved a motion for summary judgment, not a motion to dismiss, where Plaintiffs' allegations must be taken as true. Thus, while the evidence adduced in the action ultimately may support such a defense, the Court finds, as above, that such a determination is premature at this juncture.

E. PRICE STABILITY

HN9[↑] "[R]ising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated **[**43]** market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing." See *Brooke, 509 U.S. at 237*. Brooke recognized that prices may rise due to market forces, and that it **[*1146]** is entirely possible that increases in price and output could occur simultaneously where there is "growing product demand." Id. The Supreme Court noted that "[u]nder these conditions, a jury may not infer competitive injury from price *and* output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." Id.

Defendants argue that "prices were not rising, but falling 'rapidly' as suppliers reduced their costs and competition led those cost savings to be passed through to consumers, even as demand for NAND flash memory experienced 'huge increases.'" (Mot. at 17 (citing DP Compl. PP 75-76.) That is not an accurate characterization of the DP Complaint. Plaintiffs allege that, historically, memory manufacturers have been able to maintain their profit margins even as the price of memory (on a per gigabit basis) declines. (DP Compl. P 76.) They allege that such "unnatural price stability" was **[**44]** the result of Defendants' "collusively agreeing to reduce or limit capacity for the purpose of stabilizing or increasing prices." (Id.) Thus, even in times where there was an oversupply of NAND flash memory,

---

[8] The Court notes that the Complaint does not allege that market shares among the Defendants were "rapidly shifting." That simply is Defendants' characterization of some of the data alleged in the pleadings.

Defendants' conspiratorial conduct "caused those prices to *decrease at a lesser rate* than would have been the case under competitive conditions. (Id. P 77.) Given these allegations, Brooke is inapposite.

Separately, Defendants maintain that any fluctuations and or stability in the price for NAND flash memory is attributable to competitive market forces, as opposed to a collusive agreement among the Defendants to control the market. (Mot. at 17.) The authorities cited by Defendants, however, are inapposite. In *In re Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007)*, the district court dismissed an antitrust complaint which relied entirely on parallel conduct, conclusory averments of conspiracy and references to a European investigation into price fixing. In affirming the dismissal, the Second Circuit focused on (1) the failure to specify "any particular activities by any particular defendant," (2) non-specific allegations of parallel conduct, and (3) the lack of any facts establishing **[**45]** any possible nexus between the European conspiracy and any conduct in the United States. *Id. at 50*. In contrast, the pleadings herein provide much more detail regarding the intracompetitor communications directed at coordinating flash memory pricing and facts regarding the flash memory market structure showing its conduciveness towards collusive pricing schemes. Likewise, facts are alleged regarding the overlap between the companion antitrust investigations in the DRAM/SRAM markets *and* the NAND flash memory market.

Defendants' reliance on Late Fee fares no better. In that case, credit cardholders who paid excessive late fees and/or over-limit fees brought a class action against credit card issuers under *section 1 of the Sherman Act*. The centerpiece of plaintiffs' claims was set forth in a single paragraph of the complaint which was comprised of a chart showing that several of the defendants charged the same or similar late fees. *Late Fee, 528 F. Supp. 2d at 962*. This Court concluded that the complaint was devoid of facts suggesting a preceding agreement, and the scant allegations showed nothing more than parallel conduct. Id. In contrast, the Complaint is far more detailed. Here, Plaintiffs **[**46]** allege facts that the flash memory market is a highly concentrated with high barriers to entry -- conditions that are conducive to a price fixing conspiracy. (DP Compl. PP 44-48.) In addition, it is alleged that Defendants exchanged highly sensitive competitive information (id. PP 78-114), and openly communicated with one another to "coordinate" pricing (e.g., id. PP 80, **[*1147]** 87, 88, 104.) Lastly, unlike the allegations made in Late Fee, the Complaint in this case contains extensive, detailed allegations as to when, where and who engaged in at least some of the meetings that gave rise to the alleged conspiracy. (See id. PP 66-114.) These allegations easily satisfy the notice pleading requirements of the Federal Rules and readily distinguish this case from the conclusory allegations described in Late Fee.

F. **JOINT VENTURES AND CROSS-LICENSING AGREEMENTS**

Plaintiffs allege that various Defendants entered into a "web" of cross-licensing and joint venture agreements as a means to facilitate collusive behavior. (DP Compl. P 49.) In their motion to dismiss, Defendants contend that their joint ventures and cross-licenses are "unambiguously procompetitive," especially given the high entry barriers **[**47]** to the flash memory market. (Mot. at 18-19.) They further argue that the Plaintiffs fail to temporally link any joint ventures or cross-licenses to any price changes and that, at most, they show nothing more than an "opportunity" to conspire, and do not by themselves support an inference of collusion. (Id.) ***HN10***[] As a general proposition, it is true that agreements between competitors may be entirely benign. See *Texaco Inc. v. Dagher, 547 U.S. 1, 7, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. That, however, does not necessarily support Defendants' conclusion that the joint venture and cross-licensing agreements, as alleged in the pleadings, are irrelevant for purposes of the instant motions to dismiss.

The Ninth Circuit has aptly observed that ***HN11***[] "direct evidence will rarely be available" to prove the existence of a price fixing conspiracy. See *Petroleum Prods., 906 F.2d at 439*. It is for that reason that "circumstantial evidence is the lifeblood of ***antitrust law***." *U.S. v. Falstaff Brewing Corp., 410 U.S. 526, 534 n.13, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)*. In this case, the allegations regarding Defendants' participation and use of joint venture and cross-licensing agreements go beyond merely alleging that Defendants' joint ventures, licensing agreements and **[**48]** other business affiliations simply fostered an "opportunity" to collude. To the contrary, Plaintiffs alleged that such agreements were used as the means to maintain and achieve the end result of the conspiracy by controlling the supply, and thereby permitting increases in the price for the products. (DP Compl. PP 49-59, 93-94, 106-07.) [9] While these allegations may not expressly state that the agreements themselves were illegal, they nonetheless may be considered with the pleadings as a whole in determining the existence of a "plausible" conspiracy. See *High Fructose, 295 F.3d at 662* (noting that ***HN12***[] "ambiguous" evidence should be considered in antitrust claims because "most cases are constructed out of a tissue of such statements and other circumstantial evidence").

[*1148] G. TRADE SHOWS AND TRADE ASSOCIATION MEETINGS

The Complaint alleges that "Defendants belong to a web of different trade associations and participate in various industry trade shows, all of which provide forums at which they can collude to fix prices and limit capacity for NAND flash memory." (DP Compl. P 50.) One such association is the Compact Flash Association ("CFA"), in which Defendants Samsung, Toshiba, Hitachi, Mitsubishi and SanDisk all are members. (Id. P 51.) The CFA allegedly holds regular meetings and participates in trade shows throughout the world. (Id. P 52.) Plaintiffs assert **[**50]** that these meetings and trade shows provide a vehicle for the "cartel's members" to communicate regularly to "facilitate the development of a conspiracy." (Id. P 59.) In response, Defendants claim that their membership in a trade association is presumptively legitimate and that their attendance at such industry meetings and events generally does not establish illegal collusion.

HN13[] Generally, there is nothing particularly nefarious in attending industry functions. See *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007)* ("GPU I"). Nor is there anything necessarily improper with their participation or membership in industry trade associations. See *Citric Acid, 191 F.3d at 1098*. Indeed, trade associations serve a beneficial and legitimate function. See *McDaniel v. Appraisal Institute, 117 F.3d 421, 424 (9th Cir. 1997)*. That notwithstanding, courts have recognized that trade association affiliations and attendance at industry events may be alleged to show that putative conspirators had the opportunity and means to develop and/or further their alleged collusive scheme. See *Todd v. Exxon Corp., 275 F.3d 191, 213 (2d Cir. 2001)* ("the frequency of the meetings **[**51]** is itself problematic for the same reason that the exchange of current price data is suspect: It tends to facilitate the policing of price conspiracies."). And while "these allegations cannot alone support Plaintiffs' claims, [] such participation demonstrates *how and when* Defendants had opportunities to exchange information or make agreements." *SRAM, 580 F. Supp. 2d at 903* (emphasis added).

The Court also disagrees with Defendants that dismissal is warranted on the ground that Plaintiffs fail to identify "who attended these meetings, what was discussed at them, or how they purportedly related to the conspiracy other than providing an opportunity for the parties to talk to one another…." (Mot. at 20.) Not only do Defendants fail to assert any authority in support of their contention that this level of specificity - akin to *Rule 9(b)* - is required, their argument is inconsistent with the Supreme Court's holding that "[s]pecific facts are not necessary" at the pleading stage. See *Erickson, 127 S.Ct. at 2200*. Twombly merely requires enough facts in the complaint as a whole to "nudge [plaintiffs'] claims across the line from conceivable to plausible." *550 U.S. at 570*. Thus, while Plaintiffs' **[**52]** allegations regarding trade organizations and trade meetings, *standing alone,* may not state a claim under the Sherman Act, they may properly be considered along with the other allegations in the Complaint as discussed above for purposes of the assessing the sufficiency of the Complaint. See *SRAM, 580 F. Supp. 2d at 903*.

---

[9] For example, the Complaint alleges that as early as 2002, industry participants called for cooperation among competitors to "prevent a price war," and that Defendants heeded these suggestions. (DP Compl. PP 91-92.) It further is alleged that consistent with this strategy, Renesas was created in 2003 as a joint venture by Defendants Hitachi, Ltd. and Mitsubishi. (Id. P 64.) It thus is plausible to conclude that the formation **[**49]** of Renesas was itself a conspiratorial act to control prices and supply. See *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3rd Cir. 1993)* (noting that a range of circumstantial evidence can show collusion; "'[f]or example, have they attended meetings or *conducted discussions at which they had the opportunity to conspire;* have they acted against their own economic best interests; have they engaged in parallel behavior that is economically irrational unless an agreement exists; *has at least one participant expressly invited common action by the other*'") (emphasis added).

H. RELATIONSHIP BETWEEN DRAM/SRAM AND FLASH MEMORY CONSPIRACIES

Plaintiffs posit that the Defendants' alleged conspiracy to manipulate pricing for NAND flash memory was modeled after their pricing schemes in the markets for DRAM and SRAM memory, which are the subject of DOJ investigations. (DP Compl. P 71.) According to Defendants, **[*1149]** the DRAM/SRAM investigations are irrelevant for purposes of establishing a conspiracy regarding NAND flash memory on the ground that Plaintiffs have failed to establish a nexus between the DRAM/SRAM pricing schemes and the alleged conspiracy to control the price of NAND flash memory. (Mot. at 21.)

In *United States v. Andreas, 216 F.3d 645 (7th Cir. 2000)*, the court recognized that ***HN14***[] evidence concerning a prior conspiracy may be relevant and admissible to show the background and development of a current conspiracy. In Andreas, the court addressed **[**53]** a claim that there was a conspiracy to fix prices and control the output of Lysine, an amino acid. On appeal, the court rejected defendants challenge to the admissibility of evidence concerning a similar scheme involving the related market for citric acid. The court found that there was evidence that the citric acid scheme "provided the blueprint for and motivating force behind the nascent lysine scheme," and thus, was admissible to provide context as to how the lysine conspiracy operated. *Id. at 665*; see also *High Fructose, 295 F.3d at 661* (same). Likewise, in SRAM, the district court acknowledged that "[a]lthough the DRAM guilty pleas are not sufficient to support Plaintiffs' clams standing on their own, *they do support an inference of a conspiracy in the SRAM industry.*" *580 F. Supp. 2d at 903* (emphasis added).

Defendants ignore the above authority, and instead, focus on the fact that the employees who pleaded guilty to price fixing in the DRAM investigation worked for only *two* of the Defendant companies. (Mot. at 21-22, Reply at 12-13.) While that may be so, the Court notes that the two companies involved, Samsung and Hynix, collectively controlled the *majority* of the flash memory **[**54]** market *and* together paid fines approaching half a billion dollars. (DP. Compl. PP 68, 69, 46.) In addition, at least seven of the employees involved are alleged to have had responsibility for NAND flash memory pricing, sales, marketing and operations in the United States. (Id. P 67-69.) [10] Given these employees' overlapping involvement in controlling DRAM and flash memory pricing, coupled with the significant market power wielded by their employers, it is reasonable to infer that their involvement in the DRAM conspiracy had at least some connection to the alleged conspiracy in this case.

Defendants also attempt to distinguish the two conspiracies by claiming, inaccurately, that the DRAM case involved raising prices, while this case involves restricting supplies. (Mot. at 22.) In fact, the Complaint expressly alleges that "Defendants and their co-conspirators conspired to *fix, raise, maintain and stabilize the price of NAND flash memory sold in the United States*…." (DP Compl. PP 1, 33 (emphasis added).) Similarly, Plaintiffs allege that Defendants specifically discussed **[**55]** controlling prices with regard to all memory products. (Id. PP 79-80, 82, 84-85, 87-88, 102.) But even if the flash memory scheme focused more on affecting output, the fact remains that the purpose of both conspiracies was to artificially control and impact the memory market in order to generate or preserve profits. At bottom, while these facts may not *prove* the existence of a conspiracy with respect to NAND flash memory, they are properly pleaded for the purpose of establishing the plausibility that such a conspiracy existed. [11]

---

[10] It also is noteworthy that nearly all of the Defendants in this case sell DRAM and NAND flash memory. (DP Compl. P 66-69.)

[11] In their Complaint, Plaintiffs allege that the Department of Justice ("DOJ") has begun investigating Defendants for price-fixing *flash* memory. (DP Compl. PP 115-118.) Plaintiffs suggest that this development may be used to create an inference of anti-competitive activity. However, as noted by Defendants, the mere fact that an investigation is under way is not by itself an appropriate consideration for purposes of determining the adequacy of the pleadings. See *SRAM, 580 F. Supp. 2d at 903* ("The Court agrees that the existence of the investigation [regarding SRAM] does not support Plaintiffs' antitrust conspiracy claims"); *GPU, 527 F. Supp. 2d at 1024* (finding **[**56]** that it would be sheer speculation to infer anti-competitive behavior from a mere investigation, as opposed to a proceeding which results in charges or civil or criminal penalties).

[*1150] I. SUMMARY

The Court concludes that the Complaint alleges "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 576*. Defendants' motion to dismiss the Direct Purchaser Complaint is therefore DENIED.

IV. INDIRECT PURCHASER COMPLAINT

A. OVERVIEW

Separate and apart from the Direct Purchaser Complaint, 33 individuals and entities have filed an Indirect Purchaser Complaint, which also is the subject of a joint motion to dismiss. Unlike the Direct Purchasers, the Indirect Purchasers' claims are "limited in scope to NAND Flash Memory purchased indirectly where NAND Flash Memory is entirely a stand-alone product or a substantial component of another product...." (IP Compl. P 12.) Examples of such products include flash memory cards, USB flash drives, flash-based digital music players (i.e., iPods, etc.) and higher end mobile telephones and computing devices. (Id.)

Defendants' motion to dismiss presents five central arguments: (1) Plaintiffs fail to satisfy pleading requirements of **[**57]** Twombly; (2) Plaintiffs lack standing to assert state law antitrust claims; (3) Plaintiffs' consumer protection claims fail as a matter of law; (4) Plaintiffs cannot plead a claim for unjust enrichment alongside claims that seek a remedy at law; and (5) Plaintiffs lack standing to assert claims under the laws of states where none of them resides. Defendants' arguments regarding Twombly fail for the reasons discussed *supra* in the section of this Order analyzing the motion to dismiss the Direct Purchaser Complaint. As to the remaining four grounds for dismissal, the Court discusses them seriatim. [12]

B. STANDING TO PURSUE STATE ANTITRUST CLAIMS

1. Applicability of the AGC Standard

In *Illinois Brick Company v. Illinois, 431 U.S. 720, 730, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, ***HN15***[] the Supreme Court held that indirect purchasers generally may not sue for money damages under *Section 4 of the Clayton Act*. In response to Illinois Brick, a number of states passed "repealer" statutes which expressly allow indirect purchasers to recover money **[**58]** damages for antitrust violations under state law. See *California v. ARC Am. Corp., 490 U.S. 93, 97-98, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In the present case, Plaintiffs' third claim for relief for state antitrust violations is predicated on the repealer statutes of Alabama, Arizona, California, the District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Tennessee, West Virginia and Wisconsin. (IP Compl. PP 187-205.)

In their motion to dismiss, Defendants contend that Plaintiffs lack standing **[*1151]** to bring state antitrust claims on the ground that they cannot meet the requirements set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("AGC"). [13] "[T]he Supreme Court in [AGC] identified ***HN16***[] certain factors for determining whether a plaintiff who has borne an injury has antitrust standing. These factors include: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative

---

[12] All references to "Plaintiffs" and "Complaint" in this section are to the Indirect Purchaser Plaintiffs and the Indirect-Purchaser Plaintiffs' Consolidated Class Action Complaint, respectively.

[13] It bears noting that the Indirect Purchasers Plaintiffs are comprised of those who purchased (1) flash memory as a "stand-alone product' and (2) products where flash memory is a "substantial component" of a finished product. (IP Compl. P 12.) Defendants' motion to dismiss is limited specifically to the latter category, i.e., "Flash Memory-based products." (Mot. at 12.)

measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity **[**59]** in apportioning damages." *American Ad Mgmt., Inc. v. General Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)* (citing *AGC, 459 U.S. at 535*). "To conclude that there is antitrust standing, a court need not find in favor of the plaintiff on each factor." Id. Instead, courts are to balance the factors, "giving great weight to the nature of the plaintiff's alleged injury." Id.

The threshold question presented with regard to the issue of standing is whether *AGC*, the standard for determining standing under federal antitrust claims also applies to antitrust claims predicated on state law. Resolution of that question is predicated on state law. ***HN17***[] In analyzing questions of state law, federal courts are bound by the decisions of the state's highest court. See *United Broth. of Carpenters and Joiners of America Local 586 v. N.L.R., 540 F.3d 957, 963 (9th Cir. 2008)* **[**60]** ("Carpenters"). It is settled that "[w]here the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482 (9th Cir. 1986)* (as amended). If "there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck and Co., 505 F.3d 993, 994 (9th Cir. 2007)* (emphasis omitted). Relevant decisions of courts in other jurisdictions also should be considered. See *Giles v. General Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007)*.

Defendants summarily argue that AGC governs the standing inquiry to Plaintiff's state antitrust claims under Arizona, California, Iowa, Kansas, Maine, Michigan, Nebraska, North Carolina, South Dakota, Mississippi, Nevada, New Mexico, West Virginia, Wisconsin law. (Mot. at 17.) The Court concurs with Defendants only with respect to Iowa, Nebraska and California. The highest courts in both Iowa and Nebraska have held that **[**61]** the AGC factors apply to their antitrust laws. *Southard v. Visa USA, Inc., 734 N.W.2d 192, 198-99 (Iowa 2007)*; *Kanne v. Visa U.S.A., Inc., 272 Neb. 489, 723 N.W.2d 293, 302-03 (2006)*. As such, the Court is compelled to find that AGC applies to Indirect Plaintiffs' antitrust claims based on Iowa and Nebraska law. See *Carpenters, 540 F.3d at 963*. As to California, its Supreme Court has not reached this issue, but at least one of its intermediate appellate courts has applied these factors to its ***antitrust law***, the Cartwright **[*1152]** Act, *Cal. Bus. & Prof. Code § 16720 et seq.* See *Vinci v. Waste Mgmt., Inc., 36 Cal.App.4th 1811, 43 Cal. Rptr. 2d 337, (1995)*; *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)*. Accordingly, the Court finds that AGC applies to Plaintiffs' California law antitrust claims as well. See *Ryman, 505 F.3d at 994* (holding that intermediate appellate court decisions generally are binding).

The Court disagrees that AGC applies to any of remaining states in dispute. With respect to Arizona, Nebraska, Nevada, New Mexico, South Dakota and West Virginia, there are no state court appellate decisions or compelling decisions from other jurisdictions to provide this Court with guidance on how **[**62]** to "predict" how the highest court of each state would rule on this issue. See *Dimidowich, 803 F.2d at 1482*. However, Defendants note that each of these states has harmonization provisions calling for their respective statutes to be construed in accordance with federal law. See *Ariz.Rev.Stat. Ann. § 44-1412* ("in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes"); *Neb.Rev.Stat. § 59-829* ("the courts of this state in construing [Nebraska's antitrust statute] shall follow the construction given to the federal law by the federal courts"); *Nev.Rev.Stat. § 598A.050* ("The provisions of this chapter [under Nevada law] shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes"); *N.M. Stat. Ann. § 57-1-15* ("the [New Mexico] Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws"); *S.D. Codified Laws § 37-1-22* ("It is the intent of the [South Dakota] Legislature that in construing this chapter, the courts may use as a guide interpretations given by the federal or state courts to comparable antitrust statutes."); **[**63]** *W.Va. Code § 47-18-16* ("This [West Virginia] article shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal statutes").

As to Kansas, Maine, Michigan, Mississippi, North Carolina, South Dakota and Wisconsin, the Court has not been directed to any pertinent court decisions or any harmonization provisions, as in the case of the other states at issue. However, Defendants focus the Court's attention on cases purporting to demonstrate that states interpreting their antitrust laws look to federal antitrust precedents for guidance. See *Orr v. Beamon, 77 F. Supp. 2d 1208, 1212 (D. Kan. 1999)* ("standing under the Kansas antitrust statutes requires an antitrust injury similar to that required under the Sherman and Clayton Acts"); *Davric Maine Corp. v. Rancourt, 216 F.3d 143, 149 (1st Cir. 2000)* ("We have noted that the 'Maine antitrust statutes parallel the Sherman Act,' and thus have analyzed claims thereunder according to the doctrines developed in relation to federal law."); *First Med Representatives, LLC v. Futura Med. Corp., 195 F. Supp. 2d 917, 922 (E.D. Mich. 2002)* ("Michigan courts apply Sherman Act analysis to the [Michigan Antitrust Reform **[**64]** Act]"); *Pope v. Mississippi Real Estate Com'm, 872 F.2d 127, 129 (5th Cir. 1989)* (combining analysis of Mississippi and federal antitrust claims); *Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521, 530 (1973)* ("the body of law applying the Sherman Act, although not binding upon this Court in applying [North Carolina's ***antitrust law***], is nonetheless instructive in determining the full reach of that statute."); *State v. Waste Mgmt. of Wis., Inc., 81 Wis. 2d 555, 261 N.W.2d 147, 155 (1978)* ("Except for the fact that the state act applies to intrastate commerce while the federal act applies to interstate commerce, what amounts to a conspiracy in restraint of trade under the Sherman Act amounts **[*1153]** to a conspiracy in restraint of trade under the Wisconsin antitrust act.").

With little reasoning or analysis, Defendants urge the Court to follow DRAM I, where the court found the existence of harmonization provisions and/or judicial reference to federal antitrust precedents to interpret state antitrust statutes as a sufficient basis on which to trigger application of AGC. (Mot. at 8.) This Court, however, is reticent to adopt an across-the-board rule that a state's harmonization provision, whether created by statute **[**65]** or common law, is an appropriate means of predicting how a state's highest court would rule regarding the applicability of AGC to state law antitrust claims. Neither party has provided the Court with the requisite, individualized analysis on a per state basis to enable the Court to render such a determination. As a consequence, "this order declines to undertake the back-breaking labor involved in deciphering the state of antitrust standing in each of those states on this motion - particularly since, as shown below, indirect purchasers have shown standing under AGC for consumers who bought finished [flash memory products]." See *GPU II, 540 F. Supp. 2d at 1097*. Thus, the Court concludes that AGC's standing analysis applies only to Plaintiffs' state antitrust claims based on California, Iowa and Nebraska law.

2. Application of the AGC Factors to Plaintiffs' Antitrust Claims Under California, Iowa and Nebraska Law

a) Nature of the Injury

HN18[] The first factor under AGC is whether the injury alleged by Plaintiffs is the type the antitrust laws are intended to prevent. See *American Ad Mgt., 190 F.3d at 1055*. "A plaintiff may only pursue an antitrust action if it can show antitrust injury, which is **[**66]** to say 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *DRAM II, 516 F. Supp. 2d at 1089* (quoting *American Ad Mgmt., 190 F.3d at 1055*). "The requirement that the alleged injury be related to anti-competitive behavior requires, *as a corollary,* that the injured party be a participant in the same market as the alleged malefactors." *Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)* (emphasis added); see also *Tanaka v. University of Southern Calif., 252 F.3d 1059, 1063 (9th Cir. 2001)* (the anticompetitive effects must be felt in the "relevant market"). To determine whether an injured plaintiff is indeed a market participant, "the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand" between the product or services involved. *Bhan, 772 F.2d at 1470-71*.

In this case, Plaintiffs contend that they were injured by "paying higher prices for products containing NAND Flash Memory than they would have in the absence of Defendants' conspiracy." (IP Compl. P 148; Opp'n at 23.) Defendants do not dispute that this is the type of injury that antitrust laws were intended to protect **[**67]** against. See *American Ad Mgt., 190 F.3d at 1055*. Rather, Defendants' central contention is that Plaintiffs cannot show that they are "participants" in the restrained market. (Mot. at 9-10.) More specifically, Defendants assert that the alleged anticompetitive conduct occurred only in the market for *direct* purchasers of NAND flash memory, which is different than for *indirect* purchasers where the relevant market ostensibly is defined by where the particular product containing flash memory is sold. (Mot. at 9-10.)

The argument posited by Defendants was rejected in *GPU II, 540 F. Supp. 2d at* ***[*1154]*** *1098*. In that case, direct and indirect purchasers brought federal and state antitrust claims against producers of graphics processing units ("GPUs"). GPUs are devices used in computers, servers, work stations, gaming consoles and mobile communication devices. Direct purchasers alleged that they purchased GPUs directly from manufacturers, while indirect purchasers alleged they purchased finished products that contained GPUs. Defendants moved to dismiss the indirect purchasers' claims on the ground that they were not participants in the relevant market because they "participated" in the market for the finished **[**68]** product containing GPUs, as opposed to the market for GPUs themselves. Id. The court rejected that distinction, however, noting that GPUs "are separate components of a computer and that any costs attributable to them are traceable through the chain of distribution." Id.

The court in TFT-LCD applied similar reasoning in a class action involving thin film transfer liquid crystal display ("LCD") panels and products. *586 F. Supp. 2d at 1123*. As in GPU I, the defendant manufactures argued that the indirect plaintiffs could not be considered participants in the relevant market for LCDs, since they purchased finished products containing LCD panels. The court found the alleged distinction to be uncompelling in view of the plaintiffs' allegations that the market for LCD panels and the market for the products into which the panels are placed are "inextricably linked and intertwined," and as a result, the demand for LCD panels directly derives from the demand for such products in which it is used as a component. Id. The court added that "there are factual questions about the relevant market," such as whether the indirect purchaser plaintiffs actually participated in the market for LCD panels through **[**69]** their purchases of products containing such panels or whether that market was "analytically distinct" from the market for LCD panels. Id. In either event, the court concluded that "plaintiffs' allegations are sufficient at this stage to weigh in favor of standing under the first factor of AGC." Id.

As in GPU I and TFT-LCD, Plaintiffs have alleged sufficient facts that they, as Indirect Purchasers of NAND flash memory-based products, are in the "same market" as Direct Purchasers, at least as far as antitrust standing is concerned at this stage of the proceedings. The Complaint alleges that NAND flash memory has a variety of applications. It can be purchased as a stand-alone item or incorporated as a central component of finished products, such as digital music players, USB drives, and so on. (IP Compl. P 73.) Regardless of how it is sold, however, NAND flash memory provides essentially the same functionality; that is, versatile, digital storage that is *not* dependent on the presence of power to maintain its memory. (Id. PP 71-72.) Thus, while the markets for NAND flash memory and products that contain NAND flash memory technically may be different, in practice, both markets are inextricably **[**70]** intertwined and there is inherent cross-elasticity of demand between the two. (Id. P 73.) For purposes of the instant motion to dismiss, Plaintiffs have alleged sufficient facts to show that they are market participants for purposes of AGC. However, it bears noting that the actual determination of whether indirect purchasers are "participants" in the same "relevant market" for purposes of antitrust standing is better suited to resolution upon a fuller record. See *TFT-LCD, 586 F. Supp. 2d at 1123*.

b) The Directness of the Injury

HN19[] "The second [AGC] factor looks to whether [the] alleged injury was the direct result of [defendants'] allegedly anticompetitive conduct.... To assess the directness **[*1155]** of this injury, we look to the chain of causation between [the] injury and the alleged restraint in the market[.]" *Am. Ad Mgt., 190 F.3d at 1058*. Defendants contend that there is no direct injury because NAND flash memory is merely a component of the finished product, and is but one of many variables affecting its price. (Mot. at 13.) They also claim that the distribution channels for finished products differ from those for NAND flash memory. (Id.)

In TFT-LCD and GPU I, the courts found that indirect **[**71]** purchasers of components had satisfied their burden of pleading directness of injury by alleging that the cost of the component was traceable through the product distribution chain. Compare *TFT-LCD, 586 F. Supp. 2d at 1123* (directness requirement met based on allegations that cost of component part comprised a substantial amount of the finished product cost and could be traced through the distribution chain); *GPU II, 540 F. Supp. 2d at 1098* (same) with *DRAM II, 516 F. Supp. 2d at 1092* (directness requirement not met where the "complaint sets forth no allegations that, within the final purchase price of a given product purchased by plaintiffs for 'end use,' the ultimate cost of DRAM is somehow directly traceable or distinguishable").

In this case, the Complaint expressly alleges that "[w]hen NAND Flash Memory is purchased by consumer as part of an electronic device, it is a distinct, physically-discrete hardware element of the end-use product and is identifiable by a specific, discrete part or model number that permits tracing. NAND Flash Memory is identifiable and traceable throughout the chain of the distribution to the end user. It does not undergo any alterations as it moves through **[**72]** the chain of distribution." (IP Compl. P 152.) The pleadings further allege that "[t]racing can help show that changes in the prices paid by direct purchasers of NAND Flash Memory affect prices paid indirect-purchasers of the Flash Memory itself or products containing Flash Memory." (Id. P 154.) In addition, NAND Flash Memory allegedly "makes up an overwhelming majority of the cost of NAND flash-based memory devices and a substantial portion of the consumer devices in which NAND Flash Memory is packaged to be sold as a component." (Id. P 157.) These allegations are adequate to show that there is a chain of causation between Defendants' allegedly anticompetitive conduct and Plaintiffs' injury, which is the overpayment for flash memory products and finished products containing NAND flash memory.

c) Speculative Nature of Harm and Complexity in Apportioning Damages

HN20[] The final third and fifth AGC factors - the speculative nature of the harm and the complexity in apportioning damages - may be considered together. See *DRAM II, 516 F. Supp. 2d at 1092* (citing *American Ad Mgmt, 190 F.3d at 1054-55*). As to these factors, Defendants make essentially the same arguments that they raised regarding AGC's **[**73]** second factor; namely, that NAND flash memory is just one of many components of a finished product, and as such, any attempt to distinguish the impact of its allegedly inflated price on the purchase price of a retail product would be speculative and excessively complex. (Mot. at 13-15.) As discussed above, Plaintiffs have alleged that the NAND flash memory, whether in the form of a product or as a component of a finished product, remains discrete and traceable to its manufacturer. This is sufficient for purposes of avoid dismissal. See *DRAM II, 516 F. Supp. 2d at 1092-93*.

d) Duplicative Recovery

HN21[] "The risk to be avoided under [the duplicative recovery factor] is that potential **[*1156]** plaintiffs may be in a 'position to assert conflicting claims to a common fund . . . thereby creating the danger of multiple liability for the fund.'" *American Ad Mgmt., 190 F.3d at 1059* (quoting *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 542 (9th Cir. 1987))*. Defendants briefly assert that a duplicative recovery "is a near certainty" given that the Direct Purchasers' claims also are before the Court. (Mot. at 16.) Such a concern, however, generally is inapposite in the context of indirect purchaser state law **[**74]** antitrust claims. "States … which have repealed Illinois Brick and allowed indirect purchasers to sue for antitrust violations, have necessarily made the policy decision that duplicative recovery may permissibly occur. Duplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery. Accordingly, it is no bar against standing, and this factor does not weigh against standing." *DRAM II, 516 F. Supp. 2d at 1094*. In any event, the Court notes that Plaintiffs have alleged that the alleged overcharges by Defendants are distinct and traceable. (IP Compl. PP 152-57.) In such instances, courts have acknowledged that the risk of duplicative recovery is less of a concern. *TFT-LCD, 586 F.Supp.2d at 1124*; *GPU II, 540 F. Supp. 2d at 1098*.

At bottom, the Court concludes that Plaintiffs' allegations are sufficient to establish standing at this stage of the pleadings for the California, Iowa and Nebraska Plaintiffs to pursue their antitrust claims. [14]

C. CONSUMER PROTECTION CLAIMS

The next issue for the Court's consideration is Defendants' contention that Plaintiffs have failed to a state claim based on the consumer protection statutes of Arkansas, the District of Columbia, Hawaii, Kansas, Maine, New Hampshire, New Mexico, New York, Rhode Island and West Virginia. (Mot. at 17.) As will be discussed below, the Court agrees with Defendants' motion, in part, and dismisses with prejudice Plaintiffs' claims under the laws of

---

[14] As noted, Defendants have not demonstrated that AGC applies to Plaintiffs' antitrust claims based on the laws of Arizona, **[**75]** Kansas, Maine, Michigan, North Carolina, South Dakota, Mississippi, Nevada, New Mexico, West Virginia and Wisconsin, and they have not advanced any other ground for dismissing these particular claims at this time.

Kansas, Maine, Rhode Island and West Virginia. The Court also dismisses Plaintiffs' claims under the laws of the District of Columbia, Hawaii, New Hampshire, New Mexico and New York, but grants leave to amend to correct the deficiencies, as explained below. The motion to dismiss is denied as to Plaintiffs' consumer protection claims based on the law of Arkansas.

1. Arkansas [15]

HN22[] The Arkansas Deceptive Trade Practices Act ("ADTPA"), *Arkansas Code §§ 4-88-101, et seq.*, prohibits "[d]eceptive and unconscionable trade practices," including "[e]ngaging in any other *unconscionable,* false, or deceptive act or practice in business, commerce, or trade…." Id. *§ 4-88-107(a)(10)* (emphasis added); see also id., *§ 4-88-108* (prohibiting deception, fraud and false pretense). While there appear to be no published state appellate rulings directly on point, Arkansas courts have construed the statute broadly. E.g., *State ex rel Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299, 302-303 (Ark. 1999)* (usury scheme constituted "unconscionable" **[*1157]** conduct). In addition, several district courts interpreting the ADTPA have found that the term "unconscionable trade practices" is sufficiently broad to encompass price fixing. See *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 2009 U.S. Dist. LEXIS 20975, 2009 WL 560601 at *27 (M.D. Pa. March 4, 2009)* ("Chocolate Confectionary") (conspiracy **[**77]** to fix and stabilize chocolate confectionary prices); *In re New Motor Vehicles Canadian Export Antitrust Litig., 350 F. Supp. 2d 160, 178 (D. Me. 2004)* ("NMV") (conspiracy to keep Canadian-manufactured vehicles from entering the U.S. automobile market).

Relying on a footnote in *NMV, 350 F. Supp. 2d at 178 n.22*, Defendants contend that the district court rejected "the very same theory of deception -- the failure to disclose an alleged conspiracy -- that Plaintiffs espouse in this case." (Reply at 17.) That contention lacks merit. Though the Complaint alleges that Defendants acted in a "deceptive" manner "to cover up their illegal acts," the pleadings also allege that Defendants engaged in "unconscionable conduct" by misleading the public into believing that the prices they were paying for NAND flash memory were set by the free market when, in fact, they were not. (IP Compl. P 208e.) Moreover, the footnote cited by Defendants does not pertain to the ADTPA, but rather, refers generally to state consumer protection statutes that prohibit only "fraudulent or deceptive conduct." *NMV, 350 F. Supp. 2d at 177 n. 22*.

Defendants also urge the Court to follow Judge Alsup's ruling in GPU I where **[**78]** he found that plaintiffs' failure to plead "grossly unequal bargaining power" was fatal to their claims based on the consumer protection laws of Arkansas, among other states. *527 F. Supp. 2d at 1029-1030*. This Court does not find the analysis set forth in GPU I to be pertinent to the issue presented herein, particularly in light of **HN23**[] the Arkansas Supreme Court's view that an unconscionable act is one that is "an act that 'affronts the sense of justice, decency, or reasonableness,'" including acts "*violative of public policy or a statute.*" *Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800, 810-11 (Ark. 2006)* (emphasis added). Here, Plaintiffs allege specifically that "Defendants' conduct with regard to the sales of NAND Flash Memory, including their illegal conspiracy to secretly fix the price of NAND Flash Memory at supracompetitive levels and overcharge customers, was substantively unconscionable because it was one-sided and unfairly benefitted Defendants at the expense of Plaintiffs and the public." (IP Compl. P 208f.) Such allegations, construed in favor of Plaintiffs, can be considered to constitute a violation of public policy. For these reasons, Defendants' motion to dismiss Plaintiffs' **[**79]** ADTPA claim is DENIED.

2. District of Columbia

HN24[] The District of Columbia's Consumer Protection Practices Act ("DCCPPA"), *D.C. Code § 28-3901*, is intended to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices…." *D.C. Code § 28-3901(b)(1)*. The Act "defines its terms comprehensively so that it can provide a remedy for all improper trade practices." *Cooper v. First Government Mortg. & Investors Corp., 206 F.*

[15] Defendants do not specifically address the consumer protection laws of Arkansas, the District of Columbia or New Mexico, but present **[**76]** a single argument that each of these three jurisdictions requires a showing of unequal bargaining power. (Mot. at 17; Reply at 17.) Because the statutes of each of these jurisdictions differ, the Court addresses each separately.

Supp. 2d 33, 35 (D. D.C. 2002); *Dist. Cablevision Ltd. v. Bassin, 828 A.2d 714, 723 (D.C. 2003)* (purpose of DCCPPA is "to remedy all improper trade practices").

Without citing any case law specifically interpreting the DCCPPA, Defendants posit that price-fixing is not the type of conduct within the reach of the statute. (Mot. at 18.) In fact, District of Columbia courts have held that ***HN25***[] the DCCPPA proscribes the imposition of prices that are **[*1158]** "unconscionably high," i.e., prices that are "unreasonably favorable" to the seller, where "the buyer did not have a meaningful choice of alternatives under the circumstances." *Ford v. Chartone, Inc., 908 A.2d 72, 90 (D.C. 2006)*; *Chocolate Confectionary, 2009 U.S. Dist. LEXIS 20975, 2009 WL 560601 at *28* ("the **[**80]** DCCPPA subsumes a Sherman Act claim and creates an indirect purchaser cause of action for conspiratorial price fixing regardless of whether defendants have engaged in deceptive conduct.") (citing D.C. state case law).

With respect to their claims under the DCCPPA, Plaintiffs alleges that they paid "artificially inflated prices" for NAND flash memory as a result of Defendants' alleged suppression and elimination of price competition. (IP Compl. P 210e.) Absent, however, are allegations that Plaintiffs were charged "unconscionably high" prices that were unreasonably favorable to the seller, resulting from a lack of meaningful choice of alternatives under the circumstances. *Ford, 908 A.2d at 90*. As a result, the Court finds that Plaintiffs' claims under the DCCPPA are deficient and GRANTS Defendants' motion to dismiss Plaintiffs' claims under the DCCPPA. Because this deficiency could be cured by amendment, Plaintiffs will be granted leave to amend to include the requisite factual allegations as discussed above.

3. Hawaii

Plaintiffs bring a consumer protection claim under Hawaii's Antitrust Act, *Hawaii Rev. Stat. §§ 480 et seq.* (Compl. P 212e). Citing Hawaii Rev. Stat. § 480.13-3, Defendants **[**81]** argue that such a claim is not ripe given the requirement that Plaintiffs must first provide the state attorney general the opportunity to prosecute the claim on their behalf. (Mot. at 19.)

HN26[] *Section 480-2* prohibits (1) "unfair methods of competition" and (2) "unfair or deceptive acts or practices." *Hawaii Rev. Stat. § 480-2(a)*, *(d)* and *(e)*. Under *section 480.13-3(a)(1)*, "[a] class action for claims for a violation of this chapter *other than claims for unfair or deceptive acts or practices* may be filed, and may be prosecuted on behalf of indirect purchasers by a person other than the attorney general," provided that the class plaintiffs first serve a copy of the complaint on the attorney general. The attorney general has sole discretion as to whether the state will proceed with the action or file its own action. Id., *§ 480.13(a)(4)*. If the attorney general declines to so proceed, the class plaintiff shall have the right to proceed with the action. Id., *§ 480.13(a)(5)(C)*. *Subdivision (b)* states that "[t]his section shall not limit the rights of consumers to bring class actions against any person based on unfair or deceptive acts or practices declared unlawful by *section 480-2*."

Plaintiffs **[**82]** acknowledge that *unfair competition* claims *are* subject to the attorney general notification requirement, but contend that their claim for *unfair or deceptive acts* should be allowed to proceed. (Opp. at 43.) As Defendants point out, the flaw in that argument is that the Complaint alleges *both* grounds as a basis for recovery in a single claim. (IP Compl. P 212(e).) To the extent Indirect Plaintiffs desire to pursue a claim under Hawaii law, they will need to expressly limit their claim to the unfair and deceptive acts aspect of the Hawaii Antitrust Act. Consequently, Defendants' motion to dismiss as to Plaintiffs' claim based on *section 480-2* is GRANTED. Plaintiffs will be allowed leave to amend to allege a claim for unfair or deceptive acts or practices only.

4. Kansas

Plaintiffs do not oppose dismissal of their claims under the Kansas Consumer Protection Act, *Kan. Stat. §§ 50-623, et seq.* (Opp'n at 40 n.43.) Therefore, Defendants' **[*1159]** motion to dismiss Plaintiffs' claim under Kansas law is GRANTED, which is dismissed without leave to amend.

5. Maine

HN27[] The Maine Unfair Trade Practices Act ("MUTPA") prohibits "unfair methods of competition" as well as "unfair or deceptive ... **[**83]** conduct of any trade." *Me. Rev. Stat. Ann. tit. 5 §207* (Me. 2008). The Maine Supreme Court has held that "[i]n pricing cases under the Act the inquiry is whether the price has the effect of deceiving the consumer, or inducing her to purchase something that she would not otherwise purchase." *Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998)*. Applying this standard, the Court concurs with Defendants that the MUTPA does not create a cognizable claim for collusive pricing. Logically, charging *higher* prices would not deceive or induce a consumer to purchase an item he or she would not otherwise purchase. See *GPU I, 527 F. Supp. 2d at 1031* ("[a]rguing that higher prices induced consumers to make purchases simply does not make sense."); accord *Chocolate Confectionary, 2009 U.S. Dist. LEXIS 20975, 2009 WL 560601 at *29*; *TFT-LCD, 586 F. Supp. 2d at 1126*.

In an attempt to distinguish Tungate, Plaintiffs argue that its holding applies *only* to the portion of the MUTPA that pertains to claims based on "unfair and deceptive acts," and does not address the standard for claims based on "unfair methods of competition." (Opp'n at 44.) In support of their position, Plaintiffs cite NMV, where the court narrowly **[**84]** construed the Tungate court's holding as applying only to the MUTPA's restriction on "unfair or deceptive acts." *NMV, 350 F. Supp. 2d at 187 n.40*. The Court disagrees with the NMV court's restrictive reading of Tungate. By its own terms, the Tungate standard applies broadly to "pricing cases *under the Act.*" *714 A.2d at 797* (emphasis added). There is nothing in Tungate to support the purported distinction advocated by Plaintiffs. As a decision of Maine's highest court, the Court is bound to follow the holding in Tungate. See *Carpenter, 540 F.3d at 963*. In accordance with Tungate, the Court GRANTS Defendants' motion to dismiss Plaintiff's claim under the MUPTA. Because any amendment would be futile, said dismissal is without leave to amend.

6. New Hampshire

Defendants move to dismiss Plaintiffs' claim under New Hampshire Consumer Protection Act ("CPA"), *N.H. Rev. Stat. § 358-A:2*, on the ground that Plaintiffs have not alleged that any unfair or deceptive acts took place *within* New Hampshire. See *Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 504 (D.N.H. 1996)* (CPA requires that "offending conduct" occur within the state's borders). Though Plaintiffs acknowledge that their **[**85]** Complaint lacks such allegations, they briefly contend that the CPA should be read broadly in light of *LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 931 A.2d 571, 580 (N.H. 2007)*. (Opp'n at 44.) LaChance merely states that "indirect purchasers may bring claims under the CPA." *Id. at 575*. It does not, as Plaintiffs suggest, address the requirement that the offending conduct occur within the state. Given Plaintiffs' failure to state a cognizable claim under the CPA, the Court GRANTS Defendants' motion to dismiss this claim, with leave to amend to cure the deficiency if Plaintiffs are able to do so in good faith.

7. New Mexico

HN28[] The New Mexico Unfair Practices Act ("NMUPA"), *New Mexico Stat. §§ 57-12-1, et seq.*, prohibits both "unfair deceptive trade practices" and "unconscionable trade practices in the conduct of any trade or **[*1160]** commerce." *N.M. Stat. Ann. § 57-12-3*. Under New Mexico law, an unconscionable trade practice is "an act or practice . . . which to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." N.M.Rev.Stat. **[**86]** *§ 57-12-2(E)*; *NMV, 350 F. Supp. 2d at 195-96*.

Defendants contend, without citation to relevant authority, that "unconscionable trade practices" is limited to cases where "grossly unequal bargaining power" is alleged. (Mot. at 17.) Courts have taken a broader view of the NMUPA, however. ***HN29***[] "Federal courts generally permit NMUPA actions in price-fixing cases provided that the plaintiff alleges a 'gross disparity' between the price paid for a product and the value received." *Chocolate*

Confectionary, 602 F. Supp. 2d at 585, 2009 U.S. Dist. LEXIS 20975 at *143, 2009 WL 560601 at *29 (citing cases); TFT-LCD, 586 F. Supp. 2d at 1127. Nevertheless, Plaintiffs' Complaint does not contain the requisite allegations, even under a more expansive reading of the statute. The Complaint simply alleges that "[t]here was a gross disparity of *bargaining power* between the parties with respect to the price charged by Defendants and NAND flash memory," (IP Compl. P 218(c) (emphasis added).) "Gross disparity" between the *price paid for a product and the value received* is *not* alleged. Given the absence of the requisite allegations, the Court GRANTS Defendants' motion to dismiss Plaintiffs' NMUPA claim. Plaintiffs will be allowed leave to amend to cure **[**87]** this deficiency.

8. New York

Section 349 of New York's General Business Law provides, in relevant part, that: **HN30**[] "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." **HN31**[] "[S]ection 349 is directed at wrongs against the consuming public." See In re Rezulin Prods. Liab. Litig., 392 F. Supp. 2d 597, 614 (S.D.N.Y. 2005) ("Rezulin"); e.g., New York v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002) ("The antitrust violations alleged in the Complaint constitute the kind of deceptive acts and practices contemplated by section 349."). A plaintiff asserting a section 349 claim "must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." See Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000).

Defendants contend that Plaintiffs' cause of action under section 349 fails on the ground that there is no particular conduct directed specifically *at the Indirect Purchasers.* (Mot. at 20.) In Paltre v. General Motors Corp., the court held that consumers **[**88]** who purchased or leased vehicles "failed to set forth a viable cause of action to recover damages for deceptive business practices" based on allegations of price-fixing among automobile manufacturers "because the alleged misrepresentations were either not *directed at consumers* or were not materially deceptive." See Paltre v. General Motors Corp., 26 A.D.3d 481, 810 N.Y.S.2d 496, 498 (N.Y. App. Div. 2006) (emphasis added); accord Rezulin, 392 F. Supp. 2d at 614. Here, the Complaint only avers that Defendants "publicly provided pretextual and false justifications" for their price increases and made "public announcements concerning the changes in the prices of NAND Flash Memory." (IP Compl. P 219c.) Other than the supposed statements made to the "public," there are no specific allegations that the misconduct **[*1161]** was directed *at* any particular group, let alone Indirect Purchasers in New York.

Plaintiffs fail to address Paltre. Instead, they simply assert that a section 349 claim is sustainable where the deceptive conduct is directed at a "broad group of individuals." (Opp'n at 45.) That argument misses the mark. The question presented is not whether anticompetitive conduct falls within the purview of section 349. **[**89]** Rather, the issue framed by Defendants' motion is whether the misrepresentations were directed *at* Indirect Purchasers of NAND flash memory. Such allegations are absent from the pleadings, which aver only that Defendants made "public announcements" intended to create the illusion of free market pricing. (IP Compl. P 219c.) [16] As such, the Court GRANTS Defendants' motion to dismiss. Plaintiffs are granted leave to amend to cure this deficiency.

9. Rhode Island

Defendants move to dismiss Plaintiffs' claim under Rhode Island's Unfair Trade Practices and Consumer Protection Act ("UTPCPA"), R.I. Gen. Laws § 6-13.1-1, et seq,. on the ground that price fixing does not constitute "[u]nfair methods of competition and unfair or deceptive acts or practices" as defined by the UTPCPA. (Mot. at 22.) **HN32**[] Section 6-13.1-2 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." To determine whether a practice **[**90]** is "unfair" under the statute, the court is to consider: "(1) Whether the practice, without necessarily having been

---

[16] Although Plaintiffs contend that they, in fact, have made the requisite allegations, the cited paragraphs of the Complaint do not support their assertion. (Opp'n at 46 (citing Compl. PP 174, 219.)

previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." See *Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001)* (internal quotation and citations omitted).

The Court concurs with Defendants that ***HN33***[] price fixing is not within the ambit of the UTPCPA. The statute defines "unfair methods of competition and unfair or deceptive acts or practices" to consist of 19 separately enumerated practices, *none of which includes price fixing. R.I. Gen. Laws §§ 6-13.1-1(6)(i)-(xix)*. In *ERI Max Entertainment, Inc. v. Streisand, 690 A.2d 1351, 1354 (R.I. 1997)*, a video store owner sued Blockbuster Video ("Blockbuster") and Barbra Streisand (among others) for violating the state's antitrust and unfair practices **[**91]** statutes. The store's claim was based on an agreement in which Blockbuster was granted exclusive access to a Streisand concert video containing an extra song not found on versions of the videotape distributed elsewhere. In rejecting plaintiff's unfair competition claims, the Rhode Island Supreme Court explained that "a finding of unfair competition must be predicated upon conduct on the part of the respondent that reasonably tended to confuse and mislead the general public into purchasing his product when the actual intent of the purchaser was to buy the product of the complainant." *Id. at 1353-54*. The court then concluded that the defendants' exclusive distribution agreement was not the type of "unfair conduct" that the Act was intended to encompass. Id. It is clear under the foregoing authority, which is binding on **[*1162]** this court, the "price fixing conspiracy" alleged in this case (IP Compl. P 221c) is not governed by the UTPCPA. [17] For these reasons, the Court GRANTS Defendants' motion to dismiss. Because any amendment to this claim would be futile, such dismissal is without leave to amend.

10. West Virginia

Defendants argue that Plaintiffs' claim under the West Virginia Consumer Credit and Protection Act (the "WVCCPA"), *W.V. Code § 46A-6-101, et seq.*, should be dismissed because the statute does not encompass price fixing. (Mot. at 23.) The WVCCPA states, in part, that: ***HN34***[] "The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, this article shall be **[**93]** liberally construed so that its beneficial purposes may be served." *W. Va.Code § 46A-6-101(1)*.

Seizing upon the state legislature's directive that the WVCCPA be "liberally construed," Plaintiffs contend that the statute should be read to encompass price fixing. (Opp. at 47.) The Court disagrees. ***HN35***[] Price fixing is not among the 16 enumerated definitions of "[u]nfair methods of competition and unfair or deceptive acts or practices[.]" *W. Va. Code, § 46A-6-102*. Rather, on their face, each of these definitions pertains to misrepresentations or deceptive practices relating to goods and services. For example, the statute prohibits acts such as "[p]assing off goods or services as those of another"; "[u]sing deceptive representations or designations of geographic origin in connection with goods or services"; "[m]aking false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions"; and "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." Id. In short, price fixing or similar anticompetitive conduct cannot be reasonably construed to fall within the scope of the WVCCPA. See *TFT-LCD, 586 F. Supp. 2d at 1130 (WVCCPA does not include price fixing schemes)*; **[**94]** *GPU, 527 F. Supp. 2d at 1030* (same); *DRAM II, 516 F. Supp. 2d at 1119* (same).

Plaintiffs' reliance on *Federal Trade Comm'n v. Mylan Labs, Inc., 62 F. Supp. 2d 25 (D.D.C.)*, *on recons., 99 F. Supp. 2d 10 (D.D.C. 1999)* and *In re Pharmaceutical Industry Average Wholesale Price Litig., 233 F.R.D. 229, 231*

---

[17] Aggrieved purchasers are not without a remedy, as the Defendants' actions may be subject to **[**92]** the state's antitrust provisions. R.I. Gen. Laws § 6-36.2(b). However, indirect purchasers lack standing to bring a private claim under that statute. See *Siena v. Microsoft Corp., 796 A.2d 461, 464-65 (2002)* (holding that the state attorney general has standing as *parens patriae* to protect the rights of indirect purchasers in antitrust matters since they cannot bring such actions themselves directly).

(D. Mass. 2006) is misplaced. (Opp'n at 47.) While both cases support the general notion that indirect purchaser cases may be brought under the WVCCPA, neither stands for the proposition that the provision of the WVCCP at issue "justifies allowing allegations of antitrust price-fixing brought by indirect purchasers to go forward." Id. Accordingly, the Court GRANTS Defendants' motion to dismiss Plaintiffs' WVCCPA claim. Since amendment to this claim would be futile, said dismissal is without leave to amend.

[*1163] D. UNJUST ENRICHMENT CLAIMS

Finally, Defendants move to dismiss Plaintiffs' unjust enrichment claims under the laws of Arizona, Florida, Massachusetts, Minnesota, New Hampshire, North Carolina and Tennessee. They argue that the laws of each of these states "bar an action for unjust enrichment where the plaintiff has an adequate remedy at law." (Mot. at 24.) As a general principle, Defendants **[**95]** are correct that "[i]t is a basic doctrine of equity jurisprudence that courts of equity should not act … when the moving party has an adequate remedy at law …." *Mort v. United States, 86 F.3d 890, 892 (9th Cir. 1996)*; see also *Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75-76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)* ("it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief"). In response, Plaintiffs contend that they are allowed under the Federal Rules to allege claims in the alternative, even if they are inconsistent with one another. See *Fed. R. Civ. Pro. 8(d)(3)* ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

The difficulty for the Court is that neither party focuses on the appropriate issue. The laws governing claims for unjust enrichment vary from state to state. "[S]ome states recognize unjust enrichment as a separate free-standing claim, while others do not." *GPU II, 540 F. Supp. 2d at 1100*. Instead of analyzing the laws of each state separately, Defendants relegate their discussion to a string cite contained in a footnote in their moving papers. (Mot. at 24 n.9.) [18] The lack of individualized **[**96]** analysis by the parties is unhelpful. For example, Defendants cite *Community Guardian Bank v. Hamlin, 182 Ariz. 627, 630, 898 P.2d 1005 (Ariz. Ct. App. 1995)* for the proposition that an unjust enrichment claim "requires that there be no remedy provided at law." (Mot. at 24 n.9.) More recent Arizona authority, on the other hand, suggests that the "adequate remedy at law" requirement turns not on whether the plaintiff has a remedy "providing all the relief the party desires," but rather, on "whether there is a contract which governs the relationship between the parties." *Trustmark Ins. Co. v. Bank One, Arizona, NA, 202 Ariz. 535, 541 n.5, 48 P.3d 485 (2002)*.

The Court declines to independently address the viability of Plaintiffs' unjust enrichment claims with respect to the aforementioned states. In the event Defendants desire to seek a judicial resolution of this issue, they should discuss the laws of each state separately. Such analysis should be supported with citations to relevant authorities demonstrating that Plaintiffs cannot, as a matter of law, maintain a separate claim for unjust enrichment where **[**97]** they, at the same time, are pursuing claims based on state antitrust and consumer protection statutes. For these reasons, Defendants' motion to dismiss Plaintiffs' unjust enrichment claims under the laws of Arizona, Florida, Massachusetts, Minnesota, New Hampshire, North Carolina and Tennessee is DENIED without prejudice.

E. LACK OF A REPRESENTATIVE PLAINTIFF

Defendants move to dismiss Plaintiffs' second, third and fourth claims for relief to the extent that such claims are based on the laws of a state where no representative has been named; to wit, Alabama, Arizona, Mississippi, Nebraska, Nevada, Hawaii and New Hampshire. **[*1164]** (Mot. at 16.) ***HN36***[] "A class cannot assert a claim on behalf of an individual that they do not represent." *GPU I, 527 F. Supp. 2d at 1026*; accord *In re Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1106-107 (N.D. Cal. 2007)*. Where, as here, a representative plaintiff is lacking for a particular state, all claims based on *that* state's laws are subject to dismissal. Id.

---

[18] The bulk of Plaintiffs' argument also is set forth in a lengthy string cite in a footnote. (Opp'n at 48 n.47.)

Plaintiffs concede that they lack representatives for claims predicated on the laws of each of the aforementioned states. However, they request leave to amend to join a class representative for each of **[**98]** those states, except as to Alabama. Defendants argue that allowing the joinder of additional plaintiffs should be disallowed as futile on the ground that Plaintiffs lack standing. As discussed, the Court has concluded that Plaintiffs have alleged sufficient facts to establish standing with respect to their state law antitrust claims, and certain of their consumer protection claims may be viable upon proper amendment. The proposed amendment to join the missing representatives, therefore, would not be entirely futile. The Court thus GRANTS Defendants' motion to dismiss as to Plaintiffs' second, third and fourth claims under the laws of Alabama, Arizona, Mississippi, Nebraska, Nevada, Hawaii and New Hampshire. Plaintiffs are granted leave to amend to join representative class members to the extent their joinder is consistent with this Order.

F. MISCELLANEOUS REQUESTS

Several of the parties have filed requests for judicial notice ("RJN"). (Docket 399, 448, 419, 377.) All requests are unopposed, except for the RJN filed by Hynix Semiconductor America, Inc. ("Hynix") (Docket 377), to which the Indirect Purchaser Plaintiffs have filed an objection (Docket 400). The unopposed RJNs are GRANTED. **[**99]** As to Hynix's RJN, the Court's ruling does not rely on any of the materials submitted therein. Therefore, Hynix's RJN is DENIED AS MOOT and Indirect Purchaser Plaintiffs' objections are OVERRULED AS MOOT.

Direct and Indirect Purchaser Plaintiffs also filed a motion for administrative relief in which they submit copies of three district court decisions that were rendered following the scheduled hearing date on the motions to dismiss. (Docket 454). The Court finds that under the circumstances, the submission of these authorities is authorized and appropriate under Local Rules 7-3(d) and *7-11*, and as such, the motion is GRANTED.

Finally, Defendants filed a motion for a protective order to stay discovery during the pendency of the above-discussed motions to dismiss. (Docket 379). As the Court has now resolved the motions, this motion is DENIED AS MOOT.

V. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. Defendants' motion to dismiss (Docket 370, 371, 372, 373, 376, 382) the Direct Purchasers' Complaint is DENIED.

2. Defendants' motion to dismiss the Indirect Purchasers' Complaint (Docket 374) is GRANTED IN PART and DENIED IN PART, as follows:

a. The motion to dismiss is DENIED **[**100]** as to Plaintiffs' state antitrust claims.

b. The motion to dismiss is DENIED as to Plaintiffs' claims under the consumer protection laws of Arkansas, and GRANTED as to Plaintiffs' claims under the consumer protection laws of the District of Columbia, Hawaii, Kansas, Maine, New Hampshire, New Mexico, New York, Rhode Island and West Virginia. Plaintiffs are GRANTED LEAVE TO AMEND as to their claims under the laws of the District of Columbia, Hawaii, New Hampshire, New Mexico and New York. Plaintiffs' **[*1165]** consumer protection claims under the laws of Kansas, Maine, Rhode Island and West Virginia are DISMISSED WITH PREJUDICE.

d. The motion to dismiss is DENIED as to Plaintiffs' claim for unjust enrichment.

e. The motion to dismiss is GRANTED as to the Second, Third and Fourth Claims for Relief to the extent that Plaintiffs' claims are based on the laws of Alabama, Arizona, Mississippi, Nebraska, Nevada, Hawaii and New

Hampshire, on the ground that Plaintiffs have failed to name a representative plaintiff. Such claims are DISMISSED WITH LEAVE TO AMEND to join a proper representative plaintiff for each of those states (except Alabama), but only to the extent their joinder is consistent with this **[**101]** Order.

f. Plaintiffs shall have up to and including May 1, 2009 to file an amended complaint that corrects the deficiencies described in this Order. Plaintiffs may not amend their Indirect Purchaser Complaint in any manner than specified herein.

3. All unopposed requests for judicial notice (Docket 399, 448, 419) are GRANTED. Hynix's request for judicial notice (Docket 377) is DENIED AS MOOT and Indirect Purchaser Plaintiffs' objections thereto (Docket 400) are OVERRULED AS MOOT.

4. Plaintiffs' motion for administrative relief to consider additional district court authorities (Docket 454) is GRANTED.

5. Defendants' motion for a protective order staying discovery (Docket 379) pending the disposition of their motions to dismiss is DENIED AS MOOT.

6. A Case Management Conference is scheduled for **May 20, 2009 at 3:00 p.m.** The parties shall meet and confer prior to the conference and shall prepare a joint Case Management Conference Statement which shall be filed no later than ten (10) days prior to the Case Management Conference that complies with the Standing Order for All Judges of the Northern District of California and the Standing Order of this Court. Plaintiffs shall be responsible for **[**102]** filing the statement as well as for arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at the above indicated date and time.

IT IS SO ORDERED.

Dated: March 31, 2009

/s/ Saundra B. Armstrong

Honorable Saundra Brown Armstrong

United States District Court

End of Document

Mahmud v. Kaufmann

United States District Court for the Southern District of New York

March 31, 2009, Decided

05 Civ. 8090 (WCC)

Reporter

607 F. Supp. 2d 541 *; 2009 U.S. Dist. LEXIS 35301 **; 2009-1 Trade Cas. (CCH) P76,631

SAEEDA A. MAHMUD, M.D., Plaintiff, - against - WALTER KAUFMANN, M.D., JEFF AUERBACH, M.D., JANE BROOKS, M.D., GOPAL SHAH, M.D. and DAVID BRODY, M.D., Individually, Jointly and Severally, Defendants.

Subsequent History: Affirmed by *Mahmud v. Kaufmann, 2009 U.S. App. LEXIS 27937 (2d Cir. N.Y., Dec. 21, 2009)*

Prior History: *Mahmud v. Kaufmann, 496 F. Supp. 2d 266, 2007 U.S. Dist. LEXIS 46948 (S.D.N.Y., 2007)*

Core Terms

patients, privileges, admitting, defendants', recommended, antitrust, charts, staff, cardiologist, cardiac, summary judgment, allegations, cardiology, documents, tests, interfered, ad hoc committee, business relationship, tortious interference, medical services, relevant market, evaluated, notified, quotation, contends, marks, summary judgment motion, quality of care, specialized, complaints

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Supporting Materials**

S.D.N.Y. Civ. R. 56.1 provides that upon motions for summary judgment the moving party shall submit a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

HN2[] **Opposing Materials, Accompanying Documentation**

S.D.N.Y. Civ. R. 56.1 provides that the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts.

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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment may be granted where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

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

HN4[] **Entitlement as Matter of Law, Materiality of Facts**

In the context of a motion for summary judgment, a fact is material only if, based on that fact, a reasonable jury could find in favor of the nonmoving party.

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

HN5[] **Burdens of Proof, Movant Persuasion & Proof**

On a motion for summary judgment, the burden rests on the movant to demonstrate the absence of a genuine issue of material fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN6[] **Summary Judgment, Evidentiary Considerations**

In deciding whether summary judgment is appropriate, the court resolves all ambiguities and draws all permissible factual inferences against the movant.

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

HN7[] **Burdens of Proof, Nonmovant Persuasion & Proof**

To defeat summary judgment, a nonmovant must go beyond the pleadings and do more than simply show that there is some metaphysical doubt as to the material facts.

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

HN8[] **Summary Judgment, Entitlement as Matter of Law**

The court's role at the summary judgment stage of the litigation is not to decide issues of material fact, but to discern whether any exist.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Absence of Essential Element

HN9[] **Burdens of Proof, Absence of Essential Element**

Summary judgment must be granted against a party in instances when such party fails to adequately establish an essential element on which it bears the burden of proof.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN10[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A non-moving party may not rest upon unsubstantiated allegations, conclusory assertions or mere denials of the adverse party's pleading, but must set forth and establish specific facts showing that there is a genuine issue for trial. A metaphysical or other whimsical doubt concerning a material fact does not establish a genuine issue necessitating a trial. The mere existence of a scintilla of evidence supporting the nonmovant's case is insufficient to defeat a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

Summary judgment remains a vital procedure tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces. ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a case brought under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Specifically, conduct as consistent with permissible conduct as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

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

HN12[] **Sherman Act, Scope**

See *15 U.S.C.S. § 1*.

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

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

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

Only unreasonable restraints are actionable under the antitrust laws.

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

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

HN14[] **Regulated Practices, Monopolies & Monopolization**

Section 2 of the Sherman Act imposes liability on any person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN15[] **Remedies, Damages**

Sections 4 and 16 of the Clayton Act, *15 U.S.C.S. §§ 15* and *26*, permit a private party to recover damages and seek injunctive relief for any violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > Sherman Act > Claims

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

HN16[] **Sherman Act, Claims**

To prevail on a Sherman Act claim, under either *15 U.S.C.S. § 1* or *15 U.S.C.S. § 2*, a plaintiff must prove an antitrust injury. To prove an antitrust injury, the plaintiff must show that the defendants' actions caused an injury to competition; demonstrating injury only to individual competitors is insufficient. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors. To that end, the court must assess the impact of the defendants' actions upon the plaintiff's market, which requires some factual submission as to that market's structure and the services offered therein. The plaintiff bears the burden of establishing and proving the relevant market. The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN17[] **Summary Judgment, Entitlement as Matter of Law**

Generally, courts will not consider, on a motion for summary judgment, allegations that were not pled in the complaint and raised for the first time in opposition to a motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN18[] **Burdens of Proof, Nonmovant Persuasion & Proof**

On a motion for summary judgment, the nonmoving party may not rely on mere conclusory allegations or speculation, but instead must offer some hard evidence in support of its factual assertions.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN19[] Intentional Interference, Elements

To maintain an action for tortious interference with a plaintiff's business relations under New York law, the plaintiff must demonstrate that: (1) there is a business relationship between the plaintiff and a third party; (2) the defendant, knowing of that relationship, intentionally interferes with it; (3) the defendant acts with the sole purpose of harming the plaintiff, or, failing that level of malice, uses dishonest, unfair, or improper means; and (4) the relationship is injured.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN20[] Intentional Interference, Elements

To claim tortious interference with a prospective business relationship, a plaintiff must specify some particular, existing relationship through which the plaintiff would have done business but for the allegedly tortious behavior. Furthermore, the defendant must direct some activities toward the party and convince the third party not to enter into the business relationship with the plaintiff.

Torts > ... > Commercial Interference > Employment Relationships > General Overview

HN21[] Commercial Interference, Employment Relationships

A plaintiff cannot maintain a tortious interference claim against her employer. An employer cannot be liable for interfering with its own relationship with its employee. Furthermore, a tortious interference claim may not lie against agents of the employer absent a showing that they acted outside the scope of their authority.

Counsel: [1]** For Plaintiff: CARL E. PERSON, ESQ., Of Counsel, LAW OFFICE OF CARL E. PERSON, New York, New York.

For Defendants: S. ALLAN ADELMAN, ESQ., MICHAEL I. JOSEPH, ESQ., Of Counsel, ADELMAN, SHEFF & SMITH, LLC, Annapolis, Maryland; STEPHEN M. COWHERD, ESQ., Of Counsel, JEFFERS & IRELAND, P.C., Fairfield, Connecticut.

Judges: William C. Conner, Senior United States District Judge.

Opinion by: William C. Conner

Opinion

[*543] OPINION AND ORDER

CONNER, Senior D.J.

Plaintiff Saeeda A. Mahmud, M.D., brings this action against defendants Walter Kaufmann, M.D. ("Kaufmann"), Jeff Auerbach, M.D. ("Auerbach"), Jane Brooks, M.D. ("Brooks"), Gopal Shah, M.D. ("Shah") and David Brody, M.D. ("Brody" and together with Kaufmann, Auerbach, Brooks and Shah, collectively "defendants") arising out of the denial of her medical staff privileges at Bon Secours Community Hospital (the "Hospital" or "BSCH") and Orange Regional Medical Center ("ORMC"). Plaintiff alleges that defendants failed to renew her contract with the Hospital and thwarted her efforts to contract with ORMC for admitting privileges, both on the basis of her race and in an effort to limit competition in the market for certain specialized medical services in the area of Port Jervis, New **[**2]** York. Plaintiff brings claims pursuant to *42 U.S.C. § 1981*, the New York Human Rights Law, *New York Executive Law §§ 290, et seq*. (the "NYSHRL"), the Sherman Act, *15 U.S.C. §§ 1, et seq.*, and *New York General Business Law § 340* (the "NYGBL"), as well as common law claims for interference with prospective economic advantage and *prima facie* tort.

[*544] Following a series of opinions and communications with the Court, plaintiff's only remaining causes of action are her fifth and sixth causes of action, for interference with plaintiff's prospective economic advantage and violation of the Sherman Act. [1] Defendants now move for summary judgment on both of these claims. For the reasons stated herein, defendants' motion is granted in its entirety.

BACKGROUND

Plaintiff, a licensed **[**4]** physician, is board certified in internal medicine and specializes in cardiology. (Mahmud Decl. PP 3, 6-7.) Defendants are all doctors affiliated with the Hospital. (*Id*. P26.) In or about 1996, a representative from Mercy Hospital [2] offered to sell to plaintiff a pulmonary and internal medicine practice, encouraging her to open a cardiology practice because there was only one other cardiologist in the Port Jervis area, Kaufmann. (*Id*. PP 10-11.) Before she accepted the offer, plaintiff learned that Kaufmann had an exclusive arrangement for interpreting all cardiology tests (or "echo tests") administered at the Hospital, but plaintiff was told by representatives of Mercy Hospital that "something will be done about the exclusivity of cardiology tests." (*Id*. P 13.) These representatives assured plaintiff that, as she expanded her cardiology practice, she would be permitted to interpret her own patients' cardiology tests administered at the Hospital. (*Id*.) "[A] few weeks later, Kaufmann stated to [plaintiff] that he agreed to this." (*Id*.) Plaintiff ultimately accepted Mercy Hospital's offer to sell the practice. (*Id*. P 12.)

However, once plaintiff began working, Kaufmann "rescinded his earlier assurance and made a unilateral decision to read the [cardiology tests] of the . . . patients for which [plaintiff] had consulted." (*Id*. P 15.) According to plaintiff, "[t]his created quality of care issues for [her] patients because of the delay in getting the tests to [her] for her (unpaid) review, and cost [her] about $ 1,312,500 in lost fees." (Pl. R. 56.1 Stmt. P22.) [3] Plaintiff sent letters to the

---

[1] Defendants moved to dismiss plaintiff's ten-count Complaint in its entirety pursuant to *FED. R. CIV. P. 12(b)(6)* for failure to state a claim upon which relief can be granted and in an Opinion and Order dated September 27, 2006, ("*Mahmud I*") the Court dismissed plaintiff's third cause of action under NYSHRL and her eighth and tenth causes of action for *prima facie* tort. *Mahmud v. Kaufmann, 454 F. Supp. 2d 150, 164 (S.D.N.Y. 2006)* (Conner, J.). Defendants **[**3]** then moved for reconsideration of the First Opinion, and in an Opinion and Order dated June 27, 2007, ("*Mahmud II*") the Court dismissed plaintiff's first cause of action under *42 U.S.C. § 1981*, her fourth cause of action under NYSHRL, and her seventh cause of action under the NYGBL. *Mahmud v. Kaufmann, 496 F. Supp. 2d 266, 278 (S.D.N.Y. 2007)* (Conner, J.). During a telephone conference before this Court on October 15, 2008, plaintiff withdrew her second cause of action under *42 U.S.C. § 1981* and her ninth cause of action for interference with prospective economic advantage. (Pl. Mem. Opp. Summ. J. at 2.)

Plaintiff's ninth cause of action for interference with prospective economic advantage was based on defendants' alleged intentional disruption of plaintiff's relationships with her patients by making certain comments to those patients. Plaintiff's fifth cause of action, also for interference with prospective economic advantage, is based on defendants' alleged "actions . . . toward[] [p]laintiff" in "driving away [her] patients, or forcing patients to consult other doctors with Hospital privileges, through unlawful and/or improper means." (Am. Complt. P 51.)

[2] Mercy Hospital was later renamed Bon Secours Community Hospital. **[**5]** *Mahmud I, 454 F. Supp. 2d at 153 n.2*.

[3] ***HN1***[] *Local Rule 56.1* provides that upon motions for summary judgment the moving party shall submit "a separate, short and concise statement, ***in numbered paragraphs***, of the material facts as to which the moving party contends there is no genuine issue to be tried." (alteration in original). Although it appears that defendants' initial Rule 56.1 Statement meets these

Hospital's administration "seeking to rectify this **[*545]** inappropriate poaching of [her] patients' tests . . . but this effort failed to bring about any changes." (Mahmud Decl. P 15.) At least one of the defendants "was heading the doctors' committee whose consent would be needed to make the desired change." (*Id*.)

During a period of time spanning from some point in 2000 through June 2001, plaintiff was "often critical of [H]ospital management, and the level and quality of care provided by [the Hospital] and by various doctors on staff at the [H]ospital." [4] (*Id*. P 34.) She often communicated her criticisms orally, "through appropriate channels . . . but without result." (*Id*. P 35.) According to plaintiff, despite her complaints, "the quality of care remained **[**8]** the same." (Pl. R. 56.1 Stmt. P 6 (citing Mahmud Decl. P 75).) She then resorted to putting her concerns regarding "inadequate care" in her patients' medical charts, for which she was criticized by the Hospital's administration and her peers. [5] (Mahmud Decl. P 35.) Plaintiff contends that her concerns were "well founded under medical practices." [6] (Pl. R. 56.1 Stmt. P 4.)

[*546] In the Spring of 2001, the Hospital was evaluated by the Joint Accreditation Hospital Commission ("JAHCO") for purposes of its re-accreditation. (Mahmud Decl. P 37.) Plaintiff made an appointment to meet with the JAHCO to report her concerns about "the level and quality of care provided by the [H]ospital." (*Id*. P37.) She cancelled the appointment after certain employees [7] of the Hospital told her to not express her criticisms about the Hospital to JAHCO and threatened her. (*Id*. P 38.)

In July 2001, Thomas Brunelle ("Brunelle"), Executive Vice President/Administrator of the Hospital, notified plaintiff that, at the request of the Hospital's Physician Quality Assurance Committee, he would arrange for an independent

---

requirements, **[**6]** defendants' Supplemental Rule 56.1 Statement does not contain any numbered paragraphs. Therefore, the Court's citations to this Statement include only the relevant page number.

HN2[] *Local Rule 56.1* also provides that the papers opposing a motion for summary judgment "shall include ***a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing*** a separate, short and concise statement of ***additional*** material facts." (alterations in original). Plaintiff has not provided any statement corresponding to either of defendants' Rule 56.1 Statements. Instead, plaintiff directs the Court to her 84-paragraph declaration, to her own Rule 56.1 Statement, which, according to plaintiff, "is also a brief summary of the material facts," and to two exhibits which, together, contain approximately 185 documents. (Pl. Mem. Opp. Summ. J. at 3.) Plaintiff also includes a seven-page "Partial Statement of Facts" in her Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. (*Id*. at 4-12.) Plaintiff's counsel explains: "Instead of attempting to summarize this substantial body of evidence, I have arranged **[**7]** the documents . . . so that they tell the story." (*Id*. at 3.) The Court notes that not only is it an attorney's job to *attempt* to summarize the evidence, but it is the attorney's job to actually do so. By barraging the Court with documents in this manner, plaintiff not only fails to comply with Rule 56.1's requirements of "short and concise" statements, but also undermines the purpose of *Rule 56.1* "to streamline the consideration of summary judgment motions by freeing the district courts from the need to hunt through voluminous records without guidance from the parties." *Rodriguez v. Morton, 2009 U.S. Dist. LEXIS 12470, 2009 WL 414033, at *6 (S.D.N.Y. Feb. 13, 2009)* (citing *Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001)* (internal quotation marks omitted)).

[4] Plaintiff does not specify the nature of her complaints with particularity, although she states that she was concerned about "the level and quality of care provided by the [Hospital]," that "[p]atients' lives were at stake and too many deaths were happening without accountability" and that her complaints concerned "deficiencies [she] saw in BSCH conditions, nursing services and even practices by some doctors." (Mahmud Decl. PP 34, 35, 75.)

[5] Plaintiff avers that she started recording her concerns in the charts because her oral complaints did not result in any remedy of the complained-of deficiencies. (Mahmud Decl. P 75.) By recording the deficiencies in the patients' charts, she would "force [them] to be addressed and corrected" and she also would be protecting herself from blame for "unacceptable quality of care." **[**9]** (*Id*.)

[6] The documents plaintiff cites in support of this proposition concern plaintiff's qualifications, conduct and medical care; they do not corroborate or address the validity of plaintiff's complaints about hospital conditions. (*See* Mahmud Decl. PP 84A-84N; Person Decl., Ex. P at 11, 76.)

[7] None of these employees are named defendants in the instant litigation.

medical review of her charts to investigate her concerns about the level of care that was being rendered to her patients. **[**10]** (Defs. Suppl. R. 56.1 Stmt. at 1.)

Dr. Ronald Tatelbaum ("Tatelbaum") conducted the review of plaintiff's charts (the "charts") and by letter, dated October 15, 2001, (the "Tatelbaum Report") reported that there were "'serious medical issues and understandings of the basic physiology and pathology which . . . need to be addressed'" regarding plaintiff's *own* patient care. (*Id*.) Tatelbaum also noted his impression, based on the charts, that "'[plaintiff] has little respect for [H]ospital rules and regulations and little understanding of the value of a [H]ospital chart and documentation therein'" and he suggested that plaintiff be referred to the Committee for Physicians Health ("CPH"). [8] (*Id*. at 1-2.)

Brunelle sent the Tatelbaum Report to the Hospital's Medical Executive Committee ("MEC") and requested that "'corrective action'" be taken with regard to plaintiff, in accordance with Article VIII of the Medical Staff Bylaws (the "Bylaws"). (Defs. Suppl. R. 56.1 Stmt. at 2.) Pursuant to Section 8.1.2 of the Bylaws, the MEC referred the matter to Brooks, the Chief of the Department of Medicine, for further investigation. (*Id*.) Brooks, pursuant to the Bylaws, appointed an ad hoc committee (the "Ad Hoc Committee") to investigate the matter. (*Id*.) By letter, dated November 6, 2001, Brooks informed plaintiff that the Ad Hoc Committee had been appointed and that plaintiff could submit written materials to and had a right to an interview with this committee "to discuss, explain or refute the charges which have been made." (*Id*.; Lasch Decl., Ex. A at 162.) Brooks also sent plaintiff a copy of the Tatelbaum Report. (Defs. Suppl. R. 56.1 Stmt. at 2.)

On November 27, **[**12]** 2001, the Ad Hoc Committee informed Brooks that it had reviewed plaintiff's charts and "agree[d] 'in general with the majority of the issues raised by . . . Tatelbaum.'" (*Id*.) Brooks notified the MEC of the Ad Hoc Committee's findings and that she had been in touch with the CPH, which had recommended that plaintiff undergo a complete physical and psychiatric evaluation at Massachusetts General Hospital. (*Id*.) Brooks **[*547]** also recommended that plaintiff undergo the evaluation before the Ad Hoc Committee made its final recommendations to the MEC. (*Id*.) Brooks then sent a letter to plaintiff, wherein she urged plaintiff to take advantage of the opportunity to meet with the Ad Hoc Committee. (*Id*. at 3.)

According to plaintiff, the Ad Hoc Committee was comprised of the defendants and "several other doctors under their control." (Mahmud Decl. P 40.) Plaintiff also contends that Tatelbaum, a cardiologist, "had a relationship with" Bon Secours Charity Health System [9] "through his referral[s] of patients from his office," and that his recommendation "went beyond [the] scope of cardiology to suggest that [she] be sent for psychiatric evaluation." (*Id*. P 42.) Plaintiff had the charts reviewed by another **[**13]** physician, Dr. Janet Strain ("Strain"), "an interventional cardiologist," who concluded that plaintiff's care, as reflected in the charts, "has been without reproach" and was "appropriate and expeditious." (*Id*. P 43; Person Decl., Ex. P at 11.) Plaintiff sent a copy of Strain's report to Brooks and Auerbach. [10] (Defs. Suppl. R. 56.1 Stmt. at 3.)

On December 11, 2001, Brooks notified the MEC that the Ad Hoc Committee had met with plaintiff and still believed that plaintiff had "'an apparent lack of knowledge of current practice standards'" and that she had made "'inappropriate and incriminating statements in medical charts against colleagues and [the Hospital].'" (*Id*.) Brooks

---

[8] The CPH, a division of the Medical Society of the State of New York, provides "non-disciplinary, confidential assistance to physicians . . . experiencing problems from stress and difficult adjustment, emotional, substance abuse and other psychiatric disorders." (Defs. Suppl. R. 56.1 Stmt. at 2 n.2.)

Plaintiff contends that defendants "communicated with the Physicians Health Committee and induced them to request that [plaintiff] undergo psychiatric evaluation, when in fact she was functioning **[**11]** properly and in no need of treatment, evaluation or diagnosis." (Pl. R. 56.1 Stmt. P 9.) It appears plaintiff relies on her own sworn statements to support the proposition that defendants "induced" the CPH to request her evaluation.

[9] Plaintiff does not identify what relationship, if any, exists between Bon Secours Charity Health System and BSCH. (*See, e.g.*, Mahmud Decl. P 9.)

[10] At some point, Dr. Smits Kittur ("Kittur"), a neurologist, performed a neurological examination of plaintiff. (Mahmud Decl. P 43; Lasch Decl., Ex. A at 256.) Kittur also reviewed the charts and concurred in Strain's conclusion. (Mahmud Decl. P 43.)

recommended that the MEC consider suspending plaintiff until she completed the physical and psychiatric evaluation recommended **[**14]** by the CPH. (*Id*.; Lasch Decl., Ex. A at 174.) Brooks also sent a letter to plaintiff, urging her to contact Massachusetts General Hospital to schedule the evaluation. She told plaintiff:

> "This evaluation and our contact with the [CPH] was done for your protection. I sincerely hope that you will avail yourself of this opportunity. I have been informed . . . by the [CPH], that if you have not scheduled this appointment on or before December 14, 2001, your case will be dropped by the [CPH]."

(Defs. Suppl. R. 56.1 Stmt. at 3.) On December 12, 2001, plaintiff informed Brooks that she had contacted the hospital administration to inquire about monetary reimbursement pertaining to her evaluation at Massachusetts General Hospital. (*Id*.) Brooks then reported to the MEC that plaintiff had been in touch with the CPH and that plaintiff would be undergoing an evaluation by Dr. Julia Reade ("Reade"). (*Id*.) Brooks also forwarded to the MEC summaries of chart reviews made by the Ad Hoc Committee. (*Id*.)

The MEC reviewed Tatelbaum's findings, the Ad Hoc Committee's reports, Brooks's recommendation and charts prepared by plaintiff and concluded that plaintiff's "'patient care and charting have been inappropriate **[**15]** in a number of instances.'" (*Id*. at 4.) The MEC notified plaintiff of its findings and informed her that it would defer any further action until after she had been evaluated by Reade. (*Id*.) The MEC also recommended to plaintiff that she take a leave of absence until the evaluation was complete and a determination was made regarding whether it was appropriate for her to resume her practice. (*Id*.; Lasch Decl., Ex. A at 190.) By letter dated December 21, 2001, plaintiff's attorney **[*548]** notified the MEC that plaintiff was making arrangements for the evaluation by Reade but would not take a leave of absence. (Defs. Suppl. R. 56.1 Stmt. at 4.) Plaintiff was subsequently evaluated by Dr. Jhaveri of Middletown, New York. (*Id*.)

On February 14, 2002, the Ad Hoc Committee issued a report to Brooks stating that, after reviewing the charts that plaintiff prepared, it concluded that "there were multiple instances where [plaintiff's] care was inappropriate, unnecessary, and did not meet the standards of care of current medical practice." (*Id*. at 4; Lasch Decl., Ex. A at 202.) By letter dated February 21, 2002, Kaufmann, Chief of Staff of the Hospital, informed plaintiff that the MEC held a special meeting **[**16]** about her on February 19, 2002 because of her failure to be examined by Reade and her "'ongoing patient care issues.'" (Defs. Suppl. R. 56.1 Stmt. at 4.) Kaufmann also told plaintiff that the MEC, after considering her "'refusal to be evaluated as [she] had initially agreed, as well as all of the information which has been presented about [her] clinical activities and charting,'" had decided to recommend to the Board of Directors that her medical staff membership and clinical privileges be terminated, but that before making such a recommendation, the MEC would provide plaintiff with a final opportunity "'to obtain an appropriate evaluation, and, if indicated, obtain counseling or therapy.'" (*Id*. at 4-5.) Kaufmann also informed plaintiff that the MEC would consider the matter again at its next meeting, on March 11, 2002, at which meeting she would have the opportunity to appear. (*Id*. at 5.)

Plaintiff appeared at the meeting on March 11, 2002, "and that portion of the meeting [for which she was present] was recorded and transcribed." (*Id*.) The MEC voted that plaintiff must be evaluated at Massachusetts General Hospital at the Medical Staff's expense. (*Id*.) On March 12, 2002, Kaufmann **[**17]** reported to the Hospital Board of Directors the history and present status of the review concerning plaintiff and, on March 13, 2002, he notified plaintiff of the MEC's recommendation that she undergo an evaluation. (*Id*.)

On March 28, 2002, plaintiff was evaluated by Reade. (*Id*.) In a report to the CPH, dated April 12, 2002, Reade stated, *inter alia*, that plaintiff "'suffers from a severe personality disorder, and functions in the narcissistic realm'"; that she "'becomes enraged and attacking when criticized or frustrated'"; and that she "'attributes her difficulties to the envy and malign actions of others and takes no responsibility for her own bad behavior.'" (*Id*. at 5-6.) Reade concluded:

> "Given [plaintiff's] erratic behavior, the incidents of her reportedly inadequate patient care, her possible seizure history and her poor performance on various psychological tests . . ., we have serious concerns about [plaintiff]'s current fitness to practice medicine. Until her neuropsychological status has been fully evaluated, her clinical patient care should be closely supervised."

(*Id*. at 6.)

In mid-April, 2002, the CPH forwarded Reade's report to Auerbach, the Medical Director of the Hospital, **[**18]** with a recommendation that plaintiff undergo further evaluation by a behavioral neurologist and a neuropsychologist and that the hospital "'continue to provide oversight'" of her care. (*Id*.) In a letter to plaintiff dated April 22, 2002, Auerbach expressed concern that plaintiff had not agreed to participate in the CPH's evaluation of her. (*Id*.) He noted that her medical staff membership and clinical privileges had been extended to April 12, 2002 and again to May 12, 2002 "'based on the expectation that **[*549]** [she] would be actively participating in the evaluation of the [CPH].'" (*Id*. at 6-7.) Auerbach informed plaintiff that if the Hospital did not receive written confirmation by April 26, 2002 that she had agreed to cooperate with the CPH, the MEC would recommend that the Board of Directors allow plaintiff's medical staff membership and clinical privileges to expire. (*Id*. at 7.)

In a letter to the Hospital's counsel, dated April 24, 2002, the CPH reported that plaintiff was "eligible under law to join this [c]ommittee" but that her compliance would be "crucial to her success," noting Reade's assessment of plaintiff's "lack of motivation to change, absence of insight and specific hostility **[**19]** to psychological inquiry." (Lasch Decl., Ex. A at 247.) In that letter, the CPH informed that it was "'possible that [plaintiff] would respond to firm, clear, external limits,'" which the CPH would be "'prepared to set up and assist her with.'" (Defs. Suppl. R. 56.1 Stmt. at 7.)

On May 6, 2002, the MEC met and considered the CPH's recommendation that, for plaintiff to continue practicing medicine at the Hospital, direct, concurrent monitoring and supervision of her care would be required. (*Id*.) By letter dated May 7, 2002, the CPH informed plaintiff that, as plaintiff did not reach a monitoring agreement with the Hospital, effective May 5, 2002, at 5:00 p.m., plaintiff must "'cease the practice of medicine'" at the Hospital. (*Id*.) According to the letter, this meant that plaintiff could not "'perform any duties that require a medical license at the [H]ospital or in [her] office until [she has] been cleared for duty by an approved behavioral neurologist and [the CPH].'" (*Id*.)

By letter dated May 9, 2002, Brunelle notified plaintiff that it was the unanimous consensus of the MEC that the Hospital did not have the resources to provide the level of review and supervision recommended by the **[**20]** CPH for plaintiff to continue practicing there. (*Id*.) Brunelle informed plaintiff that the Board of Directors would meet on May 14, 2002 to consider the recommendations of the MEC and the CPH and that plaintiff could submit written information for the Board of Directors to consider at that meeting. (*Id*. at 7-8.)

On or about May 14, 2002, plaintiff requested a leave of absence, citing health reasons. (*Id*. at 8.) Plaintiff states that she requested the leave because she was "[a]fraid of [defendants'] apparent power and influence with the medical establishment." (Mahmud Decl. P 46.) Brunelle notified her that her request was granted and that further action on her application for reappointment to the Medical Staff was deferred indefinitely. (Defs. Suppl. R. 56.1 Stmt. at 8.)

By letter dated August 1, 2002, the CPH informed plaintiff that, although Kittur and Dr. Charles Bradshaw had concluded that it did not appear that she had any neurological organic disease and that her psychological testing results "did not contraindicate [her] return to work," neither evaluator had formulated a diagnosis on her behalf and because she had "not been given a diagnosis by the most recent evaluators, [she **[**21]** was] not eligible to join [the CPH] at [that] time." (*Id*. at 8.; Lasch Decl., Ex. A at 256.)

By letter dated November 25, 2002, Brunelle asked plaintiff whether she wanted to pursue her application for reappointment at the Hospital, which application, according to the letter, was pending at the time plaintiff took a medical leave of absence. (Defs. Suppl. R. 56.1 Stmt. at 8; Lasch. Decl., Ex. A at 30.) Plaintiff responded by letter dated December 3, 2002, wherein she informed Brunelle that she would not reapply for privileges because she had been "so traumatized by [Brunelle's] behavior **[*550]** and that of the seven doctors on the [MEC] that it appears impossible for [her] to reapply." (Defs. Suppl. R. 56.1 Stmt. at 8; Lasch Decl., Ex. A at 260.) Brunelle then advised plaintiff that her pending application, which had been on hold, was deemed to have been withdrawn. (Defs. Suppl. R. 56.1 Stmt. at 8.)

In a letter dated December 16, 2002 to the Office of Professional Medical Conduct ("OPMC"), Brunelle, without referring to plaintiff by name, described the circumstances of plaintiff's withdrawal of her application and inquired whether it was necessary to report her withdrawal pursuant to the New **[**22]** York Public Health Law. (*Id*.; Lasch Decl., Ex. A at 313-15.) He enclosed with the letter redacted copies of the reports made by Tatelbaum and Strain. (Defs. Suppl. R. 56.1 Stmt. at 8.) The OPMC informed Brunelle that his letter had been forwarded to Brian M. Murphy ("Murphy"), the OPMC's Chief Counsel. (*Id*.) In March 2003, Murphy informed Brunelle that the withdrawal of an application for privileges under the circumstances described in Brunelle's letter required reporting under state law. (*Id*.) Brunelle then informed the OPMC that the physician at issue was plaintiff. (*Id*.)

In May 2003, plaintiff "applied for affiliation" with ORMC. (Mahmud Decl. P 52.) In June 2003, Auerbach provided information to ORMC in response to its request for information about plaintiff pursuant to state law. (Defs. Suppl. R. 56.1 Stmt. at 9.) In a letter to Auerbach dated August 14, 2003, plaintiff requested that he forward to Dr. Mark Tuckfelt ("Tuckfelt") at ORMC "'all documentation associated with the review process related to my performance at [BSCH], including [Auerbach's] letter to . . . [the OPMC].'" (*Id*.) Auerbach responded that he would comply with her request and sent to the OPMC any and all documents **[**23]** associated with plaintiff's review process not already provided. (*Id*.; Lasch Decl., Ex. A at 283.) In a letter to Brunelle dated March 22, 2004, plaintiff requested that certain additional documents be sent to Tuckfelt at ORMC. (Defs. Suppl. R. 56.1 Stmt. at 9.) By letter dated April 20, 2004, Brunelle sent Tuckfelt the documents requested by plaintiff, to the extent that those documents existed. (*Id*.)

In December 2002, Tuckfelt notified plaintiff that, for her application to ORMC to proceed, ORMC needed explanations from both plaintiff and B SCH of the circumstances leading to her leave of absence from BSCH. (Person Decl., Ex. P at 41.) According to Tuckfelt, staff members at BSCH were reluctant to discuss these circumstances and he asked plaintiff to provide BSCH with a release of the information to ORMC. (*Id*.)

In a letter to plaintiff dated October 28, 2003, Tuckfelt informed her that after reviewing the reports and correspondence relating to plaintiff's work experience at BSCH, and in light of ORMC's Medical Staff Bylaws, which require that physicians adhere to the ethics of their profession and be capable of working with others and delivering patient care, there was "sufficient **[**24]** evidence to question whether [she] qualified under [the terms of the Bylaws] especially character and ability to work with others." (*Id*. at 70.) Tuckfelt suggested that she consider withdrawing her application to ORMC. (*Id*.) Plaintiff "persisted in [her] application for privileges at ORMC." (Mahmud Decl. P 55.)

Tuckfelt then contacted the OPMC, stating that, although it appeared that BSCH had reported plaintiff to the OPMC, she claimed that she never received any correspondence from the OPMC, thereby "essentially denying any knowledge of having been reported to [the] OPMC." (Person Decl., Ex. P at 72.) Tuckfelt stated that it seems "unlikely" that plaintiff would have been unaware that BSCH reported her to **[*551]** the OPMC and, therefore, he requested assistance in evaluating plaintiff's character. (*Id*.) In a letter dated December 23, 2003, the OPMC informed Tuckfelt that, after interviewing him and plaintiff, the OPMC had concluded its investigation of plaintiff and determined that there was no evidence to support a charge of misconduct under state law. (*Id*. at 76.)

From October 2003 to April 2004, the OPMC investigated plaintiff's conduct at BSCH. (Mahmud Decl. P 49.) The case was then closed. **[**25]** (*Id*.) In a letter dated July 26, 2004, the New York Department of Health informed plaintiff that, after considering her complaint against BSCH for improper failure to renew her privileges, and after reviewing and considering information relevant to the matter, it found that the Hospital's reasons for suspending her privileges were consistent with the New York Public Health Law. (Lasch Decl., Ex. C.)

On June 28, 2004, the Medical Executive Committee at ORMC "acted to deny privileges to [plaintiff]." (Mahmud Decl. P 57.) Plaintiff contends that ORMC "relied upon the documents created by [defendants] to deny [her] admitting privileges at ORMC . . ., which result was predictable as well as desired by [defendants]." [11] (Pl. R. 56.1 Stmt. P 17.) She admits that there is no evidence that any of the defendants spoke to anyone at ORMC about her or her application. (Mahmud Decl. P 69.)

---

[11] To support the proposition that defendants desired that ORMC rely on the documents "created" by them to deny admitting privileges to plaintiff, plaintiff relies only upon her own declaration. (*See* Pl. R. 56.1 Stmt. P 17 (citing Mahmud Decl. PP 50, 53).)

Plaintiff contends that defendants and other doctors at the **[**26]** BSCH "directed their attention to sham, ill-founded activities intended to create an injurious written record . . ., force [her] to withdraw from BSCH under threat of making unfounded charges of unprofessional conduct against [her] . . ., and to prevent her from obtaining admitting privileges at other hospitals." [12] (Pl. R. 56.1 Stmt. P 8 (internal citations omitted).) She asserts that they "deviated from their custom and practice of dealing with physician issues in executive session without any writings to record the events . . . so that there would be documents making [plaintiff] look bad, [13] which documents were required to be sent to the NYS regulatory agencies upon request or to any hospital at which [she] may seek admitting privileges." (*Id*. P 11.) [14] Plaintiff asserts that the Tatelbaum Report "was specifically requested by [defendants] to be adverse" [15] so that defendants **[*552]** could use it "as part of their activities directed against [p]laintiff and her career as a doctor and cardiologist." (Pl. R. 56.1 Stmt. P 19 (citing Mahmud Decl. PP 45, 53, 67-68).)

Plaintiff currently practices medicine and has admitting privileges at St. Anthony Community Hospital, a sister hospital to BSCH, and "work[s] closely with" Good Samaritan Hospital, also a sister hospital to BSCH, where she has been encouraged to apply for admitting and consulting privileges. (Mahmud Decl. P 17.) She was appointed Director of Cardiology at Ellenville Regional Hospital in November 2007, and has had admitting and consulting privileges at Catskill Regional Hospital, in Sullivan County, since 2006. (*Id*.) In June 2008, Tatelbaum offered to plaintiff a position as a physician in his medical group and, at least as of October 2008, the offer remains open. (*Id*. P 42A.)

BSCH is located 17 miles away from ORMC, which is located in Middletown, New York and is the hospital in closest proximity to BSCH. (*Id*. P 27.) The Horton Medical Center, one of two ORMC facilities in Middletown, is the hospital in closest proximity to BSCH that provides cardiac care. (*Id*.) According to plaintiff, the "main hospitals for cardiac care" are: Vassar Hospital in Poughkeepsie, New York (about 45 minutes from BSCH); Good Samaritan Hospital in Suffern, New York (about 45 minutes from BSCH); **[**29]** a hospital that is not specified by name in plaintiff's declaration, but which is located in Kingston, New York; and Newton Hospital in New Jersey. (*Id*.) Plaintiff's cardiac patients live in Port Jervis "and a 5-mile surrounding area." (*Id*. P 28.) According to plaintiff, "BSCH is the nearest hospital for all of these patients." (*Id*.)

Plaintiff now maintains a professional practice in Port Jervis and her office is equipped with "modern cardiac-care equipment," however, her practice "is not an adequate substitute for a fully-staffed hospital, especially one with a coronary care unit and an intensive care unit." (*Id*. P 30.) For plaintiff to treat patients in a hospital setting, they must be transported or transport themselves to one of the hospitals at which she has admitting privileges, [16] involving "about 30 to 45 minutes of . . . travel time [beyond that which would be required to the Hospital]," and such a length of travel time can be "dangerous for certain cardiac patients." (*Id*.) Many of plaintiff's patients are "very sick, elderly

---

[12] To support this proposition, plaintiff cites her own declaration and directs the Court to over 100 "ORMC documents," without **[**27]** providing any citations to page numbers. She also provides the citation "Ex. R, PX B-E in depositions of Defendants" however it is unclear to which parts of defendants' deposition testimony she intends to refer. (Pl. R. 56.1 Stmt. P 8.)

[13] Although plaintiff cites Auerbach's deposition testimony, nothing in that testimony indicates any intent on the part of defendants to cast plaintiff in a bad light.

[14] However, the record reflects that, while the MEC typically kept written minutes of regular meetings, it did not keep such minutes at executive sessions in the interest of maintaining the confidentiality of those meetings, "[s]o that things that are being discussed [are] not [] used to harm any individual or part of the hospital as it's being processed." (Person Decl., Ex. H (Kaufmann Dep. at 16:6-17:17).)

[15] In support of this proposition, plaintiff explains that defendants requested that the report be adverse "through failure to confront [Tatelbaum] with Strain letter . . . or the report of nuerologist Dr. Kitur [sic] who concurred with [] Strain." (Pl. R. 56.1 Stmt. P 19.) Her citations to the record do not indicate whether defendants shared the reports prepared by Strain and Kittur with **[**28]** Tatelbaum.

[16] As noted above, plaintiff has admitting privileges at Ellenville Regional Hospital, Catskill Regional Medical Center and St. Anthony Community Hospital. (Mahmud Decl. P 30.)

and poor," and "[d]ue to their medical condition as well as financial situation . . . are unable to travel [away] from the immediate area." (*Id*. P 31.) **[**30]** When they are admitted to BSCH, plaintiff has no input in their treatment and is "never called to . . . give their recent test results or medication." (*Id*. P 32.)

Plaintiff avers that, as a result of "losing" admitting privileges at BSCH and failing to obtain such privileges at ORMC, she has incurred attorneys' fees, loss of revenues, excessive travel charges and loss of "time spent in the office because of the need to travel to distant hospitals." (*Id*. P 18.) Her work schedule, which involves significant travel and long hours, has caused her personal life to suffer and has prevented her from performing "income producing speaking engagements." (*Id*.) She also "lost many cardiac patients." (*Id*. P 58.)

Plaintiff contends that "[t]he activities of [defendants] put patients at risk because they had to choose between the cardiologist they wanted as their doctor ([plaintiff]) **[*553]** and the nearest hospital for cardiac care in the event of a cardiac emergency." (Pl. R. 56.1 Stmt. P 16 (citing Mahmud Decl. PP 28, 32).) When plaintiff **[**31]** no longer had admitting privileges at BSCH, some of her patients sought and received cardiac treatment from Kaufman, a physician named Dr. Singh and "other cardiologists with admitting privileges at BSCH." (Mahmud Decl. P 50.) Plaintiff also contends that patients specifically in "the geographic market of Port Jervis and surrounding area (8-10 mile radius)" have been damaged, citing the declarations of 35 former and current patients of plaintiff, each of whom states that the patient would like plaintiff to be able to treat him or her at BSCH and some of whom also provide anecdotes about positive experiences while being treated by plaintiff. (Pl. R. 56.1 Stmt. P 20; Person Decl., Ex. O.)

Plaintiff states that "[d]efendants have *de facto* control of who is permitted to admit patients at BSCH through their mutually consensual rotation of positions of influence, such as Chief of Staff, Medical Director and Chief of Medicine in addition to chairing the Credentials, Medical Examinations and Quality Assurance Committees." (Mahmud Decl. P 33.) Plaintiff states further that "[t]hrough their ability to influence and/or control the allocation of admitting privileges . . . [and] consulting privileges **[**32]** at the Hospital and through the use of referrals, they control or at least have undue and disproportionate influence over a majority of the other physicians who can vote on such matters at BSCH." (*Id*.)

According to Kaufman, since 1982, no cardiologist who has applied for privileges to BSCH has been denied; there were six cardiologists on staff on September 30, 2008, the date of his deposition; and since 2002, four new cardiologists have joined the staff. (Person Decl., Ex. H (Kaufman Dep. at 37:4-17).)

DISCUSSION

I. Legal Standard

HN3[] Summary judgment may be granted where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See FED. R. CIV. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. ***HN4***[] A fact is material only if, based on that fact, a reasonable jury could find in favor of the nonmoving party. *Anderson, 477 U.S. at 248*. ***HN5***[] The burden rests on the movant to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN6***[] In deciding whether summary judgment is appropriate, the court resolves all ambiguities and draws all permissible factual inferences against the movant. **[**33]** *See Anderson, 477 U.S. at 255*. ***HN7***[] To defeat summary judgment, the nonmovant must go beyond the pleadings and "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. ***HN8***[] The Court's role at this stage of the litigation is not to decide issues of material fact, but to discern whether any exist. *See Gallo v. Prudential Residential Servs., L.P., 22 F. 3d 1219, 1224 (2d Cir. 1994)*. Nevertheless, as one court explained:

> ***HN9***[] [S]ummary **[**34]** judgment must be granted against a party in instances when such party fails to adequately establish an essential element on which it bears the burden of proof. . . . ***HN10***[] The non-moving

> party may not rest upon unsubstantiated allegations, conclusory assertions or mere denials of the adverse party's pleading, but must set forth and establish specific facts showing that there is a genuine issue for trial. . . . A metaphysical **[*554]** or other whimsical doubt concerning a material fact does not establish a genuine issue necessitating a trial. . . . The mere existence of a scintilla of evidence supporting the non-movant's case is insufficient to defeat a motion for summary judgment.

*Brooks v. Di Fasi, 1997 U.S. Dist. LEXIS 11162, 1997 WL 436750, at *2 (W.D.N.Y. July 30, 1997)* (internal quotation marks and citations omitted).

Furthermore, "as the Supreme Court observed . . . ***HN11***[] summary judgment remains a vital procedure tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." *Bogan v. Nw. Mut. Life Ins. Co., 953 F. Supp. 532, 537-38 (S.D.N.Y. 1997)* (Conner, J.), *aff'd*, *166 F.3d 509 (2d Cir. 1999)*. "[A]ntitrust **[**35]** law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec., 475 U.S. at 588*. Specifically, "conduct as consistent with permissible conduct as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id*.

II. Antitrust Claim

Plaintiff contends that defendants violated the Sherman Act by conspiring to create a monopoly over specialized medical services in the Port Jervis area. [17] (Am. Complt. PP 56-57.) *Section 1* of the Sherman Act provides, in pertinent part, that ***HN12***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN13***[] Only unreasonable restraints are actionable under the antitrust laws. *See* *New York ex rel. Spritzer v. Saint Francis Hosp., 94 F. Supp. 2d 399, 411 (S.D.N.Y. 2000)* (Conner, J.) (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*. ***HN14***[] *Section 2* imposes liability on any person "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize **[**36]** any part of… trade or commerce." *15 U.S.C. § 2*. [18]

HN16[] To prevail on a Sherman Act claim, under either section, the plaintiff must prove an antitrust injury. *Ezekwo v. Am. Bd. of Internal Med., 18 F. Supp. 2d 271, 278-79 (S.D.N.Y. 1998)*, **[**37]** *aff'd*, *173 F.3d 844 (2d Cir. 1999)*. To prove an antitrust injury, the plaintiff must show that the defendants' actions caused an injury to competition; demonstrating injury only to individual competitors is insufficient. *Ezekwo, 18 F. Supp. 2d at 278*. "Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors." *Capital Imaging Assocs., P. C. v. Mohawk Valley Med.* ***[*555]*** *Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)*.

To that end, the Court must assess the impact of the defendants' actions upon the plaintiff's market, which requires "some factual submission as to that market's structure and the services offered therein." *Ezekwo, 18 F. Supp. 2d at 278*. The plaintiff bears the burden of establishing and proving the relevant market. *Tunis Bros. Co. v. Ford Motor*

---

[17] As noted in *Mahmud I*, "[a]lthough plaintiff does not specifically allege a claim under the Clayton Act, ***HN15***[] sections 4 and 16 of that Act, *15 U.S.C. §§ 15*, *26*, permit a private party to recover damages and seek injunctive relief for any violation of the Sherman Act. . . . As plaintiff is seeking damages and injunctive relief, we therefore treat plaintiff's suit as seeking recovery under the Sherman Act through the private right of action provided for in the Clayton Act." *454 F. Supp. 2d at 159 n.13* (internal citations omitted).

[18] It is not clear from the Amended Complaint whether plaintiff intends to assert her antitrust claim under *section 1*, *section 2* or both sections of the Sherman Act. She states that defendants' conduct was "contrary to *15 USC 1 et seq.*" (Am. Complt. P 57.) Her opposition papers cite both *section 1* and *section 2*. (*See, e.g.*, Pl. Mem. Opp. Summ. J. at 13, 17.) However, it is not necessary to determine this issue for the discussion below as the analyses is applicable to both sections.

Co., 952 F.2d 715, 724, 726 (3d Cir. 1991). "The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes." Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004) (internal quotation marks and citation omitted). It is "the **[**38]** geographic and product/service area that is affected by the questioned activity or operation," Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1011 (S.D. Tex. 1997) (internal quotation marks and citation omitted), and it "provides the context against which to measure the competitive effects" of the defendants' alleged anticompetitive conduct. Geneva Pharms. Tech., 386 F.3d at 496.

Plaintiff alleges in her Amended Complaint that the relevant services market is the "market for certain specialized medical services, such as cardiology, oncology and gastroenterology" and that the relevant geographic area is "the tri[-]state area, centered in Port Jervis, New York and extending north to Monticello, New York[,] west to Milford, Pennsylvania[,] [s]outh to Newton, New Jersey and east to Middletown and Warwick, New York." (Am. Complt. PP 55-56.) In her opposition papers to the instant motion, plaintiff attempts to present a new, smaller geographic market, consisting of "Port Jervis, New York, and stretching outward to a distance halfway between the nearest hospital in any direction," which consists of an 8-10 mile radius around Port Jervis. (Pl. Mem. Opp. Summ. J. at 15-16.) Plaintiff's **[**39]** new description of the relevant geographic market contradicts the allegations in the Amended Complaint. At least three of the bordering locations in the Amended Complaint are greater than 10 miles away from Port Jervis. Plaintiff also argues in her opposition papers that the relevant service market is "cardiac medical services coupled with hospital admitting privileges." (Pl. Mem. Opp. Summ. J. at 16.) This description also contradicts the allegations in the Amended Complaint, which defines the relevant market as simply the "market for specialized medical services" without any mention of "admitting privileges." (Am. Complt. P 56.)

HN17[] Generally, courts will not consider, on a motion for summary judgment, allegations that were not pled in the complaint and raised for the first time in opposition to a motion for summary judgment. Alali v. DeBara, 2008 U.S. Dist. LEXIS 86760, 2008 WL 4700431, *3 n.6 (S.D.N.Y. Oct. 24, 2008). *See also* Southwick Clothing LLC v. GFT (USA) Corp., 2004 U.S. Dist. LEXIS 25336, 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004) ("A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered in resolving the motion.") **[**40]** Therefore, the allegations in the Amended Complaint govern the description of the relevant market for purposes of this motion. Plaintiff has not submitted any evidence to support the relevancy of the geographic market that she alleges in her Amended Complaint - *i.e.*, that those boundaries border an area in which specialized medical services are "reasonably interchangeable" - and, therefore, she fails to carry her burden to establish that this is the relevant market. Geneva Pharms. Tech., 386 F.3d at 496.

However, even if we did accept, as the relevant market, the market that plaintiff espouses in her opposition papers, plaintiff's **[*556]** antitrust claims would still fail because she has not established any antitrust injury within this market. In the context of this case, an antitrust injury in this market would be an injury to individuals seeking emergency cardiac services [19] for whom BSCH is the nearest hospital. *See* Ginzburg, 993 F. Supp. at 1015

[19] We presume that plaintiff intends to define the relevant service market as *emergency* cardiac services. She has presented no evidence to indicate that individuals **[**42]** within her defined geographic market would not travel to a hospital other than BSCH for non-emergency cardiac services and, thus, she has not demonstrated that the provision of such services at BSCH are not reasonably interchangeable with similar services provided at other hospitals. Rather, plaintiff argues that the relevant market is Port Jervis and the surrounding geographic area "stretching outward to a distance halfway between the nearest hospital in any direction," because "obtaining medical care within the first 10 minutes of a life-threatening event is critical for the recovery prospects" and because when an individual suffers a stroke, he or she is taken to the nearest hospital. (Pl. Mem. Opp. Summ. J. at 15-16.) Thus, it appears that she intends to argue that, because of the need for expediency, emergency cardiac services at BSCH are not reasonably interchangeable with similar services at a hospital located farther away.

To the extent that plaintiff argues that individuals that are taken to the nearest hospital for emergency services are entitled to be seen by their physician of choice (in this case, plaintiff), we reject this proposition. A contrary finding would lead to **[**43]** the absurd result that any physician would be entitled to admitting privileges at any hospital located anywhere merely because that physician's patients *may* require emergency services at that hospital at some point in the future.

("[B]ecause the purpose of ***antitrust law*** is the promotion of consumer welfare, the court must analyze the antitrust injury from the perspective of the consumer") (internal quotation marks and citation omitted). Plaintiff has not directed the Court **[**41]** to any competent evidence indicating that patients at B SCH received inferior emergency cardiac care because of defendants' actions. Nor has she demonstrated that, due to defendants' actions, the price of emergency cardiac care services has increased or that, other than patients' inability to select plaintiff at BSCH, the choice of physicians in the market has changed. *See* *Korshin v. Benedictine Hosp., 34 F. Supp. 2d 133, 138 (N.D.N.Y. 1999)* (That court, finding that plaintiff-anesthesiologist failed to allege antitrust injury, noted that plaintiff did not allege "any change in the price of anesthesiology services, a decrease in the quality or efficiency of care, or that consumers of anesthesiology services . . . have less of a market choice, other than their [in]ability to select [plaintiff], as a result of defendants' actions"); *Ginzburg, 993 F. Supp. at 1017* ("[Plaintiff] . . . fails to produce evidence that competition has been threatened or that patient choice options have diminished due to [d]efendants' conduct.").

To support her proposition that defendants' actions injured patients, plaintiff cites her own sworn declaration, which contains only her own conclusory and unsupported allegations, and the declarations of 35 patients, each stating that the patient would like plaintiff to be able to treat him or her at BSCH. (*See* Pl. R. 56.1 Stmt. PP 16, 20.) Plaintiff cannot rely on her own conclusory allegations to prove factual matters on summary judgment. *See* *Stroud v. New York City, 374 F. Supp. 2d 341, 349 (S.D.N.Y. 2005)* (quoting *Patterson v. County of Oneida, 375 F.3d 206, 219 (2d Cir. 2004))* (***HN18***[] On a motion for summary judgment "the nonmoving party 'may not rely on mere conclusory allegations or speculation, but instead must offer some hard evidence' in support of its factual assertions."). Furthermore, the stated preference for plaintiff of 35 patients is not probative as to whether patients have received inferior emergency cardiology services because plaintiff no **[*557]** longer **[**44]** has admitting privileges at BSCH. Although some of plaintiff's patients may be upset that they cannot see plaintiff as their cardiologist when, in the event of an emergency, they are taken to their local hospital, plaintiff has not demonstrated that they are denied specialized medical services or that they receive inferior medical services because plaintiff does not have admitting privileges at BSCH.

Plaintiff also argues that "patients at BSCH are being deprived of . . . quality of care . . . by reason of the [d]efendants' activities in silencing . . . [p]laintiff . . . and not doing anything to correct the adverse conditions observed by . . . [p]laintiff." (Pl. Sur-Reply Mem. Opp. Summ. J. at 8.) She fails to adequately support these propositions. She has not submitted any evidence, beyond her own conclusory allegations, that her complaints about quality of care were valid or that defendants failed to take any action in response to her complaints. Rather, the undisputed facts indicate that the Hospital did take action in response to her complaints, though not the action that plaintiff desired: the Hospital's Physician Quality Assurance Committee initiated an investigation and reviewed **[**45]** patient charts wherein she had documented her complaints. Moreover, even if plaintiff had proffered evidence to support her propositions, her concerns regarding conditions at BSCH are irrelevant to the question of whether the quality of care at BSCH diminished because of plaintiff's alleged exclusion from competition. *See* *Ginzburg, 993 F. Supp. at 1019* (Rejecting a similar argument and noting that "according to [plaintiff], the level of care . . . did not improve even in spite of her efforts. In fact, [plaintiff] claims that most of her verbal complaints were ignored and her formal written complaints were whitewashed, announced to be without merit, and used to trigger a peer review action against her.") (internal quotation marks and citation omitted).

Plaintiff also argues that patients have suffered "lower quality of medical care" because Kaufmann, and not plaintiff, read the echo tests of plaintiff's patients and that Kaufmann is "destroying competition . . . through his monopolization of echo[] test revenues." (Pl. Sur-Reply Mem. Opp. Summ. J. at 9.) Plaintiff has not submitted any competent evidence to support these arguments. She has not introduced any evidence that Kaufmann is **[**46]** less capable than she is with respect to reading of echo tests. Nor has she directed the Court to any evidence, beyond her own conclusory allegations, that any of her patients suffered as a result of the fact that Kaufmann read their echo tests. [20] (*See* Pl. R. 56.1 Stmt. PP 21-22.)

---

[20] Plaintiff also submits her own sworn statement that Kaufmann ignored her suggestions to upgrade the "equipment and cardiology services at BSCH" and that after she left, "various specialized equipment for cardiac patients remains unused, to the detriment of the cardiac patients at BSCH." (Mahmud Decl. P 80.) Plaintiff's own speculation as to the impact of the level of

In addition to an absence of any evidence that any patient suffered inferior care because of defendants' allegedly anticompetitive conduct, plaintiff also has not demonstrated that consumer choice - in this context, patients' choice of physician - has diminished due to that conduct. [21] **[*558]** Rather, the record reflects that B SCH has employed four new cardiologists **[**47]** since 2002 [22] and, since 1982, no cardiologist who has applied for privileges to BSCH has been denied. *See* *Ginzburg, 993 F. Supp. at 1017* ("Even absent . . . [the plaintiff]'s options to practice at other hospitals, [the plaintiff] still fails to produce evidence that competition has been threatened or that patient choice options have diminished due to [the d]efendants' conduct," noting that the defendants have "expanded their practices . . . by hiring associates."); *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 998 (N.D. Ga. 1992)* (Although the plaintiff was no longer able to practice at the defendant's hospital, the evidence showed that the hospital added more doctors to its staff after the plaintiff left, thus proving that "patients have more of a choice concerning which doctor to visit and that [the hospital] is a more competitive hospital with the addition of the new doctors"). The evidence also indicates that plaintiff has admitting privileges at three other hospitals, that she continues to maintain a cardiology practice in Port Jervis and that Tatelbaum has offered her a position with his practice group. [23] Therefore, to the extent that physician choice has been reduced **[**48]** for those patients that wish to see plaintiff as their cardiologist, those patients may still be able to see her, to the extent that they can travel and do not require emergency services.

Finally, although plaintiff may have established that defendants' conduct caused various injuries to herself personally, such as loss of patients' business and potential revenues from reading echo tests, this is insufficient to demonstrate that competition as a whole was harmed. *See* *Capital Imaging Assocs., 996 F.2d at 547* (Affirming that summary judgment **[**49]** was warranted on Sherman Act claim brought by plaintiff, a radiology practice that had been excluded from providing services to patients of defendants' health care provider, noting that "[plaintiff]'s position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market."); *Purgess v. Sharrock, 1992 U.S. Dist. LEXIS 17057, 1992 WL 349683, at *2 (S.D.N.Y. Nov. 9, 1992)* (finding no antitrust injury where plaintiff, an anesthesiologist who was fired by a hospital, "merely asserts injury to himself as a competitor of [the hospital] and its anesthesiologists"); *Ginzburg, 993 F. Supp. at 1019* ("Antitrust concerns . . . are not implicated by an individual physician's loss of income or patient referrals.").

Therefore, summary judgment is granted with respect to plaintiff's antitrust claims because plaintiff has failed to proffer any evidence of the relevant market alleged in her Amended Complaint and because, even if she had established the relevant market, she has failed to raise a genuine issue of material fact as to the existence of any antitrust injury.

III. [**50] Interference With a Prospective Economic Advantage Claim

HN19[] To maintain an action for tortious interference with a plaintiff's business relations under New York law, the plaintiff must demonstrate that: "(1) there is a business relationship between the plaintiff and a third party; (2) the defendant, knowing of that relationship, intentionally interferes with it; (3) the defendant acts with the sole purpose of harming the plaintiff, **[*559]** or, failing that level of malice, uses dishonest, unfair, or improper means; and (4) the relationship is injured." *Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108-09 (2d Cir. 1997)*; *see* *Scutti Enters., LLC v. Park Place Entm't Corp., 322 F.3d 211, 215 (2d Cir. 2003)*.

---

equipment and cardiology services on patient care after she left BSCH is insufficient to create a genuine issue of fact as to whether patients were harmed by defendants' alleged actions.

[21] Plaintiff provides her sworn statement that "[t]he ability of . . . patients [] in the market area to select from competing providers of . . . specialized services has been severely limited, if not eliminated, by [defendants'] alleged activities." (Mahmud Decl. P 62.) This general conclusory allegation is insufficient to create a genuine issue of fact as to whether patient choice was in fact reduced.

[22] It appears from the record that plaintiff last worked at BSCH in May 2002, at which point she requested a leave of absence.

[23] We note that these positions may not permit plaintiff to render emergency cardiac services in the relevant geographic market.

Plaintiff alleged in her original Complaint that defendants' actions "were malicious and were solely intended to harm her by interfering with her prospective economic advantage and business relationships, by driving away patients, or forcing patients to consult other doctors with Hospital privileges, through unlawful and/or improper means." (Compl. P 51.) After defendants moved to dismiss this claim, in part on the ground that plaintiff had failed to allege some particular, existing business **[**51]** relationship with which the defendants interfered, (Defs. Mem. Supp. Mot. Dismiss (Document # 9) at 16-18), plaintiff amended her Complaint to add the names of seven patients with whom she had a relationship and with which relationships defendants allegedly interfered, (Am. Compl. P51). [24] In her motion papers, plaintiff now contends that defendants' activities constituted an unlawful interference with plaintiff's relationship with ORMC, with the OPMC and CPH, with BSCH, and with "all hospitals to which [plaintiff] may apply for admitting privileges for the rest of her professional life." (Pl. Mem. Opp. Summ. J. at 18-19.) Thus, it appears that plaintiff has abandoned her prior theory of liability - that defendants interfered with her relationships with patients - and now attempts to base her claim on defendants' alleged interference with her relationships with the two medical committees and various identified and unidentified hospitals. As discussed above, we will not consider, on a motion for summary judgment, allegations that were not pled in the Complaint and are raised for the first time in opposition to a motion for summary judgment. *Alali, 2008 U.S. Dist. LEXIS 86760, 2008 WL 4700431, *3 n.6*. Therefore, **[**52]** the allegations in the Amended Complaint govern for purposes of this analysis.

As set forth in *Mahmud I*, ***HN20***[] "[t]o claim tort[i]ous interference with a prospective business relationship . . . a plaintiff must specify some particular, existing relationship through which plaintiff would have done business but for the allegedly tort[i]ous behavior." *454 F. Supp. 2d at 162* (internal quotation marks and citation omitted). Furthermore, "[t]o satisfy the second requirement, . . . the defendant must direct some activities toward the party and convince the third party not to enter into the business relationship with plaintiff." *Id*. (internal quotation marks and citation omitted). Defendants contend that "[w]hile certain of the [d]efendants had limited contact with or provided professional services to some of [plaintiff]'s patients, those contacts in no way involved any conversations regarding [plaintiff], **[**53]** and . . . [d]efendants made no statements to any patient about [plaintiff], derogatory or otherwise." (Defs. Mem. Supp. Summ. J. at 18.) In support of this statement, defendants introduce the declarations of each of the defendants: Kaufmann, Auerbach, Brooks, Shah and Brody. (*See generally*, Defs. R. 56.1 Stmt.)

Plaintiff has not submitted any evidence that any of the defendants directed any activity toward any of her patients, which activity would constitute an attempt to convince the patients not to continue a particular, existing relationship with plaintiff - not even toward the patients **[*560]** named in her Amended Complaint. [25] She offers her own conclusory allegation that defendants "influenced the [H]ospital to fail and refuse to make a new contract with [her] . . . as seen from documents produced by ORMC and . . . [d]efendants, which . . . caused some of [her] patients to seek and receive cardiac treatment from . . . Kaufmann and other cardiologists with admitting privileges at BSCH." (Mahmud Decl. P 50.) Even leaving aside plaintiff's lack of personal knowledge about these events and the validity of her inferences regarding the documents produced by ORMC and defendants, any indirect **[**54]** activity on the part of defendants directed toward the Hospital that resulted in any of plaintiff's patients seeking care from other physicians does not satisfy the second requirement of a tortious interference with business relations claim, that is, that the defendant "direct some activities toward the [patient] and convince the [patient] not to enter the business relationship with plaintiff." *Mahmud I, 454 F. Supp. 2d at 162* (internal quotation marks and citation omitted). The undisputed facts indicate that none of the defendants interfered with any of plaintiff's relationships with her patients in this manner. On this basis alone, defendants are entitled to summary judgment on plaintiff's tortious interference claim. *See* *Franzon v. Massena Mem'l Hosp., 89 F. Supp. 2d 270, 281 (N.D.N.Y. 2000)* (Granting summary judgment on plaintiff-physician's tortious interference with business relations claim where, although plaintiff alleged

---

[24] Plaintiff explained in her papers opposing defendants' motion to dismiss that "[r]ather than debate the necessity of so pleading, [p]laintiff has, in her Amended Complaint . . ., identified half-a-dozen patients with whom [d]efendants interfered." (Pl. Mem. Opp. Mot. Dismiss (Document # 12).)

[25] Plaintiff states that her claims that defendants made derogatory statements about her to her patients "are no longer part of the case." (Pl. Mem. Opp. Summ. J. at 12.) She does not argue that defendants interfered with her relationships with patients in some other manner. Thus, it appears that she has abandoned entirely this theory of liability and has not submitted any evidence in support of the claim as alleged in her Amended Complaint.

that defendant "made defamatory statements to [p]laintiff's patients, prospective patients, and the community at large regarding [plaintiff's] ability to practice medicine," plaintiff failed "to point **[**55]** to any business relationships with which [defendant] interfered.").

Even if we did accept the theory of liability that plaintiff improperly attempts to set forth in her opposition papers, defendants would still be entitled to summary judgment on plaintiff's claim of tortious interference with prospective economic advantage. First, defendants' interference with "all hospitals to which [plaintiff] may apply for admitting privileges for the rest of her professional life," (Pl. Mem. Opp. Summ. J. at 18), cannot be the grounds for liability under this cause of action because such potential relationships are neither "particular" nor "existing." *Mahmud I, 454 F. Supp. 2d at 162*. Furthermore, that plaintiff has obtained admitting privileges at three other **[**56]** hospitals since she left BSCH undermines her claim that her ability to obtain such privileges has been injured. (Mahmud Decl. P 30.)

Second, plaintiff's claim that defendants somehow tortiously interfered with her relationship with BSCH, setting aside the fact that plaintiff does not make this allegation in her Amended Complaint, must fail as well. She has not submitted any evidence that any defendant directed any activity toward the Board of Directors, which evidently makes determinations regarding admitting privileges, in an effort to interfere with plaintiff's relationship with BSCH. [26] However, she does contend, **[*561]** relying on her own sworn statements, that defendants had "*de facto* control of who is permitted to admit patients at BSCH." (*Id*. P 33.) ***HN21***[] "[A] plaintiff cannot maintain a tortious interference [claim] against her employer . . . . An employer cannot be liable for interfering with its own relationship with its employee." *Malec v. Metro. Life Ins. Co., 2007 U.S. Dist. LEXIS 23777, 2007 WL 969086, at *25 (W.D.N.Y. Mar. 30, 2007)*. Furthermore, "[a] tortious interference claim may not lie against agents of the employer absent a showing that they acted outside the scope of their authority." *Id*. Plaintiff neither **[**57]** has introduced any evidence, nor has she argued, that any defendant acted outside the scope of his or her authority. [27] Therefore, whether defendants were acting as BSCH, plaintiff's "employer," through their alleged "*de facto* control" of the Hospital, or whether they were acting as agents of BSCH, plaintiff's claim must fail.

Third, plaintiff's claim that defendants tortiously interfered with her relationship with ORMC also fails. Plaintiff does not introduce any evidence, beyond her own conclusory allegations, that any of the defendants, knowing of her application for privileges at ORMC, *intentionally* interfered with it, either by reviewing her performance at BSCH and thereby creating a "paper trail" or by contacting ORMC directly. On the contrary, the record reflects that defendants took precautions to protect plaintiff. For example, during the review of plaintiff at BSCH, defendants gave her opportunities to explain herself and encouraged her to do so (*see, e.g.*, Lasch Decl., Ex. A at 167 (11/30/01 Brooks Ltr.)); they gave her a second chance to undergo the evaluation recommended by the CPH **[**59]** after she first refused to undergo the same evaluation (Person Decl., Ex. P at 20 (2/21/02 Kaufmann Ltr.)); and they did not provide ORMC with any information about plaintiff's tenure at BSCH except in response to a request for information made pursuant to state law and after plaintiff specifically requested that the information be disclosed (Lasch Decl., Ex. A at 270 (6/6/2003 Ltr.), 281 (8/14/03 Mahmud Ltr.); Person Decl., Ex. P at 67 (8/27/2003 Auerbach Ltr.)).

---

[26] We note that, although BSCH suspended plaintiff's admitting privileges, nothing in the record indicates that it even rejected an application by plaintiff to renew her privileges. Rather, the record indicates that plaintiff took a leave of absence in May 2002, during which time her application to renew her privileges was deferred indefinitely. Brunelle contacted her in November 2002 to inquire as to whether she wanted to pursue her application, to which plaintiff responded that she did not. However, plaintiff states that her reason for not renewing her privileges was that she felt "traumatized" by the physicians that comprise the MEC. Although plaintiff technically was not denied privileges, she claims that defendants' activities prohibited her from seeking to renew them. We need not decide here whether this distinction has significance for a tortious interference **[**58]** claim.

[27] Although plaintiff contends that defendants "deviated from their custom and practice of dealing with physician issues in executive session without any writings to record the events," (Pl. R. 56.1 Stmt. at 11), this proposition is not supported by the record. Even if we accept the proposition as true, it would not establish that defendants were acting outside the scope of their authority as agents for BSCH.

Plaintiff has not created a genuine issue of fact as to the third and fourth elements of a tortious interference claim. [28]

In conclusion, defendants are entitled to summary judgment on plaintiff's claim for **[*562]** tortious interference with prospective economic advantage because plaintiff has submitted no evidence that any of the defendants directed any activity toward her patients in order to convince them to discontinue their relationships with her. Nor has plaintiff proffered sufficient evidence to indicate that defendants tortiously interfered with her relationship with any hospital or committee, to the extent that plaintiff makes this claim.

CONCLUSION

For all of the foregoing reasons, defendants' motion for summary judgment (Doc. # 29) is granted in its entirety. The Clerk of the Court is directed to enter judgment in favor of defendants. This action is dismissed with prejudice and without costs or attorneys' fees.

SO ORDERED.

Dated: White Plains, New York

March 31, 2009

/s/ William C. Conner

Sr. United States District Judge

End of Document

[28] Plaintiff argues that defendants interfered with her relationship with the OPMC and the CPH. Plaintiff has not identified any "business relationship" with the CPH or the OPMC that was injured. These two entities are committees and plaintiff has not demonstrated any potential for economic advantage with either. Furthermore, neither party addresses whether plaintiff's relationship with either of these committees has been injured by any action by defendants. Rather, it appears that the OPMC closed its investigation of plaintiff's case without any adverse finding and the CPH "found no basis to take or recommend **[**60]** any action against [plaintiff]." (Mahmud Decl. P 47.)

[Palmyra Park Hosp., Inc. v. Phoebe Putney Mem. Hosp., Inc.](#)

United States District Court for the Middle District of Georgia, Albany Division

March 31, 2009, Decided; March 31, 2009, Filed

1:08-CV-102 (WLS)

Reporter
2009 U.S. Dist. LEXIS 144937 *

PALMYRA PARK HOSPITAL, INC., d/b/a PALMYRA MEDICAL CENTER, Plaintiff, vs. PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., et al., Defendants.

Subsequent History: Motion denied by, Costs and fees proceeding at *Palmyra Park Hosp. v. Phoebe Putney Mem. Hosp., 688 F. Supp. 2d 1356, 2010 U.S. Dist. LEXIS 18606 (M.D. Ga., Mar. 2, 2010)*

Core Terms

antitrust, allegations, insurers, motion to dismiss, anti trust law, patients, hospital authority, markets, Lease, anticompetitive, Defendants', pleader, Sherman Act, state action, acute-care, contends, state law claim, contracts, anticompetitive conduct, political subdivision, managed-care, conspiracy, enforcer, exclusive contract, in-network, terminate, damages, Counts, doctrine of immunity, articulated

Counsel: **[*1]** For Palmyra Park Hospital Inc, Plaintiff: WILLIAM H HEDRICK, LEAD ATTORNEY, Albany, GA USA; Christine A. Hopkinson, W. Ray Persons, King & Spalding LLP, Atlanta, GA USA; Jeffrey S. Spigel, PRO HAC VICE, Washington, DC USA; M. Russell Wofford, Jr., Atlanta, GA USA.

For Phoebe Putney Memorial Hospital, Phoebe Putney Health System Inc, Defendants: KENNETH B HODGES, III, LEAD ATTORNEY, Atlanta, GA USA; Karin A. Middleton, LEAD ATTORNEY, Baudino Law Group, PLC, Albany, GA USA; AMY MCCULLOUGH, KILPATRICK STOCKTON, Atlanta, GA USA; David J. Darrell, PRO HAC VICE, Des Moines, IA USA; Denise Cleveland-Leggett, Baudino Law Group, PLC, Atlanta, GA USA; Jan D. Gibson, Ralph Walker, PRO HAC VICE, Baudino Law Group, PLC, Des Moines, IA USA.

For Hospital Authority of Albany / Dougherty County, Defendant: Edgar Baughn Wilkin, Jr., LEAD ATTORNEY, Albany, GA USA; James Sulentic, John Passarelli, LEAD ATTORNEYS, PRO HAC VICE, Omaha, NE USA.

Judges: HONORABLE W. LOUIS SANDS, UNITED STATES DISTRICT JUDGE.

Opinion by: W. LOUIS SANDS

Opinion

ORDER

Presently pending before the Court are Defendants Phoebe Putney Memorial Hospital, Inc. (hereinafter, "Phoebe") and Phoebe Putney Health System, Inc.'s (hereinafter, "PPHS") Motion to Dismiss and **[*2]** Defendant Hospital Authority of Albany/Dougherty County's (hereinafter, "Authority") Motion to Dismiss. (Docs. 10, 13). For the reasons below, Defendants' Motions to Dimiss (Docs. 10, 13) are **GRANTED**.

Also pending before the Court is Defendant Authority's Motion for Hearing on its Motion to Dismiss. (Doc. 15). Upon review of the parties' filings in connection with the instant Motions to Dismiss (Docs. 10, 13), the Court finds that the parties have adequately briefed the issues such that a hearing on the same is not necessary at this time. Accordingly, Defendant Authority's Motion for Hearing (Doc. 15) is **DENIED**.

BACKGROUND

Based upon the facts alleged in the Complaint (Doc. 1), as set forth in relevant part below, Plaintiff filed this suit against Defendants for violations of the Sherman Act, *Section 1*, the Georgia Constitution, and *O.C.G.A. § 13-8-2*.

FACTS[1]

Plaintiff owns and operates a 248-bed acute-care hospital in Albany, Georgia that it built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options open to residents of Dougherty and the surrounding counties. Plaintiff provides primary and secondary acute-care services, including but not limited to services **[*3]** in cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary care, and urology.

Defendant Phoebe operates Phoebe Putney Memorial Hospital, a 443-bed acute-care hospital also located in Albany. Founded in 1911, Phoebe is by far the largest hospital in southwest Georgia. Among other services, Phoebe offers acute-care obstetrics, neonatology, and cardiovascular services, for which it is practically the only provider in the geographic market. In addition, Phoebe provides other acute-care services, many of which Palmyra is prepared to compete with in the geographic market. Phoebe Putney Health System, Inc. ("PPHS") is the corporate parent of Phoebe and a number of affiliated organizations. PPHS exerts *de facto* control over and provides overall guidance, direction and resource allocation to Phoebe and its affiliate organizations

Defendant Authority, a creation of Georgia's Hospital Authorities Law, *O.C.G.A. §§ 31-7-70 et seq.*, owns Phoebe Putney's assets, but leases them to Phoebe under a long-term Lease and Transfer Agreement dated December 11, 1990. Under the lease agreement, Phoebe has controlled the assets of, and operations at, Phoebe Putney for over 15 years. Phoebe pays for the **[*4]** maintenance required at Phoebe Putney; hires and fires all employees; establishes procedures to appoint, reappoint, suspend or terminate medical staff privileges; and on its own or through agents negotiates all relationships with managed-care organizations. The Hospital Authority cannot countermand, approve or revise Phoebe's decisions in these and other management areas during the term of the lease agreement. Phoebe, in short, controls all assets and operations at Phoebe Putney.

Although the lease agreement does not expire until 2042, the Hospital Authority retains the right to terminate the lease agreement and to reassert control over Phoebe Putney's operations before then, under certain designated circumstances. Despite Plaintiff's allegations of anticompetitive behavior by Defendants Phoebe and PPHS, the Hospital Authority has not exercised its right to terminate the Lease or otherwise take over Phoebe Putney's management.

Plaintiff alleges that Defendants Phoebe and PPHS have used their market power in certain "tying markets" to: a) exclude Plaintiff from the tied markets, and b) extend Defendants' dominance across a variety of product lines to capture a market share for all acute-care **[*5]** services exceeding 70%. Plaintiff further alleges that Defendants have exploited the Phoebe Putney's must-have status in the tying markets in multiple ways to foreclose competition in the "tied markets." First, since 2000, Defendants have demanded and achieved *de facto* managed-care contracting exclusivity with Blue Cross & Blue Shield of Georgia (hereinafter, "BCBSGA"), which Plaintiff contends is by far the largest commercial insurer and claim administrator in the geographic market. Defendants have

[1] The facts set forth below are gleaned from Plaintiff's Complaint (Doc. 1), because in consideration of a motion to dismiss, the Court must accept all of Plaintiff's well pleaded allegations as true. *See infra* pp. 6-7.

accomplished this *de facto* exclusivity by requiring even more generous reimbursement rates from BCBSGA if it enters into a managed-care contract with Plaintiff. Phoebe Putney's must have status has allowed Defendants to re-impose these restrictions each time the BCBSGA contract comes up for renewal, including within the last four years.

The tying-product markets for Palmyra's claims are the markets for acute-care obstetrics, neonatology, and cardiovascular services provided to commercially insured patients. The tying-product market for acute-care obstetrics services provided to commercially insured patients includes comprehensive pregnancy and childbirth services, including treatment of **[*6]** postpartum conditions. Georgia law has long required a state-issued Certificate of Need ("CON") to provide these services. Phoebe Putney has held the requisite CON for these services, while Palmyra has not. Similarly, the tying-product market for acute-care neonatology services for commercially insured patients includes comprehensive care for high-risk pregnant women, premature infants and infants born with major complications. Georgia law has long required a state-issued CON to provide these services. Phoebe Putney has held the requisite CON for these services, while Palmyra has not. The tying-product market for acute-care cardiovascular services for commercially insured patients includes cardiac catheterization and catheterization-based cardiovascular procedures, as well as coronary bypass surgery and other cardiothoracic procedures. Cardiac catheterization involves inserting a catheter into a patient's vein or artery to perform angiographic, physiologic and, as appropriate, therapeutic procedures. Georgia law has long required a CON to operate a cardiac catheterization laboratory, which is essential to provide commercially competitive cardiovascular services in general. Phoebe Putney **[*7]** has held the requisite CON for these services, while Palmyra has not.

Plaintiff alleges that Defendants have used Phoebe Putney's market power in the tying markets to hinder competition in the separate product markets for certain other acute-care services provided to commercially insured patients (the "tied-product markets"). The tied-product markets include those for acute-care cardiology, gastroenterology, general surgery, gynecology, medicine, oncology, pulmonary care, and urology services sold to commercially insured patients.

Although commercially insured patients are usually free to seek treatment wherever they choose, managed-care contracts between commercial insurers or claim administrators and hospitals provide insured patients with significant financial incentives to seek services from a hospital under contract with their insurer or employer (an "in-network provider"). These incentives include lower co-payments and insurance premiums, and better coverage. A hospital's designation as an in-network provider also tends to steer commercially insured patients to that hospital. Employees covered by commercial insurance typically receive information from the insurer about which local **[*8]** hospitals have in-network status. Absent extraordinary circumstances, these employees tend to seek treatment where they are directed. When a hospital gains in-network status under a particular insurance plan, it therefore tends to experience an increase in the number of patients covered by that plan who seek services at that hospital. Hospitals without such contracts, or "out-of-network providers," must usually rely more heavily on revenue from government insurers such as Medicare, Medicaid, and the Veterans Administration, which typically reimburse hospitals at lower, non-negotiable rates. To serve the community and compete in their respective markets, hospitals therefore seek in-network status with commercial insurers and claim administrators.

Palmyra's experiences with commercial insurers and claim administrators mirror these general tendencies. In 1999, the last full year that Palmyra enjoyed in-network status with BCBSGA, Palmyra realized more than $24 million in gross revenues from BCBSGA-insured and -administered patients. By 2001, Palmyra's gross revenues from the same patient pool had fallen to less than $6 million.

Since 2000, Plaintiff has approached BCBSGA several times -- **[*9]** including in the last four years -- to negotiate a managed-care contract that would grant Plaintiff in-network status to provide the tied products and other services to BCBSGA-insured Georgians. Each and every time, BCBSGA has told Plaintiff that BCBSGA's managed-care contract with Defendants precludes it from contracting with Plaintiff. Defendants' insistence on a *de facto* exclusive contract in the tied markets as well as the tying markets denies BCBSGA the ability to add Plaintiff to its panel of in-network providers. Plaintiff also alleges that Defendants have similarly used Phoebes market power to coerce other insurance providers to agree to exclusive managed-care contracts.

DISCUSSION

Each Defendant, through the two motions to dismiss pending before the Court, moves to dismiss Plaintiff's Complaint as to all counts. Defendants rely on *Federal Rule of Civil Procedure 12*, which provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to **[*10]** state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6). A motion to dismiss a plaintiff's complaint, or a portion thereof, under *Federal Rule of Civil Procedure 12(b)(6)* should not be granted unless Plaintiff fails to plead enough facts to state a claim to relief that is plausible[, and not merely just conceivable,] on its face. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (citation omitted). *Id. at 1964-65* (citing *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994))*. Accordingly, "[a]t the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1274 n.1 (11th Cir. 1999)*. Finally, the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . exceedingly low." *Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985)* (quotation and citation omitted). The Court will address each motion to dismiss in turn.

I. DEFENDANT AUTHORITY'S MOTION TO DISMISS (Doc. 13)

Defendant Authority moves to dismiss Plaintiff's Complaint on two grounds. First, Defendant **[*11]** argues that it is immune as a matter of law from antitrust liability under the "state action immunity" doctrine. Alternatively, Authority argues that Plaintiff's Complaint should be dismissed in its entirety for failure to allege facts sufficient to support the federal antitrust claims and pendent state law claims. Because the Court finds that Defendant Authority is entitled to protection under the state action immunity doctrine, only the parties' arguments concerning the same are addressed below.

A. State Action Immunity Doctrine

The state action immunity doctrine, also known as the Parker doctrine, protects states from liability under federal ***antitrust law*** for their actions as sovereigns. *Crosby v. Hospital Authority of Valdosta and Lowndes County, 93 F.3d 1515, 1521 (11th Cir. 1996)*. Political subdivisions, such as hospital authorities, are not themselves sovereigns, therefore the state action immunity doctrine does not apply to them directly. *Id.* (citing *FTC v. Hospital Board of Directors of Lee County, 38 F.3d 1184, 1187 (11th Cir. 1994))*. However, the state action immunity doctrine was ultimately extended to cover political subdivisions because "[m]unicipal corporations[2] are instrumentalities of the State for the convenient administration of government within their limits, . . . [therefore] the actions of municipalities may reflect state policy." *Crosby, 93 F.3d at 1521* (quoting **[*12]** *City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 412, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (Brennan, J., plurality opinion)). "Accordingly, the Court has made clear that a [political subdivision] is entitled to state action immunity if it acted pursuant to 'clearly articulated and affirmatively expressed state policy.'" *Id. at 1521-22* (citing *Town of Hallie*

---

[2] The Crosby Court noted that the terms "municipality" and "political subdivision" were used interchangeably within the opinion. *Crosby, 93 F.3d at 1522 n. 10*.

v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)). The Eleventh Circuit has held that a hospital authority established pursuant to O.C.G.A. § 31-7-72 "is an instrumentality, agency, or 'political subdivision' of Georgia for purposes of state action immunity . . ." Id. at 1525.

To determine if an entity acted pursuant to a "clearly articulated and affirmatively expressed state policy," and is thus entitled to immunity, a three part test is employed within the Eleventh Circuit. Crosby, 93 F.3d at 1532 (citing FTC, 38 F.3d at 1187-88). The entity, here the Authority, must show: 1) that it is a political subdivision of the state; 2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct. Id. Since the Eleventh Circuit has clearly established that hospital authorities created pursuant to O.C.G.A. 31-7-72 are political subdivisions of the state, and Plaintiff does not challenge Defendant Authority's authority to perform **[*13]** the challenged action[3] , the Court will only address the third prong articulated by the court in FTC, and reiterated in Crosby.

Under the third prong of the test from Crosby, Defendant Authority must show that Georgia has "clearly articulated" a state policy authorizing anticompetitive conduct. 93 F.3d at 1532. Despite the use of the term "clearly," it is not necessary that a defendant show an explicit statement by the legislature that it anticipates anticompetitive effects. *See id.* Instead, it is only necessary for a defendant to show that anticompetitive conduct was a "foreseeable result" of the powers granted to the political subdivision. *See id.* More specifically, "[t]his circuit requires only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." *Id.* (citing Lee County, 38 F.3d at 1189-91).

Defendant contends that O.C.G.A § 31-7-70, et seq., grants it the authority to enter into a lease for the operation of a hospital and delegate the day-to-day management of the hospital to the hospital and its officers, including the decision to enter into exclusive contract arrangements. Therefore, as Defendant sees it, it is foreseeable or reasonable to anticipate that hospitals **[*14]** will seek to enter into exclusive contracts with insurance providers.

In response, Plaintiff argues that it "does not allege that the [] Authority's initial decision to lease the hospital to Phoebe Putney in 1990, . . . about 10 years before the allegedly illegal behavior began, furthered the anticompetitive scheme." Instead, Plaintiff contends that it "alleges specific conduct violating the Sherman Act: Phoebe Putney's pursuit and enforcement of exclusive contracts for the tied products, and the Hospital Authority's refusal to terminate the lease and reassume control over the hospital because of the illegal behavior that began in 2000 and continues to this day." Plaintiff cites the Georgia Constitution and Georgia caselaw to support the proposition that there is a "general public policy" in favor of competition.

The arguments regarding the state action immunity doctrine are novel and amount to an issue of first impression for this Court.[4] Based on the clarification of Plaintiff's position in its response to Defendants' motions, it appears that Plaintiff contends that the "anticompetitive conduct" to be considered under the third prong from Crosby, are the allegedly illegal actions of **[*15]** Phoebe and PPHS ***and*** Defendant Authority's failure to revoke the lease agreement. The issue as it is raised here is novel because in most cases, and certainly all of those found by the Court, the state action immunity issue is raised as the state, a municipality, or one of the state's political subdivisions seeks protection for allegedly illegal conduct committed by that entity directly. *See, e.g.*, Crosby, 93 F.3d 1515; FTC, 38 F.3d 1184. Contrarily, in this case, despite the nuanced nature of Plaintiff's arguments before the Court, Plaintiff essentially argues that Phoebe and PPHS violated the Sherman Act and Georgia antitrust laws by entering into the exclusivity contracts with certain insurance providers for the tied services and the Authority

[3] Here, OCGA § 31-7-75(7) authorizes Defendant Authority to lease hospitals to others and the lease agreement at issue here authorizes Authority to revoke the lease for certain enumerated reasons. It appears from Plaintiff's complaint and argument in response to Defendant Authority's Motion to Dismiss that the challenged conduct in this case is Defendant Authority's "refusal to terminate the lease and reassume control over the hospital because of the illegal behavior that began in 2000 and continues to this day." (Docs. 1, 17).

[4] It is likely that this would be an issue of first impression for the Eleventh Circuit as well, as the Court cannot find any caselaw from this circuit that is directly on point.

failed to intervene by terminating its contract with Phoebe. Rightfully, Plaintiff does not challenge the Authority's 1990 decision to enter into the leasing agreement with Phoebe; instead, Plaintiff's only gripe with Defendant Authority is that the Authority failed to terminate the lease in 2000, when Phoebe's allegedly illegal conduct began. Therefore, the legal issue presently before the Court is whether the state action immunity doctrine protects a political subdivision of **[*16]** the state where it is alleged that the subdivision's failure to act aided a third party's anticompetitive conduct.

Alternatively, the Court could address the novel issue above from the opposite perspective and determine whether Plaintiff can establish a violation of the Sherman Act and Georgia Antitrust Laws based upon an alleged failure to act by the Authority. The Court is well aware that where a party asserts an immunity defense, it is typically best to address such a defense first. However, the Court thinks it is a better approach to save the novel issue presented to the Court for a later day with a more complete record, especially considering the present status of this litigation and the low burden necessary to survive a motion to dismiss. Unfortunately for Plaintiff the Court's reluctance to address the issue of first impression concerning the state action immunity doctrine does little more than postpone the ultimate dismissal of its claims against Defendant Authority for a few paragraphs. For the reasons addressed fully below, the Court finds that Plaintiff's Complaint fails to state a plausible claim for relief against Defendant Authority.

B. Federal Antitrust Claims

Plaintiff's **[*17]** Complaint includes four separate federal claims: (I) *per se* violation of *section 1* of the Sherman Act; (II) rule of reason violation of *section 1* of the Sherman Act; (III) violation of *section 2* of the Sherman Act - monopolization; (IV) violation of *section 2* of the Sherman Act - Attempted monopolization. (Doc. 1).

1. Counts I and II

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. *15 U.S.C. § 1*.

Section 1 does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy. *Twombly, 127 S. Ct. at 1964* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. The crucial question is whether anticompetive conduct stems from independent decision or from an agreement, tacit or express. *Twombly, 127 S. Ct. at 1964* (citing *Theatre Enterprises, Inc. v Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*.

Although *Fed. R. Civ. P. 8(a)(2)* only requires **[*18]** a "short and plain statement" of the claims showing that a pleader is entitled to relief, a pleader must provide more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly, 127 S. Ct. at 1965*. Additionally, factual allegations must be enough to raise a right to relief above the speculative level. The Supreme Court has held that when applying the general standards from *Fed. R. Civ. P. 8(a)(2)* to a *Section 1* claim, "such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* Furthermore, "a bare assertion of conspiracy will not suffice . . . and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id. at 1966*. Such a "naked assertion of conspiracy . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999))*.

Defendant Authority contends that Plaintiff's Complaint must fail as to Counts I and II because the only allegation of anticompetitive conduct by the Authority is "purely passive." Defendant argues that this purely passive action cannot form **[*19]** the basis of liability under *Section 1* of the Sherman Act. Furthermore, Defendant contends that the Complaint fails to allege that the Authority "had any independent interest in participating in the alleged anticompetitive activities or that it benefitted from these alleged anticompetitive activities." Finally, Defendant articulates a three-part test from *Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978)*, which is apparently applied in the Third Circuit to determine whether alleged conspirators were part of a combination in restraint of trade.

In response, Plaintiff argues that the Authority is indeed a co-conspirator of Defendant Phoebe. Initially, Plaintiff contends that the test from Freidman is not applicable to this situation because the same has not been adopted by the Eleventh Circuit. Nevertheless, Plaintiff proffers arguments to satisfy the three-part test. The remainder of Plaintiff's response appears to center on the argument that Defendant Authority qualifies as a co-conspirator because it "knew" that the other defendants engaged in anticompetitive behavior in violation of the Sherman Act, and that the Authority "acquiesced in and furthered the anticompetitive scheme." Plaintiff contends that these allegations are sufficient under **[*20]** *Rule 8(a)(2)* and the Twombly decision.

The only portions from Plaintiff's Complaint directly addressing the allegations of wrongful conduct by Defendant Authority are as follows:

> 7. A creation of Georgia's Hospital Authorities Law, *O.C.G.A. §§ 31-7-70 et seq.*, the Hospital Authority of Albany/Dougherty County maintains its principal place of business in Albany, Georgia. The Hospital Authority owns the Phoebe Putney's assets, but leases them to PPMH under a long-term Lease and Transfer Agreement (the "Lease") dated December 11, 1990. Under the Lease, PPMH has controlled the assets of, and operations at, Phoebe Putney for over 15 years. PPMH pays for the maintenance required at Phoebe Putney; hires and fires all employees; establishes procedures to appoint, reappoint, suspend or terminate medical staff privileges; and on its own or through agents negotiates all relationships with managed-care organizations. The Hospital Authority cannot countermand, approve or revise PPMH's decisions in these and other management areas during the term of the Lease. PPMH, in short, controls all assets and operations at Phoebe Putney.
>
> 8. Although the Lease does not expire until 2042, the Hospital Authority retains the right to terminate the Lease **[*21]** and to reassert control over the Phoebe Putney's operations before then, under certain designated circumstances. Despite knowing that the other Defendants have engaged in anticompetitive behavior in violation of the antitrust laws, and on that basis having the right under the Lease to reassert control over Phoebe Putney's operations and end the anticompetitive behavior, the Hospital Authority has not exercised its right to terminate the Lease or otherwise take over Phoebe Putney's management. In this way the Hospital Authority has furthered the anticompetitive scheme described below. (Doc.1).

The Court declines to adopt or apply the Third Circuit test articulated in *Freidman*. As noted by Plaintiff this test has not been adopted in the Eleventh Circuit. Furthermore, the Court finds the guidance from the Supreme Court's decision in *Twombly* applicable authority and easy enough to apply to the instant case. It is clear from the language above that Plaintiff has failed to allege that Defendant Authority either contracted or combined with Defendants Phoebe and PPHS in violation of *Section 1*. Plaintiff also does not proffer such arguments in response to Defendant Authority's Motion to Dismiss. Instead **[*22]** Plaintiff contends that the allegations in the Complaint put forth a plausible claim of conspiracy against Defendant Authority. It is curious that Plaintiff alleges that Defendant Authority was/is engaged in such a conspiracy but expressly refuses to argue in favor of any such conspiracy against Defendants Phoebe and PPHS. *See* (Doc. 17, Part II.A.). Of course, the Court is aware that it is Plaintiff's prerogative, at this stage in the litigation, to put forth inconsistent theories of relief. Notwithstanding Plaintiff's prerogative, the Court finds that Plaintiff failed to plead enough facts to state a claim to relief that is plausible.

The Twombly Court made clear that a pleader must allege enough facts to suggest that "an agreement was made" and that "a bare assertion of conspiracy will not suffice." *Twombly, 127 S. Ct. at 1966*. The only allegations against Defendant Authority, as noted multiple times above, are that Plaintiff believes that Defendant Authority failed to take an action it was permitted to and such a failure, coupled with knowledge of an anticompetitive scheme, made the Authority complicit in Defendant Phoebe's alleged violations of the antitrust laws. Even when Plaintiff's allegations are taken **[*23]** as true, the conduct complained of does not rise to the level of a conspiracy to commit antitrust violations. Plaintiff fails to allege any facts to show that there was an agreement, "tacit or express," between the Authority and either of the other two defendants. Furthermore, it is well settled that mere knowledge of an illegal plan or scheme, or acquiescence to the same, is not sufficient to establish the acquiescing party as a co-conspirator. *See* *United States v. Mendez, 496 F.2d 128, 150 (5th 1974)*[5] . Accordingly, Defendant Authority's Motion to Dismiss (Doc. 14) is **GRANTED** as it relates to Counts I and II of Plaintiff's Complaint.

2. counts III and IV

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. Plaintiff clearly has not alleged any facts that would plausibly establish relief under *Section 2* of the Sherman Act against Defendant Authority[6] . Therefore Defendant Authority's Motion to Dismiss (Doc. 14) is also **GRANTED** as it relates to Counts III and IV of Plaintiff's Complaint.

C. State Law Claims

Plaintiff's Complaint includes two claims for relief **[*24]** under Georgia state law: (V) tortious interference with business relations; (VI) violations of the Georgia Constitution and Georgia state law. Since the Court has dismissed all of Plaintiff's federal claims, it is no longer appropriate for the Court to exercise pendent jurisdiction over Plaintiff's state law claims for tortious interference (Count V) and under the Georgia Constitution (Count VI). *See* *Roper v. Edwards, 815 F.2d 1474, 1477-78 (11th Cir.1987)*. Accordingly, Defendants' Motion to Dismiss (Doc. 14) is **GRANTED** as it relates to Plaintiff's state law claims (Counts V and VI). The Court has not reached a decision on the merits of Plaintiff's state law claims against Defendant Authority, therefore dismissal of Plaintiff's state law claims is **without prejudice**.

II. DEFENDANTS PHOEBE AND PPHS'S MOTION TO DISMISS

Defendants Phoebe and PPHS move to dismiss Plaintiff's Complaint in its entirety. (Doc. 12). Defendants Phoebe and PPHS challenge Plaintiff's standing to bring the antitrust claims alleged; contend that the applicable statute of limitations has passed; and in the alternative, argue that Plaintiff has failed to state a plausible claim under *15 U.S.C. § 1*. Because the Court finds that Plaintiff lacks antitrust standing to bring this action, only **[*25]** Defendants' standing challenge will be addressed below.

A. Antitrust Standing on Federal Claims

In addition to establishing Article III standing, which is required of all federal litigants, plaintiffs allegations of antitrust violations must also show antitrust standing. *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir.*

---

[5] Decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the *Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc).

[6] To the extent that Plaintiff alleges Defendant Authority also conspired with the other defendants under Counts III and IV, the Court's discussion *supra* Part I.A.1 is applicable here as well.

1991) (citing Flast v. Cohen, 392 U.S. 83, 94-101, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)). Section 4 of the Clayton Act provides a private right of action for injury caused by a violation of the antitrust laws:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

15 U.S.C.A. § 15 (supp 1990). The statute read literally establishes a cause of action for any harm which can be attributed to an antitrust violation, no matter how indirect. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). To prevent such an overly broad reading of the statute, federal courts have required that a Plaintiff have antitrust standing to maintain an antitrust suit. Id. at 534.; Todorov, 921 F.2d at 1449.

Whether antitrust standing exists is a question of law, and is therefore appropriate **[*26]** for consideration on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See*Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1387 (11th Cir. 1990). "Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws." Todorov, 921 F.2d at 1448 (citing Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 110 n. 5, 107 S. Ct. 484, 93 L. Ed. 2d 427, (1986)). Therefore, to establish antitrust standing a plaintiff must show: (1) antitrust injury and (2) that the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury. Id. To determine whether antitrust standing exists the Court must accept Plaintiff's well pleaded allegations as true, Bryant, 187 F.3d at 1274 n.1, and assume that an antitrust violation was committed by Defendants, Todorov, 921 F.2d at 1450.

1. antitrust injury

An antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause." Todorov, 921 F.2d at 1449 (citing Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). More simply, plaintiffs must prove that the injury they allege is the result of anticompetitive conduct, which is the type of conduct the antitrust laws **[*27]** were intended to prevent. *See id.* "This limitation is essential because it requires the private antitrust plaintiff to show that his own injury coincides with the public detriment tending to result from the alleged violation increasing the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition." Id. at 1450 (citing Austin, 903 F.2d at 1389-90).

Defendants Phoebe and PPHS argue that Plaintiff has failed to show antitrust injury for several reasons. First, Defendants contend that Plaintiff's Complaint includes conclusory allegations without plausible grounds to support the same. Second, despite these conclusory allegations, there is no basis in the Complaint to assume that if the contracts were not exclusive, that Plaintiff would be able to offer the insurance providers with comparable services and patient care—Plaintiff concedes that it cannot offer all of the services offered by Defendant Phoebe. Therefore, Defendants argue that an antitrust plaintiff cannot recover damages where the alleged damages were caused by the plaintiffs "own business shortcomings and failure to compete effectively." Defendants also note that the antitrust laws are intended to protect **[*28]** competition, not competitors. In the instant case, Defendants argue that their exclusive contracts with Blue Cross & Blue Shield, and potential contracts with other providers, do not dictate who the insurance providers can contract with for hospital services. Finally, Defendants contend that patients are still free to choose to use Plaintiff's services and facilities, notwithstanding the exclusivity contracts.[7]

[7] This includes patients insured by any of the insurance providers who have exclusivity contracts with Phoebe; in that instance, Plaintiff would merely be an "out-of-network" provider.

In response, Plaintiff alleges that "its injury flows from actual or imminent exclusion from the tied product markets, and that as a consequence of Palmyra's injury, competition has diminished." (Doc. 17). Plaintiff also "reminds" the Court that the following allegations from its Complaint must be assumed to be true:(1) Phoebe has coerced the insurers into accepting exclusive contracts; (2) that the exclusive contracts reduced competition in the tied markets by excluding Palmyra from various managed-care networks; (3) that Plaintiff could otherwise compete effectively in the tied product markets; (4) the exclusive contracts give no discounts to insurers; and (5) that healthcare costs have risen as a result. Based on these allegations, Plaintiff contends that its injury "flows **[*29]** not from too much competition, but from too little." (Doc. 17).

To determine whether the first prong of antitrust standing, "antitrust injury," is present, the Court must assume that Defendants have committed the alleged anticompetitive conduct[8] , *Todorov, 921 F.2d at 1450*; here, coercing insurers to enter into exclusive contracts and thereby excluding Plaintiff from competition. Defendants contend that this case is analogous to, and should be governed by, *Austin, 903 F.2d 1385*; however, the Austin decision does not support a finding that Plaintiff has failed to show antitrust injury. In Austin, the Court held that the Appellants lacked antitrust standing because, *inter alia*, they failed to allege antitrust injury. *903 F.2d at 1393*. However, the Court specifically noted in its discussion of whether such an allegation had been made that:

> The Complaint does not allege, however, the contracts between Blue Cross and the hospitals say anything at all as to the rates the hospitals charge to other purchasers. There is no claim that Blue Cross plays any role in the decisions of the hospitals to set various rates for others. Indeed, there is no claim that Blue Cross in any way coerced the hospitals to charge non-Blue Cross customers higher rates than those **[*30]** charged to Blue Cross customers.

Unlike the complaint in Austin, Plaintiff's Complaint includes allegations of coercion and conduct aimed at affecting the negotiations between the insurers and other healthcare providers. *See, e.g.*, (Doc. 1; ¶¶ 54, 56, 60). Accordingly, the Court cannot at this juncture, while under the duty to accept Plaintiff's well pleaded allegations as true, find as a matter of law that Plaintiff has failed to plead enough facts to adequately establish an ***allegation***[9] of antitrust injury.

2. efficient enforcement

In addition to showing an antitrust injury, Plaintiff must also show that it is an efficient enforcer of the antitrust laws in order to establish antitrust standing. *Todorov, 921 F.2d at 1448*. To determine whether a plaintiff will be an efficient enforcer of the antitrust laws courts consider the following factors: (1) the directness or indirectness of the asserted injury; (2) whether there exist an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) whether damages claims are highly speculative; (4) importance of avoiding duplicative recoveries and the danger of complex apportionment of damages; **[*31]** (5) whether the plaintiff can efficiently and effectively enforce an antitrust judgment; and (6) any other factors that may be relevant to the issue. *Id. at 1451-52*.

Initially, Defendants argued that Plaintiff is not an efficient enforcer because it "is not a patient/consumer of medical services, and its first interest is its profitability rather than vindicating the public interest in antitrust enforcement." (Doc. 12)

---

[8] This requirement makes this issue particularly well suited for consideration on a motion to dismiss, as the Court must accept a plaintiff's well pleaded allegations as true anyway.

[9] The Court notes here that at this point in the present litigation, Plaintiff is required to do no more than put forth well pleaded allegations. The Court's decision at this stage, on the existence of the necessary antitrust injury, therefore does not preclude a different decision if the Court reviews this matter under a more developed record—for example, upon consideration of a motion for summary judgment.

In response, Plaintiff argues that there may be more than one efficient enforcer in a particular case. Additionally, Plaintiff contends that its self-interest does not necessarily preclude it from being an efficient enforcer. Instead, Plaintiff notes that its self-interest must merely align with the public interest in greater competition. Plaintiff contends that such alignment exists here, as Defendants have excluded it from competition in the relevant market. Plaintiff alleges that Defendants' actions decrease competition "without any offsetting procompetitive benefit." Therefore, as Plaintiff sees it, "[t]hese allegations more than state a basis for antitrust standing."

The Court must disagree with Plaintiff's conclusion. As noted above, Plaintiff's allegations at a minimum establish **[*32]** a plausible antitrust injury. Additionally, there is no doubt that Plaintiff has alleged that Defendants are the cause of said injury. However, such allegations merely bring Plaintiffs claims within the purview of the Clayton Act and a "more extensive inquiry" is necessary to determine whether Plaintiff has antitrust standing. *Todorov, 921 F.2d at 1451* (citing *Associated Gen., 459 U.S. at 540*). Plaintiff fails to address the factors articulated above and highlighted by the United States Supreme Court in *Associated Gen*. and the Eleventh Circuit in Todorov—yet, Plaintiff still concludes that it "easily satisfies the test for antitrust standing."

Upon consideration of the relevant factors highlighted by the Supreme Court and Eleventh Circuit, this Court holds that Plaintiff is not an efficient enforcer of the antitrust laws with respect to the alleged anticompetitive effect on insurers and insureds, and thus cannot establish antitrust standing. First, the Court finds that Plaintiff's injury, the alleged exclusion from certain managed-care markets, from the allegedly anitcompetitive conduct of Defendants is reletively indirect and remote. The most direct affect of Defendants' alleged anticompetitive conduct would be felt by the allegedly coerced **[*33]** insurers who pay higher reimbursement rates and the patients who ultimately pay higher premiums and co-pays for medical services. *See* *Associated Gen., 459 U.S. 541-42*; *Todorov, 921 F.2d at 1453-54*; *Robles, 785 F. Supp. 989, 999 (N.D. Ga. 1992)*. Plaintiff's alleged injury is peripheral to the harm allegedly done to these groups because Plaintiff merely seeks the opportunity to increases its profits. *Id.*

In light of the indirectness of Plaintiff's alleged injury, any claim to damages based upon such injury is highly speculative. *See* *Todorov, 921 F.2d at 1451*. Plaintiff makes much of the fact that it has alleged that absent Defendants' alleged anticompetive conduct, it would be able to compete effectively. While the Court must accept this allegation as true at the motion to dismiss stage, the Court is also charged with determining whether the claim to damages is too speculative. Consistent with this requirement the Court notes the following. Plaintiff alleges that absent Defendants' anticompetive conduct, competition would increase thereby resulting in more business at its hospital. Plaintiff's claim to damages is highly speculative because even if the alleged coercion of the insurers were removed, Plaintiff would still be charged with being able to offer services adequate enough to entice the insurers to offer it **[*34]** in-network status.[10] This would require that Plaintiff be able to offer comparable quantity and quality of services to Defendant Phoebe's and the ability to challenge any pricing structure adopted by Defendant Phoebe. The highly speculative nature of Plaintiff's damages "weighs against affording [P]laintiff antitrust standing." *Id.*

The above considerations also highlight two "identifiable classes of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement." The allegedly coerced insurers fall within this group because they act on their own behalf and on behalf of their customers, the patients.[11] And patients of the allegedly coerced insurers fall within this group because they represent the "public interest," as they are in fact "the public." Additionally, the Government would fall into this category because the Government is charged with the ultimate duty to vindicate the public interest in most matters, alleged antitrust violations are no different. *See* *Robles, 785 F. Supp. at 999*. Because there are at least three more efficient enforcers of the antitrust laws in this case, it is

---

[10] This only references the tied-product services and does not account for the fact that Phoebe is the only area hospital with the requisite C.O.N. for the alleged tying-products. Therefore, Palmyra could not offer these serves unless and until it is able to gain a C.O.N. for acute-care obstetrics, neonatology, and cardiovascular services.

[11] The Court notes here that despite Plaintiff's contention on the one hand that BCBSGA, and other insurers, are the party whom Defendant Phoebe contracted with to violate *Section 1* of the Sherman Act and that BCBSGA is one of the entities/persons injured by Defendant's illegal conduct, Plaintiff has made no attempt to name BCBSGA as either a defendant or enlist them as a plaintiff (which appears to violate *Fed. R. Civ. P. 19(a)*).

likely that allowing Plaintiff's claims to proceed would result in duplicative **[*35]** recoveries; if Plaintiff's case is successful, the Government and/or the allegedly coerced insurers and/or patients will undoubtedly file suits seeking relief. It is of course true, as Plaintiff notes, that a pleader need not be ***the most*** efficient enforcer of the antitrust laws in a particular case. However, where a plaintiff's alleged injury is indirect or remote and there exists the above mentioned "identifiable class," the "justification for allowing a more remote party (i.e., one who suffered an indirect injury) privately to enforce the antitrust laws [is] diminished." *Todorov, 921 F.2d at 1451* (quoting *Associated Gen., 459 U.S. at 542*).

3. *section 16* antitrust standing

The relevant portion of *Section 16* of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws...." *15 U.S.C. § 26*. *Sections 4* and *16* provide different forms of relief; treble damages under *Section 4* and injunctive relief under *Section 16*. *15 U.S.C. § 15*; *15 U.S.C. § 26*. Essentially, *Sections 4* and *16* provide "complementary remedies for a single set of injuries." *Cargill, 479 U.S. at 113 (1986)*. Although *Sections 4* and *16* provide for different forms of relief, pleaders must have antitrust standing to bring claims under either section. *Id. at 111*. To establish antitrust standing **[*36]** under either *Section 4* or *16* a pleader must show antitrust injury[12] ; however, unlike a pleader bringing a *Section 4* claim, a *Section 16* pleader need not make as strong a showing that it is an efficient enforcer of the antitrust laws. *Id.*; *Todorov, 921 F.2d at 1452*. The *Section 16* standing requirement is less demanding because "the dangers of mismanaging the antitrust laws are less pervasive" when an equitable remedy is requested. *Todorov, 921 F.2d at 1452*. Accordingly, the Cargill Court held that "some of the factors other than antitrust injury that are appropriate to a determination of standing under *§ 4* are not relevant under *§ 16*." *479 U.S. at 111 n. 6*.

As held above, Plaintiff has plead enough plausible facts to establish antitrust injury. *Supra* Part II.A.1. Therefore, Plaintiff also satisfies the requirement of showing antitrust injury under *Section 16*. *See**Todorov, 921 F.2d at 1452*. In discussion of the Cargill decision, the Todorov Court held that "a plaintiff, in order to have standing under *section 16*, must allege threatened injury that would constitute antitrust injury if inflicted upon plaintiff and the defendant's causal responsibility for such threatened injury." *Todorov, 921 F.2d at 1452* (citing *Cargill, 479 U.S. at 113*). The current issue before the Court is what, if anything, must a pleader show in addition to antitrust injury in order to establish antitrust standing under *Section 16*. **[*37]** The *Cargill* and Todorov decisions are applicable for their discussions of the requirements for *Sections 4* and *16*; however, the usefulness of these cases in deciding this issue is limited because the pleaders from both cases were found not to have antitrust standing for failure to show the necessary antitrust injury. *See**Cargill, 479 U.S. at 122*; *Todorov, 921 F.2d at 1454*.

This Court finds that a *Section 16* pleader must show more to establish antitrust standing than a mere allegation of a causal connection between the alleged threatened injury and conduct by the defendants. Although the Todorov Court held that a *Section 16* pleader must show "the defendant's causal responsibility for such threatened injury," in addition to antitrust injury, it was surely not meant to limit the pleading requirement to a mere allegation of causal connection. The Todorov Court specifically noted that an allegation of causal connection between a defendants' alleged conduct and the alleged antitrust injury does nothing more than bring the pleaders claim within the purview of the Clayton Act. *921 F.3d at 1451*. Such allegations would typically be sufficient for a plaintiff's substantive claims to survive a motion to dismiss. However, as discussed in depth above, plaintiff's allegation of antitrust violations must satisfy **[*38]** the additional step of showing antitrust standing. Due to this additional requirement the Supreme Court has held that a "more extensive inquiry" into the alleged causal connection is necessary. *Id.* (citing *Associated Gen., 459 U.S. at 537*). The Todorov Court directly held that the fourth factor listed above is not relevant when considering antitrust standing; however, the Court finds that the other factors considered above weigh against

[12] Under *Section 4*, a pleader must show actual injury to business or property, however, under *Section 16* a pleader need only show a "threat" of loss or damage.

Plaintiff's antitrust standing to bring even a claim for injunctive relief. Accordingly, Defendants' Motion to Dismiss (Doc. 10) is **GRANTED** as it relates to any claim for injunctive relief under Counts I-IV of Plaintiff's Complaint.

B. Pendent Jurisdiction Over State Law Claims

Since the Court has dismissed all of Plaintiff's federal claims, it is no longer appropriate for the Court to exercise pendent jurisdiction over Plaintiff's state law claims for tortious interference (Count V) and under the Georgia Constitution (Count VI). *See**Roper, 815 F.2d at 1477-78*. Accordingly, Defendants' Motion to Dismiss (Doc. 10) is **GRANTED** as it relates to Plaintiff's state law claims (Counts V and VI). The Court has not reached a decision on the merits of Plaintiff's state law claims against Defendants Phoebe and PPHS, therefore **[*39]** dismissal of Plaintiff's state law claims is **without prejudice**.

CONCLUSION

For the aforementioned reasons, Defendants Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc.'s Motion to Dismiss (Doc. 10) is **GRANTED**; Defendant Hospital Authority of Albany/Dougherty County's Motion to Dismiss (Doc. 13) is **GRANTED**; and Defendant Hospital Authority of Albany/Dougherty County's Motion for Hearing on its Motion to Dismiss (Doc. 15) is **DENIED**.

SO ORDERED, this 31st day of March, 2009.

/s/ W. Louis Sands

THE HONORABLE W. LOUIS SANDS,

UNITED STATES DISTRICT JUDGE

Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.

United States District Court for the Northern District of California

March 31, 2009, Decided; March 31, 2009, Filed

No. C 06-1665 PJH

Reporter
608 F. Supp. 2d 1166 *; 2009 U.S. Dist. LEXIS 27567 **; 2009-1 Trade Cas. (CCH) P76,621

SUN MICROSYSTEMS INC., Plaintiff, v. HYNIX SEMICONDUCTOR INC., et al., Defendants.

Subsequent History: Summary judgment denied by *Sun Microsystems Inc. v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890, 2009 U.S. Dist. LEXIS 28143 (N.D. Cal., Apr. 3, 2009)*

Prior History: *Sun Microsystems Inc. v. Hynix Semiconductor Inc., 534 F. Supp. 2d 1101, 2007 U.S. Dist. LEXIS 82417 (N.D. Cal., 2007)*

Core Terms

prices, defendants', purchases, conspiracy, Target, manufacturers, external, products, subsidiaries, causation, entities, suppliers, procurement, price-fixing, antitrust, benchmark, Omnibus, summary judgment, cases, global, foreign subsidiary, expert testimony, Sherman Act, summary judgment motion, motion to dismiss, market-wide, Declaration, factors, domestic, parties

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Evidentiary Considerations**

As a general matter, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

Where concerted price-fixing is alleged, plaintiffs bear the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. In order for them to survive defendants' motion for summary judgment, therefore, the plaintiffs must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiffs to suffer a cognizable injury. The plaintiffs can establish a genuine issue of material fact by producing either direct evidence that defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Conspiracy to Monopolize, Sherman Act**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under *15 U.S.C.S. § 1*. With regard to a plaintiff's burden in proving that an issue of material fact exists on the conspiracy question, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. In sum, to survive a motion for summary judgment, the plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Conspiracy to Monopolize, Sherman Act**

A two-part test is applied whenever a plaintiff rests its case for an anticompetitive conspiracy entirely on circumstantial evidence. First, a defendant can rebut the allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] **Motions to Dismiss, Failure to State Claim**

In evaluating a motion to dismiss for failure to state a claim, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. In order to survive a dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her right to relief above the speculative level. While the complaint does not need detailed factual allegations, it is nonetheless a plaintiff's obligation to provide the grounds of his entitlement to relief which requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In short, the plaintiff must allege enough facts to state a claim to relief that is plausible on its face, not just conceivable.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] **Purchasers, Indirect Purchasers**

Indirect purchasers are too remote to suffer true antitrust injury, and therefore do not have standing under federal ***antitrust law*** to pursue claims.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] **Purchasers, Indirect Purchasers**

The ownership or control exception to the direct purchaser rule of antitrust standing permits offensive use of the pass-on theory in situations where market forces have been superseded. One example of such a situation occurs when the direct purchaser is owned or controlled by a member of an alleged conspiracy. As a general matter, the ownership and control exception has been construed to encompass relationships involving such functional economic or other unity between the direct purchaser and either a defendant or the indirect purchaser, that there effectively has been only one sale. Some examples of the types of facts that would satisfy the control exception are furthermore defined as interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, or other modes of control separate from ownership of a majority of the wholesalers' common stock.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN8[] **International Aspects, Foreign Trade Antitrust Improvements Act**

A court's assertion of subject matter jurisdiction over a plaintiff's antitrust claims based on foreign subsidiaries' purchases--notwithstanding the general proscriptions of the Foreign Trade Antitrust Improvement Act--generally requires a showing that defendants' foreign conduct (1) had a direct, substantial, and reasonably foreseeable effect on domestic commerce, which (2) gave rise to a Sherman Act claim.

Business & Corporate Law > Agency Relationships > Establishment > General Overview

HN9[] **Agency Relationships, Establishment**

The representative services doctrine asks whether a subsidiary functions as a parent corporation's representative in performing services that are sufficiently important that if it did not have a representative to perform them, the parent would undertake to perform similar services on its own.

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

HN10[] **Establishment, Consent**

The traditional common law agency doctrine is based on analysis of three factors: (1) manifestation by a principal that the agent would act on its behalf; (2) the agent's acceptance or consent to act on the principal's behalf; and (3) the understanding that the principal would be in control of the agent's undertaking on its behalf.

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

HN11[] **Establishment, Consent**

The foundation for a traditional agency test requires a plaintiff to demonstrate: (1) a manifestation by a principal that an agent shall act for him; (2) that the agent has accepted the undertaking; and (3) that there is an understanding between the parties that the principal is to be in control of the undertaking.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN12[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvement Act requires that a plaintiff demonstrate that the higher prices caused by defendants' antitrust conduct proximately caused the plaintiff to pay higher prices abroad.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN13[] **Conspiracy to Monopolize, Elements**

In order to establish a violation of *15 U.S.C.S. § 1*, a plaintiff must prove three elements: the existence of an agreement or conspiracy among two or more separate entities; that unreasonably restrains trade; and which affects commerce.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN14[] **Conspiracy to Monopolize, Elements**

With respect to the requirement that an antitrust plaintiff establish a contract, combination, or conspiracy--also referred to as concerted action--the legal standards are well established. All that is required for proof of concerted action is that the alleged parties share a commitment to a common scheme that has an anticompetitive objective or effect. The parties' motives need not be identical.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN15[] **Conspiracy to Monopolize, Elements**

One way of proving concerted action for an anticompetitive objective is by express agreement. However, a formal contract is not necessary to establish collective action. Rather, conspiracies can be shown either by direct or circumstantial evidence. Indeed, only rarely will there be direct evidence of an express agreement in conspiracy cases. Circumstantial evidence as to this element of the offense is, therefor, not only admissible, but often dispositive. It is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy, and concerted action may be inferred from circumstantial evidence of a defendant's conduct and course of dealings.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN16[] **Conspiracy to Monopolize, Elements**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under *15 U.S.C.S. § 1*. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiff, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed it. Two separate inquiries are relevant to the above issue on summary judgment motions: (1) whether a defendant had any rational motive to join the alleged conspiracy, and (2) whether the defendant's conduct was consistent with the defendant's independent interest. If defendants had no rational motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN17[] **Conspiracy to Monopolize, Elements**

A two-part test is applied whenever an antitrust plaintiff rests its case entirely on circumstantial evidence. First, a defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN18[] **Conspiracy to Monopolize, Elements**

Where the evidence tends to support an inference of non-conspiratorial conduct, an antitrust plaintiff must, in order to defeat summary judgment, come forward with evidence that shows that a defendant was not engaging in permissible competitive behavior. In other words, the plaintiff must introduce evidence that tends to overcome the defendant's plausible explanation and exclude the possibility of independent conduct by the defendant, such that an inference of collusion is reasonable.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN19[] **Conspiracy to Monopolize, Elements**

Litigation of a successful antitrust claim requires more than proof of a defendant's antitrust violation. It requires, among other things, that a plaintiff prove what is known as injury in fact--i.e., the fact of harm to the plaintiff caused by the defendant's conduct. To demonstrate injury in fact, it is generally sufficient to show with reasonable probability some causal connection between the antitrust violation and the plaintiff's alleged injury. Significantly, however, in establishing the fact of injury, the antitrust violation need not be the sole cause of the injury, though it must be a material and a substantial cause of the injury. Where the antitrust plaintiff alleges a price-fixing conspiracy claim, proof of causal injury therefore requires a showing that the plaintiff paid higher prices than it would have paid absent the conspiracy, and that defendants' allegedly anticompetitive conduct was a material cause of the plaintiff's higher payments.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN20[] **Expert Witnesses, Daubert Standard**

Fed. R. Evid. 702 governs the admission of expert opinion testimony and provides that, where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, an expert witness may be called upon to testify accordingly. *Rule 702*. Expert testimony must be both relevant and reliable to be admissible. Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry, and it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline. Trial courts must exercise reasonable discretion in evaluating and in determining how to evaluate the relevance and reliability of expert opinion testimony.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN21[] **Remedies, Damages**

Where the before-and-after approach is undertaken in an antitrust case, an expert must account for differences in market conditions when measuring damages across benchmark and conspiracy periods.

Counsel: [1]** For Sun Microsystems Inc., a California corporation, Plaintiff: Christine Elaine Cwiertny, LEAD ATTORNEY, Daniel Allen Sasse, Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA; David Daniel Cross, Jerome A. Murphy, Kathryn D. Kirmayer, Kent A. Gardiner, Matthew J. McBurney, LEAD ATTORNEYS, Crowell & Moring LLP, Washington, DC; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC.

For Unisys Corporation a Delaware corporation, Plaintiff: Christine Elaine Cwiertny, Daniel Allen Sasse, LEAD ATTORNEYS, Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA; David Daniel Cross, Jerome A. Murphy, Kathryn D. Kirmayer, Kent A. Gardiner, Matthew J. McBurney, LEAD ATTORNEYS, Crowell & Moring LLP, Washington, DC.

For Jaco Electronics, Inc., Edge Electronics, Inc., Plaintiffs: David Daniel Cross, Crowell & Moring LLP, Washington, DC; Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA.

For Hynix Semiconductor Inc. a Korean corporation, Hynix Semiconductor America Inc. a California corporation, Defendants: Kenneth Ryan O'Rourke, Steven H. Bergman, LEAD ATTORNEYS, Paul Benedict Salvaty, O'Melveny & Myers LLP, Los Angeles, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, **[**2]** CA.

For Nanya Technology Corporation a Taiwanse corporation, Nanya Technology Corporation, USA a California corporation Defendants: Na'il Benjamin, Robert E. Freitas, LEAD ATTORNEYS, Orrick Herrington & Sutcliffe LLP, Menlo Park, CA; Cathy Yunshan Lui, Howard Mark Ullman, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Elpida Memory Inc., a Japanese corporation, Elpida Memory (USA) Inc. a Delaware corporation, Defendant: Isabelle Anne Young, Michele Elizabeth Kemmerling, LEAD ATTORNEYS, Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; James Glenn Kreissman, Jason Matthew Bussey, LEAD ATTORNEYS, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Infineon Technologies AG, Infineon Technologies North America Corporation, Defendants: Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Samsung Semiconductor, Inc., 3rd party defendant: Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Benchmark Electronics, Inc., Interested Party: David Daniel Cross, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC.

For Celestica Inc., Interested Party: **[**3]** Thomas M. Gosselin, Cook Roos Wilbur & Thompson LLP, San Jose, Ca.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON

Opinion

[*1169] ORDER GRANTING MOTION TO DISMISS; DENYING MOTION TO EXCLUDE; AND GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART

Defendants' motion to dismiss, motion to exclude expert testimony, and motions for summary judgment came on for hearing on December 17, 2008 and January 21, 2009 before this court. Plaintiff Sun Microsystems, Inc. ("Sun" or "plaintiff"), appeared through its counsel, Kathyryn D. Kirmayer, Jerome A. Murphy, David D. Cross, and Jeffrey Howard. Defendants [1] appeared through their counsel, Paul Salvaty, Steven H. Bergman, Kenneth **[*1170]** O'Rourke, Michael Tubach, Tim Martin, Julian Brew, Harrison Frahn, Howard Ullman, Catherine Lui, Jonathan Swartz, Robert Pringle, Joel Sanders, Joshua Hess, and Robert E. Freitas. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants' motion to dismiss, DENIES defendants' motion to exclude, and GRANTS the motions for summary judgment in part and DENIES the motions for summary judgment in part, for the reasons stated at the **[**4]** hearing, and as follows.

---

[1] Although this action was originally brought against numerous defendant entities, several of the defendants have since been dismissed, or filed withdrawals. Those defendant entities who currently remain in the case and bring the current motions are: Hynix Semiconductor, Inc., and Hynix Semiconductor America, Inc. (collectively "Hynix"); Nanya Technology Corporation, and Nanya Technology Corporation USA ("NTC" and "NTC USA," respectively).

BACKGROUND

Plaintiff is part of the general opt-out category of cases that is related to In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, Case No. M 02-1486 PJH -- a multidistrict litigation ("MDL") action currently pending before the court. Both the MDL action and the opt-out cases generally allege a horizontal price-fixing conspiracy carried out by numerous DRAM manufacturer defendants, in violation of federal and state antitrust laws. While there are a total of six different individual cases that form a part of the opt-out category of cases, only Sun Microsystems, Inc. v. Hynix Semiconductor, et. al. is currently at issue.

A. General Background

Sun is an original equipment manufacturer ("OEM") involved in the **[**5]** technology field. It is a leading maker of computer servers and workstations, among other items. In the operative amended consolidated complaint ("ACC"), Sun alleges that from 1997 through 2002 several manufacturer defendants ("defendants") engaged in a conspiracy to control DRAM production capacity, raise DRAM prices, allocate customers, and otherwise unlawfully overcharge their DRAM customers. See, e.g., ACC PP 21, 23, 25, 27, 29, 31, & 34 (alleging that foreign defendants "manipulated the price of DRAM charged around the globe"). As a result, plaintiff alleges that, as a large purchaser of defendants' DRAM, it suffered injury in that it paid more for DRAM than it otherwise would have in the absence of defendants' conspiracy.

To that end, Sun asserts three causes of action against defendants: (1) violation of the Sherman Act pursuant to *15 U.S.C. § 1*; (2) violation of California's Cartwright Act pursuant to *§§ 16700 et seq.* of the Cal. Bus. & Prof. Code; and (3) violation of California's Unfair Competition Act pursuant to *§§ 17200 et seq.* of the Cal. Bus. & Prof. Code. See ACC, PP 79-106. Sun seeks damages as a result of the artificially inflated prices it allegedly paid for DRAM **[**6]** as a consequence of defendants' alleged price-fixing activity.

B. Facts Regarding Sun's DRAM Procurement

Sun manufactures and sells its servers and workstations both domestically and abroad. To aid in this process, Sun outsources a portion of its server and workstation assembly to a network of domestic and foreign entities comprised of (1) third-party external manufacturers and (2) Sun's corporate subsidiaries. Of particular relevance here is Sun's relationship with these two entity groups vis-a-vis a critical component of the manufacturing process -- the purchase of DRAM on Sun's behalf, for incorporation into final Sun products.

1. Third-party External Manufacturers

The ACC alleges that approximately 34% of the DRAM purchases at issue here were made by third-party external manufacturers ("EM"s). [2] See ACC P 13b. The **[*1171]** EMs were and are independent business entities located both domestically and abroad. See id. Sun does not share common ownership with any of the EMs; it does not own any controlling share of any EM, has none of the same board of directors or officers as any EM, and does not commingle funds or share corporate books and records with any EM. See Declaration of Angela M. Moore **[**7]** ISO MSJ re External Manuf. Purch. ("Moore Decl. Re EMs"), Ex. 5 at 10; Bergman Decl., Ex. 2 at Response 5, Ex. 3 at Response 50, Ex. 4 at Responses 42-45. The EMs at issue in this case include, for example, Celestica, Solectron Corporation, MiTac International Corporation, Smart Modular Technologies, Inc., Benchmark Electronics, Inc., and Expansion Electronics, Inc. See, e.g., Declaration of Steven Bergman ISO Mot. Dismiss ("Bergman Decl."), Exs. 18-21. Sun charged the EMs, in part, with purchasing DRAM directly from defendants and other

---

[2] Notwithstanding the ACC's allegation, there is a dispute between the parties as to the actual amount and percentage of DRAM purchases made by third-party external manufacturers. Using the 34% alleged in the complaint and plaintiff's own expert report as to damages, defendants contend that there are $ 1.05 billion in DRAM purchases made by external manufacturers at issue in the case. See Def. MSJ re Ext. Manuf. Purch. at 4:8-11. Plaintiff, however, contends in their opposition that external **[**8]** manufacturer purchases amount to approximately $ 179 million worth of DRAM purchases, or around 6% of Sun's total DRAM purchases. See Pl. Opp. Re MSJ re Ext. Manuf. Purch. at 1:5-6.

suppliers, in order to incorporate that DRAM into the manufacture of Sun-designed and Sun-branded products that were to be sold back to Sun (for retail sale by Sun).

Sun's relationship with the relevant EMS was formalized in Master External Manufacturing Agreements ("MEMAs"). All the MEMAs at issue here have effective dates that post-date 1997. See Declaration of Jason M. Bussey ("Bussey Decl. Re. EMs"), Ex. A; Moore Decl. Re EMs, Exs. 24-26; see also Bergman Decl., Exs. 18-21. Pursuant to the terms of the MEMAs, the EMs were considered "independent contractors" and were expressly prohibited from "act[ing] in a manner which expresses or implies a relationship other than that of independent contractor, [or] bind[s] the other party." Moore Decl. Re EMs, Exs. 24, P 8.5; Ex. 25, P 8.5; Ex. 26, P 26.3; Bussey Decl. Re. EMs, Ex. A, P 28.4.

Sun's relationship with its EMs was multi-tiered. As an initial matter, once an EM executed a MEMA with Sun, Sun's practice was to issue an award letter to the EM. See Moore Decl. Re EMs, Ex. 7 at 61, 76-77. The award letter set the price at which Sun would buy a particular DRAM-containing product from the EM, and identified quality standards **[**9]** for the product. See id. Subsequently, Sun also communicated its supply plan to the EM, informing the EM how much demand for DRAM-containing products Sun forecasted in the coming quarters. See Moore Decl. Re EMs, Ex. 7 at 76. Notably, however, Sun's forecast was fluid and was frequently updated. Sun also did not commit to actually purchasing a set quantity of DRAM-containing products in its forecasts, nor did it always end up purchasing all products forecasted. See id. at 82-83.

After receiving Sun's supply forecasts, EMs then purchased DRAM from suppliers in order to meet the demand forecasted in the supply plan. Id. at 76-77. As part of this process, Sun would preliminarily generally determine which DRAM suppliers were qualified to sell DRAM to the EMs for use in Sun products, and would furthermore generally negotiate DRAM pricing between the EMs and DRAM suppliers. See Declaration of David C. Cross ISO EM Opp. ("Cross EM Opp. Decl."), Ex. 26 at 160; Ex. 27 at 128-29; Ex. 22 at 82-83, 613; Ex. 28 at 62-64; Ex. 29 at 119-122, 124 (generally discussing Sun's creation of an approved vendor list for use **[*1172]** by the EMs). Sun's global memory procurement team in California, for example, dictated **[**10]** a single worldwide price at which the EMs were permitted to order DRAM from DRAM suppliers for incorporation into Sun products, and further awarded a specific share of business to each DRAM supplier. See Cross EM Opp. Decl., Ex 29 at 28-29, 134-35; Ex. 30 at 125-26; Ex. 28 at 71-72; Ex. 31 at 57-58. Each EM would then be told from whom, at what price, and at which percentage of business they should issue purchase orders for the DRAM to be used in Sun products. See, e.g., Cross EM Opp. Decl., Ex. 32 at 45-50; Ex. 29 at 28-29, 134-45; Ex. 30 at 125-26. In some instances, Sun even required the EMs to purchase DRAM from Sun's own inventory. See Cross EM Opp. Decl., Exs. 37-39. Either way, however, the EMs were expected to, and generally did, execute purchase orders for DRAM pursuant to the directions provided by Sun. See, e.g., id. at Ex. 24 at 61; Ex. 53; Ex. 54 at 111-112.

Nonetheless, there is evidence that at times, some of the EMs independently selected DRAM suppliers from whom to purchase DRAM, and independently negotiated DRAM pricing with those DRAM suppliers. See, e.g., Moore Decl. Re EMs, Ex. 7 at 206-09 (MiTac); Ex. 13 at 116-18 (Celestica); Ex. 21 (MiTac); see also Bergman Decl., **[**11]** Ex. 9 at 216-21; Ex. 21 at SUN001236; Ex. 31.

After DRAM pricing and suppliers were determined -- either by Sun, or the EMs acting independently -- the EMs procured the DRAM. The EMs did so by: issuing purchase orders; receiving invoices issued by the DRAM suppliers; paying the invoices sent to them by the DRAM suppliers; and taking receipt of the actual DRAM purchased from the suppliers. See Moore Decl. Re EMs, Ex. 7 at 87; Ex. 13 at 45-46; Ex. 8 at 60-62; Ex. 5 at 10:22-13:1. After accepting delivery of the DRAM from the defendant suppliers, the EMs took title to it. See id. at Ex. 9 at 610-11; Ex. 8 at 66, 72; Ex. 13 at 47; Ex. 14 at 114; Ex. 12 at 32-33, 55-56. The EMs generally retained title until Sun accepted an assembled DRAM-containing product from the EMs. As some of the EMs testified, as a result of taking title, the EMs accepted the risk of loss and damage to the DRAM, and would bear the cost of replacement for damaged DRAM. See id. at Ex. 7 at 117; Ex. 9 at 610-11; Ex. 13 at 69-74, 77-78. [3]

As for the DRAM that was delivered to, but not ultimately used by the EMs (as a result of a change in Sun's forecasts or the end of life of a particular Sun product, for example), the EMs often made efforts to return the excess to DRAM suppliers or to transfer it to another of Sun's EMs at Sun's direction. However, if these efforts were unsuccessful, Sun generally bore the cost of this DRAM and bought it back from the EMs. See id. at Ex. 28 at 53-54; Ex. 29 at 74, 94; Ex. 65 at 38-39; Ex. 30 at 34-35, 79-80, 90-94. The EMs were not permitted to sell excess DRAM to third parties without prior approval from Sun. Id. at Ex. 28 at 54; Ex. 29 at 76-77, 191-92.

Finally, having purchased DRAM from DRAM suppliers for use in the manufacture of DRAM-containing products on Sun's behalf, the last step of the distribution chain involved a downstream transaction in which Sun purchased the finished DRAM-containing products from the EMs. To do so, Sun issued purchase orders for products on a quarterly or semi-quarterly basis. Sun purchased DRAM-containing **[*1173]** products from the EMs at cost plus a percentage markup. See id. at Ex. 7 at 217-18; **[**13]** see also ACC PP 13a-b.

2. Sun's Foreign Subsidiaries

The ACC alleges that approximately 66% of the DRAM used by Sun in its finished products was purchased by and delivered to Sun's own manufacturing facilities located in the United States and abroad. See ACC P 13a. Sun further alleges that 25% of this DRAM was delivered to and purchased specifically by Sun's foreign manufacturing facilities located in Europe -- primarily Sun Microsystems Scotland ("Sun Scotland"), which manufactures servers and workstations in Linlithgow, Scotland, and Sun Microsystems International B.V. ("Sun Netherlands"), which distributes and markets Sun servers and workstations in Europe and other foreign markets. See id.

Sun Scotland and Sun Netherlands are indirect, wholly owned subsidiaries of Sun. The subsidiaries do not share the identical board of directors and officers with Sun, although they do have some common directors and officers. See Bergman Decl., Ex. 4 at Responses 4-5, 23-25. Nor do Sun's directors form a majority of the subsidiaries' boards of directors. See id. at Responses 6, 26.

The procurement process vis-a-vis Sun's foreign subsidiaries largely paralleled that of the third-party external manufacturers. **[**14]** As with the external manufacturers, for example, Sun's global procurement team based in California established a single worldwide price at which the subsidiaries were permitted to order DRAM from DRAM suppliers, for delivery in turn to Sun's subsidiaries. See generally Declaration of David C. Cross ISO FTAIA Opp. ("Cross FTAIA Opp. Decl."), Ex. 3. [4] Specifically, Sun's global procurement team utilized face-to-face negotiations, live auctions called Dynamic Bidding Events ("DBE"s), and sealed bidding events in order to establish the worldwide DRAM price and choose those DRAM suppliers from whom Sun's subsidiaries then purchased DRAM for use in manufacturing Sun products. See Cross FTAIA Opp. Decl., Ex. 5 at 21-23, 28-29, 31, 47-48, 50.

After DRAM pricing and supplier determinations had been made, and in purchasing DRAM from approved suppliers (many of whom were European entities) pursuant to the worldwide price, Sun Scotland and Sun Netherlands also issued their own purchase orders to **[**15]** suppliers; took delivery of DRAM from the suppliers; were directly invoiced for the DRAM; and settled and/or paid the invoices from the suppliers. See Bergman Decl., Ex. 4 at Responses 16, 35; Ex. 5 at Responses 17-19, 36-38. However, when issues arose with DRAM purchased by Sun's foreign subsidiaries or with respect to the subsidiaries' relationships with suppliers, the California-based global procurement team generally addressed those issues. See, e.g., Cross FTAIA Opp. Decl., Exs. 10-11; see also id., Ex. 3 at P 8.

---

[3] On many occasions, the DRAM suppliers kept track of which DRAM delivered to the EMs was intended for use in Sun products. In these instances, the suppliers' sales records identified **[**12]** Sun as the end-purchaser. See, e.g., Cross EM Opp. Decl., Exs. 1-19.

[4] The "single worldwide DRAM price" established by Sun's California-based global procurement team applied equally to Sun's foreign subsidiaries and its third-party external manufacturers. See id. at P 5.

There is evidence that the DRAM purchases made by Sun's foreign subsidiaries were used in the manufacture of finished Sun products at Sun's foreign facilities, which products were in turn sold to customers in Europe and elsewhere. See, e.g., Bergman Decl., Ex. 7 at 23-24 (discussing manufacture and sale of DRAM-containing Sun products at Sun Scotland).

C. Procedural Case History

To date, the court has had occasion to rule on two separate motions to dismiss in **[*1174]** this case. First, on March 7, 2007, the court heard defendants' motion to dismiss certain claims asserted in the original consolidated complaint in the Sun action, on grounds that the court lacked subject matter jurisdiction. **[**16]** Specifically, defendants had moved to dismiss plaintiff's claims to the extent they were based on foreign DRAM purchases made by Sun's external manufacturers and foreign affiliates on Sun's behalf, arguing that such claims were premised on unrecoverable foreign injury only. The court granted defendants' motion to dismiss, but because of the complaint's lack of clarity with respect to the nature of any claims based on foreign DRAM purchases, granted Sun leave to amend in order to set forth allegations that provided greater clarity and specificity with respect to that portion of plaintiffs' claims allegedly based on foreign harm, as distinct from that portion based on domestic harm.

Plaintiff filed the amended consolidated complaint on May 4, 2007, and subsequent to that filing, defendants moved a second time to dismiss plaintiff Sun's claims to the extent based on foreign DRAM purchases. On October 15, 2007, the court denied defendants' motion without prejudice. The court found that the Foreign Trade Antitrust Improvement Act ("FTAIA"), which precludes application of the Sherman Act to wholly foreign conduct, was applicable to defendants' foreign price-fixing conduct, as alleged. See **[**17]** Order Denying Two Motions to Dismiss and Deferring Ruling on One Motion to Dismiss ("Dismissal Order") at 12. Having so found, however, the court noted that the relevant question in this case was not really whether the general rule excluding the Sherman Act's reach over wholly foreign conduct applies, but rather whether the foreign conduct falls within the domestic injury exception to the general rule, such that subject matter jurisdiction may be properly exercised under the FTAIA. See id. This question in turn depended upon whether defendants' foreign conduct (1) had a direct, substantial and reasonably foreseeable effect on domestic commerce; and (2) whether that effect gave rise to a Sherman Act claim. Id.

The court found that plaintiff had sufficiently established the first of these two elements, by virtue of the ACC's allegations that defendants' foreign price-fixing activity led to "higher prices for DRAM in the United States, which in turn formed the predicate for plaintiffs' domestic agreements to pay higher prices for DRAM." See Dismissal Order at 16. As to the second and final element, however, the court was unpersuaded. After noting that plaintiff was required to allege proximate **[**18]** causation in order to establish the requisite nexus between domestic effect and foreign injury in order to satisfy the second domestic injury exception prong, the court found plaintiff fell short of the mark by arguing that its global procurement strategy (which set a single global price for DRAM) satisfied the proximate cause test.

Instead of dismissing plaintiff's claims outright for lack of subject matter jurisdiction, however, the court noted that plaintiff had made an alternative argument that warranted further development. Specifically, Sun had argued that, to the extent some of its own foreign facilities, subsidiaries and affiliates had made the foreign DRAM purchases at issue, such purchases were tantamount to Sun's own purchases under a "single enterprise" or agency theory, and Sun stood in those subsidiaries' shoes for purposes of raising their claims. While the court was unable to determine the validity of any such theory on the motion before it, the court stated that "if plaintiffs can articulate and prove a legal theory that would permit the court to find **[*1175]** that they stand in the shoes of or are the alter ego of their foreign affiliates as well as a factual basis for such **[**19]** a claim, the court would be permitted to find that proximate cause under the FTAIA is necessarily satisfied, and that jurisdiction exists." See id. at 22. To that end, the court denied defendants' motion to dismiss without prejudice to defendants' ability to raise the same arguments again "after an appropriate amount of discovery" had been taken to enable both sides to fully develop their arguments. Id.

D. The Instant Motions

Now several months later, discovery has closed and defendants are back before the court having filed seven different motions for resolution, the majority of them dispositive: (1) a motion for partial summary judgment as to Sun's claims based on purchases made by Sun's external manufacturers; (2) a renewed motion to dismiss certain of Sun's claims for lack of subject matter jurisdiction, to the extent based on foreign DRAM purchases; (3) a motion for summary judgment as to Sun's claims based on purchases of DRAM from defendant Mitsubishi entities; (4) an omnibus motion for summary judgment or in the alternative, for summary adjudication; (5) a motion to exclude the expert testimony of plaintiff's expert, Dr. Halbert White; (6) defendant Nanya Technology Corporation's **[**20]** ("NTC") motion for summary judgment on the basis that plaintiff cannot establish a triable issue of fact as to the entities' participation in any overarching price-fixing conspiracy; and (7) defendant Nanya Technology Corporation USA's ("NTC USA") analogous motion on the basis that plaintiff cannot establish a triable issue of fact as to NTC USA's participation in any overarching price-fixing conspiracy. [5] The parties have also filed numerous evidentiary objections, and requests for judicial notice.

Each of the relevant motions is dealt with in turn below.

DISCUSSION

A. Legal Standards

1. Summary Judgment

HN1[] As a general matter, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The court must view the facts in the light most **[**21]** favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

HN2[] Where, as here, concerted price-fixing is alleged, the plaintiffs bear the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. See, e.g., *In re Citric Acid Litig., 191 F.3d 1090, 1093 (9th Cir. 1999)*(noting that price-fixing is a per se violation of *section 1* of the Sherman Act). In order for them to survive defendants' motion for summary judgment, therefore, plaintiffs must establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. See *Matsushita, 475 U.S. at 585-86*. Plaintiffs can establish a genuine issue of material **[*1176]** fact by producing either direct evidence that defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same. See, e.g.,*Movie 1 & 2 v. United Artists Commc'ns, 909 F.2d 1245, 1251-52 (9th Cir. 1990)*; *United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

With **[**22]** respect to proof by way of circumstantial evidence in *section 1* cases, special rules apply. In Matsushita Elec. Indus. Co., the Supreme Court noted that ***HN3***[] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *[section 1*] case…". See *475 U.S. at 588*. In addressing plaintiff's burden in proving that an issue of material fact exists on the conspiracy question, the court stated, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy…". See id. In sum, to survive a motion for summary judgment, "a plaintiff seeking damages for a violation of *[section] 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently …." Id.

[5] The first five of these motions are addressed herein, while the latter two motions filed by NTC and NTC USA are addressed via separate order, to be filed by the court.

The Ninth Circuit has embraced Matsushita and has outlined HN4[] a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then "shifts back to the plaintiff to provide specific **[**23]** evidence tending to show that the defendant was not engaging in permissible competitive behavior." See, e.g., *In re Citric Acid Litig., 191 F.3d at 1094*.

These standards apply here, to the extent that plaintiffs seek to defeat summary judgment as to liability for conspiratorial conduct on the basis of circumstantial evidence, whether in whole or in part.

2. Motion to Dismiss

HN5[] In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. See, e.g., *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)*(citations omitted). In order to survive a dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her right to relief "above the speculative level." See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. While the complaint "does not need detailed factual allegations," it is nonetheless "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. In short, a plaintiff **[**24]** must allege "enough facts to state a claim to relief that is plausible on its face," not just conceivable. *Twombly, 127 S. Ct. at 1974*.

With the above collective standards in mind, the court now turns to the numerous motions before it, and addresses each in turn.

B. Motion for Summary Judgment re External Manufacturer Purchases

Generally, Sun seeks recovery for defendants' alleged Sherman Act violations based not only on the DRAM it purchased and had delivered, but also based on the DRAM delivered to and purchased in the first instance by its foreign subsidiaries and third-party external manufacturers. By way of the instant motion, defendants challenge only those claims based on the external manufacturers' DRAM purchases. Defendants note that the external manufacturers **[*1177]** initially paid defendant suppliers directly for their DRAM purchases, and argue that this made plaintiff an indirect purchaser of DRAM vis-a-vis those purchases. Thus, plaintiff's claims for recovery, to the extent based on the external manufacturers' DRAM purchases, are barred by the direct purchaser rule of *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

Sun defends its ability to assert such claims on grounds that it **[**25]** has established an agency relationship with the external manufacturers that gives Sun direct purchaser status in connection with all external manufacturer DRAM purchases, notwithstanding the external manufacturers' actual payment of DRAM prices to the defendants. Even if the court does not deem Sun a direct purchaser by virtue of the agency relationship between Sun and its external manufacturers, plaintiff maintains that it nonetheless satisfies the 'control' exception to the direct purchaser rule recognized in Illinois Brick, thus warranting denial of defendants' motion.

The issues for the court to decide are accordingly two-fold: first, whether Sun qualifies as a direct purchaser of the DRAM purchased from defendants by the external manufacturers, such that its claims based on those purchases may go forward under *Illinois Brick*. Second, and in the event Sun does not qualify as a direct purchaser, whether Sun's claims may nonetheless go forward pursuant to the 'control exception' recognized under Illinois Brick.

1. Whether Sun Qualifies as a Direct Purchaser

The direct purchaser rule is well-established. See, e.g., *Illinois Brick, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. In Illinois Brick, plaintiffs were indirect **[**26]** purchasers who sought to convince the court that they had antitrust standing to sue under federal antitrust laws because the illegal overcharge that resulted from defendants' antitrust conspiracy had been passed on to the indirect purchaser plaintiffs by middlemen further upstream. The

Supreme Court, however, consistent with its earlier holding in Hanover Shoe, [6] held that ***HN6***[] indirect purchasers are too remote to suffer true "antitrust injury," and therefore do not have standing under federal ***antitrust law*** to pursue claims. In reaching its conclusion, the court expressed concerns with the complexity of proof involved in any contrary rule, the purpose of the antitrust laws, and risk of multiple liability for defendants if such a rule were not adopted. See *id. at 731-35*.

Defendants' first and primary argument urges a straightforward application of the direct purchaser rule to the case at bar. They argue that, since the DRAM delivered to the external manufacturers -- both domestically and abroad -- was paid for in the first instance by the external manufacturers, even if on Sun's ultimate behalf, it is the external manufacturers rather than Sun who qualify as true direct purchasers capable of asserting claims premised on those purchases. For support, they rely on the Ninth Circuit's recent decision in Delaware Valley Surgical Supply Inc. v. **[*1178]** Johnson & Johnson, asserting that it firmly rejects any contrary argument.

Defendants' position on this point is well taken, and their reliance on Delaware Valley warranted. In Delaware Valley, the Ninth Circuit considered whether a plaintiff hospital had standing to bring a Sherman Act claim against a defendant manufacturer engaged in the provision of sutures and endomechanical products for use in laparoscopic surgery. See *523 F.3d 1116, 1118 (9th Cir. 2008)*. **[**28]** The pertinent facts of the case are as follows: plaintiff was a member of a group purchasing organization ("GPO") that negotiated a master agreement with defendant on plaintiff's behalf that set fixed pricing options for all sutures and endomechanical products. See id. Plaintiff then executed its own contract with defendant pursuant to the terms of the master agreement, which individual contract allowed plaintiff to purchase products either directly from defendant, or else from an authorized distributor of defendant's products. *Id. at 1119*. Plaintiff chose the latter option, and entered into yet another contract with a distributor, pursuant to which plaintiff procured defendant's products under the specified terms. Plaintiff purchased defendant's products directly from the distributor; it did not pay defendant directly for any products, nor did defendant ship any goods directly to plaintiff. Id.

In considering the same direct purchaser rule at issue here, the Ninth Circuit there squarely rejected plaintiff's argument that it could be classified as a direct purchaser of goods from defendant, instead finding plaintiff to be an *indirect* purchaser that lacked standing to sue under the federal **[**29]** antitrust laws. See *Delaware Valley, 523 F.3d at 1122*. The Ninth Circuit reasoned: "It is undisputed that [the distributor] was the immediate purchaser of sutures and endo products from [defendant]. [Distributor] paid [defendant] directly for its inventory and took title in the products before selling them to [plaintiff]. [Plaintiff] directly paid [distributor], not [defendant], for its orders. [Distributor] is not an agent or subsidiary of [defendant], but rather an independently owned and managed company. Following the clear rule set forth in Illinois Brick, [plaintiff] lacks standing because the hospital is not a direct purchaser of products from [defendant]." See id. Although the Ninth Circuit noted that plaintiff had an independent contractual relationship with the defendant, and that the actual price that plaintiff paid for defendant's products was set by "an agreement negotiated [with defendant] by a GPO on behalf of plaintiff," it also noted that plaintiff additionally "had a contract with [the distributor], and it was that contract that ultimately effectuated the transfer of these goods." See id.

Notably, the Ninth Circuit observed that its conclusion was dictated in part by **[**30]** the Supreme Court's post Illinois Brick precedent, which clarified the Court's intention to establish a "bright line rule" by means of the direct purchaser rule, and had already "closed the door on the theory that an end user who buys from an independent distributor, rather than the manufacturer, should have standing because it may be the most efficient enforcer of antitrust laws." *Id. at 1122-1123* ("Illinois Brick is not a policy holding, but rather a case of statutory construction").

---

[6] In Hanover Shoe, Inc., v. United Machinery Corp., the Supreme Court generally held that a pass-on defense cannot be relied on by defendants who seek to prove that a direct purchaser plaintiff was not actually injured by a violation of the antitrust laws, if the plaintiff has passed on some or all of the illegal overcharge to other subsequent purchasers. See *392 U.S. 481, 491-493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. The court adhered there to the "general **[**27]** principle" that the victim of an overcharge "is damaged within the meaning of [the antitrust standing statute] to the extent of the overcharge" only. *Id. at 491*.

Delaware Valley is controlling. Plaintiff does not dispute that its external manufacturers initially paid for the DRAM that was delivered to them for incorporation into Sun products, which products would in turn be delivered and sold to Sun at cost, plus an agreed upon mark-up. Nor does plaintiff dispute that the external manufacturers took title to the DRAM initially purchased from the suppliers, or that the external manufacturers were independently **[*1179]** owned and managed corporate entities. Thus, this case is directly in line with Delaware Valley, and compels the conclusion that it is the external manufacturers, and not plaintiff, who must be deemed the "immediate purchasers" of DRAM. This is so, despite **[**31]** the existence of an overarching independent pricing strategy maintained and operated by Sun in connection with purchases of DRAM from defendants. After all, and notwithstanding plaintiff's protestations to the contrary, the same reasons articulated by the Delaware Valley court in rejecting the plaintiff hospital's direct purchaser claim on the basis of its independent contractual relationship with the defendant, apply here, too.

Plaintiff's agency argument that the external manufacturers acted as mere "purchasing agents" for Sun, does not change this analysis. As articulated by plaintiff's counsel at the hearing on the instant motion, a finding that the external manufacturers acted as Sun's purchasing agents would allow the external manufacturers' direct payments to defendant DRAM suppliers to be legally attributed to Sun, thereby cloaking Sun with the necessary authority to assert claims based on external manufacturer DRAM purchases. Application of this purchasing agency theory would also allow plaintiff to proceed "outside the scope of Illinois Brick," in counsel's words, thereby obviating any objections based on Delaware Valley. For support for the purchasing agency theory, plaintiff **[**32]** relies on *In re Coupon Clearing Service, Inc., 113 F.3d 1091 (9th Cir. 1997)*, and *E.&J. Gallo Winery v. Encana Energy Servs., Inc., 2008 U.S. Dist. LEXIS 46927, 2008 WL 2220396 (E.D. Cal. May 27, 2008)*. See Pl. Opp. Re EM Purch. at 9:11-12:19.

These cases, however, are neither persuasive nor controlling. *In re Coupon Clearing Serv*. is a bankruptcy decision and did not address federal ***antitrust law*** at all, let alone did it consider the availability of an agency theory as an alternative theory available in the direct/indirect purchaser context. As for *E.&J. Gallo Winery*, it does address the availability of a general agency theory in the federal antitrust context. However -- and putting aside the decision's non-binding status upon this court -- *E.&J. Gallo Winery* only considered the availability of a general agency theory to a plaintiff seeking to impose antitrust *liability* on parent-subsidiary corporations. This is, in the court's view, a distinct question from the issue urged by plaintiff upon the court here -- i.e., whether a plaintiff can invoke a purchasing agency theory as an alternative means of establishing direct purchaser standing for purposes of asserting federal antitrust claims. In contrast to the agency **[**33]** theory discussed by the district court in *E.&J. Gallo Winery*, the present inquiry precedes the question of antitrust liability entirely, and instead deals with a plaintiff's legal ability to assert antitrust claims in the first instance.

Aside from the lack of convincing legal support for plaintiff's purchasing agency theory, moreover, the real problem with plaintiff's argument is that it requires the court to turn its back on what it views as the clear governing framework of *Illinois Brick*. As the Ninth Circuit has made clear, that framework set forth a "bright line rule" that prohibits all but direct purchasers from bringing suit under the federal antitrust laws -- adherence to which is required under the undisputed factual scenario advanced here. See *Delaware Valley, 523 F.3d at 1122-23*. Thus, and without clear legal authority to the contrary, no justification for departing from this well-recognized framework exists. And while plaintiff correctly notes that Delaware Valley did not have occasion to examine the precise purchasing agency argument advanced here, the factual similarities in the case at bar to Delaware Valley persuade this court that any such **[*1180]** argument would have been discredited **[**34]** by the Ninth Circuit as yet another misguided attempt to fashion a "new formulation of the

Illinois Brick rule." See *id. at 1123, 1124* (the Supreme Court's "firm [direct purchaser] rule does not provide us the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements").

In sum, therefore, fidelity to controlling precedent requires the conclusion that for all claims based on DRAM purchases made by external manufacturers, it is those external manufacturers and not Sun who qualify as direct purchasers capable of bringing suit, pursuant to the direct purchaser rule of *Illinois Brick*.

2. Control Exception to Illinois Brick Direct Purchaser Rule

Sun asserts, however, that even if the court concludes that Sun does not qualify as a direct purchaser under Illinois Brick, it is nonetheless qualified to assert claims based on external manufacturer DRAM purchases, by virtue of the 'control' exception recognized in Illinois Brick.

HN7[] The 'ownership' or 'control' exception permits offensive use of the pass-on theory in situations where "market forces have been superseded." One example of such a situation occurs **[**35]** when the direct purchaser is owned or controlled by a member of an alleged conspiracy. See, e.g., *Illinois Brick, 431 U.S. at 736 n.16* ("Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer"); cf. *Perkins v. Standard Oil Co., 395 U.S. 642, 648, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*; *In re Western Liquid Asphalt Cases, 487 F.2d, at 197, 199*. While long-recognized, however, there are few authoritative cases that clearly define the legal showing required to justify application of the control exception, and no Ninth Circuit authority that provides affirmative guidance on the issue. As a general matter, the ownership and control exception has been construed to encompass relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser, that there effectively has been only one sale. See, e.g., *Jewish Hosp. Ass'n v. Stewart Mech. Enters., 628 F.2d 971, 975 (6th Cir. 1980)*; *Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326-27 (9th Cir. 1980)*; see also, e.g., *In re Mercedez-Benz Antitrust Litig., 157 F. Supp. 2d 355, 355 (D. N.J. 2001)*("[T]he **[**36]** rationale of Illinois Brick's bar to indirect purchaser suits does not apply where the supposed intermediary is controlled by one or the other of the parties"). Some examples of the types of facts that would satisfy the control exception have furthermore been defined as: "interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, or other modes of control separate from ownership of a majority of the wholesalers' common stock." *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 606 (7th Cir.1997)*.

Here, plaintiff concedes that it and the external manufacturers were separate legal entities, lacked interlocking directorates and officers, did not own each other's stock, and did not enter into loan agreements, trust agreements, or extensions of credit on behalf of one another. See, e.g., Pl. Opp. Br. at 15:20-26; see also, e.g., Moore Decl., Ex. 5, Responses 48, 58; Ex. 8 at 68-76; Ex. 15 at P 18; Ex. 13 at 50-52, 118. Plaintiff contends, however, that these facts are not determinative of the control question, since application of the exception depends upon the narrower issue **[**37]** whether sufficient control is exercised in connection with the actual procurement **[*1181]** of DRAM for incorporation into Sun products *only* -- not whether it is exercised in connection with structural day to day control of an entity. And this, says plaintiff, it has indisputably demonstrated based on the uncontested evidence showing that Sun determined from whom, at what price, and at which percentage of business the external manufacturers would order DRAM; that Sun provided forecasts to determine the quantities of DRAM ordered by the external manufacturers; and that Sun bore the cost of the DRAM that was ordered by the external manufacturers on its behalf (by paying for the DRAM at cost plus a percentage mark-up). See, e.g., Moore Decl. Re EMs, Ex. 7 at 76; see also, e.g., Cross EM Opp. Decl., Ex. 22 at 82-83, 613; Ex. 26 at 160; Ex. 27 at 128-29; Ex. 28 at 62-64; Ex. 29 at 28-29, 119-122, 124, 134-45; Ex. 30 at 125-26; Ex. 32 at 45-50.

For support of its argument that it is only control over the external manufacturers' DRAM procurement activities that counts for purposes of the control exception (rather than the presence of structural control), plaintiff relies primarily on *In re Toilet Seat Antitrust Litig., 1977 U.S. Dist. LEXIS 14311, 1977 WL 1453 (E.D. Mich. Aug. 24, 1977)*. **[**38]** As plaintiff notes, In re Toilet Seat found that a plaintiff lumber company could allege class action antitrust claims against defendant manufacturers of toilet seats, notwithstanding that plaintiff did not "purchase directly from" the manufacturers but rather relied on a midstream purchasing agent to make purchases on plaintiff's behalf. See *1977 U.S. Dist. LEXIS 14311, [WL] at *2*. The court found that plaintiff's relationship with the purchasing agent was one of "principal and agent" rather than buyer and seller, and that the relationship fell within the control exception of Illinois Brick. Id. The evidence that the court relied on in coming to this conclusion demonstrated: that the middle agent with whom plaintiff dealt was a "purchasing concern;" that plaintiff engaged the agent for "a flat monthly fee;" that the fee paid to the agent "bore no relation to the quantity of goods obtained;" and that billing arrangements varied with different transactions, although in some circumstances, the agent would be billed first and in turn would bill plaintiff. Id.

Putting aside for the moment the fact that *In re Toilet Seat* constitutes (as so many of the cases cited herein by the parties do) non-binding authority, it is **[**39]** not altogether persuasive. *In re Toilet Seat* teaches that the control exception may be satisfied when the plaintiff employs an independent broker or purchasing agent as middle man whose sole function is to act as a mere conduit for the procurement of goods. This, however, is different from the case at bar. Here, plaintiff does not dispute that it employed external manufacturers for assistance in the actual manufacture of Sun products -- *not* simply as brokers to act as conduits for the procurement of DRAM. This broader relationship triggers additional complexities that are highlighted by the different billing arrangements evidenced in both cases. In re Toilet Seat notes, for example, that plaintiff's purchasing agent was paid a flat monthly fee for its services that bore no relationship to the quantity of goods obtained. Here, by contrast, Sun's payments to external manufacturers are directly proportional to the amount of Sun-finished products that Sun purchases, since all products are paid for on a cost basis, plus an additional percentage mark-up. These differences serve to highlight a larger disparity: whereas *In re Toilet Seat* is characterized by facts indicating that market forces **[**40]** have been suspended (e.g., flat fee payment that is resistant to supply and demand forces), the present case is characterized by a relationship in which traditional market forces remain in play. As such, the fundamental premise upon which the control exception is to be applied -- i.e., in situations in which market forces are **[*1182]** suspended -- is not evident here, even if evident under the facts of *In re Toilet Seat.*

This conclusion is consistent with Jewish Hosp. Ass'n, a Sixth Circuit case that both sides agree is instructive. See *628 F.2d at 975*. In listing there the "examples of situations where an ownership or control relationship between an indirect purchaser and a direct purchaser might make the passing-on bar inapplicable," the Sixth Circuit noted situations involving parent-subsidiary relationships, or one company's stock ownership of another, as the paradigmatic examples. Id. Significantly, however, the court also noted that, while a relationship with an independent broker or purchasing agent such as that described in In re Toilet Seat could also satisfy the exception, this rule only applies where market forces are truly superseded. Id.; see also *Howard Hess Dental Lab. v. Dentsply Intern., 424 F.3d 363, 372 (3d Cir. 2005)*("modes **[**41]** of control that might qualify for the control exception include 'interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, [or] trust agreements").

Since there is no evidence that plaintiff's external manufacturers were independent purchasing agents of the type contemplated by *In re Toilet Seat* and *Jewish Hosp. Ass'n*, application of the control exception is therefore inappropriate here, unless plaintiff can demonstrate other recognized modes of control that might suggest that market forces have been superseded -- e.g., interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, etc. As noted, however, it is undisputed that this is not the case.

It is worth noting, furthermore, that to the extent that the external manufacturers retain, and have exercised, their right to sue defendants, this further confirms that market forces have not been superseded in the traditional sense contemplated by the control exception, and that the policy reasons behind the *Illinois Brick* decision remain intact. Indeed, as defendants point out, at least **[**42]** two external manufacturers -- Celestica and Solectron -- have submitted direct purchaser claim forms as part of the direct purchaser MDL proceedings in the In re DRAM litigation before the court. See Moore Decl. Re EMs, Ex. 13 at 41-43; Exs. 17-19.

In sum, therefore, the court concludes that plaintiff has failed to introduce a material dispute of fact as to whether market forces here have been superseded in the manner contemplated for the control exception to apply.

* * *

Based on all the foregoing, the court agrees with defendants that Sun does not qualify as a true direct purchaser for those claims based on DRAM purchases made by external manufacturers, and has furthermore failed to established a material dispute of fact as to application of the control exception to *Illinois Brick*. Defendants' motion for summary judgment is accordingly GRANTED.

C. Motion to Dismiss Claims Based on Foreign DRAM Purchases

Defendants' motion to dismiss seeks a ruling that the court lacks subject matter jurisdiction over plaintiff's claims, to the extent based on purchases made by Sun's foreign subsidiaries. [7] As noted, the **[*1183]** motion is defendants' third attempt to persuade the court to dismiss plaintiff's claims **[**43]** based on foreign DRAM purchases, and "addresses the narrow jurisdictional question remaining after the court's October 2007 ruling on defendants' motion to dismiss" -- i.e., whether plaintiff can articulate and prove a legal theory that would satisfy proximate causation under the FTAIA. According to defendants, the completion of discovery has now sufficiently developed the factual record to make clear "that Sun cannot carry its jurisdictional burden" under the statute.

As discussed ad nauseam in the court's prior dismissal orders, ***HN8***[] the court's assertion of subject matter jurisdiction **[**44]** over plaintiff's claims based on foreign subsidiaries' DRAM purchases -- notwithstanding the general proscriptions of the FTAIA -- generally requires a showing that defendants' foreign conduct (1) had a direct, substantial and reasonably foreseeable effect on domestic commerce; which (2) gave rise to a Sherman Act claim. See *15 U.S.C. § 6a*.; see also *F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 987-88 (9th Cir. 2008)*. Having already found that plaintiff has shown the former, the court now limits its inquiry to the latter, and examines whether plaintiff can demonstrate proximate causation between the recognized domestic effect of defendants' conduct (i.e., the setting of higher prices for DRAM in the United States) and plaintiff's foreign injury (i.e., the payment of higher DRAM prices abroad). See discussion, supra at 8-10; Dismissal Order at 20-21; see also *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d at 987-88*. Resolution of this inquiry depends upon resolution of plaintiff's two alternative theories: (1) the single enterprise theory; and (2) the agency theory. **[**45]** [8]

Before getting to the merits of these theories, however, there are two preliminary issues raised by the parties that require resolution. [9] First, plaintiff contends, as it has previously, that it is legally improper in the first instance to sever for the court's consideration any portion of claims based on foreign DRAM purchases, since those claims are also based on domestic DRAM purchases -- the court's jurisdiction over which no one disputes. Second, and assuming severance of the foregoing claims for the court's consideration is permissible, the parties dispute whether the proper legal standard to be applied in evaluating the instant motion is that provided **[**46]** **[*1184]** by *Federal Rule of Civil Procedure 12(b)(1)*, or alternatively, *Federal Rule of Civil Procedure 56*.

As to the first preliminary issue, plaintiff contends that since it is undisputed that the court has jurisdiction over Sun's claims premised on *domestic* deliveries of DRAM, the court cannot arbitrarily carve out from these claims the portion that are based on foreign deliveries, and dismiss them. This argument is unpersuasive, however, for as

---

[7] Defendants' motion also targets all claims based on purchases made by Sun's foreign external manufacturers. Thus, defendants seek dismissal of claims based on an aggregate total purchase amount of "more than $ 762 million between August 1998 and June 2002 and more than $ 732 million between April 1999 and June 2002." See Cross FTAIA Opp. Decl., Ex. 1 at P 4. However, in view of the court's grant of summary judgment with respect to all claims based on DRAM purchases made by external manufacturers -- both domestic *and* foreign -- this additional ground is now moot for purposes of the instant motion to dismiss.

[8] It should be noted that defendants' moving papers also seek dismissal based on Sun's inability to demonstrate subject matter jurisdiction over the claims at issue pursuant to an alter ego theory. However, as Sun states in its opposition brief and conceded at the hearing, it is not pursuing an alter ego theory in arguing for subject matter jurisdiction. See MTD Opp. Br. at 10:15-11:3 (the "alter ego and veil piercing analyses addressed by defendants are materially different" from the single enterprise theory being argued by Sun).

[9] Plaintiff also initially contends "[a]s a threshold matter," that defendants have stipulated that the only transactions at issue in this motion are deliveries of DRAM to Sun's foreign facilities, and not deliveries of DRAM to Sun's external manufacturers. The court has already decided that the latter issue is moot for purposes of this motion. Even if it had not so decided, however, the court would nonetheless find that the stipulation at issue lends no support for plaintiff's argument. See Cross FTAIA Opp. Decl., Ex. 1.

defendants point out, the court already considered and ruled upon the issue in its October 2007 order. Specifically, the court there said: "as to whether plaintiffs' claims based on foreign injury are severable from their claims based **[**47]** on domestic injury (which defendants have not moved to dismiss), the court agrees with a number of courts who have employed sound analysis in determining that such claims are severable." Dismissal Order at 22 (citing *In re Rubber Chemicals, 504 F. Supp. 2d 777, 2007 U.S. Dist. LEXIS 62734, at *13-22)*. Plaintiff presents no compelling reason for departure from this earlier holding. To the extent, moreover, that plaintiff rests its renewed argument against severance on the court's corollary statement that it "need not decide the issue definitively" on the prior dismissal motion, the court takes the opportunity now to definitively decide the issue in favor of severance.

As to the parties' second preliminary dispute over the proper legal standard applicable to the present motion, the court concludes that defendants have correctly argued in favor of application of a *12(b)(1)* standard, rather than a *Rule 56* standard.

Both parties rely on *Thornhill Publ'g Co. v. Gen. Tel. & Elec., 594 F.2d 730 (9th Cir. 1979)* in their competing approaches to this issue. In Thornhill, the Ninth Circuit affirmed the lower court's grant of defendant's summary judgment motion seeking dismissal of plaintiff's complaint on grounds that **[**48]** the complaint's alleged conduct was outside the jurisdictional reach of the Sherman Act. The trial court had applied the *Rule 56* summary judgment standards in deciding the motion, rather than the *12(b)(1)* standard usually applied to motions to dismiss for lack of subject matter jurisdiction. While noting that it need not definitively resolve the question whether the *Rule 56* standard or a *12(b)(1)* standard should have been applied by the district court, the Thornhill court made several observations about the use of these standards in the antitrust context.

The Ninth Circuit noted that where, as here, a motion attacking jurisdiction is made on the basis of facts in the record, such a motion is commonly labeled a "speaking motion," which is subject to analysis pursuant to *12(b)(1)* standards, and which allows the court to resolve disputed facts in evaluating the jurisdictional claims. See *594 F.2d at 733*. However, the court went on to note that, where the jurisdictional issues in an antitrust case are not separable from the merits of a case (e.g., where an element required to state a Sherman Act claim "is an element of the substantive offense as well as a jurisdictional requirement"), then **[**49]** a motion going to the jurisdictional issue should be accorded *Rule 56* treatment. See id.

The Thornhill court also took specific note of a prior recent case in which the Ninth Circuit considered the jurisdictional and substantive issues presented in a Sherman Act case specifically, found them to be legally distinct, and applied a *12(b)(1)* legal standard. The Thornhill court quoted language from that prior case as follows: "[t]he jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given defendant's conduct was of the kind prohibited by the Act'… Specifically, 'the jurisdictional question . . . is whether defendants' conduct **[*1185]** had a sufficient relationship to interstate commerce to be subject to regulation by Congress… (while) the substantive issue… is whether defendants participated in anti-competitive conduct." *Id. at 735*. The Thornhill court cautioned, however, that this earlier observation had been reached in a case where the opposing party had conceded that the jurisdictional and substantive issues were separable. To that end, and notwithstanding the reasoning of this earlier case, the Thornhill court concluded that in a case "where the jurisdictional **[**50]** issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits," the *Rule 56* standard still applies. See id.

Thornhill's discussion is complicated and not altogether clear. Nonetheless, as applied here, *Thornhill* is best read as suggesting that the *12(b)(1)* standard, rather than a *Rule 56* standard, is appropriate. The jurisdictional issues in the case -- while factual in nature -- do not appear to be so "enmeshed" with the substantive issues of plaintiff's Sherman Act claim such as to require *Rule 56* treatment. As the Thornhill court contemplated, the jurisdictional issue in Sun's Sherman Act and Cartwright Act claims (insofar as the foreign purchase based claims are concerned) is whether defendants' conduct had a sufficient relationship with the domestic effects of that conduct and plaintiff's injury, so as to be subject to regulation under the FTAIA. The substantive issues of plaintiff's claims, however, are whether defendants participated in anti-competitive conduct by conspiring to fix prices. Since the two issues are distinct, analysis pursuant to *12(b)(1)* standards is appropriate. Accordingly, the court shall consider **[**51]** the factual evidence presented and resolve factual disputes as necessary to determine the existence of jurisdiction as a matter of law.

Having disposed of the preliminary issues, the court now turns to the two theories advanced by plaintiff.

1. Single Enterprise Theory

Plaintiff asserts that it stands in the shoes of its wholly owned foreign subsidiaries -- and thus that those subsidiaries' DRAM purchases at artificially high levels were proximately caused by the setting of a single inflated DRAM price in the U.S. -- because it, Sun Scotland and Sun Netherlands collectively "operated as a single enterprise with a unified purpose in the production and sale of Sun products and the procurement of components, such as DRAM, needed to assemble those products." See Pl. Opp. Br. at 10:2-4. As evidence of this single enterprise theory, Sun points to the global DRAM procurement strategy instituted and managed by Sun's global memory procurement team headquartered in California. Plaintiff also relies on several district court cases, including, primarily, *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, and *Aventis Envtl. Sci. USA LP v. Scotts Co., 383 F. Supp. 2d 488, 499-500 (S.D. N.Y. 2005)*. **[**52]** Ultimately, however, neither plaintiff's reliance on the evidence nor its reliance on the case law withstands scrutiny.

To begin with, plaintiff's legal authority is less than compelling. While true that a single entity doctrine was announced in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, that case held that parent and subsidiary corporations are to be considered a single collective entity for purposes of conspiracy liability under *section 1* of the Sherman Act, and cannot be found liable for conspiracy with each other under the Act. The doctrine therefore expressly deals with the question whether a parent and subsidiary corporation may be charged with conspiring with each other, **[*1186]** and not, as is the case here, with the question whether those two entities may collectively be treated as a single entity for purposes of jurisdictional antitrust standing. Nor has any other case relied on by plaintiff so extended the single entity doctrine announced in Copperweld.

Plaintiff is closer to the mark in citing Aventis, an antitrust case allowing a U.S. affiliate plaintiff to assert antitrust claims based on the harm done to its foreign affiliate. See *Aventis, 383 F. Supp. 2d at 499-500*. **[**53]** Aventis noted that plaintiffs had "proffered evidence which, if believed, would demonstrate that all three [affiliate plaintiff] entities were acting as a single enterprise and shared a complete unity of interests." Id. Nonetheless, *Aventis* is distinguishable. First, and as defendants point out, it did not deal with the FTAIA specifically. Putting this concern aside, however, the court finds it significant that the foreign affiliates in Aventis had assigned their antitrust claims to the plaintiff affiliate corporation. Id. This fact alone strongly suggests a plaintiff's entitlement to assert claims on behalf of its foreign affiliates. Here, however, this critical fact is lacking. Furthermore, the Aventis court provided no analysis supporting its conclusion; thus, it is impossible for this court to meaningfully evaluate the contours of any single entity doctrine applied by that court. And while Aventis did note that two other district court cases had affirmed the existence of the single entity doctrine, neither of those cases dealt with a similar FTAIA context. See, e.g., *In re Vitamins Antitrust Litig., 2001 U.S. Dist. LEXIS 8903, 2001 WL 755852, at *3 (D.D.C. June 7, 2001)* and Farmland Dairies, Inc. v. New York Farm Bureau, Inc., 1996 WL 191971, at *4 (N.D.N.Y. Apr.15, 1996) **[**54]** (holding without meaningful discussion that a parent could bring antitrust claims on behalf of its subsidiary when their interests were the same and they were treated as the same entity). In sum, therefore, plaintiff's legal authorities -- the majority of which are non-binding -- have not convinced the court that the single entity doctrine should be applied in the manner advanced by plaintiff here.

Second, defendants correctly point out that plaintiff rests its evidence in support of its single enterprise theory in part on a global procurement strategy that has already been discredited. See Opp. Br. at 10:2-5 (Sun and its subsidiaries "operated as a single enterprise with a unified purpose in the production and sale of Sun products and the procurement of components, such as DRAM, needed to assemble those products"); see also Cross FTAIA Opp. Decl., Ex. 3 at P 4. Both this court and the Ninth Circuit have held that, to the extent plaintiff's proximate causation theory rests on proof of a global procurement strategy, this is not a viable legal theory. See, e.g., *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d at 989-90* (rejecting plaintiff's attempt to argue "a direct **[**55]** correlation between the U.S. price and the prices abroad" and fact "that the [d]efendants' activities resulted in the U.S. prices directly setting the worldwide price," and noting prior rejections of "single global price" theories of proximate causation). Thus, plaintiff's reliance on its global procurement strategy as evidence in support of its proximate causation argument -- if made via a single enterprise theory -- must be rejected.

In sum, the court finds that plaintiff has failed to sufficiently demonstrate that application of a single entity doctrine is appropriate in the manner urged by plaintiff here as to the foreign subsidiaries.

2. Agency Theory

This leaves plaintiff with its second, and alternative, theory -- that of agency. Plaintiff argues that agency principles are satisfied under one of two different, but equally applicable, agency doctrines: the representative **[*1187]** services doctrine, and the traditional common law doctrine of agency. Defendants, for their part, assert that Sun cannot satisfy either.

Preliminarily, an overview of the relevant agency doctrines is appropriate. ***HN9***[] The representative services doctrine, which the Ninth Circuit has acknowledged in the personal jurisdiction **[**56]** context, asks whether the subsidiary functions as the parent corporation's representative in performing services that are sufficiently important that if it did not have a representative to perform them, the parent would undertake to perform similar services on its own. See *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1134-35 (9th Cir. 2003)*(representative agency test permits the imputation of contacts where the subsidiary was "either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself"); *Doe v. Unocal, 248 F.3d 915, 925, 928 (9th Cir. 2000)*("the question to ask is… whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent").

HN10[] The traditional common law agency doctrine -- for which both parties cite federal district court authorities -- is based on analysis of three factors: (1) manifestation by a principal that the agent would act on its behalf; (2) the agent's acceptance or consent to act on the principal's behalf; and (3) the understanding that the principal would be in control of the agent's undertaking on its behalf. See *Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1241-42 (N.D. Cal. 2004)*; **[**57]** *E&J Gallo Winery v. EnCana Energy Servs., Inc., 2008 U.S. Dist. LEXIS 46927, 2008 WL 2220396, *11 (E.D. Cal. 2008)*. Whereas the representative services doctrine acknowledged in Doe considers the agency question in light of the parent-subsidiary relationship in the jurisdiction context, both Bowoto and E&J Gallo consider the agency question in light of the parent-subsidiary relationship in the liability context.

In determining which legal standard to apply in order to determine the existence of an agency relationship for FTAIA jurisdiction purposes, the court notes that neither of the alternatives presented by the parties is, strictly speaking, persuasive. Neither the personal jurisdiction context nor the liability context discussed in the cited cases, for example, is directly on point with the FTAIA scenario. Moreover, after review of the cited case law, the court finds that the scope of the agency test laid out therein is less than clear. Thus, it is not immediately apparent to the court that either of the two formulations discussed by the parties should be given immediate effect, their contrary arguments notwithstanding.

This is not to say that the cases are not helpful, however. Bowoto and E&J Gallo, for example, **[**58]** both correctly note that the traditional common law of agency provides the basis for the guiding principles that should be given effect in this case. And as both district courts acknowledge, in the area of agency, it is federal common law that controls with respect to federal claims like the Sherman Act. See *Bowoto, 312 F. Supp. 2d 1229*; *E&J Gallo, 2008 U.S. Dist. LEXIS 46927, 2008 WL 2220396 at *5*. In turn, federal common law is guided by those principles set forth in the Restatement of Agency. Turning, then, to the operative Restatement Third, it lays ***HN11***[] the foundation for a traditional agency test that requires a plaintiff to demonstrate: (1) a manifestation by the principal that the agent shall act for him; (2) that the agent has accepted the undertaking; and (3) that there is an understanding between the parties that the principal is to be in control [10] of the **[*1188]** undertaking. See *Restatement (Third) of Agency, §*

---

[10] The court observes that the concept of 'control,' as employed for purposes of the traditional agency test, is distinct from the legal test **[**59]** for 'control' that applies in connection with the well-recognized control exception to Illinois Brick (discussed supra in connection with defendants' motion challenging external manufacturer purposes). This is so even if, as defendants pointed out at the hearing, the underlying arguments going to both are similar.

1.01; see also *Transamerica Leasing, Inc. v. La Republica de Venezuela, 339 U.S. App. D.C. 385, 200 F.3d 843, 849 (D.C. Cir.2000)*. This, therefore, is the test that the court employs here.

Applying this test here, the ultimate question is therefore whether plaintiff can point to facts that establish (1) Sun's intent to have its foreign subsidiaries act on Sun's behalf in purchasing DRAM; (2) that the foreign subsidiaries accepted and/or understood their role in purchasing DRAM on Sun's behalf; and (3) that there is an understanding between Sun and its foreign subsidiaries that Sun is to be in control of the subsidiaries' procurement of DRAM. To that end, plaintiff submits the following facts: Sun's foreign facilities purchased DRAM at prices set, from vendors chosen, and amounts determined by a global memory procurement team based as Sun headquarters in California; and the DRAM suppliers' own records demonstrate that Sun was a single customer, without distinction between Sun and its foreign subsidiaries. See Cross FTAIA Opp. Decl., Ex. 3 at PP 4-8; [11] id. at **[**60]** Exs. 12-16.

While defendants do not dispute these facts, they point out that Sun's subsidiaries -- specifically, Sun Scotland and Sun Netherlands -- issued their own purchase orders to primarily European entities of defendant DRAM manufacturers; had their own equitable ownership different than Sun's; were sufficiently capitalized to satisfy their own debts and liabilities; did not maintain common funds or commingle assets with Sun; used their own accounts to settle the invoices issued to them by their European DRAM suppliers; took delivery of the DRAM they purchased and used that DRAM to manufacture finished products; and sold those products through their own European sales offices. See Declaration of Steven Bergman ISO FTAIA Dismissal **[**61]** ("Bergman FTAIA Decl."), Ex. 4 at Responses 2, 6-8, 10, 12, 20, 25-27, 29, 31; id., Ex. 11 at 63:16-64:17; see also Cross FTAIA Opp. Decl., Ex. 1 at PP 4,6. Based on these facts, defendants contend that the subsidiaries themselves controlled their purchases of DRAM, and there is no basis for concluding that they acted as Sun's agent with respect to the procurement of DRAM overseas.

Ultimately, the court agrees with defendants. As an initial matter, the undisputed facts fairly demonstrate, as plaintiff submits, that plaintiff intended to have its foreign subsidiaries purchase DRAM under terms and conditions, and from DRAM suppliers, established by Sun's global procurement team in California; that the foreign subsidiaries did, in fact, purchase their DRAM from DRAM suppliers pursuant to Sun's global procurement strategy; and that, to the extent Sun's global procurement team established and enforced its DRAM procurement strategy -- via its communications with DRAM suppliers and the foreign subsidiaries -- Sun was in control **[*1189]** of its procurement strategy. Critically, however, and notwithstanding this showing, the undisputed facts do *not* demonstrate that Sun intended, or that the foreign subsidiaries **[**62]** understood, that any DRAM purchases were being made on *Sun's* behalf, as opposed to on behalf of the foreign subsidiaries. In fact, and as defendants note, the facts demonstrate that the subsidiaries purchased DRAM from primarily European entities of defendant DRAM manufacturers, took delivery of the DRAM they purchased, and used that DRAM to manufacture finished Sun products that were sold through the subsidiaries' own European sales offices. All of which suggests that, although Sun may have established and controlled the applicable DRAM pricing strategy pursuant to which the subsidiaries purchased DRAM, it is the subsidiaries who then took charge of their own DRAM purchases, for their own eventual use. Significantly, plaintiff has submitted no evidence disputing these facts.

Moreover, to the extent that plaintiff seeks to transform Sun's undisputed control over its global procurement strategy into a finding that Sun's subsidiaries are but agent actors whose every move in furtherance of Sun's global strategy should be imputed to Sun, the court is mindful that some degree of control is usually, even if not necessarily, implicit in the parent subsidiary relationship. Thus, the degree **[**63]** of control exercised by the parent in order for the subsidiary to qualify as an agent must therefore exceed that which is to be expected in the normal scope of any such relationship. Furthermore, defendants' point that, having availed itself of the advantages of the parent subsidiary relationship under corporate law, Sun cannot now easily disavow itself of such to suit its purposes, is well taken. See, e.g., *Disenos Artisticos, E Industriales, S.A. v. Costco Wholesale Corp., 97 F.3d 377,*

---

[11] Defendants have objected to the Declaration of Peter Wilson, on grounds that the information contained therein constitutes "new" evidence not previously disclosed, and that its disclosure now violates Sun's earlier obligation to supplement all discovery responses by June 30, 2008. The court overrules this objection, however, in light of defendants' failure to set forth an adequate showing as to what evidence contained in the declaration is actually "new."

380 (9th Cir. 1996)(noting that a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties)("[g]enerally, the corporate veil can be pierced only by an adversary of the corporation, not by the corporation itself for its own benefit").

In sum, the court finds that, notwithstanding Sun's acknowledged control with respect to its global procurement *strategy*, the undisputed evidence demonstrates that Sun Scotland and Sun Netherlands controlled, in large part, their own purchases of DRAM for their own use and sale. As such, plaintiff's effort to demonstrate that **[**64]** the subsidiaries were acting on Sun's behalf, or that Sun maintained the requisite level of control over the subsidiaries' actual purchases, fails. The foreign subsidiaries cannot therefore be deemed Sun's agents for purposes of the foreign DRAM purchases made by them.

Having failed to persuade the court that application of either a single enterprise or agency theory is appropriate, plaintiff has exhausted the avenues available to it to show that the foreign DRAM purchases made by its foreign subsidiaries should in effect be considered purchases made by Sun itself. Without a valid theory to show that it stands in the shoes of its subsidiaries for purposes of those DRAM purchases, the purchases themselves must be viewed as foreign transactions made by independent subsidiary entities, albeit pursuant to a global pricing strategy instituted by its parent corporation, Sun.

Under these facts, the court cannot find jurisdiction under the FTAIA for any claims premised on such purchases. As noted time and again by this court, ***HN12***[] the FTAIA requires that plaintiff demonstrate that the higher U.S. DRAM prices caused by defendants' conduct proximately caused *plaintiff* to pay higher DRAM prices **[*1190]** abroad. **[**65]** However, as has just been determined, it is plaintiff's subsidiaries, rather than plaintiff itself, who actually paid any higher DRAM prices abroad. To the extent Sun suffered any injury as a result of its subsidiaries' higher DRAM payments, those injuries are derivative of those suffered by the foreign subsidiaries. Thus, no proximate cause link has been established. See, e.g., *In re Dynamic Random Access Memory Antitrust Litig., 546 F.3d at 988* ("The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain the higher prices globally, but [plaintiff] has not shown that the higher U.S. prices proximately caused *its* foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices.")(emphasis added).

In so ruling, the court declines plaintiff's invitation to re-examine the boundaries of its earlier proximate cause holding. As the court stated in its most recent dismissal order, the only question for resolution at this stage is the existence of proximate cause vis-a-vis the two theories highlighted and discussed herein. Moreover, while plaintiff's **[**66]** counsel's desire to revisit the issue is understandable, the court disagrees at the outset with counsel's characterization of the court's earlier proximate cause inquiry. Contrary to counsel's statement at the hearing that the court's earlier discussion of the issue focused on whether a higher negotiated U.S. DRAM price "cause[d] Sun to go out and purchase a lot of DRAM," the court's actual proximate cause analysis was squarely focused on whether a higher negotiated U.S. DRAM price caused "Sun to pay that price for all the DRAM that it purchased." See Dismissal Order at 20-22. As the court finds herein, however, the answer to this inquiry is no. This is so, despite plaintiff's accurate observation that there is a single global price for artificially inflated DRAM that was negotiated as a result of defendants' conduct.

* * *

In sum, and for all the foregoing reasons, jurisdiction under the FTAIA is lacking over plaintiff's claims, to the extent premised on foreign DRAM purchases made by Sun's foreign subsidiaries. The court accordingly GRANTS defendants' motion to dismiss such claims. [12]

D. Motion for Summary Judgment Re Purchases from Mitsubishi Entities

---

[12] To the extent defendants also seek dismissal of plaintiff's state claims in addition to the Sherman **[**67]** Act claim, the court declines to reach this issue based on nothing more than defendants' cursory footnote (citing two out-of-circuit district cases) suggesting that plaintiff's state law claims are subject to the same FTAIA analysis as is undertaken here.

Defendants also move for summary adjudication of all plaintiff's claims, to the extent based on purchases from the former defendant Mitsubishi entities [13] worth $ 420 million. Defendants note that any recovery premised on these purchases first requires proof that Mitsubishi is liable for participating in an anticompetitive conspiracy -- something that plaintiff cannot demonstrate. See *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)*(to prove *section 1* violation, plaintiff must prove the existence of a contract, combination, or conspiracy, among other elements). Specifically, defendants challenge plaintiff's ability to prove either (1) that Mitsubishi itself is guilty of any anticompetitive activity; or (2) that the remaining defendants' **[*1191]** unlawful conspiratorial conduct should otherwise be imputed to Mitsubishi. Not only does this justify summary judgment **[**68]** with respect to plaintiffs federal and state antitrust claims, but defendants also argue that plaintiff's inability to recover from the remaining defendants those overcharges it paid to Mitsubishi, justifies summary judgment with respect to plaintiff's UCL claim as well.

Plaintiff, naturally, resists, responding that not only is there direct evidence of a conspiracy to fix prices by several of the other defendants in the case, but that the circumstantial proof overwhelmingly establishes that it is more likely than not that Mitsubishi participated in the price-fixing conspiracy. Thus, the federal and state antitrust claims must be allowed to proceed. As for plaintiff's UCL claim, plaintiff contends that principles of joint and several liability apply, and save the claim.

Preliminarily, an overview of plaintiff's allegations against defendants **[**69]** -- and Mitsubishi specifically -- is appropriate. Plaintiff's consolidated complaint alleges that the defendant Mitsubishi entities, along with the other co-defendants in this case, participated in a conspiracy to unreasonably restrain trade, in violation of *section 1* of the Sherman Act. See ACC, P 80. Plaintiff also alleges that the conspiracy specifically "consisted of a continuing agreement, understanding and concert of action among defendants and their coconspirators, the substantial terms of which were to fix, raise maintain and stabilize the prices of, and/or allocate the market for, DRAM sold throughout the world, including the United States." See id. at P 82. As part of the conspiracy, plaintiff contends that defendants participated in meetings and conversations to discuss the price of DRAM; agreed to manipulate prices and supply so as to boost sagging DRAM sales; issued price announcements and price quotations in accordance with the agreements reached by defendants; and sold DRAM to customers throughout the world, including the United States, at non-competitive prices. See id. at P 83.

Turning to the parties' arguments, the court resolves them via consideration of the following: **[**70]** (1) an overview of the legal standards applicable to antitrust conspiracy challenges on summary judgment; (2) the evidence of Mitsubishi's liability for the alleged anticompetitive conduct; and (3) whether, under California's UCL, plaintiff may legally seek recovery against defendants on the basis of DRAM purchases made from Mitsubishi. [14]

1. Relevant Section 1 Legal Standards

HN13[] In order to establish a *section 1* violation, **[**71]** plaintiff must prove three elements: the existence of an agreement or conspiracy among two or more separate entities; that unreasonably restrains trade; and which affects commerce. See, e.g., *American Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 788 (9th Cir. 1996)*. Plaintiff alleges that Mitsubishi participated in a horizontal price-fixing conspiracy by entering into an agreement with the other defendants to fix the prices and supply for DRAM. It is well established that **[*1192]** such an agreement, if proven, is per se unreasonable. See, e.g., *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed.*

[13] There were originally three defendant Mitsubishi entities named as defendants in the present action: Mitsubishi Electric Corporation, Mitsubishi Electric and Electronics USA, Inc., and Mitsubishi Electric Europe B.V. All, however, were dismissed from the action with prejudice on November 21, 2008, pursuant to a stipulation entered by the parties.

[14] Defendants also make the argument that, to the extent plaintiff's evidence of Mitsubishi's participation in the conspiracy relies on conduct committed at a time that plaintiff's experts finds no damages to plaintiff, defendants cannot be liable. This is similar to the argument made by the direct purchaser defendants on summary judgment, which the court rejected. For similar reasons, the court also rejects the argument here. In sum, there is no support for the principle that particular activities of a conspiracy can be excluded from consideration simply because they do not lead to actual damages. Rather, the question in regards to the conspiracy is simply whether plaintiff suffered some damage flowing from the unlawful conspiracy throughout the overall conspiracy period.

1129 (1940); see also In re Flat Glass Antitrust Litig., 385 F. 3d 350 (3d Cir. 2004). As noted, the only issue argued by defendants on this motion is the existence of an actual agreement or conspiracy to restrain trade, that includes Mitsubishi.

HN14[] With respect to the requirement that plaintiff establish a "contract, combination, or conspiracy" -- also referred to as "concerted action" -- the legal standards are well-established. All that is required for proof of concerted action is that the alleged parties share a "commitment to a common scheme that has an anticompetitive objective or effect." See, e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); **[**72]** United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960). The parties' motives need not be identical. Id.

HN15[] One way of proving concerted action is by express agreement. However, a formal contract is not *necessary* to establish collective action. See, e.g., United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966). Rather, conspiracies can be shown either by direct *or* circumstantial evidence. Indeed, courts recognize that only "rarely will there be direct evidence of an express agreement" in conspiracy cases. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 720, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965). Circumstantial evidence as to this element of the offense is, therefor, not only admissible, but often dispositive. The Ninth Circuit has long recognized that "it is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy," and that concerted action may be inferred "from circumstantial evidence of [a] defendant's conduct and course of dealings." See, e.g., Movie 1 & 2, 909 F.2d 1245, 1251-52 (9th Cir. 1990). Here, neither party disputes that plaintiff seeks to prove Mitsubishi's conspiratorial activity only through circumstantial **[**73]** evidence.

As noted, with respect to proof of conspiracy by circumstantial evidence, the Supreme Court has expressly considered this issue in the summary judgment motion context, specifically in the landmark antitrust case, Matsushita Electric Indus. Co., 475 U.S. 574. There, the court noted that **HN16**[] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a [section 1] case.... [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy ... To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [section] 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently [A plaintiff], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [it]." See 475 U.S. at 588.

The Matsushita court identified two separate inquiries that are relevant to the above issue on summary judgment motions: (1) whether the defendant had "any rational motive" to join the **[**74]** alleged conspiracy, and (2) whether the defendant's conduct "was consistent with the defendant's independent interest." See Matsushita, 475 U.S. at 587. The court stated that, "if [the defendants] had no rational motive to conspire, and if [their] conduct is consistent with other, equally plausible explanations, the conduct **[*1193]** does not give rise to an inference of conspiracy." Id. at 596-97.

The Ninth Circuit, once again, has framed this issue in terms of burdens of proof. It has outlined **HN17**[] a two-part test to be applied "whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can 'rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." Second, the burden then "shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." See, e.g., In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999).

The above standards apply as follows here: if defendants come forward with evidence supporting a lack of any agreement or conspiracy to commit unlawful activity by Mitsubishi, they shift **[**75]** the burden to plaintiff to introduce sufficient evidence to warrant the inference of conspiratorial conduct on Mitsubishi's part. With respect to circumstantial evidence, however, the court must consider such evidence in light of the above two-part burden-shifting test espoused by the Ninth Circuit pursuant to Matsushita -- i.e., if defendants are able to show a plausible and justifiable reason for Mitsubishi's conduct that is consistent with competitive behavior, plaintiff must then provide specific evidence that tends to exclude the possibility of competitive behavior.

2. Evidence of Mitsubishi's Conspiratorial Conduct

As a general preliminary matter, the court finds that defendants' showing is sufficient to shift the burden to plaintiff to introduce evidence that warrants the inference of conspiratorial conduct on Mitsubishi's part. Defendants have pointed, for example, to several of the purported pricing communications in evidence, and noted that many on their face suggest that Mitsubishi did not provide pricing information to any of the defendants; rather, the defendants' OEM customers provided Mitsubishi pricing information -- which is perfectly legal. See, e.g., Declaration of **[**76]** Timothy Martin ISO MSJ re Mitsubishi Purchases ("Martin Decl."), Exs. 27, 39, 44. Similarly, defendants note that plaintiff relies on several emails from DRAM suppliers that allegedly include Mitsubishi pricing information, but that the emails never actually state whether Mitsubishi was the source for any pricing information. See Martin Decl. at Exs. 17-21, 26, 30-33. Plaintiff also relies on emails that suggest the possibility of past or future exchanges without any indication of when, or whether the past or future exchanges actually occurred. See id. at Exs. 16, 25. This, say defendants, cannot demonstrate Mitsubishi's participation in any actual conspiracy. Finally, defendants also comment that the numerous instances of communications about generic market conditions in the DRAM industry -- i.e., the general "shop talk" about the industry -- also fail to indicate any conspiratorial conduct. Id. at Ex. 47; Ex. 49 at 44, 69. See *In re Citric Acid Antitrust Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)*(general shop talk not actionable as conspiratorial conduct).

HN18[] Having thus demonstrated that the evidence tends to support an inference of non-conspiratorial conduct, plaintiff must now, in **[**77]** order to defeat summary judgment, come forward with evidence that shows that Mitsubishi was *not* engaging in permissible competitive behavior. See *In re Citric Acid, 191 F.3d at 1094*. In other words, plaintiff must introduce evidence that tends to overcome defendants' plausible explanation and *exclude* the possibility of independent conduct by Mitsubishi, such that an inference of collusion is reasonable. **[*1194]** See *id. at 1096*. Generally, the evidence plaintiff relies on falls into two broad categories of evidence: the factual evidence, and the economic evidence.

Unfortunately for plaintiff, however, this evidentiary showing fails before it even begins. For as defendants correctly note, plaintiff's showing suffers from a fundamental flaw: its inability to distinguish between any of the Mitsubishi entities. Despite having sued three different Mitsubishi entities, for example, plaintiff fails to credit any of the evidence disclosing purportedly anticompetitive communications, actions, or activity by those entities, to any particular entity. This omission is significant. As the court pointed out with respect to the Nanya defendant entities' summary judgment motions in the related In re DRAM litigation **[**78]** (and elsewhere herein), it is generally true that a corporate entity's actions cannot be imputed to another corporate entity. Thus, although plaintiff presents circumstantial evidence that may very well suggest conspiratorial activity on the Mitsubishi entities' part, without knowing which to which entity the evidence refers, the court cannot fully evaluate the strength of the evidence as to any particular entity. See, e.g., Declaration of David Cross re Mitsubishi MSJ Opp. ("Cross Mitsubishi Opp. Decl."), Ex. 8 at 73-74; Ex. 13 (communications between and among employees of admitted co-conspirators indicating these defendants had direct communications with Mitsubishi employees about market share and other "competitive inputs."); Ex. 9 at 138-42 (high level employee testimony of meetings with Mitsubishi representatives and other DRAM defendants to discuss general market conditions); Ex. 11 (NEC employee email reporting discussion with Infineon contact, noting that Infineon contact "knows production figures" for Mitsubishi); Ex. 12 (Hynix employee's internal email discussion rumored meeting at which Mitsubishi and other defendants "probably discussed product cut back or something related **[**79]** issues"). Nor, more specifically, can plaintiff raise a disputed issue of fact as to any specific Mitsubishi entity's participation in any allegedly anticompetitive conspiracy.

It should be noted, furthermore, that plaintiff had ample opportunity, through discovery, to legally distinguish each Mitsubishi entity from the other and develop a full record of conduct pertaining to each. Having had this rather obvious opportunity but having failed to avail itself of it, the court can only suppose that plaintiff made a strategic and voluntary decision to blur the corporate lines between the entities -- possibly in the hopes that an undifferentiated showing of purportedly actionable conduct might serve to create a picture of culpability greater than the sum of each entity's individual part in the matter.

Whatever the reason, however, the court ultimately concludes that plaintiff cannot meet its burden to defeat summary judgment, since it cannot preliminarily tell the court which entity is responsible for which communication or act. Accordingly, the court hereby GRANTS defendants' motion for summary judgment on the grounds presented herein. In view of this holding, it is unnecessary for the court **[**80]** to consider defendants' arguments with respect to plaintiff's UCL claim.

E. Defendants' Omnibus Motion for Summary Judgment

HN19[] Litigation of a successful antitrust claim requires more than proof of a defendant's antitrust violation. It requires, among other things, that a plaintiff prove what is known as 'injury in fact' -- i.e., the fact of harm to plaintiff, caused by the defendant's conduct. See, e.g., *Northwest Publ'ns, Inc. v. Crumb, 752 F.2d 473, 476 (9th Cir. 1985)*("[c]ausal antitrust injury is an essential element of any remedy under **[*1195]** the Sherman Act"). To demonstrate injury in fact, it is "generally sufficient to show with reasonable probability some causal connection between the antitrust violation and [plaintiff's alleged injury]." *Northwest Publ'ns, 752 F.2d at 476*. Significantly, however, in establishing the fact of injury, the antitrust violation need not be the sole cause of the injury, though it must be a material and a substantial cause of the injury. See *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury **[**81]** in fulfilling his burden of proving compensable injury under *§ 4*"); *Glen Holly Entm't v. Tektronix Inc., 343 F.3d 1000 (9th Cir. 2003)*(plaintiff, who was driven out of the market as a result of defendants' anticompetitive behavior, sufficiently alleged antitrust injury in fact). Where, as here, an antitrust plaintiff alleges a price-fixing conspiracy claim, proof of causal injury therefore requires a showing that plaintiff paid higher prices than it would have paid absent the conspiracy, and that defendants' allegedly anticompetitive conduct was a material cause of plaintiff's higher payments.

It is plaintiff's ability to make this showing that defendants challenge. Generally, plaintiff's causation theory is that certain defendants' admittedly unlawful conduct in fixing DRAM prices with respect to six individual OEMs ("Target OEMs") was not only limited to the Target OEMs, but also targeted plaintiff and/or resulted in higher DRAM prices on a market-wide basis, thus injuring plaintiff. For proof of this theory, plaintiff relies on the guilty pleas entered by several co-defendants in a separate criminal DRAM price-fixing case, [15] the expert testimonies of Drs. Marshall and White, and **[**82]** the factual evidence in the record. Defendants do not dispute the viability of plaintiff's causation theory per se, but contend that plaintiff's causation showing falls short of creating a genuine issue of material fact as to whether defendants' alleged conduct actually resulted in the sale of artificially inflated DRAM to plaintiff. Specifically, defendants argue: that neither the pleas nor the factual evidence establishes either that plaintiff was a target of any unlawful price-fixing conspiracy carried out by the defendants during the relevant time frame alleged, or that the conspiracy had market-wide effects; that plaintiff fails to introduce any evidence of an output restraint, the fixing of benchmark prices, or any other mechanism by which defendants' alleged conduct vis-a-vis the Target OEMs could affect market-wide prices; and that, to the extent plaintiff relies on expert testimony to establish causation, that testimony impermissibly substitutes opinion for facts, since it eschews factual analysis of the relationship between defendants' conduct and higher prices market-wide, in favor of unsupported assumptions and observations regarding the DRAM market that only superficially **[**83]** support a finding of impact. Even if plaintiff's causation showing is deemed sufficient, defendants argue that it is nonetheless too remote to allow recovery.

The court's primary mission is relatively straightforward: to determine whether plaintiff has made an adequate showing, for purposes of summary judgment, that defendants' allegedly anticompetitive conduct caused plaintiff to pay artificially high prices for DRAM. Answering this overarching **[*1196]** question, however, depends upon evaluation of what the court views as the parties' core underlying sub-theories and arguments: (1) plaintiff's theory that certain defendants' admitted conspiracy to fix the Target OEMs' DRAM prices also directly targeted and raised prices paid by plaintiff; (2) plaintiff's corresponding theory that the admitted conspiracy to fix the Target OEMs'

---

[15] Specifically, defendants Infineon, Hynix, Samsung and Elpida, as well as certain of their employees, pled guilty to participation in a DRAM price-fixing conspiracy that targeted numerous large original equipment manufacturers. See, e.g., Cross Omnibus Opp. Decl., Exs. 1-19.

DRAM prices had a market-wide impact on all direct customers' DRAM prices, including those paid **[**84]** by plaintiff; and (3) whether plaintiff's causation arguments are nonetheless too remote to defeat summary judgment.

The court addresses each of the foregoing in turn.

1. Evidence that Defendants Directly Targeted Sun

Plaintiff asserts that the factual evidence establishes not only the existence of a price-fixing conspiracy with respect to the Target OEMs, but also that defendants more broadly targeted and raised prices directed at plaintiff. For proof, plaintiff points out among other things: that the guilty pleas of Elpida and one of its high level employees, along with that of a high level Samsung employee, expressly identified Sun as a target of the acknowledged conspiracy to fix Target OEM prices; that Samsung (also an acknowledged co-conspirator vis-a-vis the Target OEMs), identified Sun as "Public Enemy Number 1" in 2001; that Samsung's account manager for Sun testified that between 2000 and 2002, he communicated about pricing and price strategy with Sun account managers for Elpida, Hynix and Infineon (again, all of which also pleaded guilty to price-fixing vis-a-vis the Target OEMs) at least once quarterly; and that certain defendants' account managers openly discussed plans to **[**85]** boycott Sun's dynamic bidding events ("DBE"s) in December 2001, before ultimately coordinating their bids in advance of Sun's DBE. See Declaration of David Cross re Omnibus Opp. ("Cross Omnibus Opp. Decl."), Ex. 1 at PP 2, 4(e); Ex. 16 at PP 2, 4(d); Ex. 18 at PP 2, 4(d); see also Exs. 41, 62, 64, 67-71; Ex. 120 at P 11. Plaintiff also submits evidence that the same sales representatives and managers responsible for Target OEM accounts and pricing, were also responsible for Sun pricing. See id. at Exs. 23, 38, 51-56, 81-83. This evidence, says plaintiff -- which is also cited by the expert testimony -- establishes the likelihood that a reasonable juror would find that defendants' unlawful actions vis-a-vis the Target OEMs targeted as well, and furthermore caused plaintiff to pay higher DRAM prices.

Defendants contest this conclusion, asserting that while this evidence may relate to the presence or absence of a conspiratorial agreement with respect to Sun specifically, it does nothing to actually establish a causal injury -- i.e., it does not actually link defendants' conduct to the actual prices paid by plaintiff. Moreover, defendants note that plaintiff's factual evidence all post-dates **[**86]** June 2001 -- well after the start of the alleged conspiracy periods at issue. Thus, the existence of any impact to plaintiff caused by defendants' allegedly anticompetitive conduct is contradicted by the testimony of plaintiff's own expert, Dr. White, who finds that plaintiff had no damages at all for the vast majority of time beginning June 2001 and ending December 2002, and only limited damages for the small amount of time in which any effect was noted. See, e.g., Supplemental Declaration of Paul Salvaty re Def. Omnibus MSJ ("Salvaty Reply Decl."), Exs. 16-17.

On the whole, the court finds that plaintiff has come forward with sufficient evidence to establish a triable issue of material fact as to whether defendants' allegedly anticompetitive conduct was targeted directly at plaintiff, and caused plaintiff to pay higher prices for DRAM. Defendants **[*1197]** do not dispute, for example, that the guilty pleas in evidence by certain defendants concede both the existence of a conspiracy to fix the price of DRAM with respect to the Target OEMs, and its effectiveness in raising DRAM prices. See, e.g., Cross Omnibus Opp. Decl., Ex. 1 at P 4(d) (admission that Elpida and certain other defendants "reached **[**87]** agreements on price increases and were able to institute price increases on DRAM sales to certain OEMs"). Nor do they dispute, although they seek to lessen the impact of, Elpida's admission that its employees conspired with certain defendants to allocate and divide a bid offered by plaintiff in an auction in March 2002, or that rigged bids were in fact, submitted at plaintiff's auction. See id. at P 4(e). Thus there is at least some evidence of a conspiracy by certain defendants to target the price that Sun was to pay for DRAM purchased from defendants during the relevant time period. Furthermore, there is no dispute that some of the same sales representatives and managers who pled guilty to conspiring to raise DRAM prices to Target OEM accounts were also responsible for Sun pricing, and that certain defendants' employees exchanged pricing information relating to DRAM sold to Sun, including the markup over cost amounts. See, e.g., id., Ex. 20 at 83-84; Ex. 38 at 52-54. Nor is there a dispute that Dr. White found that Sun suffered at least *some* overcharges during the alleged conspiracy period. See Salvaty Reply Decl., Exs. 16-17. This evidence, combined with Dr. Marshall's testimony **[**88]** comparing and correlating the relationship between Target OEM prices and plaintiff prices (including Sun), creates a plausible inference that defendants' conduct directly targeted Sun in addition to conspiring against the Target OEMs, and was a material cause of higher DRAM prices paid by Sun. See Cross Omnibus Opp. Decl, Ex. 24 at 2-6.

To be sure, defendants appropriately emphasized that vagaries and ambiguity exist with respect to plaintiff's evidence, as much of the factual evidence is based on correspondence and deposition testimony that falls short of establishing a firm direct link between defendants' conduct vis-a-vis plaintiff, and higher DRAM prices actually paid by Sun as a result of a particular type of conduct. Defendants also correctly invoke the truism that correlation is not causation, fidelity to which limits the extent to which Dr. Marshall's correlation analysis may, standing alone, satisfy plaintiff's burden. However, to the extent defendants contend that plaintiff's evidence of communications between the parties goes only to the existence of a conspiracy and not to causation, defendants are mistaken. It is true enough that the evidence may come in as part of plaintiff's **[**89]** attempt to prove a conspiracy. Defendants have presented neither persuasive reasoning nor authority, however, as to why this same evidence may not also be submitted to prove that any underlying conspiracy also had an effect on plaintiff.

Moreover, it must be remembered that causation may be demonstrated with circumstantial evidence just as easily as with direct evidence. See *Zenith, 395 U.S. at 125* (fact of injury may also be established by inference or circumstantial evidence); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1051 (9th Cir. 1981)*. To that end, the court concludes plaintiff has introduced sufficient evidence, albeit of a circumstantial nature, that would allow a reasonable juror to conclude that defendants' allegedly anticompetitive conduct, if proven, resulted in the payment of higher DRAM prices by plaintiff. The issue and the evidence must therefore be presented to the trier of fact.

[*1198] 2. Evidence that Defendants' Conduct led to Market-wide Price Increases

In addition to arguing that defendants caused plaintiff to pay higher DRAM prices by directly targeting it as part of defendants' acknowledged conspiracy to fix DRAM prices to Target OEMs, **[**90]** plaintiff also argues that defendants caused plaintiff to pay higher DRAM prices because the Target OEM conspiracy had a market-wide impact on all DRAM purchasers' prices. The foundation for plaintiff's causation arguments is rooted in the expert testimony of plaintiff's causation expert Dr. Marshall, and to a lesser extent, Dr. White, plaintiff's primary damages expert. As a corollary argument, plaintiff notes, however, that the factual evidence also supports Drs. Marshall and White's expert testimony.

The bulk of defendants' motion challenges this expert testimony. Defendants assert that, in order for plaintiff to create a genuine issue of material fact that would allow a jury to determine that defendants' conduct increased DRAM prices on a market-wide basis between August 1998 and June 2002, plaintiff must establish either that defendants restrained DRAM production and output, or that defendants fixed benchmark prices for DRAM. Defendants point out, however, that neither Dr. Marshall's nor Dr. White's testimony analyzes, let alone opines on, the existence of any DRAM output restraints or any agreement to fix benchmark prices for DRAM. Furthermore, their testimony -- which defendants **[**91]** claim improperly rests on the guilty pleas instead of any analysis of the factual evidence -- is based on broader assumptions than what the evidence can support, and relies on correlation analysis as an improper substitute for actual causation.

Before turning to the sufficiency of plaintiff's evidence, however, the court notes that the parties preliminarily dispute the appropriate legal standard that governs plaintiff's causation showing. Specifically, defendants contend that plaintiff's proof of an industry-wide price impact is legally dependent upon proof of the mechanism through which industry-wide prices can be affected -- i.e., evidence of a supply restraint, or evidence that defendants fixed benchmark prices for DRAM. Plaintiff, while not disagreeing that it must link defendants' conduct with an industry-wide impact on DRAM prices, contends that defendants are nonetheless wrong in arguing that the precise mechanism through which such industry-wide impact can be shown is a legal requirement. Thus, while neither party effectively disputes that it is plaintiff's burden to demonstrate that defendants' price-fixing conspiracy actually caused plaintiff to pay higher prices, they do **[**92]** dispute the level of particularity that plaintiff must meet in demonstrating that a causal link is present between defendants' conduct and higher industry-wide DRAM prices paid by plaintiff.

For support of the proposition that plaintiff is legally required to establish a DRAM output reduction or the fixing of benchmark prices, defendants rely on *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588 (7th Cir.*

1984), and Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). None of these cases, however, stands for the proposition that plaintiff must, as part of its legal burden, prove an output restriction or a conspiracy to fix benchmark prices as a necessary prerequisite for demonstrating that defendants' alleged conspiracy had the market-wide effect of raising DRAM prices. Indeed, one of the cases -- Nat'l Collegiate Athletic Ass'n -- suggests the opposite, as it expressly notes in dicta that: "Restrictions on price and output are the paradigmatic *examples* of restraints of trade that the Sherman Act was intended to prohibit." *National Collegiate Athletic Ass'n v.* ***[*1199]*** *Board of Regents of University of Oklahoma, 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*(emphasis added).

This is not **[**93]** to say that defendants' arguments miss the mark entirely. For, as their cited cases do show, it is the norm that a price-fixing conspiracy with industry-wide impact would be expected to employ output reductions or benchmark price manipulation as a means for carrying out the overarching conspiracy. This reflects economic truisms, however -- the proof of which may or may not help plaintiff establish causation in this case -- as opposed to legal requirements. Thus, plaintiff's burden in demonstrating causation continues to be limited to the burden thus far defined by the courts: that of establishing, "with reasonable probability some causal connection between the antitrust violation and [plaintiff's alleged injury]." *Northwest Publ'ns, 752 F.2d at 476*. This is so, even though plaintiff has attempted, as discussed below, to establish defendants' output reduction and/or fixing of benchmark prices at any rate.

The court now turns to the parties' substantive arguments regarding plaintiff's showing. As noted, plaintiff's causation showing rests primarily on the expert testimonies of Drs. Marshall and White, as well as certain factual evidence in the record. A brief summary of both the expert **[**94]** testimony and the evidence is therefore in order, prior to evaluation of both.

Dr. Marshall. Dr. Marshall was asked to assume that the defendants engaged in a conspiracy to fix the price of DRAM sold to the Target OEMs, and then to undertake an economic analysis to determine whether the defendants' conspiracy had an effect on the prices of DRAM sold to the plaintiffs. See Declaration of Paul B. Salvaty Re Omnibus MSJ ("Salvaty Omnibus Decl."), Ex. 25 at P 12. After reviewing numerous documents and deposition testimony produced in the case, Dr. Marshall opined that the prices paid by the Target OEMs and the plaintiffs moved closely together before, during, and after the defendants' admitted conspiracy, and that four characteristics of the DRAM industry led the Target OEMs' prices, other purchasers' prices, and market-wide prices to move together. See id. at PP 31-32. Those four characteristics are: (a) the standardized nature of DRAM products, (b) the existence of well-established sales channels outside of the defendants' contractual relationships with the Target OEMs (i.e., the spot market for DRAM), (c) the transparency of DRAM prices in the industry (as seen in the multiple public **[**95]** pricing reports frequently published during the relevant time period), and (d) the presence of most favored customer (MFC) clauses that prevented defendants from offering lower DRAM prices to any non-Target OEMs.

Dr. Marshall further opines that the close relationship between the Target OEMs' prices, market-wide prices, and plaintiff's prices is suggested and confirmed by: the evidence of pricing communications amongst the defendants demonstrating the participants' understanding that the Target OEM prices, other firms' prices, and market-wide prices moved together; visual inspection of the prices paid by the Target OEMs and plaintiff (i.e., on a graph); and standard regression analyses which tested the relationship between prices paid by the Target OEMs and prices paid by plaintiff. See id. at PP 33-35; see also generally Cross Omnibus Opp. Decl., Ex. 24. Dr. Marshall also opines that, given the foregoing DRAM industry characteristics as a whole, it would have been contrary to defendants' economic incentives to prevent the admitted price increases to the Target OEMs from affecting the plaintiff (else, the Target OEMs could have simply bought cheaper DRAM through the same mechanisms **[**96]** used by **[*1200]** plaintiff to purchase DRAM). Id. at PP 36-37. Based on all this, Dr. Marshall concludes that the defendants' conspiracy affirmatively affected the price of DRAM sold to plaintiff. Id.

Dr. White. Dr. White was asked to assume that the defendants engaged in a conspiracy to fix the price of DRAM sold to the Target OEMs, and then to undertake an economic analysis to determine the extent to which plaintiffs were overcharged as a result of defendants' conspiracy during two time periods -- the period April 1, 1999 through

June 15, 2002 (the "plea period") and the period August 1, 1998 through June 15, 2002 (the "conspiracy period") [16]. See Salvaty Omnibus Decl., Ex. 2 at P 2. Generally, an overcharge corresponds to the difference between the price purchasers actually paid during a conspiracy period, and the prices they would have paid but for the existence of the conspiracy (i.e., the "but for" prices). Thus, to determine the extent of the plaintiff overcharges here, Dr. White estimated plaintiff's but for prices during the relevant conduct period, and then calculated the plaintiff's damages using the difference between the actual prices paid by plaintiff, and the but for prices that **[**97]** plaintiff would have paid. See id. at P 16.

To estimate plaintiff's but for prices, Dr. White performed regression analysis. He used the before and after approach, described as follows. Dr. White analyzed the statistical relationship between actual DRAM prices on the one hand, and real supply/demand and market factors on the other hand that were present in the DRAM industry. Id. at P 17. The statistical data were taken from two benchmark periods before and after the conspiracy period. Dr. White then used the statistical relationship between DRAM price and relevant market factors to estimate what the but for **[**98]** prices would have been during the conspiracy period, had DRAM pricing and relevant market factors followed the same relationship during the conspiracy period that they had in the benchmark periods. Id. By accounting for the relevant market factors during the alleged conspiracy period, Dr. White opines that any difference between the actual prices during the conspiracy period and the but for prices for the conspiracy period can be directly attributed to the effects of defendants' conduct. Id.

Specifically, this before and after approach can be broken down into "three stages." Salvaty Omnibus Decl., Ex. 2 at P 19. First, Dr. White had to determine the impact of the defendants' admitted conspiracy on the prices paid for DRAM chips and modules by the Target OEMs. Id. at P 20. To do so, Dr. White used regression analysis to obtain a prediction equation -- based on data from the outside benchmark periods only -- for the Target OEMs' but for prices during the conspiracy period. The prediction equation allowed Dr. White to arrive at a price index of the Target OEMs' but for prices. Id. In the second stage of his analysis, Dr. White estimated the statistical relationship between the DRAM prices **[**99]** actually paid by the plaintiff, and the DRAM prices actually paid by the Target OEMs. Id. at P 33. He then used regression analysis to create a price index for the plaintiff that relates the plaintiff's DRAM prices in each month **[*1201]** to the Target OEMs' DRAM prices in the same and nearby months. Id. Finally, in the third stage, Dr. White applied the estimated statistical relationship between the Target OEMs' prices and plaintiff's prices (from stage 2) to the Target OEMs' but for price index (from stage 1), in order to obtain plaintiff-specific but for price indexes. See Salvaty Omnibus Decl., Ex. 2 at P 34. The resulting difference between the plaintiff's specific but for price, and the actual price paid by plaintiff during the conspiracy period, is the amount of the overcharge caused by defendants' anticompetitive activity (i.e., plaintiff's damage amount). Id. at P 35.

For Sun, the results of Dr. White's analysis indicate that Sun's total weighted average overcharge percentage during the conspiracy period was 50%. Id. at P 39. This weighted average percentage takes into account the fact that Sun's purchases from the defendants were relatively larger during the months with the highest **[**100]** overcharges. Id. Sun's simple non-weighted average overcharge percentage during the conspiracy period was 31%. Id.

As noted at the outset, defendants attack this expert testimony on three fronts, arguing (1) that neither expert analyzes or even opines whether defendants actually restrained output during the conspiracy period on a market-wide basis; (2) that neither expert analyzes or opines whether defendants fixed benchmark prices so as to affect price on a market-wide basis; and (3) that Dr. Marshall bases his testimony on unfounded assumptions, fails to establish that the market characteristics he identifies actually functioned the way he claims, and that even if Dr. Marshall's theory is credited, it only explains that there is a relationship between the Target OEMs' DRAM prices and plaintiff's DRAM prices -- not that defendants' conduct actually caused an increase in plaintiff's DRAM prices.

---

[16] The primary difference between Dr. Marshall's testimony and Dr. White's testimony is that, while Dr. Marshall was asked to determine *whether* defendants' unlawful conduct had an effect on plaintiff's purchase of DRAM (i.e., caused an injury to plaintiff), Dr. White was asked to determine the actual *extent* of that effect (i.e., the amount of damage). Thus, Dr. Marshall's testimony goes purely to the causation issue, while Dr. White's testimony is primarily directed at the damages issue, but is nonetheless relevant to causation to the extent it necessarily proves the fact of injury.

See, e.g., Def. Omnibus MSJ Br. at 13:22-23; 14:9-18 (conspiracy to reduce output necessary to raise market-wide prices); id. at 17:8-15; 17:21-23 (alternatively, plaintiff's injury depends on existence of successful conspiracy to raise benchmark prices). For the following reasons, however, **[**101]** the court finds that these arguments fall short of demonstrating plaintiff's inability to establish a genuine dispute of material fact as to causation.

As to defendants' first argument, the court has already noted that plaintiff is not legally required to prove defendants' participation in a supply reduction as an element of causation. As such, and as plaintiff points out, plaintiff's experts cannot be faulted for failing to demonstrate that a supply reduction was the actual mechanism by which industry-wide prices were raised (provided, however, that the experts demonstrate that defendants' conduct was a material cause of plaintiff's injury). Notwithstanding this observation, however, the court finds that plaintiff has, in fact, introduced evidence in support of a supply reduction. Dr. Marshall, for example, does actually opine that, based on his review of the documents and deposition testimony in the case, "defendants engaged in a variety of supply restrictions." See Salvaty Omnibus Decl., Ex. 25 at PP 123-24. Such supply restrictions "include temporary reductions in production and the withholding of inventory from customers." Id. In support thereof, Dr. Marshall relies on several **[**102]** email communications among the various defendants purportedly indicating defendants' decisions to reduce output. See id. at fn. 155. Furthermore, plaintiff also independently points to the factual evidence in the case, asserting that it corroborates the expert testimony. See Cross Omnibus Opp. Decl., Ex. 180 (internal Hynix email); Ex. 176 (handwritten Hynix notes); Ex. 172 (internal Elpida presentation noting that "supply has been reduced"); **[*1202]** Ex. 174 (Micron email acknowledging "current shortage" due primarily to "capacity utilization in the industry"); Ex. 50 (De Dios testimony noting there are "numerous different ways of adjusting supply to influence price").

Defendants respond to plaintiff's showing by pointing out Dr. Marshall's contradictory testimony stating that he did "not have an opinion regarding the existence of an output restraint in the marketplace." See Salvaty Omnibus Decl., Ex. 26 at 200:14-16. They also look to the factual evidence for support, arguing that no supply reduction took place because the defendants expanded output and were operating at 100% of capacity. See id. at Exs. 42-43 at 147:1-4, Ex. 45 at 138:17-39:5; Ex. 46 at 136:16-18, Ex. 48 at 74:4-5; see also **[**103]** (Samsung plea). Their expert testimony, too, concludes that no supply restriction took place. See, e.g., id., Ex. 12 at 61-62.

These contrasting views and evidence constitute a disputed issue of fact as to the presence of a supply restriction in the DRAM market carried out by defendants during the alleged time frame. Although defendants take issue with the nature of the documentary evidence cited by Dr. Marshall in his report and point out Dr. Marshall's failure to consider all "other evidence" supporting the lack of a supply restriction in the DRAM marketplace (e.g., actual production data or production decisions), see Def. Omnibus MSJ Br. at 14, n. 13, these are challenges that must ultimately be decided by the trier of fact. Notably, defendants have not argued any manifest failure in Dr. Marshall's methodology, or otherwise attacked the admissibility of his opinion.

A similar analysis also applies to defendants' second argument -- i.e., that the expert testimony fails to establish causation because it does not opine whether defendants fixed benchmark prices so as to affect a market-wide price increase that injured plaintiff. As a preliminary matter, the court again notes that plaintiff **[**104]** is not, in the first instance, necessarily required to prove the existence of defendants' efforts to fix benchmark prices as a legal element of their claim. However, as is the case with the supply restriction argument, plaintiff nonetheless targets as much. Specifically, Dr. Marshall opines that defendants were able to institute industry-wide price increases by conspiring to raise "spot prices" as a precursor to contract prices, and that combined with the observable characteristics of the DRAM industry (e.g., standardized nature of DRAM, price transparency, well-established sales channels, and the use of most favored customer clauses), it would have been difficult for defendants to raise prices to one set of buyers without raising prices industry-wide -- recognition of which in fact led defendants to fix industry-wide prices. See Salvaty Omnibus Decl., Ex. 25 at PP 14-15, 150; id. at P 121 (defendants "discussed market-wide prices" and "recognized that they needed to increase spot market prices in order to increase contract prices, and numerous documents also indicate that the defendants coordinated on spot market pricing"); see also, e.g., id., Ex. 25 at PP 134-165 (discussing characteristics **[**105]** of DRAM industry allowing for spot prices and contract prices to influence industry prices); see also Cross Omnibus Opp. Decl., Ex. 120 at P 6; Ex. 133. Plaintiff also argued in its opposition and at the hearing on the motion that the Target OEM prices themselves constituted a "benchmark" price from which plaintiff's prices were derived, a fact further corroborated by the factual evidence, and Dr. Marshall's analysis correlating plaintiff's prices with Target OEM prices. See, e.g., Cross Omnibus Opp. Decl., Ex. 56 at 169:23-170:1 (Hynix admission that "Apple was a benchmark price for [pricing] information for Sun"); Ex. 24 at 64 n. 129; Ex. **[*1203]** 25 ("Let's make every effort to make Sun price to be in line with the current price for other MNA customers"); Ex. 38 (admitting that a price increase to IBM would also raise the price at Sun); Ex. 80 ("we are raising sync DRAM price per the changes in price to PC OEM customers").

Defendants respond that Dr. Marshall's testimony that defendants "could not raise the named OEMs' prices without also raising spot market prices" is based on pure conjecture, as it is unsupported by any affirmative evidence of that spot market prices were actually fixed. **[**106]** See, e.g., Salvaty Omnibus Decl., Ex. 25 at P 150. Moreover, to the extent that Sun contends that the Target OEM prices were benchmark prices, defendants note that Dr. Marshall himself expressly disavowed this very theory in his reports. Id., Ex. 24 at PP 28, 127. As to his views on the characteristics of the DRAM market, defendants also dispute the conclusions he reaches regarding the effect those characteristics had on industry-wide prices. Salvaty Omnibus Decl., Ex. 25 at P 157, Ex. 26 at 221:5-224:22. Dr. Marshall ignores, for example, the fact that most favored customer clauses only required the matching of lower prices for purchases of "like quantities of substantially comparable products." See Def. Omnibus MSJ Br. at 24:21-25:6. Sun, however, purchased DRAM that was entirely distinct from the DRAM purchased by the Target OEMs, thereby making it impossible for plaintiff to demonstrate any link between the DRAM prices paid by the Target OEMs and those paid by plaintiff. Salvaty Omnibus Decl., Ex. 10 at Ex. 27; Ex. 12 at PP 17-19.

As with the supply reduction issue, the court finds that the parties' contrasting arguments and evidence constitute disputed issues of material fact. **[**107]** Although defendants may raise valid challenges to the nature of the evidence underlying the expert opinions regarding the existence of a conspiracy to fix benchmark prices, the jury must have the final say over the weight to be given each party's showing. For purposes of summary judgment, plaintiff has come forward with sufficient circumstantial and expert evidence to create a triable issue of fact as to whether defendants' conduct affected benchmark prices for DRAM which in turn raised prices industry-wide.

Finally, defendants' third argument -- i.e., that Dr. Marshall's testimony rests on unfounded assumptions and even if credited, only explains that there is a relationship between the Target OEMs' DRAM prices and plaintiff's DRAM prices, not that defendants' conduct actually caused an increase in plaintiff's DRAM prices -- also fails. First, to the extent defendants take issue with the experts' reliance on the conduct admitted by certain defendants in their guilty pleas in 'assuming' the existence of a price-fixing conspiracy aimed at the Target OEMs, rather than independently proving such conduct, the court finds this objection meritless. The guilty pleas are properly in evidence, **[**108]** and the experts are entitled to base their opinions on the facts established therein. To the extent defendants take issue with those facts, they are entitled to dispute them at trial. However, the experts' reliance thereon does not render their testimony objectionable as a matter of law.

Second, defendants' argument fails because, properly read, Dr. Marshall's testimony *does* undertake an explanation for whether and how defendants' price-fixing conspiracy with respect to the Target OEMs could have artificially raised prices on an industry-wide basis. Specifically, Dr. Marshall's testimony opines: that based on a visual understanding of the relationship between DRAM pricing for Target OEMs and plaintiff, and furthermore on the results of regression analyses **[*1204]** that confirm a closely correlated relationship between Target OEM pricing and plaintiff's pricing, and based further on the documents in evidence demonstrating a conspiracy that extended beyond simply the Target OEMs, that DRAM pricing for Target OEMs moved together with plaintiff's DRAM prices; and that, when the nature of the DRAM industry is considered together in conjunction with this closely correlated relationship, it would not **[**109]** have been economically plausible for defendants to restrict their DRAM price-fixing conspiracy to the Target OEMs. Rather, defendants' conspiracy would have affected the entire industry.

This expert testimony warrants presentation to a jury. While defendants correctly note that correlation testimony -- relied on heavily by Dr. Marshall -- does not equal causation, the court is not persuaded that Dr. Marshall's correlation analysis is employed as a catch-all substitute for causation here. For when taken in conjunction with the totality of all the other evidence submitted by plaintiff, Dr. Marshall's causation theory is supported by more than just the correlation analysis. Defendants, of course, are entitled to cast doubt on the quantity and quality of the testimony and evidence at trial. As a matter of law, however, plaintiff's showing as to causation is not so insufficient as to justify a grant of summary judgment. See, e.g., *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042 (9th Cir. 1987)*("If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury"); *Perkins v. Standard Oil, 395 U.S. 642, 648, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*.

In **[**110]** sum, and although defendants have made a valiant showing to the contrary, the court concludes that plaintiff has come forward with a sufficiently plausible theory -- by way of the expert testimony and the circumstantial evidence -- to create a triable issue of fact as to whether defendants' conduct vis-a-vis plaintiff and/or the Target OEMs could have raised prices to plaintiff directly or through industry-wide effect.

3. Proximate Cause

Finally, defendants contend that, even if the court finds that plaintiff has adequately presented a material issue of fact as to causation, plaintiff's theory of causation (and the proof going to it) should still be considered too remote, as a matter of law. After all, defendants note that courts have generally held that not just causation, but proximate causation, is necessary to state a claim for antitrust damages. See, e.g., *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 (9th Cir. 1999)*. Thus, a direct relationship between the injury and the alleged wrongdoing is required. See, e.g., *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 701 (9th Cir. 2001)*. To that end, the basic problem **[**111]** with plaintiff's theory, say defendants, is that causation here is not based on any price-fixing activity aimed directly at plaintiff but rather is based on the fact that defendants' conspiracy to fix prices to Target OEMs *in turn* caused an increase to plaintiff's prices, which increase was due *in turn* to the market forces affecting prices and the characteristics of the DRAM market. See Def. Omnibus MSJ Br. at 29:18-21. This theory depends on the operation of generic market forces rather than defendants' conduct, and furthermore fails to articulate any chain of causation between defendants' conspiracy and plaintiff's injury vis-a-vis these market features. See id. at 29:22-27.

Plaintiff, in opposition, does not dispute the proximate causation requirement, but states that proximate causation is satisfied **[*1205]** in price-fixing cases by proof that a plaintiff's prices are affected by a conspiracy, regardless whether the defendants' conduct is directed primarily at a different set of products or customers. This is the case here: plaintiff has demonstrated, through its expert testimony and the evidence, that defendants intentionally communicated with each other in order to artificially inflate **[**112]** plaintiff's prices, kept plaintiff's prices in line with Target OEM prices, and used Target OEM prices either to negotiate higher prices with plaintiff when Target OEM prices increased, or to resist plaintiff's attempts to secure lower prices. Moreover, plaintiff's note that there is nothing in Dr. Marshall's testimony or analysis that suggests that plaintiff's injuries were derivative of the Target OEMs' injuries, or even that plaintiff's pricing was entirely dependent on the pricing decisions for the Target OEMs. Furthermore, plaintiff has submitted evidence demonstrating that it *has* been individually targeted.

Plaintiff has the better argument here. Preliminarily, it is true that proximate causation is required for plaintiff's state antitrust claim under the Cartwright Act (even if not explicitly required as such for plaintiff's Sherman Act claim). Even if proximate causation must be shown, however, plaintiff's causation theory satisfies this standard. Dr. Marshall does not opine, as defendants suggest, that plaintiff's increased price was caused by the Target OEMs' increased price and generic market forces. Rather, Dr. Marshall's testimony is (as noted above) that defendants' conspiracy **[**113]** to raise prices to the Target OEMs actually reached farther than the Target OEMs and encompassed plaintiff, and that proof of the conspiracy's effect on plaintiff is corroborated by the relationship between Target OEM pricing and plaintiff's DRAM pricing over time, as well as the presence of certain factors in the DRAM industry that would have made it economically implausible for the defendants to limit their price-fixing conspiracy solely to the Target OEMs. While the distinction between defendants' characterization of Dr. Marshall's testimony and Dr. Marshall's actual testimony is a subtle one, this does not make it insignificant. It is the difference between a theory that hinges plaintiff's pricing primarily on factors outside defendants' control, and a theory that properly hinges plaintiff's pricing on defendants' actual conduct. Thus, the court views plaintiff's causation theory as one that presents a sufficiently direct causal link between defendants' conduct and plaintiff's injury to pass the proximate cause hurdle.

Furthermore, to the extent that defendants make the passing argument that plaintiff's causation theory is really an impermissible umbrella theory in disguise, the **[**114]** court rejects this contention. The umbrella theory of liability is essentially a "consequential damages theory." See *In re Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1339 (9th Cir. 1982)*. This theory is implicated when a plaintiff seeks recovery from price-fixing defendants, on the basis of purchases that the plaintiff made from *non-conspiring competitors* of the defendants. In essence, the plaintiff pursuing this theory contends that defendants' successful price-fixing conspiracy created a "price umbrella" under which non-conspiring competitors of defendants raise their prices to a level at or near the fixed price set by the conspiring defendants. A successful umbrella liability theory thus seeks to hold price-fixers liable for harm allegedly flowing from their illegal conduct even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions. See id.

Many courts, including the Ninth Circuit, have rejected umbrella liability theories. Indeed, in In re Petroleum Prods. **[*1206]** Antitrust Litig, the Ninth Circuit held that it had "little hesitance in concluding that the limitations recognized in Illinois Brick bar umbrella **[**115]** claims in the context of the multi-tiered distribution chain alleged" in the case. *Id. at 1340*. The court explicitly reserved judgment, however, as to whether "in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory." See *id. at 1340*.

Defendants would now have the court step into the opening created by the Ninth Circuit's refusal to consider the umbrella liability theory in situations involving a single level of distribution and a single class of direct purchasers (as is the scenario here), and conclusively decide its legal impropriety. However, aside from the fact that prudence counsels restraint, there is also the fact that defendants' invitation presupposes that an umbrella theory of liability is, in fact, actually being asserted. Yet, as plaintiff points out, this is not the case. Plaintiff is seeking damages based on purchases made from the allegedly conspiring defendants in this case only -- *not* based on purchases made from any non-conspiring competitors of defendants. While true that several of the defendants **[**116]** named in Sun's lawsuit were not named in the guilty pleas that affirmatively establish the existence of a price-fixing conspiracy as to the Target OEMs, this has no bearing on the instant action. Plaintiff has sued *all* the named defendants here as co-conspirators who *each* participated in an alleged conspiracy to fix DRAM prices, which conspiracy injured plaintiff. It is up to plaintiff to demonstrate that each defendant did, in fact, participate in such a conspiracy. Nonetheless, plaintiff has not moved on this issue, and it must be reserved for trial. Assuming this conspiracy among each and every named defendant, however, no umbrella theory of liability is even implicated.

Finally, the court disposes of defendants' argument that analysis of certain AGC factors also demonstrates that plaintiff's claims are too remote. See *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 534-35, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*("AGC") (establishing multi-factor test for use in determining antitrust standing). While not totally clear, defendants appear to imply that the AGC factors are equivalent to the Ninth Circuit's proximate cause requirement, since they guarantee that an antitrust plaintiff's **[**117]** injuries may not be too remote from defendants' conduct. For reasons already discussed, however, plaintiff raises a material dispute of fact regarding causation and in doing so, also raises a material dispute of fact regarding the directness of plaintiff's injury.

Accordingly, for all the above reasons, the court rejects defendants' arguments that plaintiff's theory of causation fails on remoteness grounds.

* * *

In sum, defendants have failed to persuade the court that summary judgment as to plaintiff's Sherman Act claim is warranted for lack of causation. As such, defendants' summary judgment motion on this ground is DENIED. Since the analysis for injury and causation is similar for plaintiff's Cartwright Act and Unfair Competition Law claims, and in view of the court's conclusions regarding defendants' proximate causation arguments, defendants' motion is also DENIED with respect to these additional claims. In so ruling, the court also denies defendants' alternative motion for summary adjudication as to limited issues encompassed herein.

[*1207] F. Motion to Exclude the Testimony of Dr. Halbert White

HN20[] *FRE 702* governs the admission of expert opinion testimony. It provides that, where "scientific, **[**118]** technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness may be called upon to testify accordingly. See *Fed. R. Evid. 702*. Pursuant to the Supreme Court's interpretation of the rule, expert testimony must be both relevant and reliable to be admissible. See, e.g., *Daubert v. Merrell Dow Pharm., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*; *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Expert opinion testimony is relevant if the knowledge underlying it has a "valid … connection to the pertinent inquiry," and it is reliable if the knowledge underlying it "has a reliable basis in the knowledge and experience of [the relevant] discipline." *Daubert, 509 U.S. at 592*; *Kumho Tire Co., 526 U.S. at 149*. Trial courts must exercise reasonable discretion in evaluating and in determining how to evaluate the relevance and reliability of expert opinion testimony.

Defendants here seek to exclude the testimony of plaintiff's damages expert, Dr. White, claiming that Dr. White's testimony falls short of the relevant standard. They make three arguments in this regard: (1) Dr. White's analysis fails to demonstrate that market conditions **[**119]** were the same in the benchmark and cartel periods; (2) Dr. White improperly excludes from consideration any factors that were under defendants' control (e.g., supply and demand factors, capacity utilization); and (3) Dr. White's methodology is unreliable.

Preliminarily, a brief review of Dr. White's testimony is in order. As noted in connection with defendants' omnibus motion for summary judgment regarding causation, Dr. White is charged by plaintiff with establishing the extent to which all the opt-out plaintiffs were overcharged as a result of defendants' conspiracy. Generally, Dr. White opines that a market-wide conspiracy resulted in overcharges as high as 50% to plaintiffs, between August 1998 and June 2002. To do this, he first assumes the existence of the conspiracy set forth in the plea agreements, with the exception of the conspiracy's start date, which Dr. White assumes was either April 1, 1999 or August 1, 1998. Then he employs a three step process. First, Dr. White measures the impact of the alleged conspiracy on the prices paid for DRAM chips and modules by the Target OEMs. To do so, Dr. White uses regression analysis to obtain a prediction equation (based on DRAM sales **[**120]** and price data during the benchmark periods) for the Target OEMs' but for prices during the conspiracy period. The prediction equation is what allows Dr. White to arrive at a price index of the Target OEMs' but for prices. Second, Dr. White estimates the statistical relationship between the DRAM prices actually paid by the plaintiff, and the DRAM prices actually paid by the Target OEMs. Specifically, he uses regression analysis to create a price index for the plaintiff that relates the plaintiff's DRAM prices in each month to the Target OEMs' DRAM prices in the same and nearby months. Finally, Dr. White applies this estimated statistical relationship between the Target OEMs' prices and plaintiff's prices to the Target OEMs' but for price index (from step 1), in order to obtain plaintiff-specific but for prices.

Defendants first contend that Dr. White's analysis fails to demonstrate that market conditions were the same in the benchmark and cartel periods. Defendants' argument is premised on Ninth Circuit authority, which defendants claim **[*1208]** holds that use of a "before and after" approach to determining damages requires "some showing that the market conditions in the two periods were similar **[**121]** but for the impact of the violation." See, e.g., *Pacific Coast Agricultural Expert Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975)*("Plaintiffs' method of measuring damages, known as the 'before and after' theory, may be used only where there has been some showing that the market conditions in the two periods were similar but for the impact of the violation"); see also Areeda & Hovenkamp, ***Antitrust Law*** at 384-85 (requiring that changes in market conditions between the benchmark and conspiracy periods must be "taken into account in estimating the 'but for' prices during the conspiracy period'"). In contravention of this requirement, argue defendants, Dr. White assumes rather than proves that market conditions were comparable during the benchmark and conspiracy periods, despite the fact that Dr. White himself concedes that the DRAM industry was more competitive and less competitive at times. See Declaration of Joshua Stambaugh re Motion to Exclude ("Stambaugh Decl."), Ex. 8 at PP 272-73; Ex. 21 at 78-79.

Generally, defendants have correctly cited Ninth Circuit authority holding that, ***HN21***[] where the before and after approach is undertaken, an expert must account for differences **[**122]** in market conditions when measuring damages across benchmark and conspiracy periods. See *Pacific Coast, 526 F. 2d 1196*. However, plaintiff has also correctly noted that neither the cases relied on by defendants, nor Areeda & Hovenkamp, stated as much in connection with a "reduced form price equation" specifically -- which is what Dr. White employs here through use of his "prediction equation." In a reduced form price equation, price is "expressed as a function of supply and demand variables." And as plaintiff points out, where this type of multiple regression analysis is used, "plaintiff has controlled for changes in demand and supply determinants of price, and the resulting prediction on price during the conspiracy period takes into account influences other than the conspiracy that could serve to increase the … prices." See Areeda & Hovenkamp at 386. Thus, to the extent Dr. White's prediction equation takes supply and demand variables into account as a function of price, it is acceptable.

More importantly, plaintiff correctly points to several examples in which Dr. White's testimony does, in fact, take market conditions between the benchmark and conspiracy periods into account. Dr. **[**123]** White's analysis uses several production indices related to end products for DRAM (e.g., end products reflect production issues), and furthermore includes several variables related to the underlying costs of manufacturing DRAM. See Stambaugh Decl., Ex. 1 at PP 216-17; Ex. 2, Appendix E. In addition, Dr. White undertook a separate study of exogenous factors -- e.g., boom and bust cycles, earthquakes, other production influences -- in his rebuttal report, precisely in order to answer defendants' criticisms on this point. Even after undertaking this alternative analysis, Dr. White found that the alternative analysis verified his own initial results. See id. at Ex. 1 at P 218; Ex. 1 at Appendix G at PP 355-81.

In sum, the law suggests that it is permissible for Dr. White to use a reduced form price equation, which expresses price as a function of supply and demand, in order to control for changes in market conditions. And significantly, Dr. White's initial analysis and the rebuttal analysis both indicate that Dr. White has actually attempted to control for certain changes in market conditions. Thus, to the extent that defendants challenge the accuracy or propriety of these variables, it **[**124]** is an issue **[*1209]** that goes to the weight, rather than the admissibility, of Dr. White's testimony.

Defendants' second argument in support of exclusion centers on Dr. White's purported failure to consider any factors that were under defendants' control. According to defendants, Dr. White assumes the conspiracy admitted by certain defendants, and leaps from there to a model in which *all* of defendants' conduct -- including unilateral decisions related to output, for example -- is presumed to be tainted by the conspiracy. In doing so, say defendants, Dr. White erroneously lumps together legal and illegal conduct. See *Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1371 (9th Cir. 1992)*(exclusion appropriate where damages study fails to distinguish between legal and illegal conduct). Indeed, defendants note that their own experts and witnesses have introduced testimony that numerous changes in capacity, yield and market conditions arising during the conduct period were responsible for any restrictions in output -- not any conspiratorial conduct. Yet, Dr. White admits that he attributes any impact or changes in output to the conspiracy, and not to any other sources. This failure to make allowance **[**125]** for unilateral decisions affecting DRAM supply and prices, warrants exclusion.

Without challenging the legal principle that legal and illegal conduct should not be lumped together, plaintiff responds that defendants' criticisms do not go to the admissibility of Dr. White's testimony, merely the weight. After all, the court in In re Linerboard considered and rejected the very same argument that defendants are making here, and admitted Dr. White's same methodology. See *In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666 (E.D. Pa. 2007)*.

The court agrees with plaintiff on this point. Several economic studies support the argument that, in order to generate a reliable set of plaintiff but for prices, experts should not include any factors that were themselves tainted by the conspiracy. See Pl. Opp. BR. Re Dr. White's Testimony at 12:4-8. Hence, Dr. White purported to omit the factors under the conspirators' control, so as to exclude any effects of the conspiracy itself in generating plaintiff's but for prices. This seems reasonable. It is also not the same as improperly *including* both legal and illegal conduct. Rather, Dr. White's analysis simply takes out all of defendants' conduct altogether. **[**126]** Moreover, while not controlling, it is at least instructive that the *In re Linerboard* court allowed Dr. White's testimony to come in over the precise same argument that defendants are making here. And finally, while defendants may have very valid points regarding the importance of outside influences -- like changes in capacity and market conditions -- in raising prices (thereby leading to the conclusion that defendants have not caused an industry-wide conspiracy at all), these are points that go to the weight, and not the admissibility of Dr. White's testimony. Accordingly, the court rejects defendants' second argument in support of exclusion.

Finally, the court reaches the same conclusion with respect to defendants' third and final argument in support of exclusion -- i.e., that Dr. White's second step, in which he uses the Target OEM but for prices to predict plaintiff's but for prices, is unreliable and inadmissible. Defendants' primary objection to the reliability of Dr. White's analysis seems to be that Dr. White's second step generates huge damages to plaintiff even when the conspiracy had no effect on the Target OEMs' prices. This is nonsensical enough, say defendants, to lead **[**127]** to exclusion. Moreover, defendants note that Dr. White's second step finds no support among accepted methodologies and conflicts with what Dr. **[*1210]** White himself states is the generally accepted approach.

Defendants' arguments are interesting, but not necessarily grounds for exclusion. The gist of their argument is that Dr. White should have predicted plaintiff's but for prices directly, rather than using the Target OEMs' but for prices to generate the plaintiff's but for prices (based on his analysis of the relationship between Target OEM prices and plaintiff prices). If Dr. White had simply repeated his first step -- which *is* generally accepted -- in order to directly estimate plaintiff's but for prices, defendants note that plaintiff would have ended up with huge undercharges for plaintiff, not overcharges. Even if defendants are right, however, this is the type of criticism that goes to the weight of Dr. White's testimony. This is because defendants do not do enough to demonstrate that Dr. White's second step is unreliable, or otherwise totally at odds with the scientific literature. Plaintiff submits, for example, citations to several instances in which a two step forecasting method **[**128]** has been used, even when a single step approach was available. According to these citations, the two step forecasting method has been used to predict international countries' growth rates, real interest rates, GDP rates, as well as other economic factors. See Declaration of David Cross re Dr. White Opp. ("Cross Exclusion Opp. Decl."), Exs. 20-24. Furthermore, plaintiff has also pointed to case law where similar two-step forecasting methods in the antitrust context specifically was admitted -- the *In re Linerboard* and *In re Vitamins Antitrust Litig*. cases. See id. at Exs. 25, 34. While these cases, as noted before, are not controlling, they are instructive.

Moreover, there is the additional point that Dr. White's use of the two step method was undertaken with the specific intent and belief that this method, under the facts of this case, is "the most reliable way to obtain the but-for price estimates" for plaintiff. See id. at Ex. 4 at 64. Thus, Dr. White's use of the second step, far from being undertaken in some unscientific manner, is explained as a means of *increasing* reliability. While defendants may understandably attack this method as one that decreases reliability, such an attack **[**129]** goes to the weight, and not the admissibility of the approach.

It should also be noted that those cases that *do* hold experts' econometrics analyses inadmissible are limited to cases in which the expert had blatant failures in methodology -- e.g., they ran only simple regressions rather than complex regressions, or totally omitted to include supply and demand factors as part of the methodology. See, e.g., *In re Methionine Antitrust Litig., 2003 U.S. Dist. LEXIS 14828, 2003 WL 22048232 (N.D. Cal. 2003)*(expert failed to run multiple regressions). None of these deficiencies is evident here.

Finally, it is also worth mentioning, as plaintiff points out, that Dr. White conducted ten alternative methods of analysis, in response to defendants' criticisms of Dr. White's initial analysis. All of them corroborate Dr. White's initial analysis. Defendants' challenges to these are fairly generic, and generally are predicated upon the principle that Dr. White's recourse to alternative analyses still does not demonstrate that his initial analysis is valid. However, to the extent these additional analyses tend to corroborate Dr. White's initial testimony, they support a finding of reliability.

In sum, defendants have presented no **[**130]** arguments that establish sufficient grounds for outright exclusion of Dr. White's testimony. While they may have raised valid criticisms and concerns with respect to Dr. White's analysis, these are all criticisms and concerns that go to the **[*1211]** testimony's weight and not its admissibility. Plaintiff, moreover, has done an acceptable job of demonstrating that Dr. White's analysis is based on reliable principles and methodologies.

Defendants' motion to exclude the expert testimony of Dr. White is accordingly DENIED.

G. Evidentiary Objections

Defendants have filed numerous evidentiary objections in connection with each motion discussed herein, asserting several conceivable grounds (hearsay, lack of foundation and/or authentication, relevance, etc.) for objection wherever possible. In addition, defendants filed a motion to strike in response to *plaintiff's* response to defendants' evidentiary objections regarding their motion to exclude the testimony of Dr. Halbert White. In view of the sheer number of objections at issue, the court declines to review each and every exhibit as a matter of course. Rather, the court has reviewed defendants' objections -- and plaintiff's response thereto -- in connection **[**131]** with those exhibits that the court has actually relied upon in its analysis and decision.

As a preliminary matter, the court notes that many of defendants' objections are overly broad. In particular, while having objected to a majority of exhibits on hearsay grounds, defendants have largely failed to detail the actual statements that purportedly qualify as hearsay. As plaintiff points out, this is a deficiency that makes it difficult, if not impossible, for the court to assess defendants' hearsay objections -- and any potential hearsay objections -- at this stage. To the extent that defendants have also objected to plaintiff's exhibits on grounds of relevance and lack of foundation and/or authentication, the court has also found the objections unpersuasive with respect to the exhibits relied on by the court for the purposes of this order.

With this in mind, the court hereby OVERRULES defendants' objections to certain exhibits, as follows:

(a) defendants' objections to Exhibits 12-13, 18-19, 28, 37-39, 53, and 74 of the Cross Declaration, submitted in support of Sun's opposition to defendants' motion for partial summary judgment as to external manufacturer purchases, are OVERRULED;

(b) **[**132]** defendants' objections to Exhibits 3, 5, and 10-11 of the Cross Declaration submitted in support of plaintiff's opposition to the motion to dismiss certain claims for lack of subject matter jurisdiction under the FTAIA, are OVERRULED;

(c) defendants' objections to Exhibits 11-3 of the Cross Declaration submitted in opposition to defendants' motion for summary judgment based on purchases from Mitsubishi entities, are OVERRULED;

(d) defendants' objections to Exhibits 1-19, 20, 23-25, 38, 41, 5-56, 62, 64, 67-71, 80-83, 120, 172, 174, 176, and 180 of the Cross Declaration in support of Sun's opposition to defendants' motion for summary judgment and, in the alternative, summary adjudication, are OVERRULED; and

(e) defendants' objections to Exhibits 8-25 and 26-34 of the Cross Declaration submitted in opposition to defendants' motion to exclude the testimony of Dr. Halbert White are OVERRULED.

To the extent, however, that defendants have additionally filed a motion to strike the supplemental declaration of Dr. White that was submitted in connection with plaintiff's response to defendants' evidentiary objections, the motion to strike is GRANTED, as the filing of that supplemental declaration **[**133]** violates the deadline for **[*1212]** completing expert discovery that was imposed in this case.

Finally, as intimated above, to the extent defendants have made evidentiary objections to exhibits not relied on by the court herein, the court declines to rule on the admissibility of those exhibits. The parties remain free to raise any objections thereto at trial, if necessary.

H. Requests for Judicial Notice

Both sides have filed requests for judicial notice of various unrelated court decisions. <u>See</u> Plaintiffs' Request for Judicial Notice Regarding Case Materials from in re Vitamins and In re Linerboard; <u>see also</u> Defendants' Request for Judicial Notice ISO Motion to Exclude the Testimony of Plaintiffs' Expert Witness Halbert White.

The court hereby GRANTS both sides' requests for judicial notice, as it finds that the documents for which each party seeks judicial notice present a proper basis for such a request, pursuant to *Federal Rule of Evidence 201*.

I. Conclusion

For all the foregoing reasons, the court hereby GRANTS summary judgment in part and DENIES summary judgment in part, as follows: (1) defendants' motion for partial summary judgment as to Sun's claims based on purchases made by Sun's external **[**134]** manufacturers is GRANTED; (2) defendants' motion for summary judgment as to Sun's claims based on purchases of DRAM from defendant Mitsubishi entities is GRANTED; and (3) defendants' omnibus motion for summary judgment or in the alternative, for summary adjudication, is DENIED. The court furthermore GRANTS defendants' renewed motion to dismiss certain of Sun's claims for lack of subject matter jurisdiction, to the extent based on foreign DRAM purchases, and DENIES defendants' motion to exclude the expert testimony of plaintiff's expert, Dr. Halbert White.

IT IS SO ORDERED.

Dated: March 31, 2009

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

End of Document

Trident Holdings, LLC v. Great Wraps, Inc.

United States District Court for the Northern District of Georgia, Atlanta Division

March 31, 2009, Decided; March 31, 2009, Filed

CIVIL ACTION NO. 1:06-CV-3142

Reporter
2009 U.S. Dist. LEXIS 140229 *

TRIDENT HOLDINGS, LLC and AMERICAN CONSULTING CORPORATION, Plaintiffs, v. GREAT WRAPS, INC., ET AL., Defendants.

Subsequent History: Vacated by, in part, Reconsideration granted by *Trident Holdings, LLC v. Great Wraps, Inc., 2010 U.S. Dist. LEXIS 152553 (N.D. Ga., Sept. 22, 2010)*

Core Terms

Wraps, franchise, defendants', plaintiffs', summary judgment motion, alleges, material fact, antitrust, misrepresentations, costs, summary judgment, market power, franchisees, untruthful statement, training, estimate, tied product, fraud claim, terminated, statute of limitations, sales, opened, merger clause, amended complaint, damages, Sherman Act, representations, quotation, omission, marks

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A fact's materiality is determined by the controlling substantive law. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Summary Judgment, Burdens of Proof

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, *Fed. R. Civ. P. 56* mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Fed. R. Civ. P. 56(c)*. In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Fed. R. Civ. P. 56(c)*).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3[] Burdens of Proof, Movant Persuasion & Proof

The movant bears the initial responsibility of asserting, the basis for his summary judgment motion. However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely showing--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] Entitlement as Matter of Law, Appropriateness

After the movant has carried his burden, the party opposing summary judgment is then required to go beyond the pleadings and present competent evidence designating specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. While the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN5[] Contract Interpretation, Good Faith & Fair Dealing

Under Georgia law, every contract contains an implied duty of good faith and fair dealing. However, breach of this covenant does not give rise to an independent cause of action under Georgia law. A covenant of good faith is not an independent contract term that can be breached.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

HN6[] Burdens of Proof, Movant Persuasion & Proof

Under Georgia law, a party asserting fraud must show five elements: (1) a false representation or omission by defendant, (2) scienter, (3) intention to induce plaintiff to act or refrain from acting, (4) justifiable reliance, and (5) damage to plaintiff. A party challenging an assertion of fraud on a motion for summary judgment will succeed if it shows a lack of evidence as to only one of those elements.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN7[] **Contract Conditions & Provisions, Integration Clauses**

In Georgia, a valid merger clause precludes any subsequent claim of deceit based upon pre-contractual representations. A merger clause operates as a disclaimer, establishing that the written contract completely and comprehensively represents all of the parties' agreement and therefore bars plaintiffs from asserting reliance on the alleged misrepresentation not contained within the contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN8[] **Contract Conditions & Provisions, Integration Clauses**

Where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he has relied upon the other party's misrepresentation and his action for fraud must fail.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN9[] **Contract Conditions & Provisions, Integration Clauses**

A merger clause bars a fraud claim for contradictory prior or contemporaneous statements.

Contracts Law > Defenses > Affirmative Defenses > Fraud & Misrepresentation

HN10[] **Affirmative Defenses, Fraud & Misrepresentation**

Fraud must relate to an existing fact or a past event, not mere broken promises, unfulfilled predictions or erroneous conjecture as to future events.

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Requirements

HN11[] **Disclosure & Registration, Requirements**

A uniform franchise offering circular only required to disclose bankruptcies that were filed or discharged within the ten-year period preceding the disclosure document. *16 C.F.R. § 436.5(d)(1) (2007)*.

Business & Corporate Compliance > ... > Distributorships & Franchises > Business & Corporate Law > Distributorships & Franchises

Governments > Legislation > Statute of Limitations > Time Limitations

HN12[] **Businesses & Corporations, Distributorships & Franchises**

Under *Cal. Corp. Code §§ 31303* and *31304*, there is a one-year statute of limitations that requires a plaintiff to bring an action within one year of the discovery by the plaintiff of the violation.

Business & Corporate Compliance > ... > Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration

Governments > Legislation > Statute of Limitations > Time Limitations

HN13[] **Distributorships & Franchises, Disclosure & Registration**

Claims must be brought before the expiration of one year after the discovery by the plaintiff of the plaintiff of the facts constituting such violation, not after the plaintiffs' knowledge of the violation. *Cal. Corp. Code § 31304*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Opposing Materials

HN14[] **Burdens of Proof, Nonmovant Persuasion & Proof**

Conclusory allegations without specific supporting facts have no probative value and are not sufficient to defeat summary judgment.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

HN15[] **Causes of Action, Fraud & Misrepresentation**

A defendant's statements about support cannot rise to the level of an untrue statement under the California Franchise Investment Law. A statement must relate to an existing fact or a past event, not mere broken promises, unfulfilled predictions or erroneous conjecture as to future events. Furthermore, descriptions of a level of support cannot amount to an actionable representation of fact because they are inherently subjective and vague.

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

HN16[] **Termination, Good Cause**

The California Franchise Relations Act provides that no franchisor may terminate a franchise prior to the expiration of its term, except for good cause. *Cal. Bus. & Prof. Code § 20020* (1980). Good cause includes the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure the failure.

Business & Corporate Compliance > ... > Distributorships & Franchises > Business & Corporate Law > Distributorships & Franchises

Governments > Legislation > Statute of Limitations > Time Limitations

HN17[] **Businesses & Corporations, Distributorships & Franchises**

The statute of limitations for the Illinois Franchise Disclosure Act (IFDA) precludes a party from bringing an action to enforce any liability, unless it is brought within one year after the franchisee becomes aware of the facts or circumstances that give rise to the IFDA claim. *815 Ill. Comp. Stat. Ann. 705/27*.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

HN18[] **Fraud & Misrepresentation, Material Misrepresentations**

Because the false statements must relate to an offer or sale, no statement made after an agreement is signed can be considered.

Antitrust & Trade Law > Robinson-Patman Act

Evidence > Burdens of Proof > Allocation

HN19[] **Antitrust & Trade Law, Robinson-Patman Act**

To establish an action for price discrimination under the Robinson-Patman Act, a plaintiff must allege and prove that there were two actual sales at two different prices made by the same seller to at least two different purchasers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Evidence > Burdens of Proof > Allocation

HN20[] **Tying Arrangements, Sherman Act Violations**

A *15 U.S.C.S. § 1* claim has five elements: (1) a tying and a tied product, (2) evidence of actual coercion by the seller that in fact forced the buyer to purchase the tied product, (3) that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product, (4) anticompetitive effects in the tied market, and (5) involvement of a not insubstantial amount of interstate commerce in the tied product market. the first inquiry in any Sherman Act *§ 1* tying case is whether the defendant has sufficient market power over the tying product. Therefore, a plaintiff would have to establish that defendant had sufficient market power in the tying product to force the plaintiff to accept the tied product.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

Evidence > Burdens of Proof > Allocation

HN21[] **Antitrust & Trade Law**

In addition to establishing liability, plaintiffs challenging violations of the antitrust laws must also show that they have suffered antitrust injury, that is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Plaintiffs must show both an injury to themselves as a competitor and an injury to competition in general.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

HN22[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The United States Court of Appeals for the Eleventh Circuit has held that an injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Evidence > Burdens of Proof > Allocation

HN23[] **Actual Monopolization, Monopoly Power**

To establish monopolization, a plaintiff must show both possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Civil Procedure > Remedies > Costs & Attorney Fees

Civil Procedure > Sanctions

HN24[] **Remedies, Costs & Attorney Fees**

A party can recover expenses of litigation where the evidence reveals no bona fide controversy or dispute with regard to the defendant's liability.

Civil Procedure > Remedies > Costs & Attorney Fees

Civil Procedure > Sanctions

HN25[] **Remedies, Costs & Attorney Fees**

In he context of an award of litigation expenses, bad faith is more than bad judgment or negligence it requires a dishonest purpose and conscious doing of wrong.

Civil Procedure > Remedies > Costs & Attorney Fees

HN26[] **Remedies, Costs & Attorney Fees**

A recovery of expenses of litigation must be based upon evidence which shows more than a mere breach of contract.

Civil Procedure > Remedies > Costs & Attorney Fees

HN27[] **Remedies, Costs & Attorney Fees**

Expenses of litigation relate only to the transaction upon which the underlying action is based and refers to a time prior to the institution of suit, not defendant's conduct in defending the case.

Civil Procedure > Sanctions > Baseless Filings

HN28[] **Sanctions, Baseless Filings**

Fed. R. Civ. P. 11 sanctions are appropriate: (1) when a party files a pleading that has no reasonable factual basis, (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law, or (3) when the party files a pleading in bad faith for an improper purpose. *Fed. R. Civ. P. 11(b)*.

Civil Procedure > Sanctions > Baseless Filings

HN29[] **Sanctions, Baseless Filings**

Fed. R. Civ. P. 11(b) sets forth the underpinning standard upon which a motion for sanctions should be judged: by presenting to the court a pleading an attorney certifies that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information. In short, *Rule 11* requires an attorney to make a reasonable investigation to determine whether his claims are viable. *Fed. R. Civ. P. 11(b)(2)-(4)*

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

HN30[] **Baseless Filings, Frivolous Lawsuits**

The United States Court of Appeals for the Eleventh Circuit has noted that, before imposing sanctions, a court must determine whether the claims are frivolous and, if so, whether the person who signed the pleadings made a reasonable inquiry that would have revealed their frivolity. To satisfy that reasonable inquiry standard, an attorney must investigate both the facts and the law to determine if there is a reasonable basis for maintaining the action or position taken in the papers. An attorney acts in bad faith if he pursues claims that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound. If an attorney does not make a reasonable inquiry, the court must impose sanctions even if the attorney has a good faith belief that the claims were sound.

Counsel: [*1] For Trident Holdings, Llc, American Consulting Corporation, Plaintiffs, Counter Defendants: Mitchell J. Kassoff, LEAD ATTORNEY, Mitchell J. Kassoff, Attorney at Law, South Orange, NJ USA; Steven M. Kushner, LEAD ATTORNEY, Eugenia Wooten Iredale Fellows La Briola, LLP, Atlanta, GA USA.

For Kender Corporation, a California Corporation, Cns Ventures, Inc., a California Corporation, Consol Plaintiffs: Mitchell J. Kassoff, LEAD ATTORNEY, Mitchell J. Kassoff, Attorney at Law, South Orange, NJ USA; Steven M. Kushner, LEAD ATTORNEY, Eugenia Wooten Iredale Fellows La Briola, LLP, Atlanta, GA USA.

For Great Wraps, Inc., Mark Kaplan, Robert Solomon, Henry Strauss, Defendants, Counter Claimants: Steven C. Rosen, LEAD ATTORNEY, Office of Steven C. Rosen, Atlanta, GA USA.

For Sanjiv Kapur, Consol Defendant: Mitchell J. Kassoff LEAD ATTORNEY, Mitchell J. Kassoff, Attorney at Law, South Orange, NJ USA.

For Fellows Labriola Llp, Respondent: Anthony L. Cochran, Chilivis, Cochran, Larkins & Bever, LLP, Atlanta, GA USA; Christine L. Mast, Hawkins Parnell Thackston & Young, LLP-GA, Atlanta, GA USA.

Judges: JULIE E. CARNES, UNITED STATES DISTRICT JUDGE.

Opinion by: JULIE E. CARNES

Opinion

ORDER

This case is presently before the Court on defendants' **[*2]** Motion for Summary Judgment [232] and plaintiffs' Motions for Summary Judgment ([236], [237]). Defendants also have filed a Motion for Clarification [229] and a Motion for Sanctions [233]. The. Court has reviewed the record and the arguments of the parties and for the reasons set out below, concludes that defendants' Motion for Summary Judgment [232] should be **GRANTED**, defendants' Motion for Clarification [229] should be **DENIED**, defendants' Motion for Sanctions [233] should be **GRANTED**, and plaintiffs' Motions for Summary Judgment ([236], [237]) should be **DENIED** on Count One and **DENIED as moot** on Counts Two, Three, Four, Five, Six, and Ten.

BACKGROUND

This case arises out of a franchise dispute between plaintiffs Trident Holdings, LLC ("Trident") and American Consulting Corporation ("American"), developers of franchise areas ("area developers"), and defendant Great Wraps, restaurant franchisor. Trident is California corporation; American is an Illinois corporation; and Great Wraps is a Georgia corporation. (Am. Compi. [11] at ¶¶ 2-4.)

Great Wraps' relationship with American began in February 2004 when Kevin Parker ("Parker"), Great Wraps' Vice President of Operations, sent information **[*3]** to American about opening a franchise. (*Id.* at ¶¶ 8, 22-23.) On October 20, 2004, American and Great Wraps executed an Area Development Agreement ("Agreement") in which Great Wraps sold a Great Wraps franchise to American and required the latter to open stores and find franchisees to open additional stores. (*Id.* at ¶ 20; Solomon Aff. [191-6], Ex. A at ¶ 1.1.)[1]

Great Wraps' relationship with Trident began in June 2005, when Parker sent information to Trident about opening a franchise. (Am. Compl. [11] at ¶¶ 28-29.) On August 17, 2005, Trident and Great Wraps executed an Agreement

[1] Both parties frequently reference documents without providing a citation to the record or even making clear what document is being referenced. This sloppy citing makes it even more time-consuming for the Court to review the record. If the parties wish the Court to review the documents in future briefings, they must take the time to ensure that their citations are correct.

that sold a Great Wraps franchise to Trident and required Trident to open stores and find franchisees to open additional stores.[2] (*Id.* at ¶¶ 25--26; Solomon Aff. [191-6], Ex C at ¶ 1.1.)

American's Agreement required it to build stores within eight months of signing the Agreement. (Solomon Aff. [191-6], Ex. A at 1 2.1.) Trident's Agreement required it to build stores within ten months of signing the Agreement. (*Id.*, Ex. C at 9C 2.2.) Neither American nor Trident opened franchises within the required amount of time and they therefore violated the Agreements. (Defs.' Mot. for Summ. J. [232] at 1.) Both plaintiffs **[*4]** did, however, sell franchises to other parties and collect fees and royalties from Great Wraps for selling those franchises. (Solomon Aff. [191-6] at ¶¶ 14--16.) Though they were required to have their third-party franchisees open stores, their franchisees also failed to open stores during that time. (Defs.' Mot. for Summ. J. [232] at 1.) Trident and American both allege that many of defendants' actions and false representations caused them to be unable to open any stores within the specified amount of time. (*See generally* Am. Compl. [11].)

In April and September 2006, American was notified in writing of its breaches of its Agreement, and, in November 2006, Trident was likewise notified. (Solomon Aff. [191-6] at ¶¶ 10-11.) Great Wraps invited American and Trident to discuss changes to their Agreements. (*Id.* at ¶ 12.)

Rather than meeting with Great Wraps, plaintiffs filed Complaint [1] on December 29, 2006. (Defs.' Mot. for Summ. J. [232] at 3.) They sought damages against Great Wraps and several of its employees: Kenneth Chambers, former Director of Procurement and Logistics; Mark Kaplan, former Chairman of the Board of Directors; Christina Koestner, former Director of Franchise Development; **[*5]** Parker, Vice President of Operations; Jonathan Randel, former Director of Procurement and Logistics; Dan Reed, former Director of Franchise Development; Michael Rotondo, Vice President of Operations; Robert Solomon, President;-and Henry Strauss, a member of the Board of Directors.[3] (Am. Compl. [11] at ¶¶ 5-13.)

Plaintiffs alleged breach of contract; breach of'the covenant of good faith; fraud; violations of the California Franchise Investment Law ("CFIL"), California Franchise Relations Act ("CFRA"), and Illinois Franchise Disclosure Act ("IFDA"); antitrust violations of the Sherman Antitrust Act, Clayton Act, and Robinson-Patman Act; and expenses of litigation. (*See* Am. Compl. ¶¶ 176-294.)

In January 2007, Great Wraps terminated the Agreements. (Solomon Aff. [191-6] at ¶ 13.) Defendants filed a Motion for Summary Judgment [232], and plaintiffs filed Motions for Partial Summary Judgment ([236], [237]).

DISCUSSION

I. **Defendants' Motion for Clarification**

One of the motions pending is defendants' Motion for Clarification [229]. In February 2008, defendants filed Motions for Summary Judgment ([186], [191]) and Motions for Sanctions ([187], [192]). On May 15, 2008, plaintiffs filed a Motion to **[*6]** Reset the Time. Period for the Parties to File Motions for Summary Judgment [227] because defendants had just provided new documentary evidence ordered by the Magistrate Judge. The Court granted the motion [228] to extend the time frame and denied without prejudice defendants' pending summary judgment and sanctions motions ([186], [187], [191], [192]).

---

[2] The two Agreements are essentially identical in all material ways, except as noted in the Order.

[3] The Court approved the dismissal of Rotondo on May 21, 2007 (Order [66]) and of Chambers, Koestner, Parker, Reed, and Randel on June 18, 2008 (Stipulation of Dismissal [231]). Therefore, the remaining individual defendants are Kaplan, Solomon, and Strauss.

Defendants then filed a Motion Seeking Clarification [229] of the Court's Order [228]. Defendants said that they planned to file identical summary judgment motions and reply briefs and sought clarification that the plaintiffs had to file response briefs identical to their previous ones ([199], [200]).

As the entire purpose of the extension was to allow plaintiffs to address the new evidence in their briefs, it would have made no sense to require plaintiffs to refile the same briefs that had been earlier submitted. If defendants chose to file an identical brief, that was their prerogative. Therefore, the Court **DENIES** defendants' Motion for Clarification [229].

II. Defendants' Motion for Summary Judgment

Defendants have filed a Motion for Summary Judgment [232] in which they argue they are entitled to summary judgment on plaintiffs' claims **[*7]** for breach of the covenant of good faith; fraud; violations of the CFIL, CFRA, and IFDA; violations of the Sherman Antitrust Act, Clayton Act, and Robinson-Patman Act; and expenses of litigation. (*See* Am. Compl. [11] at ¶¶ 176-294.)

A. Standard for Summary Judgment

HN1[] Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *FED. R. Civ. P. 56(c)*. A fact's materiality is determined by the controlling substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. . An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.*

HN2[] Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, *Rule 56* mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *FED. R. Civ. P. 56(c)*. In such a situation, there can be "'no genuine issue as to any material fact,'" as "a complete failure of proof concerning **[*8]** an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp., 477 U.S. at 323* (quoting *FED. CIv. P. 56(c)*).

HN3[] The movant bears the initial responsibility of asserting, the basis for his motion. *Id. at 323*. However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. *HN4*[] After the movant has carried his burden, the nonmoving party is then required to "go beyond the pleadings" and present competent evidence designating "'specific facts showing that there is a genuine issue for trial.' *Id at 324* (quoting *Fed. R. Civ. P. 56(e)*). While the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party, *Samples v. City of Atlanta, 846 F.2d 1328, 1330* (11th dir. 1988), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson, 477 U.S. at 247-48*.

B. Count One: Breach of Contract

Count One of Plaintiff's Amended Complaint asserts a cause of action against Great Wraps for breach of the Agreement. **[*9]** (Am. Compl. [11] at 5T 177-93.) Defendants do not seek summary judgment regarding this claim because they concede. that parties "nearly always [have] factual disputes regarding such claims." (Defs.' Mot. for Summ. J. [232] at 3.)

C. Count Two: Breach of the Covenant of Good Faith

Count Two of plaintiffs' Amended Complaint asserts a cause of action against Great Wraps for the breach of the covenant of good faith and fair dealing. (Am. Compl. [11] at ¶ 195.) Defendants claim that they are entitled to summary judgment on this claim because Georgia law does not recognize this claim as an independent cause of action. (Defs.' Mot. for Summ. J. [232] at 4.) The Court agrees.

Before addressing the substance of plaintiffs' claims, the Court determines, as an initial matter, that Georgia law applies to the controversies that arise from the parties' Agreements. In their Opposition to Defendants' Motion for Summary Judgment ([235] at 4), plaintiffs claim it "is disputed" that Georgia law applies to this claim, but completely fail to support this assertion.[4] According to the Agreements, however, Georgia law governs the claims arising from the Agreements. (*See* Solomon Aff. [191-6], Ex. A at § 10.14; id., Ex. **[*10]** C at § 10.14 ("This Agreement . shall be governed by [sic] construed and enforced in accordance within, the laws of the State of Georgia, USA.").)

HN5[] Under Georgia law, every contract contains an implied duty of good faith and fair dealing. *E.g., Quantum Trading Corp. v. Forum Realty Corp., 278 Ga. App. 485, 489, 629 S.E.2d 420 (2006)*. However, breach of this covenant does not give rise to an independent cause of action under Georgia law. *Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1429 (11th Cir. 1990)* (a "'covenant [of good faith]' is not an independent contract term" that can be breached) (citations omitted); *Stuart Enters. Int'l, Inc. v. Peykan, Inc., 252 Ga. App. 231, 235, 555 S.E.2d 881 (2001)* ("[T]he Eleventh Circuit Court of Appeals has . . ruled that Georgia law would not recognize such an independent cause of action. . . We agree."). Thus, any breach of the implied covenant of good faith would be subsumed by plaintiffs' claim for breach of contract for defendants' alleged breach of the Agreements.

Because Georgia law governs, plaintiffs cannot maintain a claim for breach of the covenant of good faith. Therefore, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Count Two.

D. Count Three: Fraud

Plaintiffs allege that Great Wraps made "material misrepresentations" to plaintiffs on which plaintiffs "reasonably relied" when they signed their Agreements. (Am. Compl. [11] at ¶¶ 198-99.) This allegation forms **[*11]** the basis for plaintiffs' fraud claim against Great Wraps.[5] With only a two-page response to defendants' arguments in support of summary judgment, plaintiffs have mustered only the puniest of efforts to support their fraud claim. *See* Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 14-16. Plaintiffs' response consists of little more than a listing of paragraphs in the Amended Complaint that purportedly alleged the acts of fraud. There is virtually no effort to rebut defendants' legal arguments.

That said, the Court has attempted to discern the gist of plaintiffs' contentions. Plaintiffs appear to claim that Great Wraps made material misrepresentations (1) in prior and contemporaneous statements and (2) in Uniform Franchise Offering Circulars ("UFOC"), which franchisors distribute to potential franchisees to provide information.

HN6[] Under Georgia law,[6] a party asserting fraud must show five elements: (1) a false representation or omission by defendant; (2) scienter; (3) intention to induce plaintiff to act or refrain from acting; (4) justifiable

---

[4] (*See also* Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 14 ("[T]he franchises in issue were sold and operated in California and Illinois, which law applies.").)

[5] Plaintiffs do not assert claims of fraud against any of the individual defendants.

[6] In their response brief concerning the fraud claim, plaintiffs again observe that California and Illinois law apply, but they don't explain why that is so, given a contrary provision in the contract that provides that Georgia law applies. Likewise, they cite no cases to help the Court understand why they believe that California or Illinois law applies to the fraud claim, or why, even if those

reliance;. and (5) damage to plaintiff. Adkins v. Cagle Foods JV, LLC, 411 F.3d 1320, 1325 (11th Cir. 2005) (quoting Pro-Fab v. Vipa, Inc., 772 F.2d.847, 851 (11th Cir. 1985)); Collins v. Regions Bank, 282 Ga. App. 725, 727, 639 S.E.2d 626 (2006). A party challenging an assertion of fraud on a motion for summary judgment will succeed if it **[*12]** shows a lack of evidence as to only one of these elements. Collins, 282 Ga. App. at 727.

1. The Merger Clause Bars Plaintiffs from Claiming They Relied on Prior Representations that Contradict the Written Agreements.

Plaintiff American signed its agreement with Great Wraps on October 20, 2004; plaintiff Trident's signed its agreement on August 17, 2005. As to misstatements made to American, see Amended Complaint [11] at ¶ 136 (Great Wraps provided "positive earnings claims" to American in March .2004); ¶ 137 (alleging the March 2004 statement was untrue); ¶ 147 ("Great Wraps did not disclose to American that one of Great Wraps' franchisees was incurring heavy financial losses"); ¶ 156, (Great Wraps misrepresented to American that "it was growing very rapidly and had a history of '20 Years Proven Success'").

A review of the above listing suggests that American's 'fraud claim relies primarily on statements made before the respective agreements were signed. As to misstatements allegedly made to Trident, *see id.* at ¶ 27 (Great Wraps provided Kapur (Trident's principle) with "positive earnings claims" in June 2005); ¶ 39 (Great Wraps gave incorrect information to Trident about "'Real Estate Criteria'" in June 2005); ¶ 40 (in July 2005, Great Wraps **[*13]** misrepresented to Trident the number of franchises that Great Wraps had sold); ¶ 41 (referring to alleged misrepresentations Great Wraps made to Trident in July 2005).

Plaintiffs' fraud claims based on these statements, which were made prior to the execution of the written agreement, are barred because the agreement contained a merger clause. ***HN7***[] In Georgia, a valid merger clause "precludes any subsequent claim of deceit based upon pre-contractual representations." *E.g.,* Mims v. Cagle Foods JV, LLC, 148 Fed.Appx. 762 (11th Cir. 2005) (quoting First Data POS, Inc. Willis, 273 Ga. 792, 795, 546 S.E.2d 781 (2001)) (internal quotation marks omitted). A merger clause "operates as a disclaimer, establishing that the written contract completely and comprehensively represents all of the parties' agreement" and therefore "bars [plaintiffs] from asserting reliance on the alleged misrepresentation not contained within the contract"; Kobatake v. E.I. DuPont De Nemours & Co., 162 F.3d 619, 625 (11th Cir. 1998) (quoting Pennington v. Braxley, 224 Ga. App. 344, 346, 480 S.E.2d 357 (1997)) (internal quotation marks omitted).

This is so "because ***HN8***[] where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he has relied upon the other party's misrepresentation and his action for fraud must fail." Kobatake, 162 F.3d at 626 (quoting Am. Demolition, Inc. v. Hapeville Hotel Ltd. P'ship, 202 Ga. App. 107, 109, 413 S.E.2d 749 (1991) **[*14]**) (internal quotation marks omitted).

Indeed, courts in the Eleventh Circuit have repeatedly ruled that ***HN9***[] a merger clause bars a fraud claim for contradictory prior or contemporaneous statements. *See, e.g.,* Wholesale Telecom Corp. v. ITC Deltaoom Commc'ns, Inc., 176 Fed.Appx. 76, 79 (11th Cir. 2006) (no fraud occurred when merger clause disclaimed representations made before contract was executed); Mergens v. Dreyfoos, 166 F.3d 1114, 1119 (11th Cir. 1999) (fraud claims barred by general release and merger clause); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1315 (11th Cir. 1998)* (finding it was "unreasonable" as a matter of law for plaintiff to rely on alleged guarantee that was not in contract when contract contained merger clause); Kobatake, 162 F.3d at 625 (merger clause in releases barred plaintiffs from voiding releases based on fraud); Hall v. Coram Healthcare Corp., 157 F.3d 1286, 1287 (11th Cir. 1998) (Georgia law states that when an injured party seeks damages rather than rescission, "a merger clause prevent[s] recovery by estopping the claimant from asserting reliance on any misrepresentations or omissions made outside of the four corners of the contract."); Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405, 1411 (11th Cir. 1998) (By signing an invoice, a party "reaffirmed the sales

states' laws apply, plaintiffs could withstand a motion for summary judgment. *See* Pls.' Opp'n to Defs.' Mot. for Summa J. [235] at 14("[T]he franchises in issue were sold and operated in California and Illinois, which law applies.")

contract and all of its provisions, including the merger clause. As such, [plaintiff] could not justifiably rely" on another party's representation.).[7]

The Agreements here contained merger clauses. Specifically, each Agreement provided that it "supersede[d] all **[*15]** prior discussions, understandings and agreements between the parties with respect to the matters contained herein, and contain[ed] the sole and entire agreement between the parties hereto with respect to the transactions contemplated herein." (Solomon Aff. [191-6], Ex. A at § 10.2; *id.*, Ex. C at § 10.2.)

Because plaintiffs signed Agreements with merger clauses, Georgia law provides that they necessarily could not have relied on alleged prior misrepresentations that contradicted the provisions of these contracts. In addition, plaintiffs also signed Developer Compliance Checklists, in which they admitted that "Great Wraps did not give me (directly or indirectly, or my Corporation), nor have relied on any representations, warranties, inducements, pro formas, forecasts, estimates, or any other statements regarding net profits, gross profits, net sales, gross sales, financing, costs or expenses related to the operation of my Great Wraps" and "that there [were] no oral agreements or inducements claimed by Franchisee that are binding on Franchisor unless they [were] written into this Agreement." (Solomon Aff. [191-6], Ex. B at 1 (emphasis omitted).)[8] American's president even acknowledged that he did not **[*16]** rely on any prior representations of cost or sales and therefore could not make any fraud claims based on prior and contemporaneous statements. (*See* Prathipati Dep. [184] at 44.25, 54.22-55.6.)

2. Plaintiffs Have Not Proven Fraud as a Result of Uniform Franchise Offering Circulars (UFOCs) Disseminated by Defendants

As noted, plaintiffs have filed to prove fraud in connection with prior oral representations by defendants. Plaintiffs also claim that defendants issued Uniform Franchise Offering Circulars (UFOCs) in connection with their promotion to plaintiffs and that these UFOCs contained material misrepresentations. As defendants have noted, it is extremely difficult to analyze this contention by plaintiffs as the latter never adequately specify the UFOC to which they refer; do not adequately give dates for the particular UFOC; and, as to some allegations, it appears that plaintiffs are relying on a UFOC that was issued after plaintiffs entered into their agreements with the defendants. Obviously, a misrepresentation made after the agreement could not have been a representation on which the plaintiffs relied.

Another difficulty in analyzing this claim is plaintiffs' failure to adequately **[*17]** identify specific misrepresentations, thereby forcing the Court to scour the record. That effort, which has been burdensome to the Court, reveals only a few arguable false representations. None of them would be sufficient to prove a claim of fraud.

a. Brand Consistency

First, Kapur alleged that the UFOC stated that Great Wraps has "brand consistency, a uniform menu" and a "standardized" look. (Kapur Dep. [185] at 106.12-13.) Kapur said that statement was untrue because "names [of menu items] are different" between stores and that one store contained different "decor," "colorings," and "window signs." (Kapur. Dep. [185] at 107.19-21; 108.18-20). The Court finds that these statements are too vague, subjective, and insignificant to be considered material facts. Different decor at one store does not negate "brand consistency" or a "standardized look," and variations among menus do not preclude a "uniform menu." *See also* *Am. Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C., 426 F.Supp.2d 1356, 1364 (N.D. Ga. 2006)* (***HN10***[] fraud "must relate to an existing fact or a past event," not "mere broken promises, unfulfilled predictions or erroneous conjecture as to future events") (citations and internal quotation marks omitted).

---

[7] A merger clause is only insufficient to defeat a fraud claim when the party has sought to rescind the contract. *City Dodge, Inc. v. Gardner, 232 Ga. 766, 770, 208 S.E.2d 794 (1974)*. Plaintiff has not sought rescission of the agreement.

[8] The language in Trident's Compliance Checklist has a few insignificant differences, but it is essentially the same. (*See* Solomon Aff. [191-6], Ex. D at 1-2.)

Plaintiffs have not sought rescission of the agreements, and instead **[*18]** sue only for damages. As neither plaintiff ever even opened a store, it is difficult to understand how inconsistent decor or menu among Great Wraps' stores would have given rise to any damages on their part.

b. Bankruptcies

According to defendants, "the only remotely significant false statement by Great Wraps in its [UFOC] was its failure to disclose the 1996 and 1997 bankruptcy filings of Robert Saade, a former employee." (Defs.' Mot. for Summ. J. [232] at 19.) The Court concludes that the above were not material omissions and cannot form the basis of a fraud claim.

First, the drafters of the specific UFOC, Kaplan and Solomon, were unaware of Saade's bankruptcy. (Kaplan Aff. [191-5] at ¶¶ 7-9; Solomon Aff. [191-6] at ¶¶ 27-29.) In addition, as Saade was not involved in the sales or contract negotiations with either plaintiff, his bankruptcy filing almost a decade before is not material. (Solomon Aff. [191-6] at ¶ 26.)

Kapur also alleges that the non-disclosure of the 1991 bankruptcy of Parker, Great Wraps' Vice President of Operations, was a material omission. (Kapur Aff. [199-1] at ¶ 10.) ***HN11***[] A UFOC is only required to disclose bankruptcies that were filed or discharged within the ten-year **[*19]** period preceding the disclosure document. *16 C.F.R. § 436.5(d)(1) (2007)* .

c. Omission of the Conviction of an Employee

Finally, Kapur complains that the UFOC omitted the felony conviction of Randel, another Great Wraps employee. (Kapur. Aff. [199-1] at ¶ 17.) Though Kapur's affidavit does not provide the date of the referenced UFOC, Kapur cannot be referring to the 2004 and 2005 UFOCs that plaintiffs initially received, as Randel did not work in the corporate offices until March 2006. (Randel Aff. [188-4] at ¶ 3.) Necessarily, a UFOC provided after plaintiffs had signed their Agreements cannot support a fraud claim.

Additionally, as Randel was never an officer, principal, executive officer, or director of Great Wraps (*id.* at ¶ 4), he was not required to be listed in the UFOC. Kapur also alleges that Randel "was engaged in the selling of franchises," but in 2005, Randel was manager of a corporate store and not selling franchises. (Kapur Aff. [199-1] at ¶ 15; Randel Aff. [188-4] at ¶ 3.) Accordingly, the omission of a reference to Randel's prior conviction cannot support plaintiffs' fraud claim.

d. Other Representations

Plaintiffs further allege false representations or omissions by referring to paragraphs **[*20]** in the Amended Complaint [11], though they fail to give any factual detail or legal support for these claims. (Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 15.) In plaintiffs' own motions for summary judgment (Pl.'s Mot. for Summ. J. [236]. at 24; Pl.'s Mot. for Summ. J. [237] at 25), plaintiffs' arguments regarding the fraud count are only that the allegations "have been proven by the facts stated in Plaintiff's Statement of Material and Undisputed Facts and [d]efendants' admissions." Surely, even the most inexperienced attorney could not credibly contend that he had proved a fact merely by alleging the fact in the complaint.

Plaintiffs also introduce another irrelevant statement. In ¶ 146 of the Amended Complaint [11], plaintiffs state that "Great Wraps did not disclose to American that it was being investigated by the Office' of the Attorney General of the State of Illinois." According to defendants, however, this problem "arose in the last quarter of 2006," well after the Agreements were signed, and "was resolved amicably with the franchisee and no action was taken against Great Wraps by the Illinois Attorney General." (Second Solomon Aff. [238-2] at ¶ 18.)

In short, plaintiffs **[*21]** have failed to sufficiently identify and explain, much less prove, the particular misrepresentations that they allege as supporting their fraud claim.. This failure, by itself, justifies summary judgment for defendants on the fraud claim. Plaintiffs, however, also fail to show other required elements of a fraud claim.

3. Plaintiffs Have Not Proved Scienter, Justifiable Reliance, and Damages

Even if plaintiffs had proven material misrepresentations, they have failed to show scienter by the defendants. Scienter is defined as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1373 (8th ed. 2004.) Plaintiffs' allegations of scienter mainly concerns defendants' purported knowledge that it was impossible to open a franchise within the time period set out in the agreement.[9] The president of Great Wraps, however, states that

> other franchisees have been able to sign a lease, construct a space, and open a Great Wraps[] restaurant within one year or less from the date of a franchise agreement. For example, in American's territory, three of eight stores were open within eight months or less after signing their **[*22]** franchise agreements. In Trident's territory, one store opened in seven months, with a second store opened in nine months after signing their franchise agreements.

(Second Solomon Aff. [238-2] at ¶ 17.)

Solomon also testified that both plaintiffs had many opportunities to lease spaces, but they never did. (*Id.* at ¶ 12.) In addition, Prathipati, the principal for plaintiff American, owned a Quizno's store in the area, so he should have been familiar with franchising opportunities there. (Prathipati Aff. [199-1] at ¶ 26.)

As to Saade's bankruptcy, the individuals who put together the UFOC did not have knowledge of that fact and, hence, did not have scienter. (Kaplan Aff. [191-5] at ¶¶ 7-9; Solomon Aff. [191-6] at ¶¶ 27-29.)

Plaintiffs have also failed to show justifiable reliance on any alleged misrepresentations by defendants. Plaintiffs refer to several paragraphs in the Amended Complaint [11] that allegedly prove justifiable reliance.[10] (Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 15.) All these paragraphs, however, refer to representations made before the contracts were signed and on which defendants could not have reasonably relied because of the merger clause. *See* *supra at 11-14*. *See* *Prince Heaton Enters., Inc. v Buffalo's Franchise Concepts, Inc., 117 F.Supp.2d 1357, 1361 (N.D. Ga. 2000)* '(Thrash, **[*23]** J.) ("Plaintiffs [could not] prove justifiable reliance on misrepresentations about the projected financial success of their franchises" because they "expressly agreed they would not rely on

---

[9] *See* ¶ 45 ("Great Wraps knew that it was virtually impossible to build a store within ten months of signing of [Trident's] Area Development Agreement"); ¶ 53 ("Great Wraps knew it would take much longer to find potentially good sites in Southern California because its commercial real estate market was in huge demand and competition for food locations among various brands trying to gain a footprint in Southern California was very intense"); ¶ 54 ("Great Wraps knew that almost any good site would not be available for months if not years out into the future"); ¶ 55 ("Great Wraps knew that Trident could not meet the stipulated store opening schedule in any territory"); ¶ 57 ("Great Wraps knew about the nature of the commercial real estate market as they had had an [a]rea [d]eveloper in Los Angeles and Ventura Counties for over two years"); ¶ 159 ("Great Wraps knew it was virtually impossible to build a viable store within eight months of the signing of [American's] Area Development Agreement").

[10] *See* ¶ 22 (Great Wraps provided costs to American in February 2004); ¶ 23 (Great Wraps sent a letter to American with costs in February 2004); ¶ 24 (Great Wraps confirmed costs for a Great Wraps store in October 2004); ¶ 27 (Great Wraps provided "incorrect positive earnings claims" to Trident in June 2005); ¶ 28 (Great Wraps sent a letter to Trident with information about opening a store in June 2005); ¶ 29 (Parker sent a letter with the cost of a store in June 2005); ¶ 30 (Great Wraps sent costs to Trident in June 2005); ¶ 39 (Great Wraps "provided incorrect information" about Great Wraps "'Real' Estate Criteria'" in June 2005); ¶ 41 (misrepresentations made to Trident in July 2005); ¶ 44 (Agreement specified that Trident build a store within ten months of the signing of the Agreement). Paragraph 199 states merely that "[p]laintiffs reasonably relied on the misrepresentations made by Great Wraps."

representations made by [d]efendants and are bound by their agreement.") (citations omitted). *See also Am. Casual Dining, L.P., 426 F.Supp.2d at 1364* ("[f]raud cannot be based on misrepresentations" upon which the plaintiff could not "justifiably rely") (citation omitted).

Further, each Agreement contained a section wherein plaintiffs acknowledged numerous risks, further underscoring the point that they could not have justifiably relied on defendants' projections. (Solomon Aff. [191-6], Ex. A at § 10.17; *id.*, Ex. C at § 10.17.)

Finally, plaintiffs have failed to show any damages. Plaintiffs allege several different types of damages, but most of these relate to their franchisees, who are not plaintiffs.[11] Plaintiffs, themselves, never opened any stores, and their allegations about damages therefore fail. Because plaintiffs have not proven false representations, scienter, justifiable reliance, or damages, they cannot succeed on a fraud claim. The Court therefore **GRANTS** defendants' Motion for Summary Judgment [232] on Count Three.

E. Count Four: Violation [*24] of California Franchise Investment Law ("CFIL")[12]

Plaintiff Trident alleges in the Amended Complaint ([11] at ¶¶ 203-213) that Great Wraps and the individual defendants violated the California Franchise Investment Law (CFIL), which applies to all franchisees in California and their franchisors. *Cal Corp. Code § 31005* (1971). Under the agreement, Trident agreed to open its own store and sell franchises to others in California.

Plaintiffs allege that defendants violated *Cal Corp. Code § 31200* by making an untrue statement of a material fact in their UFOC. Plaintiffs also allege that defendants violated *Cal. Corp. Code § 31201* by making an untrue statement of a material fact in their dealings with Trident. Many of these alleged misstatements duplicate the allegations in the fraud claim.

1. Plaintiffs' Claims Are Barred by the Statute of Limitations.

Even if Trident could show false statements, its claims are time-barred by the statute of limitations. ***HN12***[] Under *Cal. Corp. Code §§ 31303* and *31304*, there is a one-year statute of limitations that requires a plaintiff to bring an action within one year of the discovery by the plaintiff of the violation.[13] Trident executed its Agreement on August 17, 2005. (Solomon Aff. [191-6] at Ex. C.) Plaintiffs filed this action on December 29, 2006. (Compl. **[*25]** [1].)

---

[11] *See* ¶ 33 (plaintiffs' "loss of profits"); ¶ 36 ("high cost of construction and store operations" "prevented [p]laintiffs from selling additional franchises"); ¶ 78 (plaintiffs' franchisees have had "to borrow more and pay higher loan payments"); ¶ 80 (have had to spend more time with franchisees, "reducing their profits"); ¶ 142 (plaintiffs' "ability to sell additional franchises" has been "hurt"); ¶ 143 ("[o]ne store shut down in September 2006"); ¶ 152 (franchise "unprofitable"); ¶ 153 (American's franchisees "refused to open additional stores"); ¶ 154 ("high cost of construction and store operations" "have prevented American from selling additional franchises"); ¶ 166 ("franchisee's losses were never recovered"); ¶ 201 (requesting "compensatory and punitive damages in an amount in excess of $75,000").

[12] Defendants do not address Counts Four or Six in their Motion for Summary Judgment [232], but rather refer the Court to the arguments in the February 11, 2008 Brief of [Previous] Defendants Kevin Parker, Dan Reed, Kenneth Chambers, Jonathan Randel and Christina [Koestner] in Support of Summary Judgment [186].

[13] *See Cal. Corp. Code § 31303* ("No action shall be maintained to enforce any liability created under *Section 31300* [which allows a person to sue for a violation of *Cal. Corp. Code § 31200* if the offer or sale of a franchise contains misleading or untrue required statements] unless brought before . . . the expiration of one year after the discovery by the plaintiff of the fact constituting the violation"); *Cal. Corp. Code § 31304* ("No action shall be maintained to enforce any liability created under *Section 31301* [which allows a person to sue for a violation of *Cal. Corp. Code § 31201* if a person purchases a franchise while relying on the false or misleading statements] unless brought before the . . . expiration of one year after the discovery by the plaintiff of the facts constituting such violation").

Therefore, if Trident knew of any facts allegedly constituting a violation before December 29, 2005, the statute of limitations would bar a claim against such violations.

In his deposition, Kapur, the principal of Trident, alleged that the following statements constituted untrue statements in violation of the CFIL:

> The level of support [defendants] promised, the mentioning of food costs at the corporate training store, the number of stores they were going to open the following year. The store buildout cost. There could have been more.

(Kapur Dep. [185] at 110.23-111.2.)

Even if any of these statements were actionable as misrepresentations, Trident will be time-barred if it learned of any of these facts before December 29, 2005.

Kapur began visiting Great Wraps stores in September 2005, having signed its Agreement in August 2005. (*Id.* at 135.12-15.) Trident also started receiving monthly sales reports, franchise fees, and royalties for stores in its area within a few weeks after signing the Area Development Agreement. (*Id.* at 136.3-24.) Therefore, Kapur soon learned about the level of support Great Wraps was providing, the food costs, and the number of stores in his area, as well **[*26]** as the number of stores that would be opening. Trident would have also learned the actual store buildout costs for a store in California in November 2005 when he visited another area developer's opening of a Great Wraps store. (*Id.* at 36.3-24; Der Dep. [183] at 60.23-24.) Therefore, any allegations relating to these claims are barred by *Cal. Corp. Code §§ 31303* and *31304*.

Kapur also alleged that the UFOC contained untrue statements about Great Wraps' "brand consistency." *See supra* II.D.2.a.(1) (Kapur Dep. [185] at 106.11-13.) Trident also would have been able to form its opinion about brand consistency, uniformity of menu, and standardized look soon after beginning work as an area developer, well before December 29, 2005. Therefore, assuming these statements could constitute false statements within the meaning of the Act, these claims are also barred by *Cal. Corp. Code §§ 31303* and *31304*.

In short, the statute of limitations bars plaintiffs' claims.[14]

2. Even if Trident's Claims Were Not Barred by the Statute of Limitations, Trident Cannot Maintain a Claim Under the California Franchise Investment Law.

a. Trident Makes Only Conclusory Allegations Without Any Supporting Facts.

Even if the claims were not barred by the statute of limitations, **[*27]** Trident still could not maintain a claim under the CFIL because it cannot point to any untrue statements. As a preliminary matter, ***HN14***[] "conclusory allegations without specific supporting facts have no probative value" and are not sufficient to defeat summary judgment. *See, e.g., Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985)* (citations omitted). The vast majority of plaintiffs' claims are conclusory allegations with no specific supporting facts. Nevertheless, the Court will address the allegations briefly.

b. Trident Does Not State a Claim Under *§ 31200*.

[14] Plaintiffs state that they "did not know they possessed claims against the defendants until they consulted with counsel." (Pls.' Opp'n to Defs.' Mot. for Summ. J. [200] at 8.) Unfortunately for plaintiffs, the ***HN13***[] claims must be brought before the "expiration of one year after the discovery by the plaintiff of the **facts** constituting such violation," not after the plaintiffs' knowledge of the violation. *Cal. Corp. Code § 31304* (emphasis added).

Trident alleges that defendants violated *Cal. Corp. Code § 31200*, which states that "[i]t is unlawful for any person willfully to make any untrue statement of a material fact [or omit to state a material fact] in any application, notice or report filed with the commissioner under this law." Therefore, Trident must prove that defendants (a) willfully (b) made an untrue statement of, or omitted (c) a material fact in the UFOC. Furthermore, Trident has to prove causation and damages to recover for a violation of this section. *Cal. Corp. Code § 31301*.

The Court has already determined that the statements about brand consistency, bankruptcies, and Randel's conviction are not material, see *supra* II.2.a.(1)-(3), and therefore cannot constitute **[*28]** a violation of *§ 31200*.[15] Plaintiffs also state in their response to the Statement of Undisputed Facts (235-6 at ¶ 32) that Great Wraps erred in listing Randel as Director of Procurement and Logistics in 2007 because he left Great Wraps in February 2007. (See Defs.' Reply in Supp. of Mot. for Summ. J. [222] at 6.) This error is irrelevant because the 2005 UFOC is the only material one that deals with the "[o]ffer" or "sale" of a franchise, see *Cal. Corp. Code § 31300*.

Kapur also alleges that Great Wraps failed to identify Reed in its filings. (Kapur Aff. [199-1] at ¶ 11.) This omission cannot be a misrepresentation because Reed did not join Great Wraps until June 2005 and was not employed with Great Wraps when the UFOC was delivered to Trident. (Reed Dep. [188-2] at ¶¶ 5.)

Kapur alleges in his affidavit that the UFOC listed Koestner as the Director of Franchise Development, even though Reed was the Director of Franchise Development. (Koestner Aff. [199-1] at ¶ 14.) The UFOC to which Kapur refers is the 2006 UFOC, so it is clearly not relevant, as Trident had already signed its Agreement when this UFOC was issued. Further, this type of error is not material. Accordingly, Trident does not state a claim under *§ 31200*.

c. Trident [*29] Does Not State a Claim Under *§ 31201*.

Cal. Corp. Code § 31201 states:

> It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication not enumerated in *Section 31200* which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Because the false statements must relate to an "offer" or "sale," no statement made after the Agreement was signed can be considered.

(1) Level of Support

Trident has alleged that it received a poor level of support from Great Wraps. However, Kapur testified that he got a "good" and "appropriate" level of support his first six months and that at one point, his "opinion even improved." (Kapur Dep. [185] at 112.25, 114.2-3.) Though he says that he later felt the support was "substandard," he did not explain in the deposition specifically why his opinion changed. (*Id.* at 113.2.) ***HN15***[] Defendants' statements about support cannot rise to the level of an "untrue statement" under the CFIL. See also *Am. Casual Dining, L.P., 426 F.Supp.2d at 1364* (statement "must relate to an existing fact or a past event," not "mere broken promises, unfulfilled predictions or erroneous **[*30]** conjecture as to future events") (citations and internal quotation marks omitted).

---

[15] Additionally, the Cal. Corp. Code provides a defense if the "defendant exercised reasonable care and did not know" of the untruth "or, if he or she had exercised reasonable care, would not have known." *Cal. Corp. Code § 31300*. At the time they prepared the UFOCs for Trident and American, neither Solomon nor Kaplan, who wrote the UFOCs, had any knowledge or reasonable grounds to believe the UFOCs had incorrect information. They were specifically unaware of Saade's filing for bankruptcy when they prepared the UFOC. (Kaplan Aff. [191-5] at ¶¶ 7-9; Solomon Aff. [191-6] at ¶¶ 27-29.) Therefore, even if the statements were material, defendants would have a defense under *Cal. Corp. Code § 31300*.

Furthermore, descriptions of a level of support cannot amount to an actionable representation of fact because they are inherently subjective and vague. *Ferreira v. Quik Stop Mkts., Inc., 141 Cal.App.3d 1023, 1030, 190 Cal. Rptr. 778 (1983)* ("the description of a business as a 'success' or 'failure' was highly subjective and did not amount to an actionable representation of fact").

(2) Food Costs

Kapur also alleged that defendants gave an untrue statement that food costs at the training store were "around 30 percent." (Kapur Dep. [185] at 114.24.) However, Kapur has admitted he has no evidence that this alleged statement was untrue. (*See id.* at 115.6, 115.9.)[16] In addition, the quoted costs were estimates and thus cannot be considered to be untrue statements of material fact.

Further, the UFOC that Great Wraps provided to Trident stated that it

> [did] not furnish or authorize our salespersons to furnish any oral or written information concerning the actual or potential sales, *costs*, income or profits of a Great Wraps Restaurant. *Actual results vary from unit to unit and we cannot estimate the results of any particular franchise*.

(Kapur Dep. [185], Ex. 4 at 23 (emphasis added).) Trident **[*31]** also signed two documents in which it affirmed that it had not relied on any statement regarding costs: first, in the Agreement (Solomon Aff. [191-6], Ex. C at 1 10.16), and second, in a Developer Compliance Checklist signed contemporaneously with the Agreement (*Id.*, Ex. D at 1).

(3) Number of Stores

Kapur alleged in his deposition that Great Wraps had been untruthful about the number of stores they were going to open the following year. (Kapur Dep. [185] at 110.25-111.1.) Kapur said that three employees of Great Wraps said that Great Wraps would open "in the range of 60, 70, 80 stores," though Kapur admitted that the employees did not disclose any potential locations. (*Id.* at 115.19-117.10.) These statements, however, are clearly estimates and expressions of hope, which are not representations of fact. *See* *Next Century Communs. Corp., 318 F.3d at 1028*.

(4) Store Buildout Costs

Kapur also alleged that Great Wraps' statements about "buildout cost[s]" were untrue. (Kapur Dep. [185] at 111.1.) However, like the projected number of stores, these representations were clearly an estimate and were not a statement of fact. When Great Wraps sent the estimate of $228,725 to Kapur on June 22, 2005, the letter stated that "while costs may vary **[*32]** by market and market conditions, the attached will give you a *general idea."* (Original Dep. Exs. [217], Ex. 89 at 1 (emphasis added).) (*See also* Parker Dep. [188-1] at 1 10 ("With regard to build-out, store development and operations, I provided estimated costs which were clearly expressed as estimates only, and I, also, informed [p]laintiffs that the costs may vary by market and market conditions.").)

In addition, Kapur admitted that he did not know what the estimated costs should have been and that he did not have any evidence that the estimate was wrong, particularly because no other strip center store had been built in that location at that time. (Kapur Dep. [185] at 120.23, 125.20-127.21.)

---

[16] *See also* *Am.'s Favorite Chicken Co. v. Cajun Enters., Inc., 130 F.3d 180, 183 (5th Cir. 1997)* ("the disclaimer clause in the franchise agreements states that [plaintiff] was not induced to execute the agreements by any extra-contractual representations" and that therefore "'[t]he misrepresentations and omissions upon which [plaintiff] bases its CFIL claims thus could not have been 'material'").

(5) Other Misrepresentations

Kapur also alleges other misrepresentations; however, none amount to false statements under the Act. For example, Kapur stated that Great Wraps said that it "was doing very well, it was growing very rapidly, people were very happy, they had sold many stores, they were opening many stores and were experiencing explosive growth." (Kapur Dep. [185] at 97.24-98.1.) Kapur, however, gave no evidence that these statements were untrue, and courts have determined that this language **[*33]** is puffery and therefore not actionable. See *Next Century Communs. Corp., 318 F.3d at 1028*.

In short, because the statute of limitations bars any claims and because Trident could not maintain a claim even if its claims were not time-barred, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Count Four as to all defendants.

F. Count Five: Violation of California Franchise Relations Act ("CFRA")

Trident alleges that, by terminating the Trident Agreement, Great Wraps and the individual defendants violated *Section 20020* of the California Franchise Relations Act (CFRA). ***HN16***[] CFRA provides that "no franchisor may terminate a franchise prior to the expiration of its term, except for good cause." *Cal. Bus. & Prof. Code § 20020* '(1980). (See Am. Compl. [11] at ¶ 216-218.) Good cause includes "the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure the failure." *Id.*

Defendants had good cause to terminate the Agreement. Great Wraps had given Trident notice in the form of a letter of default on November 10, 2006. (Solomon Aff. [191-6] at ¶ 11.) When the Agreement was terminated on January 10, 2007, Trident had not cured the **[*34]** failure. (*Id.* at ¶ 13.) Accordingly, Trident had been given a "reasonable opportunity"--over twice the specified time period--to cure the failure, and Great Wraps therefore as a matter of law did not violate the CFRA.

Furthermore, defendants can have no remedy under this Act. The only remedy CFRA provides is the repurchase of inventory. *Cal. Bus. & Prof. Code § 20035*. See *also* *Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1291 (9th Cir. 1987)* ("We conclude that [CFRA] itself provides no remedy . . . except repurchase."). Because Trident never opened a restaurant, it did not have any inventory to repurchase. Accordingly, even assuming plaintiff had a claim, the statutory remedy would be useless. Therefore, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Count Five as to all defendants.

G. Count Six: Violation of the Illinois Franchise Disclosure Act ("IFDA")

Plaintiff American, which operated in Illinois, alleges that Great Wraps and the individual defendants violated the *Illinois Franchise Disclosure Act (IFDA) of 1987, 815 Ill. Comp. Stat. Ann. 705/1 et seq. (1988)* (Am. Compl. [11] at If 220-227.) Plaintiff American, however, has failed to state any claims under this Act.

1. American's Claims Are Barred by the Statute of Limitations.

HN17[] The statute of limitations for **[*35]** the IFDA precludes a party from bringing an action to enforce any liability, unless it is brought within one year after the franchisee becomes aware of the facts or circumstances that give rise to the IFDA claim. *815 Ill. Comp. Stat. Ann. 705/27*.

American executed its Agreement on October 20, 2004. (See Solomon Aff. [191-6] at Ex. A.) The case was not filed until December 29, 2006. (Compl. [1].) Therefore, if American knew of any facts allegedly constituting a violation before December 29, 2005., the statute of limitations would bar a claim against such violations.

Prathipati, the principal of American, alleges that Great Wraps made untrue statements about construction costs, average gross sales, and training. (Prathipati Aff. [199-1] at ¶¶ 9, 16, 21). American began working as an area developer in October 2004 and began learning about construction costs by March 2005. (Prathipati Dep. [184] at 67.19; 71.11.) Prathipati received information about the approximate average gross sales for a store every month in 2005. (*Id.* at 78.4.) As for training, he complained that he had thought he would have received training within a few months of October 2004. (*Id.* at 90.18.) Therefore, he would have known about all these issues **[*36]** before December 2005, and the one-year statute of limitations thus bars American's claims.

2. Even if American's Claims Were Not Barred by the Statute of Limitations, American Cannot Maintain a Claim Under the Illinois Franchise Disclosure Act.

a. Defendants Did Not Violate *§ 705/5*.

American alleges that defendants violated *§ 705/5* of the IFDA by making an untrue statement of material fact in its UFOC. (Am. Compl. [11] at ¶ 222.) This section states that "[i]t is unlawful for any person to make or cause to be made any untrue statement of a material fact in any application, notice, or report filed with the Administrator, or to omit to state in any application, notice, or report any material fact." *815 Ill. Comp. Stat. Ann. 705/5(4)*.

Defendants allege that the UFOC in effect in 2004 did not disclose Chambers' position or role with Great Wraps. (Prathipati Aff. [199-1] at ¶ 25.) Chambers was a Director of Operations at this time. (Chambers Dep. [188-3] at ¶ 3.) Because Chambers was not involved in the offer or sale of the franchise to American and had no involvement in the preparation or delivery of the UFOC, the Court concludes that this fact is not material. (*Id.* at ¶ 6-7, 9-10.)

b. Defendants Did Not Violate *§ 705/6*.

American alleges that defendants **[*37]** violated *§ 705/6* of the I FDA by making untrue statements of material fact. This section states:

> [i]n connection with the offer or sale of any franchise made in this State, it is unlawful for any person, directly or indirectly, to . . . (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

815 Ill. Comp. Stat. Ann. 705/6(b).

HN18[] Because the false statements must relate to an "offer" or "sale," no statement made after the Agreement was signed can be considered. *Id.*

(1) Cost Estimates

First, American alleges that Great Wraps provided incorrect build-out information for Illinois. (Prathipati Aff. [199-1] at ¶ 16.) The statement American points to, however, is simply not false. The March 31, 2004 UFOC estimated costs at $260,300. (Prathipati Dep. [184] at Ex. 4.) Prathipati acknowledged in his deposition, however, that Koestner provided him with a range of $194,000 to $280,000 in March 2005, which is well within the range of the previous estimate. (Prathipati Dep. [184] at 71.25.) (*See also* Parker Dep. [188-1] at ¶ 10 ("With regard to build-out, store development and operations, I provided **[*38]** estimated costs which were clearly expressed as estimates only, and I, also, informed [p]laintiffs that the costs may vary by market and market conditions.")) Therefore, the cost estimate was not an untrue statement of material fact.

(2) Gross Sales

Prathipati alleged that he was told in March 2004 that the average sales of a store were over $400,000. (Prathipati Dep. [184] at 74.12-13, 74.22.) He had no evidence that average sales were less than $400,000, and he did not know what the average sales were for a Great Wraps store for any time in 2004. (*Id.* at 80.6.) Thus, again, plaintiff has failed to prove the statement was false.

(3) Training

Prathipati alleges that American did not receive the two-week training it had been promised. (*Id.* at 101.1.) He claims that he got one day of training one time and one week of training another time. (*Id.* at 101.6-10.) He also admitted, however, that he never sent his vice president for training in Atlanta, which he could have done, because his vice president had worked at Great Wraps before. (*Id.* at 107.9-23.) The Court concludes that the difference between eight days and fourteen days is not enough to constitute a material fact, particularly in light **[*39]** of the fact that American did not avail itself of all the training to which it was entitled. No employees of American or Trident ever went to Atlanta for multiple-week detailed operations training, and both plaintiffs "consistently ignored [defendants'] repeated oral and written requests to come to Atlanta to train." (Second Solomon Aff. [238-2] at ¶ 19.) Furthermore, neither plaintiff complained about training until well after filing suit and only after Great Wraps first raised the issue. (*Id.*)

(4) Registration

Prathipati alleges that Great Wraps failed to disclose that American would have to be registered with the State of Illinois, and it took Great Wraps almost three months to register American. (Prathipati Aff. [199-2] at ¶¶ 11-12.) However, defendants note that the delay was attributable, in large part, to Prathipati's taking one month to return information. (Second Solomon Aff. [238-2] at ¶ 9.) Additionally, Illinois took longer to process the information because of the holidays. (*Id.*) The Court does not find defendants' omission concerning the need to register was material and finds that plaintiff's actions contributed to any delay.

(5) Kickbacks

Prathipati alleges that Great Wraps **[*40]** received "kickbacks," (Second Prathipati Aff. [200-2] at ¶ 49-50), but in his deposition acknowledged no knowledge of such "kickbacks." (Prathipati Dep. [184] at 119.2.) Kapur likewise acknowledged no knowledge of kickbacks. (Kapur Dep. [185] at 133.21-134.5.)

(6) Additional Misrepresentations

In plaintiffs' interrogatory responses, American claimed several additional untrue statements of material fact. (*See* Prathipati Dep. [185], Ex. 5.) For example, American alleges that Koestner painted a "very rosy picture of Great Wraps growth," promised success, said that Chicago could handle fifty Great Wraps stores in the next five years, and assured Prathipati that Great Wraps gave excellent support. (*Id.* at 3.) Prathipati alleged all these statements to be untrue. The Court finds that these statements are puffery and are therefore not actionable. *See, e.g.,* *Next Century Communs. v. Ellis, 318 F.3d 1023, 1028*. *See also* *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 807, 811 (2d Cir. 1996)* (the statement "[w]e expect 1993 to mark another year of strong growth in earnings per share" constituted non-actionable puffery, reasoning that a rational investor would not have relied thereon) (internal quotation marks omitted); *Lasker v. N.Y. State Elec. & Gas Corp., 85 F.3d 55, 59 (2d Cir. 1996)* ("by proffering its conviction that [its] 'business strategies [would] lead to continued prosperity,' **[*41]** [defendant] was in no way insuring that dividend rates would remain constant, or that the stock price would not decline. These statements consist of precisely the type of 'puffery' that this and other circuits have consistently held to be inactionable.") (citations omitted).

American also referenced Koestner's comment that there were no non-compete issues between Great Wraps and Quizno's and that Great Wraps did not return American's franchise fee after it terminated the agreement.[17] (*Id.* at 3, 10.) American did not provide any evidence for these unsubstantiated claims, and, therefore, they cannot be the basis for a claim.

c. Defendants Did Not Violate *§ 705/19*.

Finally, American alleges that defendants violated *§ 705/19* of the IFDA by improperly terminating American's franchise and the Franchise Agreement. This section states that "[i]t shall be a violation of this Act for a franchisor to terminate a franchise of a franchised business located in this State prior to the expiration of its term except for 'good cause.'" *815 Ill. Comp. Stat. Ann. 705/19*.

American claims that defendants terminated the Agreement in retaliation for the fact that plaintiffs filed an Amended Complaint [11]. (Pls.' Opp'n to Defs.' Mot. for Summ. J. [200] at 15.) Defendants, **[*42]** however, were entitled to terminate the Agreement because American did not open any stores, in violation of the plain terms of the Agreement, and because it did not cure its default within thirty days after receiving notice. (*See* Solomon Aff. [191-6], Ex. A at ¶ 2.1; *id.*, Ex. C at 2.1; *id.* at ¶ 11.) American admits this fact. (*See* Pls.' Resp. to Defs.' Statement of Material Facts [235-6] at ¶ 4.) Therefore, defendants could not have violated this Act.

Accordingly, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Count Six as to all defendants.

H. Counts Seven, Eight, and Nine: Violations of the Sherman Antitrust Act, the Clayton Act, and the Robinson-Patman Act

Plaintiffs allege that Great Wraps violated the Sherman Antitrust Act, the Clayton Act, and the Robinson-Patman Act by exercising monopoly power, discriminating in price, and illegally restraining trade through a tying arrangement. (Am. Compl. [11] at ¶¶ 229-271, 273-282, 284-292.) A "tying arrangement" is "[a] seller's agreement to sell one product or service only if the buyer also buys a different product or service." Black's Law Dictionary 1557 (8th ed. 2004). The "tying product" is "[t]he product or service **[*43]** that the buyer wants to buy," and the "tied product" is "the different product or service that the seller insists on selling." *Id.*

The Clayton Act states that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C.A. § 14*. The "theories of liability are substantively synonymous" between the Sherman Act and the Clayton Act. *Bob Maxfield, Inc. v. Am. Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981)* (citations omitted).[18] Therefore, courts generally analyze Sherman Act and Clayton Act claims together. *See, e.g.,* *S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc., 138 F.3d 869, 874 (11th Cir. 1998)*.

Plaintiffs allege that defendants' "tying" arrangement violated the Robinson-Patman Act, which states that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality." *15 U.S.C.A. § 13*. (Am. Compl. [11] at ¶ 290.) Plaintiffs allege that price discrimination occurred because defendants' "actions required [p]laintiffs to charge higher prices for [their] services to the public in order to cover [the] **[*44]** higher costs due to the forced purchase [of] the tied products." (Am. Compl. [11] at ¶ 288.)

---

[17] Plaintiffs have not returned any money either, and neither Trident nor American ever asked for the return of their money prior to filing suit against Great Wraps. (Solomon Aff. [191-6] at ¶ 25; Second Solomon Aff. [238-2] at ¶ 13.)

[18] Decisions of the former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981)* (*en banc*).

HN19[] To establish an action for price discrimination under the Robinson-Patman Act, a plaintiff must allege and prove that there were two actual sales at two different prices made by the same seller to at least two different purchasers. *S. Bus. Communs., Inc. v. Matsushita Elec. Corp. of Am., 806 F. Supp. 950, 959 (N.D. Ga. 1992)*. Because there were no sales made in this case, there can be no violation of the Robinson-Patman Act. Further, as to plaintiffs' allegations of illegal tying, they have failed to establish that a tying arrangement existed. Thus, plaintiffs cannot make any viable antitrust claims under any of these Acts.

1. Sherman Act, *Section 1*

Plaintiffs allege a violation of *Section 1* of the Sherman Antitrust Act, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C.A. § 1*. (Am. Compl. [11] at ¶ 234.)[19]

a. Plaintiffs Cannot Prove a Tying Violation.

Plaintiffs allege an illegal tying arrangement, under *Section 1*. **HN20**[] Such a claim has five elements:

> (1) "a tying and a tied product"; (2) "evidence of actual coercion by the seller that in fact forced the buyer to [purchase] **[*45]** the tied product"; (3) that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) "anticompetitive effects in the tied market"; and (5) "involvement of a 'not insubstantial' amount of interstate commerce in the tied product market."

Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502-03 (11th Cir. 1985) (citing *Yentsch. v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980))*.

Courts have recognized that "[t]he first inquiry in any [Sherman Act] *§ 1* tying case is whether the defendant has sufficient market power over the tying product." *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 200 (3d Cir. 1994)*. Therefore, plaintiffs would have to establish that Great Wraps had sufficient market power in the tying product to force the plaintiffs to accept the tied product.

Plaintiffs confuse "contract power" with "market power." Plaintiffs cite *Collins v. Int'l Dairy Queen, 980 F. Supp. 1252, 1260-61 (M.D. Ga. 1997)*, a case with similar facts, in which the court denied defendants' motion for summary judgment because it found that the franchisee was locked in to the agreement to buy tied products. (Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 9-10.) However, in *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1224 n.11 (11th Cir. 2002)*, the Eleventh Circuit effectively overturned *Collins*: "we reject [*Collins*] in favor of what we consider to be the more persuasive rationale of *Queen City* and its progeny;" *Queen City* distinguished economic power and market power.[20] *Maris* held that **[*46]** "contract power is [not] equated to market power for antitrust purposes," *id.*, and that "the mere existence and exercise of contract power does not show that a defendant had market power or violated the law." *Id. at 1219*. A court therefore has to "attempt to ascertain a defendant's economic position in the relevant market, rather than its power pursuant to a particular contract, when considering whether a defendant has market power." *Id. See also United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch., 89 F.3d 233, 236-37 (5th Cir. 1996)* ("Economic power derived from contractual agreements such as franchises . . . 'has nothing to do with market power . . . or antitrust.'") (citation omitted).

---

[19] Defendants incorrectly argue that ***antitrust law*** does not apply to private disputes over a franchise contract (Defs.' Mot. for Summ. J. [232] at 5), and in fact cites several cases where courts do apply ***antitrust law*** in such instances.

[20] In *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 443 (3d Cir. 1997)*, the court concluded that the franchisee plaintiffs had to purchase products from Domino's not because of Domino's market power, but because they were contractually bound to do so.

Courts have recognized that it is difficult to prove market power in fast-food franchise cases: the "importance of proving that the owner of the tying product has real market power may doom the franchise trademark cases, as they mostly involve highly competitive retail industries, such as the fast-food business." *Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 705 (7th Cir. 1984)*. Such is the case here.

In addition, after the Supreme Court ruled in *Jefferson Parish* that a market share of thirty percent was not sufficient to establish an unlawful tie, courts have been reluctant to infer market power from a lower percentage.[21] *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 517 (3d Cir. 1998)* ("since *Jefferson Parish*, no **[*47]** court has inferred substantial market power from a market share below [thirty] percent"); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 481 (3d Cir. 1992)* (defendant's ten to twelve percent share of the car market "provides unrefuted evidence that it lacks power in the tying product market"); *Marts v. Xerox, Inc., 77 F.3d 1109, 1113 n.6 (8th Cir. 1996)* (eighteen percent of photocopier market is insufficient to support antitrust tying).

In this case, plaintiffs allege that the relevant market is the "wrapped sandwich market" and that Great Wraps has "100%" of the market share for this product. (Am. Compl. [11] at ¶¶ 229-30; Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 5.) The claim that Great Wraps does not compete against any other company defies this Court's own experience as a fast-food consumer. It is disingenuous for plaintiffs to use an artificially narrow definition of market power to claim Great Wraps has 100% of the market for wrapped sandwiches when it is clear that the relevant market is much broader.

First, a "market" is defined by "reasonably interchangeable" substitutes. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Courts have recognized that in franchise cases, the relevant market is not only a market for the specific type of food, but is "the fast food franchising market, or perhaps more generally, **[*48]** the franchising market." *Tominaga v. Shepherd, 682 F. Supp. 1489, 1494 (CD. Cal. 1988)* (referring to *Siegel v. Chicken Delight Inc., 448 F.2d 43, 50 (9th Cir. 1971))*.[22]

In *Tominaga*, the plaintiff franchisee implicitly argued that his restaurant, "Pizza Man," did not compete against any restaurants besides other "Pizza Man" restaurants. The district court concluded that the argument "that the relevant [tying] market is the 'Pizza Man franchising' market. . . . is erroneous as a matter of law." *Tominaga, 682 F. Supp. at 1494*. Therefore, Great Wraps' market is the franchise market, and Great Wraps must compete against all types of franchises, including, to name just a few, McDonald's, Chick-Fil-A, Burger King, Wendy's, Kentucky Fried Chicken, Arby's, Quizno's, Subway, Hardee's, Pizza Hut, and Taco Bell. (Solomon Aff. [191-6] at ¶ 19; Kaplan Aff. [191-5] at ¶ 3.)

Furthermore, Great Wraps is not the only restaurant that offers wrapped sandwiches. After Long John Silvers introduced wrapped sandwiches in 1996, at least thirty-two restaurants have added wrapped sandwiches to their menus, including Blimpie, Panera, Waffle House, Tropical Smoothie Cafe, and Steak Escape. (Kaplan Aff. [191-5] at ¶ 5.)

---

[21] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7, 27, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (defendant hospital's thirty percent share of market showed that it lacked the "kind of dominant market position that obviates the need for further inquiry into competitive conditions").

[22] Plaintiffs argue that *Chicken Delight* supports the proposition that a trademark gives a franchisor sufficient market power to violate antitrust laws, but this position has been strongly criticized and rejected. *See Tominaga, 682 F. Supp. at 1494* (stating that *Chicken Delight*'s analysis has been under "crippling attack" because "[i]t makes no economic sense to attribute significant market power to the Chicken Delight trademark"); *Principe v. McDonald's Corp., 631 F.2d 303, 309 (4th Cir. 1980)* (stating that "[f]ranchising has come a long way" since *Chicken Delight* and concluding that emphasis "upon the trademark as the essence of a franchise is too restrictive").

In the overall franchising market, Great Wraps possesses very little market power. **[*49]** In 2006, Great Wraps' market share was .04%.[23] (Solomon Aff. [191-6] at ¶ 21.) At the end of 2006, Great Wraps had only twelve stores in California, in a market with 60,761 eating establishments, and only seven stores in Illinois, in a market of 22,480 eating establishments. With these numbers, it is absurd to argue that Great Wraps possessed 100% market power.

Because plaintiffs cannot prove "sufficient market power" (and provide no evidence of market share or market power), their tying claim fails. Additionally, they do not meet any of the other prongs of the test. Because they never bought any supplies, there were no "tied products," so they do not meet the first prong. *See, e.g., Amey, Inc., 758 F.2d at 1503*. Because they never even bought an allegedly tied product, they cannot meet the second prong of the test, which requires actual coercion to buy the tied products. *See, e.g., Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1218 (3d Cir. 1976)* ("coercion is implicit . . . in the concept of leverage upon which the illegality of tying is premised"). Plaintiffs offer no evidence to support their claims that there were "anticompetitive effects in the tied product market" or "involvement of a 'not insubstantial' amount of interstate commerce in the tied product market," so they **[*50]** cannot meet the fourth and fifth prongs of the test. *See, e.g., Amey, Inc., 758 F.2d at 1503*.

b. Plaintiffs Cannot Show an Antitrust Injury.

HN21[] In addition to establishing liability, plaintiffs challenging violations of the antitrust laws must also show that they have suffered "antitrust injury," that is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Plaintiffs must show both an injury to themselves as a competitor and an injury to competition in general. *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 421 (11th Cir. 1984)*.

Plaintiffs allege that defendants have violated the antitrust laws "by the illegal 'tying arrangement' of Great Wraps exploiting its control over" the franchise, which was the "'tying product.'" (Am. Compl. [11] at ¶ 246.) Plaintiffs claim that they were required to purchase "tied product[s]," items such as food and uniforms, from Great Wraps and its approved suppliers and contractors. (*Id.* at ¶ 247.)

HN22[] The Eleventh Circuit has held that an "injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value." *Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir. 1982)*. *See also Olmstead v. Amoco Oil Co., 725 F.2d 627, 630-31 (11th Cir. 1984)* (applying *Kypta* to find directed verdict for defendant on tying claim); *Midw. Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 718-19 (11th Cir. 1984)* (applying **[*51]** *Kypta* to endorse the district court's grant of summary judgment for defendants on tying claims).

Though plaintiffs claim that they were charged "higher prices" for the tied items (Am. Compl. [11] at ¶ 234), they have not provided any evidence that the tied and tying products exceeded their combined fair market value. *See Burden v. Int'l Longshoremen's Ass'n, Local No. 1410, 510 F.Supp.2d 618, 628 n.9 (S.D. Ala. 2007)* (citation omitted) (an "assertion in the unverified amended complaint . . . is not evidence for purposes of a motion for summary judgment.") American's owner said that he had no evidence that he could have bought any other food for a lower price. (Prathipati Dep. [184] at 120.7-9.) He also said that he had not investigated other vendors' prices, did not know if other vendors carried all the products, and admitted that franchisees saved money and time to have "one-stop shopping." (*Id.* at 120.10-124.2.)

Similarly, Trident's owner admitted that some of the prices from Great Wraps' vendors were lower than he could have gotten from other vendors. (Kapur Dep. [185] at 204-25.) Additionally, plaintiffs have provided no evidence that they purchased or even attempted to purchase any of the tied products. (Solomon Aff. [191-6] at ¶¶ 8-9, 18.)

[23] The top eighteen sandwich chains had sales of over $92 billion in 2005. Quizno's, another sandwich shop, had sales of over $1.7 billion, but a market share of only 2.29% of the top 100 restaurant chains. Great Wraps had sales of approximately $32 million, meaning that its market share was less than .04%. (Solomon Aff. [191-6] at ¶¶ 21-22.)

Also, the Agreement had a provision **[*52]** that allowed plaintiffs to purchase from other vendors with Great Wraps' permission, but plaintiffs never requested such approval in writing, as required by the Agreements. (Solomon Aff. [191-6] at ¶¶ 17-18; Prathipati Dep. [184] at 122.17-123.11.)[24]

Accordingly, plaintiffs cannot show any type of injury, much less one "of the type the antitrust laws were intended to prevent." *Brunswick Corp., 429 U.S. at 489*. Furthermore, if there had been antitrust violations, plaintiffs would have been an active participant in them, as they received a portion of franchise fees and royalties from franchisees who opened up Great Wraps franchises in their territories. (*See* Solomon Aff. [191-6] at ¶¶ 14-16.)

Therefore, because plaintiffs cannot prove a tying violation or establish an antitrust injury, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Section l of the Sherman Act.

2. *Section 2* of the Sherman Act

Plaintiffs also allege a violation under *Section 2* of the Sherman Act, which holds liable "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C.A. § 2*.

HN23[] To establish monopolization, **[*53]** a plaintiff must show both "possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Ad-Vantage Tel. Dir. Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1341 (11th Cir. 1987)* (citations omitted). As with *Section 1* of the Sherman Act, plaintiffs cannot prove that Great Wraps had monopoly power. See supra II.H.1.a Also as with *Section 1*, plaintiffs cannot prove that an antitrust injury occurred because they never opened any store. *See supra* II.H.1.b.

Accordingly, because plaintiffs cannot prove that defendants had monopoly power or that plaintiffs suffered an antitrust injury, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on *Section 2* of the Sherman Act. Moreover, because plaintiffs cannot establish a tying arrangement or antitrust injury, their antitrust claims fail under the Sherman Act, Clayton Act, and Robinson-Patman Act. The Court therefore **GRANTS** defendants' Motion for Summary Judgment [232] on Counts Seven, Eight, and Nine.

I. Count Ten: Expenses of Litigation

Plaintiffs allege that "[d]efendants have acted in bad faith, been stubbornly litigious and/or caused Plaintiffs unnecessary trouble and expenses," **[*54]** therefore entitling plaintiffs to recover their litigation expenses, including attorneys' fees, pursuant to *O.C.G.A. § 13-6-11*.[25] (Am. Compl. [11] at ¶ 294.)

HN24[] A party can recover expenses of litigation "where the evidence reveals no bona fide controversy or dispute with regard to the defendant's Liability." *Steel Magnolias Realty, LLC v. Bleakley, 276 Ga. App. 155, 157, 622 S.E.2d 481 (2005)* (citations omitted). In this case, defendants have been granted summary judgment on each

[24] Prathipati claimed that he asked Great Wraps for a food vendor in Chicago, but he never put the request in writing and has no evidence for that claim. (Prathipati Dep. [184] at 123.3-11.) Kapur also stated that he was "forbidden to look for alternate sources of supplies," but he likewise gave no evidence to support that claim. (Kapur Dep. [185] at 204.20-22.)

[25] *O.C.G.A. § 13-6-11* states in relevant part:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

claim, except the breach of contract claim. Therefore, defendants have done better than show a bona fide controversy; they have prevailed on these claims.

As to the one claim that remains to be tried--the breach of contract claim--plaintiffs have not rebutted defendants' arguments that a bona fide dispute exists on this claim. If a bona fide controversy does exist, "a recovery under this Code section is impermissible unless there is evidence that the defendant has acted in bad faith in the underlying **[*55]** transaction." Id. (Citation and internal quotation marks omitted.) ***HN25***[] Bad faith is more than "bad judgment or negligence" it requires a "dishonest purpose" and "conscious doing of wrong." *Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 49, 557 S.E.2d 420 (2001)* (citation and internal quotation marks omitted). *See* *Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc., 230 Ga. App. 455, 457, 496 S.E.2d 546 (1998)* (finding insufficient evidence of bad faith because no showing that developer "acted through ill will or furtive design" or "sinister motive"). Here, plaintiffs have offered no evidence that the defendants acted in bad faith with a "dishonest purpose" or "conscious doing of wrong." *Rapid Group, Inc., 253 Ga. App. at 49* (internal quotation marks omitted); *see supra* II.D.2.b.

In fact, defendants offered to discuss the situation, rather than terminate the Agreements, when they sent plaintiffs notices that the latter had breached the Agreements. (*See* Solomon Aff. [191-6] at ¶ 12 ("[I]n September and November of 2006, we invited both to contact us and to discuss changes to their respective Agreements so that our relationships could continue. Neither ever responded in a meaningful fashion.").) Accordingly, the Court concludes that defendants did not act in bad faith.

Additionally, ***HN26***[] a recovery of expenses of litigation "must be based upon evidence which shows more than a mere breach of contract." **[*56]** *Pulte Home Corp., 230 Ga. App. at 457* (citation and internal quotation marks omitted). Because the court is granting summary judgment as to the other claims, it concludes that the case can, at best, be nothing more than a breach of contract suit.[26] Therefore, the Court **GRANTS** defendants' Motion for Summary Judgment [232] on Count Ten.

III. Plaintiffs' Motions for Summary Judgment

Because the Court has granted Defendants' Motion for Summary Judgment [232] on Counts Two-Ten, Plaintiffs' Motions for Summary Judgment ([236], [237]) are **DENIED as moot** on Counts Two, Three, Four, Five, Six, and Ten.[27]

Though defendants did not move for summary judgment on Count One--breach of contract--plaintiffs did. (Pl.'s Mot. for Summ. J. [236] at 25; Pl.'s Mot. for Summ. J. [237] at 24.) Yet, as has become their trademark, plaintiffs did not make any legal arguments, but simply stated that breach of contract had "been proven" by the facts alleged in Plaintiff's Statement of Material and Undisputed Facts and defendants' admissions. Of course, as is their practice, plaintiffs did not specify any admissions. (*Id.*) Defendants responded in their Opposition to American's Motion for Summary Judgment ([240] at 23) to the arguments that they believed **[*57]** American might have made, had plaintiffs chosen to actually brief their own motion: (1) that Great Wraps did not register American promptly in Illinois; (2) that Great Wraps did not account for regional advertising funds collected from area franchisees; (3) that Great Wraps did not provide training; and (4) that Great Wraps improperly terminated the agreement.

---

[26] While plaintiffs say that defendants admitted "to their knowing violation of the law" (Pls.' Opp'n to Defs.' Mot. for Summ. J. [235] at 18), they provide no citation to the record alleging where defendants made this admission. Plaintiffs also say that they are entitled to expenses of litigation because defendants "engaged in a series of improper actions in refusing to provide proper discovery." *Id.* Regardless of whether this statement is true, ***HN27***[] expenses of litigation relate only "to the transaction upon which the underlying action is based and refers to a time prior to the institution of suit, not defendant's conduct in defending the case." *M & H Constr. Co., Inc. v. N. Fulton Dev. Corp., 238 Ga. App. 713, 715, 519 S.E.2d 287 (1999)*' (citations omitted). Therefore, actions during discovery are irrelevant to a court's determination of expenses of litigation.

[27] Plaintiffs did not move for summary judgment on Counts Seven, Eight, or Nine. (*See* (Pl.'s Mot. for Summ. J. [236]; Pl.'s Mot. for Summ. J. [237].)

Defendants state that their delay in registering American was due to American's delay in providing the necessary paperwork and that American has not shown how it was damaged by the delay. (Second Solomon Aff. [238-2] at ¶ 9.) Defendants also state that the defendants never collected any regional advertising. (*Id.* at ¶ 11.) Defendants state that American never sent designees to Atlanta for training, so American cannot argue that Great Wraps did not provide training. (*Id.* at ¶ 19.) Finally, defendants contend that Great Wraps appropriately terminated the contract under the Agreement, which stated that Great Wraps could "declare this Agreement immediately terminated" in the event of default. (Solomon Aff. [191-6], Ex. A at § 8) Plaintiffs admitted that they had defaulted and did not cure the default in the appropriate thirty-.day period. **[*58]** (Pls.' Resp. to Great Wraps' Statement of Material Facts [235-6] at ¶ 4.)

The Court therefore concludes that defendants have shown "genuine issues of material fact," and it **DENIES** Plaintiffs' Motions for Summary Judgment ([2361, [2371) on Count One.

IV. Defendants' Motion for Sanctions

A. Standard for Sanctions

Defendants filed a Motion for Sanctions [233] against Trident and American, alleging that their claims "violate[d] *Rule 11* because they were made for an improper purpose and have needlessly increased the costs and scope of litigation." (Defs.' Mot. for Sanctions [233] at 2.)

HN28[] *Rule 11* Sanctions are appropriate

> (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose.

Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996) (quoting *Jones v. Int'l Riding Helmets, Ltd., 49 F. 3d 692, 694 (11th Cir. 1995))*; *Fed. R. Civ. P. 11 (b)*.

HN29[] *Rule 11*.(b) sets forth the underpinning standard upon which a motion for sanctions should be judged:

> [b]y presenting to the court a pleading . . . an attorney . . . certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry **[*59]** reasonable under the circumstances (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

In short, *Rule 11* requires an attorney to make a reasonable investigation to determine whether his claims are viable. *See**Fed. R. Civ. P. 11(b) (2)-(4)*. ***HN30***[] The Eleventh Circuit has noted that, before imposing sanctions, a court must determine whether the claims are frivolous and, if so, whether the person who signed the pleadings made a reasonable inquiry that would have revealed their frivolity. *Int'l Riding Helmets, Ltd., 49 F.3d at 695* (citing *McGuire Oil Co., Inc. v. Mapco, 958 F. 2d 1552, 1563 (11th Cir. 1992))*. To satisfy this reasonable inquiry" standard, an attorney must investigate both the facts and **[*60]** the law to determine if "there is a reasonable basis for maintaining the action or position taken in the papers. *Patterson v. Aiken, 111 F.R.D. 354, 355 (N.D. Ga. 1986)*, *aff'd*, *841 F.2d 386 (11th Cir. 1988)*. An attorney acts in bad faith if he pursues claims "that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." *In re TCI Ltd., 769 F.2d 441, 445 (7th Cir.*

1985). If an attorney does not make a reasonable inquiry, the court must impose sanctions even if the attorney has a good faith belief that the claims were sound. *Int'l Riding Helmets, Ltd., 49 F.3d at 695*.

B. Plaintiffs Have Filed Numerous Claims That Lack Reasonable Factual Basis or Are Based on Legal Theories with No Reasonable Chance of Success.

Plaintiffs have filed numerous claims that lack a reasonable factual basis or are based on legal theories that have no reasonable chance of success. *See Worldwide Primates, Inc., 87 F.3d at 1254*. As the Court has illustrated, *supra*, plaintiffs' claims were all meritless. Indeed, plaintiff mustered only the puniest of efforts to defend these claims.

Plaintiffs' Count Two--breach of the covenant of good faith--is not an independent contract term under Georgia law. *See supra at 8-10*. Any reasonable research effort would have uncovered that fact Plaintiffs also assert that Georgia law does not apply, but provide no legal support or other explanation for that assertion. *Id.*

For **[*61]** Count Three-the fraud claim--plaintiffs failed to show any actual or actionable misrepresentations made by defendants. *See supra at 10-23*.

Plaintiffs' claims under the CFIL and IFDA--Counts Four and Six--are barred by the statute of limitations *See supra at 24, 35* A reasonable inquiry into the law would have revealed this fact Plaintiffs are also without any legal support to argue that the statute of limitations should not apply because they did not know about the claims until they were told by counsel. (Pls.' Opp'n to Defs.' Mot. for Summ. J. [200] at 8.) Furthermore, plaintiffs' claims under these laws are frivolous, even if the statute of limitations did not apply. *See, e.g., supra at 27 et seq.*, 36 *et seq.*

Plaintiffs' claim for violation of the California Franchise Relations Act--Count Five--is also frivolous, as the only remedy the Act provides for is a repurchase of a franchisee's inventory, of which plaintiffs had none. *See supra at 33-34*. Additionally, CRFA allows a defendant to terminate a contract for good cause, which Great Wraps clearly had in this situation. *Id.* Indeed, defendants offered to try to work the matter out with plaintiffs, and it was plaintiffs who sued.

Plaintiffs' antitrust claims--Counts Seven, Eight, and Nine--are **[*62]** particularly frivolous. *See supra at 42 et seq.* Plaintiffs do not cite any evidence in their briefs for these claims other than restating the conclusory allegations in their unverified Amended Complaint [11]. Plaintiffs' contention that Great Wraps possesses 1000 of the market share for its "Unique Services" is absurd and insulting to the intelligence of the reader. (Am. Compl. [11] at ¶¶ 229-30.) Plaintiffs never purchased any tied products anyway, and they never presented any evidence about market share or market power. (Solomon Aff. [191-6] at ¶¶ 8-9, 18.)

Plaintiffs also offer no support or evidence to explain how 3 defendants have exhibited "bad faith," which showing is required to hold them liable for the expenses of litigation, set out in Count Ten. *See Rapid Group, Inc., 253 Ga. App. at 49*. Plaintiffs also argue that defendants should pay expenses of litigation because of defendants' improper actions during discovery, even though Georgia law only allows recovery for actions instituted prior to a suit. *See M & H Constr. Co., Inc., 238 Ga. App. at 715*. Again, a reasonable inquiry of the applicable law should have made plaintiffs aware of that fact.

Also egregious is plaintiffs' suit against a Board member, Mr. Strauss, against whom plaintiffs have no evidence Plaintiffs **[*63]** admit they "do not have information"[28] to contradict Strauss's testimony that he was a "passive investor, was a Board member who did not prepare any information for plaintiffs, had no dealings with plaintiffs, and

[28] (*See* Pls.' Resp. to Defs.' Great Wraps, Mark Kaplan, Robert Solomon and Henry Strauss' Statement of Undisputed Facts [200-4] at ¶ 17.)

had no knowledge of any incorrect information. (Strauss Aff. [191-7] at ¶¶ 91 4-10.) Plaintiffs have no reasonable factual basis to sue Strauss.[29]

With each of their frivolous claims, plaintiffs have clouded the record with irrelevant and incorrect law, unsubstantiated facts, and conclusory allegations, thus wasting a great deal of the defendants' and the Court's time. Accordingly, defendants ' Motion for Sanctions is **GRANTED**. The Court assesses against plaintiffs' counsel fees and expenses in an amount to be shown at either a hearing or subsequent filing by defendants, as set out below.

CONCLUSION

For the foregoing reasons, the Court **DENIES** defendants f Motion for Clarification [229], **GRANTS** defendants' Motion for Summary Judgment [232], **DENIES** plaintiffs' Motions for Summary Judgment ([236], [237]), and **GRANTS** defendants ' Motion for Sanctions [233].

Defendants shall set out in a memorandum, to be filed within **sixty (60) days**, the fees and expenses it seeks as sanctions. Defendants **[*64]** shall properly document and explain its basis for the amounts sought. Plaintiffs may respond within **thirty (30) days** after the filing of defendants' response.

The consolidated joint pretrial order will also be due within **sixty (60) days**. The parties shall comply with all requirements for that document as set out by local rule. Given plaintiffs' counsel's difficulty in understanding how a claim should be prosecuted, the Court directs plaintiffs to also set out in the pretrial order each particular breach of contract that it alleges. Plaintiffs shall also cite to the particular section of the agreement on which they rely. Plaintiffs should provide a brief statement of why they contend a breach occurred. Defendants, in turn, should provide a brief explanation of its position as to each alleged breach.

SO ORDERED, this 31 day of March, 2009

/s/ Julie E. Carnes

JULIE E. CARNES

CHIEF UNITED STATES DISTRICT JUDGE

End of Document

[29] Though he is no longer a defendant, plaintiffs also sued Rotondo, who did not begin working for Great Wraps until over fourteen months after Trident signed its Agreement. (Rotondo Dep. [211] at 33.20) This sloppy and promiscuous naming of uninvolved defendants provides another reason to sanction plaintiffs' behavior.

CBC Cos. v. Equifax, Inc.

United States Court of Appeals for the Sixth Circuit

March 5, 2009, Argued; April 2, 2009, Decided; April 2, 2009, Filed

File Name: 09a0129p.06

No. 08-3261

Reporter
561 F.3d 569 *; 2009 U.S. App. LEXIS 6904 **; 2009 FED App. 0129P (6th Cir.) ***; 2009-1 Trade Cas. (CCH) P76,558

CBC COMPANIES, INC.; CBC INNOVIS, INC., Plaintiffs-Appellants, v. EQUIFAX, INC.; EQUIFAX INFORMATION SERVICES LLC, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 06-00654. George C. Smith, District Judge.

Core Terms

Reseller, antitrust, reissues, mortgage lender, allegations, tri-merged, Mortgage, terms

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Sherman Act, Claims**

The appellate court reviews de novo a district court's decision to dismiss a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. In its review, the appellate court accepts a plaintiff's factual allegations as long as they raise a right to relief above the speculative level. Particularly in the antitrust context, the Supreme Court cautions that a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Sherman Act, Claims**

To prove antitrust injury, the key inquiry is whether competition--not necessarily a competitor--suffered as a result of the challenged business practice. Unless an antitrust plaintiff alleges an injury that arises from an anticompetitive aspect of the practice under scrutiny, the complaint will not survive *Fed. R. Civ. P. 12(b)(6)* scrutiny.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Motions to Dismiss, Failure to State Claim**

A naked assertion gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

But even where a business carries a significant portion of the market share, ***antitrust law*** is not a negotiating tool for a plaintiff seeking better contract terms.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] **Sherman Act, Claims**

No cognizable antitrust injury exists where the alleged injury is a byproduct of the regulatory scheme or federal law rather than of the defendant's business practices.

Counsel: ARGUED: Michael J. Canter, VORYS, SATER, SEYMOUR & PEASE, Columbus, Ohio, for Appellants.

Michael P. Kenny, ALSTON & BIRD, Atlanta, Georgia, for Appellees.

ON BRIEF: Michael J. Canter, Kenneth J. Rubin, James Allison Wilson, Jr., VORYS, SATER, SEYMOUR & PEASE, Columbus, Ohio, for Appellants.

Michael P. Kenny, Gregory B. Mauldin, Teresa T. Bonder, Peter Kontio, ALSTON & BIRD, Atlanta, Georgia, Robert Garrett Cohen, Roger P. Sugarman, KEGLER, BROWN, HILL & RITTER CO., Columbus, Ohio, for Appellees.

Judges: Before: SILER, COOK, and McKEAGUE, Circuit Judges.

Opinion by: COOK

Opinion

[*570] **[***1]** COOK, Circuit Judge. The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") regulate the residential-mortgage-loan industry by requiring mortgage brokers and lenders to consider a consumer's credit information before approving loans. Specifically, federal regulations require brokers **[***2]** and lenders to purchase data from each of the three nationwide consumer reporting agencies ("NCRAs")--Experian, Ltd., TransUnion LLC, and Equifax, Inc. Plaintiffs **[**2]** CBC Companies, Inc. and CBC Innovis, Inc. (collectively, "CBC") are resellers--companies that purchase consumer credit information from all three NCRAs and consolidate the data into a "tri-merged report." As a cheaper alternative, some resellers also sell copies of tri-merged reports, or "reissues." CBC filed this antitrust lawsuit against Equifax, Inc. and its reseller subsidiary, Equifax Information Services LLC (collectively, "Equifax"), after Equifax implemented a contractual fee that CBC alleges will restrict the ability of resellers to offer reissues. Equifax moved to dismiss the case, and CBC now appeals the district court's **[*571]** grant of that motion. Because CBC failed to allege an antitrust injury and thus lacks standing, we affirm.

I.

After conducting business absent a contract for two years, Equifax demanded that CBC sign an agreement (the "Reseller Agreement") as part of a new policy that allegedly required resellers to pay a fee--comparable to the price of an original tri-merged report--each time a reseller sold a reissue. CBC responded by filing this lawsuit on July 31, 2006, citing violations of *Sections 1* and *2 of the Sherman Act*. [1] *15 U.S.C. §§ 1*, *2*. Alleging that Equifax **[**3]** threatened to terminate its status as a reseller, CBC signed the Reseller Agreement a few months later. After CBC filed suit, Equifax changed the fee terms pertaining to reissues multiple times. Equifax first announced a decrease in the fee to $ 1.05 per reissue, then switched to an algorithm-based penalty, and finally, declared that an "explicit per-transaction formula" would determine a fee based on each reseller's volume of sales.

CBC contends that by requiring resellers to pay a fee upon selling each reissue--despite not purchasing new data--Equifax harnesses the "monopoly power" it shares with other NCRAs in the market of providing credit data (the "Mortgage Reseller Market") in order to monopolize and attempt to monopolize the service of providing consumer credit information to mortgage lenders (the "Mortgage Lender **[***3]** Market") in violation of *Sections 1* and *2 of the Sherman Act*. *15 U.S.C. §§ 1*, *2*. Because only lenders (not brokers) have the option of purchasing reissues as opposed to original tri-merged reports, the Mortgage Lender Market is at issue here. Concluding that CBC's complaint **[**4]** amounted to a mere contract dispute over price terms, the district court held that CBC failed to allege any antitrust injury and lacked antitrust standing as a result. The court dismissed the case, and CBC timely appealed.

II.

HN1[] We review de novo a district court's decision to dismiss a complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. *J&R Mktg., SEP v. Gen. Motors Corp., 549 F.3d 384, 389 (6th Cir. 2008)*. In our review, we accept a plaintiff's factual allegations as long as they "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Particularly in the antitrust context, the Supreme Court cautions that "a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Mich. Division-Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 731-32 (6th Cir. 2008)* (quoting *Twombly, 550 U.S. at 558*).

The district court dismissed CBC's complaint because it failed to allege any antitrust injury--a "necessary, but not always sufficient," component of antitrust standing. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; **[**5]** *see* *NicSand, Inc. v. 3M NicSand, Inc.., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc) ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law."). ***HN2***[] To prove **[*572]** antitrust injury, the key inquiry is whether *competition*--not necessarily a competitor--suffered as a result of the challenged business practice. *See* *NicSand, 507 F.3d at 450* ("[O]ne competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition."); *see also* *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 485 F.3d 880, 887 (6th Cir. 2007)* (requiring an antitrust plaintiff to demonstrate that "the alleged violation tended to reduce competition overall" and that "the plaintiff's injury was a consequence of the resulting diminished competition" (citation omitted)). Unless an antitrust plaintiff **[***4]** alleges an injury that arises from "an anticompetitive aspect of the practice under scrutiny," the complaint will not survive *Rule 12(b)(6)* scrutiny. *See* *NicSand, 507 F.3d at 451* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*). CBC contends that it established the requisite injury **[**6]** for antitrust standing by alleging that Equifax is leveraging its "monopoly power" in the Mortgage Reseller Market to restrain competition in the Mortgage Lender Market by "imposing and

[1] The complaint at issue here is the First Amended Complaint, which CBC filed in August 2007.

threatening to impose financial penalties on Resellers that sell Reissues, and by diminishing and threatening to diminish the competitive advantage Reissues enjoy over [tri-merged] reports." This argument is meritless.

First, CBC's complaint contains only conclusory allegations, and not facts sufficient to support more than a speculative injury to competition. *See* *Twombly, 550 U.S. at 555*. CBC suggests that Equifax is: (1) diminishing the competitive advantage of reissues over tri-merged reports; (2) restricting competition between its own reseller subsidiary, Equifax Mortgage, and other resellers; and (3) increasing reissue costs and decreasing options for mortgage lenders. In effect, CBC argues injury in the form of "higher costs [for reissues] and loss of market share in the Mortgage Lender Market."

But CBC's complaint fails to allege key facts to substantiate an antitrust injury--that is, that competition in the Mortgage Lender Market decreased due to Equifax's Reseller Agreement. Although the complaint **[**7]** contends that "CBC Innovis and other Resellers are the principal victims of Equifax's unlawful actions," CBC never identifies any of these other resellers, and never establishes whether any of these resellers signed a contract similar to the Reseller Agreement. *See* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008)* ("Without an explanation of the other insurance companies involved, and their products and services, the court cannot determine the boundaries of the relevant product market and must dismiss the case for failure to state a claim."). Moreover, although CBC filed its amended complaint in August 2007, several months after signing the Reseller Agreement, the complaint fails to allege any specific increases in costs for its reissues or lost market sales in the Mortgage Lender Market. CBC's complaint offers **[***5]** generalized allegations of antitrust injury, but the Supreme Court requires more than "naked assertion[s]" to establish antitrust standing. *See* *NicSand, 507 F.3d at 451* (quoting *Twombly, 550 U.S. at 557*). As the *Twombly* Court pronounced, ***HN3***[] "a naked assertion . . . gets the complaint close to stating a claim, but without **[**8]** some further factual enhancement it stops short of the line between possibility and plausibility." *550 U.S. at 557*.

Second, the facts alleged in CBC's complaint suggest that CBC's fundamental frustration is with the price **[*573]** terms of the Reseller Agreement, rather than specific anticompetitive behavior. Summarizing its own complaint, CBC argues that because it "pleaded that Equifax's unilaterally imposed contractual restrictions impair resellers' ability to compete and that Equifax is the only source of a necessary input, the Amended Complaint presents triable issues of fact." Essentially, CBC disagrees with the price terms of the contract that Equifax proposed and CBC later signed. ***HN4***[] But even where a business carries a significant portion of the market share, ***antitrust law*** is not a negotiating tool for a plaintiff seeking better contract terms. *See* *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1428 (6th Cir. 1990)* ("'*Section 2 of the Sherman Act* does not give [plaintiffs] the exclusive right to dictate the terms on which they will deal,' nor does it require [the defendant] to accede **[**9]** to every demand of [the plaintiffs].") (quoting *Trace X Chem., Inc. v. Canadian Indus., Ltd., 738 F.2d 261, 266-67 (8th Cir. 1984))*.

Third, to the extent that CBC alleges an impact on the Mortgage Lender Market, the federal regulations are the more likely basis for any putative injury, and not any specifically anticompetitive conduct on the part of Equifax. ***HN5***[] No cognizable antitrust injury exists where the alleged injury is a "byproduct of the regulatory scheme" or federal law rather than of the defendant's business practices. *RSA Media, Inc. v. AK Media Group, Inc., 260 F.3d 10, 13, 15 (1st Cir. 2001)*; *see* *Standfacts Credit Servs. v. Experian Info. Solutions, Inc., 294 F. App'x 271, 272 (9th Cir. 2008)* (holding that even where the NCRA defendants held "monopoly power in the wholesale market," plaintiff **[***6]** resellers could not succeed on their antitrust claims where the monopoly power derived from federal requirements and not anticompetitive conduct). The district court properly concluded that CBC's complaint failed to allege facts sufficient to support an antitrust injury, and thus rightly dismissed the complaint for failure to establish antitrust standing.

III.

We affirm the district court's **[**10]** decision dismissing CBC's complaint.

CWIE, LLC v. Bandwith Consulting, Inc.

United States District Court for the Central District of California

April 2, 2009, Decided; April 2, 2009, Filed

SA CV 08-1423 DOC (RNBx)

Reporter
2009 U.S. Dist. LEXIS 135999 *

CWIE, LLC and Ronald Cadwell v. Bandwith Consulting, Inc. and Ari Benowitz

Subsequent History: Injunction denied by *CWIE, LLC v. Bandwith Consulting, Inc., 2009 U.S. Dist. LEXIS 39035 (C.D. Cal., Apr. 20, 2009)*

Core Terms

Counterclaim, customers, cause of action, unfair, competitors, fraudulent, misrepresentations, deceive, general public, allegations, unfair competition, business practice, fraudulent act

Counsel: [*1] For CWIE, LLC, Plaintiff, Counter Defendant: Jay M Spillane, LEAD ATTORNEY, Spillane Trial Group PLC, Sherman Oaks, CA; Raphael D Cung, LEAD ATTORNE, Mendes & Mount LLP, Los Angeles, CA.

For Bandwidth Consulting, Inc., a California corporation, Ari Benowitz, Defendants: Bruce D May, Kent Wycliffe Easter, Maren B Hufton, Peter L Wucetich, LEAD ATTORNEYS, Stradling Yocca Carlson & Rauth, Newport Beach, CA.

For Ira Ronald Cadwell, a individual, Consol Counter Defendant: Jay M Spillane, LEAD ATTORNEY, Spillane Trial Group PLC, Sherman Oaks, CA; Raphael D Cung, LEAD ATTORNE, Mendes & Mount LLP, Los Angeles, CA.

For Bandwidth Consulting, Inc., a California corporation, Ari Benowitz, Counter Claimants: Kent Wycliffe Easter, Peter L Wucetich, LEAD ATTORNEYS, Stradling Yocca Carlson & Rauth, Newport Beach, CA.

Judges: HONORABLE DAVID O. CARTER, JUDGE.

Opinion by: DAVID O. CARTER

Opinion

CIVIL MINUTES — GENERAL

PROCEEDING (IN CHAMBERS): GRANTING COUNTERCLAIM DEFENDANT'S MOTION TO DISMISS THE FOURTH CAUSE OF ACTION TO THE AMENDED COUNTERCLAIM

Before the Court is Counterclaim Defendants CWIE, LLC's and Ira Ronald Cadwell's Motion to Dismiss Counterclaim for Failure to State a Claim under *Federal Rule of Civil Procedure 12(b)(6)*. The Court finds the matter appropriate for **[*2]** decision without oral argument. *Fed. R. Civ. P. 78*; *Local R. 7-15*. After considering the moving, opposing, and replying papers thereon, and for the reasons set forth below, the Court hereby GRANTS WITH PREJUDICE the Motion to Dismiss the fourth cause of action to the amended counterclaim.

I. BACKGROUND

CWIE, LLC and its principal, Ira Ronald Cadwell, (collectively, the "Counterclaim Defendants") are in competition in the Internet networking business with Bandwidth Consulting, Inc. and Ari Benowitz (collectively, the "Counterclaimants"). Counterclaim Defendants operate a wholesale Internet access and website hosting business and serve Internet based businesses with bandwidth and hosting requirements. In 2002, Counterclaim Defendants provided cash, computer equipment, training, technical support, and a customer call center to help with the launch of Bandwidth Consulting, Inc. ("BandCon"). BandCon was also included on an already existing contract between CWIE, LLC ("CWIE") and a third party to obtain bandwidth. In exchange for Counterclaim Defendant's support, Counterclaimants agreed to grant Counterclaim Defendants a 10 percent interest in the company and promised Counterclaim Defendants its interest would never be **[*3]** diluted. Counterclaimants also promised to pay Counterclaim Defendants 10 percent of its annual net income.

CWIE sued Counterclaimants for failing to abide by this written agreement when Counterclaimants failed to pay 10 percent of its annual income and diluted CWIE's interest in the company to between 7 and 8 percent. Counterclaimants counterclaimed and asserted eleven causes of action arising from breaches of fiduciary duty, breach of contract, unfair competition, and other related wrongs. Counterclaimants amended their counterclaim to include only ten causes of action. The Counterclaim Defendants have filed this Motion to Dismiss for Failure to State a Claim (the "Motion") as to the fourth cause of action in Counterclaimants' amended counterclaim (the "Fourth Cause of Action") only. Counterclaimants' Fourth Cause of Action alleges violation of the California Unfair Competition Laws as outlined by the *California Business and Professions Code § 17200, et seq.*[1]

II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. Once it has adequately stated a claim, a plaintiff may support the allegations in its complaint with any set of facts consistent with those allegations. **[*4]** *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007)*; see *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)* (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory). Dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief. *Bell Atlantic, 127 S. Ct. at 1968* (abrogating *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Guerrero v. Gates, 442 F.3d 697, 703 (9th Cir. 2006)*; *Balistreri, 901 F.2d at 699*. Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003)* (citing *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996))*; *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*.

III. DISCUSSION

Counterclaimants' Fourth Cause of Action alleges Counterclaim Defendants violated *§17200* when (1) Ira Ronald Cadwell ("Cadwell") held himself out to be the owner of BandCon and advised a customer to transfer its internet structure needs to a BandCon competitor and discontinue payments to BandCon; (2) Cadwell instructed BandCon competitors to "watch what BandCon does, and when they do it, do it," indicating that competitors should imitate **[*5]** BandCon; (3) Cadwell negotiated with a BandCon customer, Alpha Red's, accounts payable and debts

---

[1] All further statutory citations are to the Business and Professions Code unless otherwise indicated.

directly with Alpha Red's various vendors and creditors, stating that he was overriding the management of Alpha Red and dictating which vendors Alpha Red would pay; and (4) Counterclaim Defendants' misrepresentations that it was in control of Alpha Red caused other customers to become suspicious that BandCon was no longer financially sound because its accounts receivable from Alpha Red were in jeopardy.

§ 17200 states in part, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice..." Its coverage is "sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law. '" (*Rubin v. Green (1993) 4 Cal.4th 1187, 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044*, quoting *Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 113, 101 Cal.Rptr. 745, 496 P.2d 817*). However, the statutory language referring to "any unlawful, unfair or fraudulent" practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*.

Unfair competition includes any unlawful, unfair, or fraudulent business act or practice. In order to limit broad and general claims of "unfair business acts or practices" under *§ 17200*, the Supreme Court of California found **[*6]** it necessary to narrow the definition of "unfair" as it is applied to claims alleged against business competitors:

> To guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under *[§] 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *[§] 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.
>
> *Id. at 186-187*.

Counterclaim Defendants argue that the Fourth Cause of Action has not been tethered to any legislative or declared policy and, therefore, must be dismissed for failure to state a claim.

Counterclaimants argue that the Fourth Cause of Action is valid because it does not allege that Counterclaim Defendants' conduct was "unfair," but rather that the conduct was "fraudulent." **[*7]** A business practice is fraudulent under *§ 17200* if members of the public are likely to be deceived. *See* *Comm. On Children's Television v. General Foods. Corp., 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660 (1983)*; *see also,* *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439 (2000)* (business practice was fraudulent where customers of defendant car rental provider were likely to be deceived). The only element required to prove a fraudulent act is the likelihood of deception. *Children's Television, 35 Cal. 3d at 211*; *accord,* *Schnall, 78 Cal. App 4th at 1167*; *People v. Orange County Charitable Servs., 73 Cal. App. 4th 1054, 1076, 87 Cal. Rptr. 2d 253 (1999)*.

The parties in this case dispute whether the Fourth Cause of Action alleges "fraudulent acts" or "unfair acts" within the definition of "unfair competition" as outlined in *§17200*. In their Opposition, Counterclaimants allege several "fraudulent acts" including: (1) deception by Cadwell which caused a customer to transfer its business from BandCon to a competitor; (2) imitating and inducing others to imitate BandCon's business practices causing a competitor to mirror their website; (3) overriding management of a customer's accounts payable; and (4) causing other BandCon customers to become suspicious of BandCon's financial viability.

A problem arises as this Court interprets the Supreme Court of California's decisions in *Children's Television*, which broadened *§ 17200* to include more than anti-competitive business practice and include "the right of the public to protection from fraud **[*8]** and deceit." *Children's Television, 35 Cal. 3d at 209*. Counterclaimants argue that their claim is "fraudulent" and thus gives them the liberty to simply allege that "customers have been deceived." However, *Children's Television* requires that claims for "fraudulent acts" allege that the general public was deceived. *Id.* Therefore, Counterclaimants must allege in its pleading deception beyond those misrepresentations to its customers, and more specifically, must plead misrepresentations made to the general public which are likely to deceive the general public.

Counterclaim Defendants have cited federal decisions dismissing state claims for violation of unfair competition laws when fraudulent conduct is alleged. In *Sybersound Records, Inc. V. UAV Corp., 517 F. 3d 1137 (9th Cir. 2008)*, the Ninth Circuit dismissed Sybersound's claim under *§ 17200* because it failed to state a claim and did not plead that UAV's "misrepresentations [were] likely to deceive members of the general public." *Sybersound, 517 F. 3d at 1153*. Sybersound and UAV are competitors that produce and sell karaoke records. *Id. at 1141*. UAV falsely told customers that Sybersound's karaoke recordings infringed on copyrights. *Id.* UAV also made misrepresentations to customers that they had all of the necessary licences when they held only compulsory licenses or no licenses at all. **[*9]** *Id.* These facts are similar to the facts in the instant case, in which Counterclaim Defendants allegedly made misrepresentations to Counterclaimants' customers.

Because the Ninth Circuit held that UAV's misrepresentations to customers were not likely to deceive the general public in *Sybersound*, this Court finds that Counterclaim Defendant's misrepresentations to Counterclaimants' customers, sophisticated companies, were also not likely to deceive members of the general public, and therefore, are not "fraudulent acts" under *§ 17200*. *See also National Rural Telecommunications Co-op. v. DIRECTV, Inc., 319 F.Supp.2d 1059, 1078 (C.D. Cal. 2003)*; *Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Cal. 2001)* (it is necessary under the "fraudulent" prong [of *§ 17200*] to show deception to some members of the public, or harm to the public interest, and not merely to the direct competitor or other non-consumer party to a contract). Sophisticated companies, like Defendant BanCon here and its corporate clients, are not members of the "general public." *See* *Rosenbluth Int'l., Inc. v. Superior Court, 101 Cal.App.4th 1073, 1078, 124 Cal.Rptr.2d 844, 847 (2002)*.

The deficiency in Counterclaimants' counterclaim cannot be cured and the claim under *§ 17200* fails as a matter of law. Accordingly, the Court hereby GRANTS WITH PREJUDICE Counterclaim Defendant's Motion to Dismiss the fourth cause of action to the counterclaim.

IV. DISPOSITION

For the reasons set forth above, Counterclaim Defendants **[*10]** Motion to Dismiss the Fourth Cause of Action to the Amended Counterclaim is hereby GRANTED WITH PREJUDICE.

The Clerk shall serve this minute order on all parties to the action.

Nichols v. Mahoney

United States District Court for the Southern District of New York

April 2, 2009, Decided; April 2, 2009, Filed

08 Civ. 3306 (CM)(DCF)

Reporter

608 F. Supp. 2d 526 *; 2009 U.S. Dist. LEXIS 34955 **

ANDRE NICHOLS and DANIEL MORAES, Plaintiff -against- MICHAEL T. MAHONEY, EMC CONTRACTING INC., EMC NEW YORK CONTRACTING, and EMC OF NEW YORK, INC., Defendants.

Core Terms

plaintiffs', hired, enterprise, illegal alien, allegations, harboring, aliens, entities, wages, employees, defendants', antitrust, predicate act, association-in-fact, motion to dismiss, proposed amended complaint, proximate cause, original complaint, amended pleading, anti trust law, depressed, knowingly, tending, pattern of racketeering activity, amended complaint, violations, commerce, quotation, overtime, courts

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the plaintiff. In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true. The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Motions to Dismiss, Failure to State Claim**

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Indeed, a plaintiff must assert enough facts to state a claim to relief that is plausible on its face. This "plausibility standard" is a flexible one, obliging a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN3[] Motions to Dismiss, Failure to State Claim

In assessing whether a proposed amendment to a complaint is futile, a court uses the standard for a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN4[] Racketeer Influenced & Corrupt Organizations, Claims

To establish a Racketeer Influenced and Corrupt Organizations Act (RICO) violation under *18 U.S.C.S. § 1962(c)*, a plaintiff must allege and prove four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. These requirements apply whether the RICO claim is civil or criminal in nature. In addition, a civil RICO claimant must show: (1) a violation of the RICO statute, *18 U.S.C.S. § 1962*; (2) an injury to business or property; and (3) that the injury was caused by the violation of *§ 1962*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN5[] Racketeer Influenced & Corrupt Organizations, Claims

18 U.S.C.S. § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) statute makes it unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. To plead a RICO violation, a plaintiff must allege the existence of two distinct entities: (1) a person; and (2) an enterprise that is not simply the same person referred to by a different name. *Section 1961(3)* defines a person as any individual or entity capable of holding a legal or beneficial interest in property. *18 U.S.C.S. § 1961(3)*. An "enterprise" is defined as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*. The enterprise requirement is most easily satisfied when the enterprise is a formal legal entity. However, an association-in-fact may also be a RICO enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN6[] Racketeer Influenced & Corrupt Organizations, Claims

The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. Nothing in the Racketeer Influenced and Corrupt Organizations Act statute requires more separateness than that.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN7[] Racketeer Influenced & Corrupt Organizations, Claims

An association-in-fact theory is a group of persons associated together for a common purpose of engaging in a course of conduct which is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure. Thus, proof of various racketeering acts may be relied on to establish the existence of the charged enterprise. While the question of whether a group of individuals or corporations exhibit such organization and common purpose is ordinarily one of fact, the complaint must allege facts that permit an inference that such an association exists.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN8[] **Racketeer Influenced & Corrupt Organizations, Claims**

The distinctness requirement of Racketeer Influenced and Corrupt Organizations Act (RICO) helps a court determine whether an association-in-fact exists: In practice, the dual requirements of (1) distinctness and (2) the proof needed to demonstrate an association-in-fact, work in tandem to weed out claims dressed up as RICO violations but which are not in fact. Specifically, the distinctness doctrine requires a plaintiff to demonstrate that the RICO person is legally separate from the RICO enterprise, while the association-in-fact requirement helps ensure that distinctness is not achieved by simply tacking on entities to the enterprise which do not in fact operate as a "continuing unit" or share a "common purpose."

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

The distinctness requirement and proof of an association-in-fact are met by showing that the third party added to the enterprise shares a common purpose with the enterprise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN10[] **Racketeer Influenced & Corrupt Organizations, Claims**

For a plaintiff to plead a substantive violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, he must allege a pattern of racketeering activity, and to establish a RICO conspiracy, a plaintiff must show a conspiracy to commit a substantive RICO violation. Thus, claims under both *18 U.S.C.S. § 1962(c)* and *(d)* require that a plaintiff allege a pattern of racketeering activity. To survive a motion to dismiss, this pattern must be adequately alleged in the complaint.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN11[] **Enforcement of Immigration Laws, Employer Liabilities & Obligations**

See *8 U.S.C.S. § 1324(a)(3)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN12[] Racketeer Influenced & Corrupt Organizations, Claims

In the U.S. Court of Appeals for the Second Circuit, it has long been that law that a plaintiff relying on *§ 273(a)(3) of the Immigration and Nationality Act* (INA) as a predicate act must allege both that the defendant knowingly hired illegal aliens and that the defendant had actual knowledge that the illegal aliens it hired were brought into the country in violation of the statute in order to plead a violation of *§ 274(a)(3) of the INA.*

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN13[] Racketeer Influenced & Corrupt Organizations, Claims

Congress wrote two different statutes addressing the hiring of illegal aliens, One entitled "Unlawful employment of aliens" makes it illegal to hire illegal aliens knowing that the aliens are not authorized to work. *8 U.S.C.S. § 1324a*. A violation of this statute is not a Racketeer Influenced and Corrupt Organizations Act (RICO) predicate act. The other makes it illegal knowingly to hire illegal aliens who are known to have been smuggled ("brought") into the United States. *8 U.S.C.S. § 1324*. A violation of that statute is a RICO predicate act. The key difference between the two statutes is the employer's knowledge of how the illegal alien arrived in the United States. If the employer does not know that at least 10 of its illegal hires were "brought into" the country by some third party (as opposed to walking across the border themselves, or arriving on a visitor's or student visa and overstaying their welcome), then it has not committed a RICO predicate act by hiring them--even though it has committed a federal crime by knowingly hiring the aliens without regard to how they entered the country.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN14[] Enforcement of Immigration Laws, Employer Liabilities & Obligations

See *8 U.S.C.S. § 1324a(a)(1)-(2)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN15[] Racketeer Influenced & Corrupt Organizations, Claims

It is not enough for a plaintiff to allege that the defendants hired illegal aliens--or even that they did so knowingly. Rather, a plaintiff must allege that the defendant knew both that at least 10 of its employees were undocumented aliens and that those 10 employees arrived in the United States in a manner that qualifies as being "brought" here. Moreover, the plaintiff must plead facts tending to show that the statute specified by Congress as a predicate act was violated.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN16[] Enforcement of Immigration Laws, Employer Liabilities & Obligations

Purely conclusory allegations about defendants' knowledge of the means by which their employees entered the United States is insufficient.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN17[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Twombly case applies in more than antitrust cases. Indeed, the U.S. Court of Appeals for the Second Circuit has indicated that there are certain types of cases where Twombly obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. A civil Racketeer Influenced and Corrupt Organizations Act case is just such a case.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN18[] **Racketeer Influenced & Corrupt Organizations, Claims**

If Twombly means anything, it means that, bald assertions and conclusions of law will not suffice. The pleadings must create the possibility of a right to relief that is more than speculative. Therefore, after Twombly, a plaintiff in a civil Racketeer Influenced and Corrupt Organizations Act lawsuit must plead some facts tending to show that his ultimate conclusion is "plausible."

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN19[] **Enforcement of Immigration Laws, Employer Liabilities & Obligations**

See *8 U.S.C.S. § 1324(a)(1)(A)(iii)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN20[] **Racketeer Influenced & Corrupt Organizations, Claims**

To plead a violation of *§ 274(a)(1)(A)(iii) of the Immigration and Nationality Act*, *8 U.S.C.S. § 1324(a)(1)(A)(iii)*, a plaintiff must allege both that (1) the "person" knew or recklessly disregarded the alien's unlawful status, and (2) the "person" took steps that were intended to help the illegal alien remain undetected. Violation of *§ 274(a)(1)(A)(iii) of the Immigration and Nationality Act* is a predicate act under the Racketeer Influenced and Corrupt Organizations Act.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN21[] Enforcement of Immigration Laws, Employer Liabilities & Obligations

Within the meaning of § 274(a)(1)(A)(iii) of the Immigration and Naturalization Act, *8 U.S.C.S. § 1324(a)(1)(A)(iii)*, harboring encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence. Harboring comprises a wide range of conduct, including providing illegal aliens housing, transportation, arranging sham marriages, assisting them in getting employment, teaching them to hide their illegal identity, and sheltering illegal aliens from the immigration authorities and shielding them from observation to prevent their discovery.

Immigration Law > Enforcement of Immigration Laws > Employer Liabilities & Obligations > General Overview

HN22[] Enforcement of Immigration Laws, Employer Liabilities & Obligations

Hiding aliens from immigration authorities violates the statute. Installing a security system designed to alert illegal aliens of an impending governmental raid or inspection to help the illegal aliens escape detection constitutes harboring. Shutting down a jobsite to prevent a detection is no different than putting an alarm bell on a site to tell the illegal aliens to run away.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN23[] Racketeer Influenced & Corrupt Organizations, Claims

A plaintiff only has standing to sue under *18 U.S.C.S. § 1964(c)* if the alleged violation under the Racketeer Influenced and Corrupt Organizations Act (RICO) was the proximate cause of the plaintiff's injury. To allege proximate cause, a plaintiff must show some direct relation between the injury asserted and injurious conduct alleged. In other words, when a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In evaluating whether the plaintiff's alleged violation meets this "directness" requirement, courts should consider the policy reasons behind it. The U.S. Supreme Court has identified three reasons for requiring a direct connection between the alleged RICO violation and the plaintiff's injury: (1) the factual difficulty of measuring indirect damages and distinguishing among distinct independent causal factors; (2) the complexity of apportioning damages among plaintiffs to obviate the risk of multiple recoveries; and (3) the fact that the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN24[] Racketeer Influenced & Corrupt Organizations, Claims

The plaintiff must show that the defendant's violation not only was "but for" cause of his injury, but was the proximate cause as well. The U.S. Court of Appeals for the Second Circuit has equated "but for" and "proximate" cause with "transaction" and "loss" causation.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN25[] Sherman Act, Scope

Section 1 of the Sherman Act prohibits, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1. To establish a § 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason. Thus, a § 1 plaintiff must allege that the defendants entered into some type of an agreement (tacit or express) with a separate entity. This is because it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN26[] Private Actions, Standing

A private plaintiff may not recover damages under the antitrust laws unless it demonstrates that it has suffered an "antitrust injury." Courts colloquially refer to this requirement as "antitrust standing." It is entirely distinct from standing under Article III of the Constitution. An "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. To demonstrate antitrust injury, a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute. Thus, the antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. Antitrust standing serves the same function as proximate cause under the Racketeer Influenced and Corrupt Organizations Act (which derives from antitrust standing).

Antitrust & Trade Law > Sherman Act > Claims

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN27[] Sherman Act, Claims

Even if a plaintiff adequately alleges an antitrust injury, he may lack standing for other reasons. These include: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Antitrust & Trade Law > Sherman Act > Claims

HN28[] Sherman Act, Claims

Plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN29[] Public Enforcement, State Civil Actions

See *N.Y. Gen. Bus. Law § 340*.

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN30[] Standing, Sherman Act

The Donnelly Act, *N.Y. Gen. Bus. Law § 340*, was modeled after the Sherman Act. In fact, it is often called the "Little Sherman Act," and courts are instructed that Donnelly should generally be construed in light of federal precedent and given a different interpretation only where state policy, differences in the statutory language or the legislative history justify such a result. Thus, if the plaintiffs do not have standing to assert a federal antitrust claim, they do no have standing to bring a Donnelly Act claim.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN31[] Antitrust & Trade Law, Sherman Act

Although undoubtedly the sweep of Donnelly Act may be broader than that of Sherman Act, under the familiar canon of statutory construction, noscitur a sociis, the term, "arrangement", takes on a connotation similar to that of the other terms with which it is found in company, and thus must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, "contract", "combination" or "conspiracy."

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Minimum Wage

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Overtime & Work Periods

HN32[] Scope & Coverage, Minimum Wage

Section 216(b) of the Fair Labor Standards Act provides a right of action to any employee whose employer violates the provisions of *29 U.S.C.S. § 206* or *29 U.S.C.S. § 207*, which govern wages and hours, respectively. *Section 206(a)* requires "Every employer" to pay a minimum wage to each of his employees. *29 U.S.C.S. § 206*. *Section 207(a)(1)* requires an employer to pay its employees overtime wages. *29 U.S.C.S. § 207*. Under that section, employers must pay employees at a rate of not less than one and one-half times the employee's regular rate for hours worked in excess of forty per week. *29 U.S.C.S. § 207(a)*. The type of "work" covered by this section is defined as physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily for the benefit of the employer and his business.

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Minimum Wage

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Enterprise Coverage

HN33[] **Scope & Coverage, Minimum Wage**

The minimum wage and maximum hour requirements of the Fair Labor Standards Act apply only to employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce. *29 U.S.C.S. §§ 206(a)*, *207(a)*. *29 U.S.C.S. § 203(s)(1)* defines an "Enterprise engaged in commerce," to include any enterprise that has employees engaged in commerce or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and that has gross annual revenues of $ 500,000 or more.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

HN34[] **Wage & Hour Laws, Scope & Definitions**

Where a plaintiff alleges violations of the Fair Labor Standards Act's minimum and overtime wage provisions, the complaint should, at least approximately, allege the hours worked, for which wages were not received.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Definition of Employers

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Enterprise Coverage

HN35[] **Scope & Definitions, Definition of Employers**

Under *29 U.S.C.S. § 203(s)(1)*, there are two ways in which an employer is considered to have "engaged in commerce:" by pleading individual or enterprise coverage. First, for an employee to qualify for individual coverage under the Fair Labor Standards Act (FLSA), he must have personally performed work involving or related to the movement of persons or things between states. *29 C.F.R. § 779.103*. Second, for enterprise coverage, the plaintiffs' employer must have engaged in interstate commerce. Courts have noted that virtually every enterprise in the nation doing the requisite dollar volume of business is covered by the FLSA.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Definition of Employers

HN36[] **Scope & Definitions, Definition of Employers**

Individuals with significant decision-making authority over a company may be liable as employers under the Fair Labor Standards Act.

Labor & Employment Law > Wage & Hour Laws > Statute of Limitations

HN37[] **Wage & Hour Laws, Statute of Limitations**

Generally, the Fair Labor Standards Act has a two-year statute of limitations, except in the case of willful violations, for which the statute of limitations is three years. *29 U.S.C.S. § 255(a)*. A violation is willful, if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

HN38[] **Wage & Hour Laws, Scope & Definitions**

The relevant portions of the New York State Labor Law, *N.Y. Lab. Law §§ 190 et seq.*, do not diverge from the Fair Labor Standards Act.

Counsel: **[**1]** For Andre Nichols, Daniel Moraes, Plaintiffs: Gary Silverman, LEAD ATTORNEY, Joy Kim Mele, O'Dwyer and Bernstein, L.L.P., New York, NY.

For Michael T. Mahoney, EMC Contracting Inc, EMC New York Contracting, EMC of New York, Inc, Defendants: George L. Santangelo, George L. Santangelo, Esq., New York, NY.

Judges: Colleen McMahon, United States District Judge.

Opinion by: Colleen McMahon

Opinion

[*529] DECISION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND GRANTING PLAINTIFFS' CROSS MOTION FOR LEAVE TO AMEND

McMahon, J.:

Defendants move to dismiss plaintiffs' complaint. Plaintiffs oppose the motion, and cross-move for leave to amend, attaching a proposed amended complaint.

An order disposing of these motions issued on March 31. Plaintiffs' motion for leave to amend was granted. However, because both their original and amended pleadings failed to state claims under the civil RICO statute or antitrust laws, defendants' motion to dismiss Counts I, II and III (RICO Claims), IV (violation of the Sherman Act, *15 U.S.C. § 1*) and V (violation of the Donnelly Act, *N.Y. Gen. Law. § 340 et seq*.) of the plaintiffs' complaint was granted and the claims were dismissed with prejudice. Defendants' motion **[**2]** to dismiss Counts VI (violation of the Fair Labor Standards Act) and Count VII (violation of New York Labor Law) was denied.

This opinion explains the reasons for the court's ruling.

The Gravamen of this Action

This is the latest in a series of civil RICO actions that have been filed in various federal courts across the nation, capitalizing on the popular outcry against undocumented aliens who are working openly in the United States. Plaintiffs, Andrew Nichols and Daniel Moraes, are construction workers who were formerly employed by the defendant corporations and their owner, Michael T. Mahoney. They allege that their wages were depressed because the defendants knowingly hired undocumented aliens, in violation of *Section 274 of the Immigration and Nationality Act*, *8 U.S.C. § 1324(a)*. Plaintiffs also contend that defendants' actions constituted an illegal "scheme" to restrain free competition within the construction industry, by giving defendants an unfair advantage over employers who do not employ illegal workers.

Plaintiffs also allege that they were not properly compensated for overtime hours worked or paid minimum wage, in violation of the Fair Labor Standards Act, *29 U.S.C. § 201 et seq.* **[**3]** and *New York Labor Law §§ 190 et seq*., *650 et seq*.

Discussion

I. Standard of Review

A. Motion to Dismiss

HN1[] *Rule 12(b)(6) of the Federal Rules of Civil Procedure* provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the plaintiff. "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. Gen. Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991)*. The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

[*530] ***HN2***[] "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (quotations, **[**4]** citations and alterations omitted). Indeed, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." *Id. at 1974*. This "plausibility standard" is a flexible one, "oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*, cert. granted, *128 S. Ct. 2931, 171 L. Ed. 2d 863 (2008)*.

B. Leave to Amend

HN3[] In assessing whether a proposed amendment to a complaint is futile, a court uses the standard for a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. *Esposito v. Deutsche Bank AG, 07 civ. 6722, 2008 U.S. Dist. LEXIS 101460, 2008 WL 5233590 at *3 (S.D.N.Y. Dec. 16, 2008)* (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d. Cir. 2002))*. The court has granted plaintiffs' leave to amend and will evaluate both the original and the proposed amended complaints in this decision.

II. Plaintiff Fails to State Any Viable Civil RICO Claim

Pursuant to *18 U.S.C. § 1964(c)*, the plaintiffs allege violations under *sections 1962(c)* and *(d)* (RICO conspiracy) of the RICO statute.

HN4[] To establish a RICO violation under *section 1962(c)*, **[**5]** a plaintiff must allege and prove four elements: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' These requirements apply whether the RICO claim is civil or criminal in nature." *City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 439 (2d Cir. 2008)* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*.

In addition, a civil RICO claimant must show: "(1) a violation of the RICO statute, *18 U.S.C. § 1962*; (2) an injury to business or property; and (3) that the injury was caused by the violation of *Section 1962*." *Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 183 (2d Cir. 2008)* (quotation and citation omitted).

Defendants contend that the plaintiffs fail to plead sufficiently (1) the existence of an enterprise; (2) a substantive violation of *section 1962*; and (3) proximate cause. Plaintiffs' original complaint does not adequately plead a substantive violation (predicate act). They try to cure that defect in two different ways in their amended complaint; one way works, and one does not. However, the amended pleading fails to plead proximate cause between the predicate acts and plaintiffs' injury. Therefore, the RICO claims **[**6]** must be dismissed.

A. Both the Original Complaint and The Proposed Amended Complaint Adequately Plead Conduct of An "Enterprise"

HN5[] *Section 1962(c)* of the RICO statute makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." *18 U.S.C. § 1962(c)*. To plead a RICO violation, a plaintiff "must allege….the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161-62, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*; *Smokes-Spirits, 541* **[*531]** *F.3d at 446*. *Section 1961(3)* defines a person as "any individual or entity capable of holding a legal or beneficial interest in property." *18 U.S.C. § 1961(3)*. An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*; *Smokes-Spirits, 541 F.3d at 447*; *Kottler v. Deutsche Bank AG, 607 F. Supp. 2d 447, 2009 WL 55885, at *5 (S.D.N.Y. 2009)*.

The **[**7]** enterprise requirement is most easily satisfied "when the enterprise is a formal legal entity." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 173 (2d Cir. 2004)*. However, an association-in-fact may also be a RICO enterprise. Id.

In this case, the plaintiffs allege the existence of both a formal legal entity enterprise (Count I) and an association-in-fact enterprise (Count II). The defendants contend that neither enterprise pleading satisfies the requirements of RICO. They are wrong on both accounts.

In Count I, the plaintiffs allege that Mahoney, the principal of the EMC entities, is the "person," and that the EMC entities are the enterprise. These allegations are sufficient to plead the existence of two distinct entities. *Cedric Kushner, 533 U.S. at 166*. In Cedric Kushner, the Supreme Court reversed and remanded the Second Circuit's decision affirming the dismissal of the plaintiff's complaint. The plaintiff sued Don King, the president and sole shareholder of Don King Productions, alleging violations of the RICO statute. The district court dismissed the complaint because it found that King was not a "person" who was distinct from "the enterprise," but rather was **[**8]** part of the enterprise. For many years, it was the law in this Circuit that a corporation and its employees could not constitute an "enterprise." However, in an unanimous decision, the Supreme Court undid that precedent, holding, *HN6*[] "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." *Id. at 163*.

The allegations of Count I meet the distinctness requirement, because Mahoney--a natural person--is distinct from EMC--the enterprise--even though he is also the principal of the EMC entities. The defendants' argument otherwise is based on a misreading of the plaintiffs' complaint. Defendants mistakenly assert that the plaintiffs' complaint alleged, "EMC is the enterprise and the corporate entity conducting the affairs of the enterprise" (i.e., the person). (Def. Mem. at 14.) However, the complaint actually says, "At all times relevant to this action, defendant Mahoney was a "person" as defined in *18 U.S.C. § 1961(3)*. Defendants EMC constitute the enterprise as defined in **[**9]** *18 U.S.C. § 1961(4)*." (Compl. PP 90-91; Am. Compl. PP 114-15.)

In Count II, the plaintiffs allege that the defendants are part of an enterprise composed of entities associated-in-fact, which consists of the EMC entities, Mahoney, and American Latin. They allege that, under the direction of EMC and Mahoney, the association-in-fact worked together to obtain "illegal workers for employment by EMC." (Compl. P 69; Am. Compl. P 92.) By doing so, all three hoped to make large sums of money--EMC and Mahoney by depressing wages, and American Latin by receiving a fee for each worker it provided EMC. (See Compl. PP 70-71; Am. Compl. PP 93-94.)

HN7[] An association-in-fact theory is "a group of persons associated together for a common purpose of engaging in a course **[*532]** of conduct. . . . [which is] proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. "Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure. Thus, . . . proof of various racketeering acts may **[**10]** be relied on to establish the existence of the charged enterprise." United States v. Coonan, 938 F.2d 1553, 1559-60 (2d Cir. 1991). "While the question of whether a group of individuals or corporations exhibit such organization and common purpose is ordinarily one of fact, the complaint must allege facts that permit an inference that such an association exists." Zito v. Leasecomm Corp., 02 Civ. 8074, 2004 U.S. Dist. LEXIS 19778, 2004 WL 2211650, at *7 (S.D.N.Y. Sept. 30, 2004).

In addition, **HN8**[] the distinctness requirement of RICO helps a court determine whether an association-in-fact exists:

> In practice, the dual requirements of (1) distinctness and (2) the proof needed to demonstrate an association-in-fact, work in tandem to weed out claims dressed up as RICO violations but which are not in fact. Specifically, the distinctness doctrine requires a plaintiff to demonstrate that the RICO person is legally separate from the RICO enterprise, while the association-in-fact requirement helps ensure that distinctness is not achieved by simply tacking on entities to the enterprise which do not in fact operate as a "continuing unit" or share a "common purpose."

Smokes-Spirits, 541 F.3d at 447.

Defendants contend that plaintiffs' **[**11]** associate-in-fact theory in Count II is deficient. They cite Baker v. IBP, Inc., 357 F.3d 685, 691 (7th Cir. 2004), in support of their argument.

In Baker, the plaintiffs argued that defendant violated section 274(a)(3), and derivatively RICO, by bringing in and employing illegal aliens "for financial gain (a reduction in the wages it must pay). . . ." Id. at 687. The plaintiffs alleged that the enterprise--based on an association-in-fact theory--consisted of the defendant plus "the persons and organization who help it find aliens to hire." Id. at 691. The plaintiffs' RICO complaint was dismissed because the plaintiffs failed to allege a distinction between the defendant and the enterprise. Id. at 692. The Seventh Circuit found the plaintiffs' pleading lacking in two respects. First, the plaintiffs' complaint failed to allege how the alleged association-in-fact shared a common purpose, which is an "essential ingredient" of a RICO claim. Id. The court reasoned that the alleged association could not have a common purpose because each member of the associated group had different goals: defendant wanted to pay lower wages, the recruiter organization wanted to be paid for more services rendered, **[**12]** and the Chinese Mutual Aid Association wanted to help members of its ethnic group get jobs. Id. Second, even if the plaintiffs' adequately pled the existence of an enterprise, their pleading failed to allege that any defendant operated the association-in-fact. Id.

Baker, while interesting, is not the law of this Circuit, and would likely not be good law in this Circuit. In Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001), the Second Circuit concluded that pleading the existence of an association-in-fact consisting of employment placement services, labor contractors, newspapers, and "various immigrant networks" that help illegal aliens obtain employment was sufficient to withstand a motion to dismiss. Id. at 379.

Moreover, even if Baker were the law here, the plaintiffs' allegations sufficiently plead an association-in-fact. Both the **[*533]** original and the amended complaints allege that the association-in-fact operated under the direction of defendants, so that the enterprise could procure illegal aliens for employment by EMC. All three entities--EMC, Mahoney and American Latin--entered into this association to make money. EMC and Mahoney would make **[**13]** money by depressing wages, and American Latin would profit by receiving a fee for each worker it provided the defendants. All "therefore had a stake in the success of the other," Zito, 2004 U.S. Dist. LEXIS 19778, 2004 WL 2211650, at *8, because their ability to make money depended on the efforts of each party. These allegations are enough to satisfy the "common purpose" requirement. See id.

The plaintiffs' complaint also sufficiently alleges an entity that is distinct from its members. In Baker, the court found the plaintiffs' failed to allege a distinct entity because the plaintiffs alleged that the named defendant "operates *itself* unlawfully . . . [by] hir[ing], harbor[ing] and pay[ing] the unlawful workers." Baker, 357 F.3d at 691. Here, the plaintiffs' allegations, taken as true, are different. They allege that EMC and Mahoney direct American Latin to find illegal aliens for EMC job sites, and once found, American Latin's pool of illegal workers "take direction from EMC's foremen and supervisors, but are paid [the reduced wage] by American Latin." (Compl. P 26; Am. Compl. P 27.)

Thus, the complaints allege RICO persons (Mahoney and EMC) who are legally separate from the RICO enterprise (EMC-Mahoney-American **[**14]** Latin association-in-fact), which operates for a common purpose. See *Smokes-Spirits, 541 F.3d at 447* (noting ***HN9***[] the distinctness requirement and proof of an association-in-fact are met by showing that the third party added to the enterprise shares a common purpose with the enterprise).

B. The Original Complaint Fails To Plead That The Members of The Enterprise Committed A Predicate Act Through A Pattern of Racketeering Activity

HN10[] For a plaintiff to plead a substantive violation of the RICO statute, he "must [allege] a pattern of racketeering activity, and to establish a RICO conspiracy, a plaintiff must show a conspiracy to commit a substantive RICO violation. *Spool, 520 F.3d at 183*. Thus, claims under both *section 1962(c)* and *(d)* require that a plaintiff allege a pattern of racketeering activity. "To survive a motion to dismiss, this pattern must be adequately alleged in the complaint." Id. (quotation and citation omitted).

The plaintiffs' original complaint alleges that defendants engaged in a "pattern of racketeering activity" by knowingly hiring numerous illegal aliens in violation of *Section 274(a)(3) of the Immigration and Nationality Act*, 18 U.S.C. § 1324(a), a RICO predicate offense. **[**15]** *18 U.S.C. § 1961(1)(F)* ("any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens)").

Section 274(a)(3) provides:

> ***HN11***[] (A) Any person who, during any 12-month period, knowingly hires for employment at least *10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B)* shall be fined under title 18 or imprisoned for not more than 5 years, or both.
> (B) An alien described in this subparagraph is an alien who--
>
> (i) is an unauthorized alien (as defined in *section 1324a (h)(3)* of this title), [1] and
>
> **[*534]** (ii) *has been brought into the United States* in violation of this subsection.

8 U.S.C. § 1324(a)(3) (emphasis added). ***HN12***[] In this Circuit, it has long been that law that a plaintiff relying on section 273(a)(3) as a predicate act must allege both that the defendant knowingly hired illegal aliens and that the defendant "had actual knowledge that the illegal aliens it hired were *brought into the country in violation of the statute*" *Commercial Cleaning, 271 F.3d at 387* (citing *Sys. Mgmt., Inc. v. Loiselle, 91 F. Supp. 2d 401, 408 (D. Mass. 2000)* (emphasis added), in order to plead a violation of section 274(a)(3).

The plaintiffs' original complaint fails to allege a violation of section 274(a)(3). The original complaint does not contain the necessary allegation that defendants knew that at least 10 of the aliens they hired were brought into the country by someone else (as opposed to getting here on their own).

HN13[] Congress wrote two different statutes addressing the hiring of illegal aliens, One entitled "Unlawful employment of aliens" makes it illegal to hire illegal aliens knowing that the aliens are not authorized to work. *8 U.S.C. § 1324a*. [2] A violation of this statute is not a RICO predicate act. The other makes it illegal knowingly to hire

---

[1] *Section 1324a(h)(3)* **[**16]** defines an unauthorized alien as, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." *8 U.S.C. 1324a(h)(3)*.

[2] The relevant section of the statute provides:

> ***HN14***[] It is unlawful for a person or other entity--

illegal aliens who are known to have been smuggled ("brought") into the United States. *8 U.S.C. § 1324*. A violation of that statute is a RICO predicate act.

The key difference between the two statutes is the employer's knowledge of how the illegal alien arrived in the United States. If the employer does not know that at least 10 of its illegal hires were "brought into" the country by some third party **[**18]** (as opposed to walking across the border themselves, or arriving on a visitor's or student visa and overstaying their welcome), then it has not committed a RICO predicate act by hiring them--even though it has committed a federal crime by knowingly hiring the aliens without regard to how they entered the country.

In Commercial Cleaning, the Second Circuit discussed this critical distinction. Although sustaining most of the allegations of a complaint remarkably similar to this one, it held that a district court had properly dismissed the complaint because the plaintiffs failed to allege that the defendants knew when they hired the aliens that at least 10 of them had been "brought into" the United States. *Commercial Cleaning, 271 F.3d at 387*. After Commercial Cleaning, ***HN15***[] it is not enough for a plaintiff to allege that the defendants hired **[*535]** illegal aliens--or even that they did so knowingly. Rather, a plaintiff must allege that the defendant knew *both* that at least 10 of its employees were undocumented aliens *and* that those 10 employees arrived in the United States in a manner that qualifies as being "brought" here. Moreover, the plaintiffs must plead facts tending to show that the statute **[**19]** specified by Congress as a predicate act was violated. See id.

The original complaint in this case says not a word about the defendants' knowledge of how any of their illegal alien employees entered the United States. *Commercial Cleaning*, which is binding on this Court, thus compels dismissal of the original complaint.

Because the original complaint must be dismissed, the Court will not here discuss whether it pleads proximate cause--the third and final pleading requirement under RICO. The Court reserves that discussion for the amended complaint.

After dismissing the Commercial Cleaning complaint on the technical ground discussed above, the Second Circuit determined that the case should be remanded to give the plaintiff the chance to add the missing allegations to their complaint. *Id. at 387 n.5*. Knowing this, the plaintiffs have cross-moved for leave to amend the complaint and have proffered a proposed amended pleading that purports to cure the deficiencies of the original.

The proposed amended complaint does two things. First, it includes several conclusory allegations that are obviously intended to allege that defendants knew some of their illegal alien employees had been smuggled into **[**20]** the country by third parties. Those allegations are factually insufficient to allege the requisite knowledge

Second, the proposed amended complaint adds a wholly new predicate act allegation. It charges that the defendants violated a different law, *8 U.S.C. § 1324(a)(1)(A)(iii)* (also known as *section 274(a)(1)(A)(iii) of the*

(A) to hire, or **[**17]** to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or (B)

(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or

(ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in *section 1802* of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S.C. § 1324a(a)(1)-(2).

Immigration and Nationality Act), by harboring the illegal aliens who they employ on multiple occasions. *18 U.S.C. § 1961(1)(F)*. This proposed amendment fails to state a RICO claim, because it fails to allege proximate cause.

C. The Proposed Amended Complaint Still Fails to Plead a Violation of Section 274(a)(3)

As far as the alleged section 274(a)(3) predicate act allegations are concerned, the plaintiffs' proposed amended pleading fails to cure the deficiencies of the original complaint.

The recent Supreme Court decision of *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, makes it clear that ***HN16***[] purely conclusory allegations about defendants' knowledge of the means by which their employees entered the United States insufficient. In Twombly, the Supreme Court reversed and remanded a decision denying a motion to dismiss a complaint for failure to state a **[**21]** claim. The plaintiffs brought a putative class action against major telecommunications providers, alleging an antitrust conspiracy in violation of the Sherman Act, *15 U.S.C. § 1*, The question presented was whether the complaint should be dismissed because the plaintiffs failed to allege any facts tending to show that two or more parties had entered into an agreement to violate the antitrust laws. The pleading alleged no more than parallel conduct, together with a conclusory claim that the defendants conspired to violate the antitrust laws.

The Supreme Court, reversing the Second Circuit, held the pleading failed to state a claim. *Twombly, 550 U.S. 544, 557, 127 S. Ct. at 1966*. In its ruling, the Supreme **[*536]** Court announced that the standard applied to pleadings on *Rule 12(b)(6)* motions to dismiss for half a century--that a complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim," *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* (emphasis added)--had "earned its retirement." *Twombly, 550 U.S. at 563, 127 S. Ct. at 1969*.

The Supreme Court justified the imposition of a somewhat more stringent test at the pleading stage by **[**22]** noting the toll that civil litigation takes on defendants. *Id. at 1967*. In some cases, allowing a plaintiff's threadbare claim to proceed gives rise to an "in terrorem" effect where, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . . ." Id. The Court's solution to this problem was simple: "It is only be taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence." Id. (quotation and citation omitted).

While the scope of Twombly was initially murky, see, e.g., McMahon, The Law of Unintended Consequences: Shockwaves in the Lower Courts, *41 Suffolk U. L. Rev. 851, 852-53 (2008)*, it is by now clear that ***HN17***[] the case applies in more than antitrust cases. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007)*; Iqbal, *490 F.3d at 157*. Indeed, the Second Circuit has indicated that there are certain types of cases where Twombly "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is **[**23]** needed to render the claim *plausible*." *Iqbal, 490 F.3d at 157-58* (emphasis in original). A civil RICO case is just such a case.

A civil RICO lawsuit has vast implications for the defendants because of the specter of treble damages and the possibility of permanent reputational injury to defendants from the allegation that they are "racketeers." Courts have frequently commented on the "in terrorem" settlement value that a threat of a civil RICO claim creates. See, e.g., *Tamayo v. Blagojevich, 526 F.3d 1074, 1083 (7th Cir. 2008)*; *Nakahara v. Bal, 97 Civ. 2027, 1998 U.S. Dist. LEXIS 825, 1998 WL 35123, at *9 (S.D.N.Y. Jan. 30, 1998)*. The concerns about the impact of civil antitrust litigation that were articulated by the Supreme Court in Twombly (see above) are equally, if not moreso, applicable to civil RICO claims. That should not be surprising, since the civil RICO statute was modeled on the Sherman Act. See *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)* (discussing same).

HN18[] If Twombly means anything, it means that, "Bald assertions and conclusions of law will not suffice. The pleadings must create the possibility of a right to relief that is more than speculative." *Spool, 520 F.3d at 183*. (quotations **[**24]** and citations omitted). Therefore, after Twombly, a plaintiff in a civil RICO lawsuit must plead some facts tending to show that his ultimate conclusion is "plausible." In connection with the allegation that defendants violated the section 274(a)(3)--the alleged predicate act that gives rise to a purported "pattern of racketeering activity"-- Twombly means that the plaintiffs must plead some facts tending to show that these particular defendants actually knew that at least 10 of the illegal aliens they knowingly hired were brought into this country by some third party (or, as some courts have phrased it, were smuggled in) so that they could work illegally in the United States.

The Court has carefully reviewed the proposed amended pleading. It does not **[*537]** contain any factual allegation tending to make plausible their ultimate (and wholly conclusory) contention that the defendant knew that they were hiring 10 illegal aliens who had been "brought" into this country.

The amended complaint alleges:

> 66. Upon information and belief, defendants EMC and Mahoney have knowingly hired 10 or more individuals each calendar year since 2004 with actual knowledge that the workers were not authorized to work **[**25]** in the U.S. and had been brought into the U.S. in violation of *§ 1324*.

(Am. Compl. P 66.) That is a purely conclusory allegation, pleaded on information and belief. However, it is not supported with any factual allegations tending to show that defendants in fact had such knowledge. Neither is there any disclosure of the basis for plaintiffs' "belief" that defendants knew that at least 10 of the aliens they hired each year "ha[d] been brought into the United States." *8 U.S.C. § 1324(a)(3)(B)(ii)*. Undocumented workers arrive in this country in many ways. Nothing in the proposed amended complaint suggests why these defendants knew, or should have known, that any of the people they hired arrived in the United States in any particular way.

The amended pleading contains a number of new allegations (again, nearly all of which are pleaded on information and belief) that did not appear in the original complaint and that 1 presume are intended to bolster the conclusory allegation that defendants knew how their illegal employees got into the country:

> 1. As many as 7.2 million unauthorized migrants are employed in the United States, and as many as 14% of all workers in the construction industry are **[**26]** illegal aliens.
> 2. Neither defendants nor American Latin Services Enterprises Corp., the business that supplied many of their workers, (a) complied with their legal obligations to obtain proof of identity from the workers they hired/supplied; (b) asked employees to sign Form W-4 so that taxes and other deductions could be withheld from their wages; (c) carried out the necessary withholdings.
> 3. The reason they did not do these things was that they well knew the persons who were being hired/supplied were illegal aliens--indeed, it was "common knowledge" within the company.
> 4. Defendants hired illegal workers in order to drive wages down.

(Am. Compl. PP 1-4.) Unfortunately for the plaintiffs, none of these factual allegations tends to show that the defendants named in the caption knew how their undocumented alien employees arrived in this country. They tend only to show the defendants knew they were hiring illegal aliens--which, while a violation of federal law (*8 U.S.C. § 1324a*), is not a RICO predicate act.

Finally, plaintiffs assert, in paragraph 74:

> At a minimum, given the highly publicized and comprehensive measures undertaken by the federal government, especially since 2001, to safeguard **[**27]** our borders and prevent unauthorized entry into the U.S. and to criminal [sic] employers who hire illegal workers, defendants knew or should have known that the illegal workers they hired were brought into the U.S. in violation of *§ 1324*.

(Am. Compl. P 74.) Again, not a single fact is pleaded that gives rise to the conclusion articulated in this paragraph. While the Court has no way of knowing for sure what proportion of illegal workers were *not* smuggled in by a third party, it is clear from the Court's criminal docket that many undocumented aliens who are working in this country arrived on their own **[*538]** and were not "brought into" the country. Plaintiffs allege no fact tending to show that the Government's "highly publicized and comprehensive measures" are limited to those aliens who were smuggled into the country. Rather, they have been addressed to any and all undocumented workers. Without pleading any facts tending to show that *these* defendants knew that they were hiring aliens who had been smuggled in--for example, an allegation that defendants hired workers directly from persons who brought aliens into the United States, or from persons who were known to work with smugglers--plaintiffs **[**28]** fall short of what the law requires. See *Twombly, 550 U.S. 544, 557, 127 S. Ct. at 1966*. No such allegations are made here.

The Court recognizes that there are other, earlier cases, in which conclusory allegations of the sort plaintiffs here plead have survived a *Rule 12(b)(6)* motion to dismiss on the ground that section 274(a)(3) violations were not sufficiently pled. *Williams v. Mohawk Indus., Inc., 465 F.3d 1277 (11th Cir. 2006)*; *Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002)*. [3] Their precedential value is limited, however, because they precede Twombly, and so were being judged under the now-retired "no set of facts" standard.

D. The Proposed Amended [29] Complaint Sufficiently Alleges A Violation of Section 274(a)(1)(A)(iii)**

The plaintiffs also try to cure the defect in their original complaint by adding an entirely new RICO predicate act allegation. They allege that defendants "harbored" illegal aliens in violation of section 274(a)(1)(A)(iii), which provides:

> ***HN19***[] Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation

8 U.S.C. § 1324(a)(1)(A)(iii). ***HN20***[] To plead a violation of this statute, a plaintiff must allege both that (1) the "person" knew or recklessly disregarded the alien's unlawful status, and (2) the "person" took steps that were intended to help the illegal alien remain undetected. See *United States v. Kim, 193 F.3d 567, 574-75 (2d Cir. 1999)*. Violation of section 274(a)(1)(A)(iii) is a RICO predicate act.

HN21[] Within the meaning of this statute, harboring "encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally and **[**30]** to prevent government authorities from detecting his unlawful presence." *Id. at 574* (citation omitted). Harboring comprises a wide range of conduct, including providing illegal aliens housing, transportation, arranging sham marriages, assisting them in getting employment, teaching them to hide their illegal identity, and "*shelter[ing] [illegal aliens] from the immigration authorities and shield[ing] [them] from observation to prevent their discovery*." Id. (citations omitted) (emphasis added).

Plaintiffs' proposed amended pleading sufficiently alleges that, on at least two occasions in the last ten years, the defendants harbored the illegal aliens they had **[*539]** hired. The amended complaint alleges that defendants knew (or recklessly disregarded) their employees' undocumented status.

> 67. Upon information and belief, it was common knowledge within EMC that their workers were not authorized to work in the U.S. In fact, EMC's own supervisors and/or foremen were illegal aliens. Many of EMC's workers sought out employment with EMC, because they knew that EMC hired illegal workers, and therefore they would not be required to show proof of employment eligibility.

(Am. Compl. P 67.)

It also alleges that **[**31]** defendants attempted to hide their undocumented workers from the government:

---

[3] If Commercial Cleaning had reached such a result, this Court would be bound by the Circuit's decision. However, Commercial Cleaning reached the opposite result--the Circuit ruled that the plaintiffs had not alleged a violation of section 273(a)(3). I suspect that, in 2002 or 2003, the Second Circuit, confronted by a pleading like plaintiffs' here, might well have concluded that it was sufficient at the motion to dismiss stage. But no such ruling was ever made, to my knowledge, and Twombly changes the landscape considerably.

> 68. In an effort to shield their illegal workers from detection, EMC, and American Latin intentionally did not complete 1-9 forms or asked their employees to complete W-4 forms.
> ***
> 70. In an further effort to conceal, shield, and/or harbor their illegal workers, EMC would shut down the jobsite if they thought government authorities would be conducting a raid.
> ***

(Am. Compl. PP 68, 70.) These allegations of actions and omissions by defendants--failing to complete forms, shutting down job sites when inspections were anticipated--are sufficient to state a claim for violation of section 274(a)(1)(A)(iii). See *Kim, 193 F.3d at 574-75*.

Moreover, plaintiffs allege that defendants hired numerous undocumented aliens during a four year period, so the complaint satisfies the requirement that there be more than one predicate act of harboring during a 10 year period. *18 U.S.C. § 1961(5)*; *Spool, 520 F.3d at 183*.

The defendants contend that these allegations do not show that the defendants "substantially" facilitated the illegal aliens' unlawful stay in the United States. However, the Second Circuit has already decided that ***HN22***[↑] hiding **[**32]** aliens from immigration authorities violates the statute. *Kim, 193 F.3d. at 574* (citing *United States v. Herrera, 584 F.2d 1137, 1145 (2d Cir. 1978))*. In Herrera, this Circuit held that installing a security system designed to alert illegal aliens of an impending governmental raid or inspection to help the illegal aliens escape detection constitutes harboring. *584 F.2d at 1145*. The allegations here are that the defendants (1) failed to complete legally required paperwork in order to conceal the presence of aliens on their payroll, and (2) shut down job sites when they thought the government would conduct a raid. [4] Shutting down a jobsite to prevent a detection is no different than putting an alarm bell on a site to tell the illegal aliens to run away; and both of the activities alleged are designed to prevent the government from finding people who would be subject to deportation.

Therefore, the amended pleading cures the original complaint's failure to plead a "pattern of racketeering activity" by pleading a "pattern" of harboring illegal alien workers.

E. The Proposed [**33] Amended Complaint Does Not Plead Racketeering Injury/Proximate Cause

HN23[↑] A plaintiff only has standing to sue under *section 1964(c)* if the alleged RICO violation was the proximate cause of the plaintiff's injury. *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453, 126 S. Ct. **[*540]** 1991, 164 L. Ed. 2d 720 (2006)* (citing *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*; see also *Commercial Cleaning, 271 F.3d at 380*. To allege proximate cause, a plaintiff must show, "some direct relation between the injury asserted and injurious conduct alleged." *Smokes-Spirits, 541 F.3d at 440* (quoting *Holmes, 503 U.S. at 268*). In other words, "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza, 547 U.S. at 461*.

In evaluating whether the plaintiff's alleged violation meets this "directness" requirement, courts should consider the policy reasons behind it. See *Id. at 458-60*. The Supreme Court has identified three reasons for requiring a direct connection between the alleged RICO violation and the plaintiff's injury:

> (1) the factual difficulty of measuring indirect damages and distinguishing among distinct independent **[**34]** causal factors; (2) the complexity of apportioning damages among plaintiffs to obviate the risk of multiple recoveries; and (3) the fact that the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law.

---

[4] The amended complaint would be improved if defendants were able to allege that this occurred on more than one occasion.

Smokes-Spirit, 541 F.3d at 440 (citing Holmes, 503 U.S. at 269) (quotations omitted).

In Holmes, supra, Securities Investor Protection Corporation ("SIPC") claimed that one Robert Holmes conspired with others to manipulate stock prices. SIPC asserted that Holmes and others had conducted an enterprise through a pattern of racketeering activity consisting of multiple stock manipulations in violation of the federal securities laws--which are predicate acts. Nonetheless, the Supreme Court held that SIPC lacked standing to maintain a RICO claim against Holmes, because SIPC's injury--which derived from its subrogation to the claims of Holmes' defrauded customers--was not proximately caused by Holmes' conduct. Id. at 276. The Court--applying settled principles of causation under the antitrust laws to civil RICO claims--announced that there had to be some direct **[**35]** relationship between the injury asserted and the injurious conduct alleged. Id. at 265-68. In a much-quoted passage, the Court announced that **HN24**[] the plaintiff must show that the defendant's violation "not only was 'but for' cause of his injury, but was the *proximate cause* as well." Id. at 268 (emphasis added). In subsequent cases, the Second Circuit has equated "but for" and "proximate" cause with "transaction" and "loss" causation. See, e.g., McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008).

In Anza, supra, the Supreme Court applied the rationale of Holmes to a civil RICO case where the plaintiff (Ideal) was the principal competitor of the defendants' alleged enterprise (National). Ideal alleged that National and its principals injured it by failing to charge New York sales tax to cash-paying customers, which allowed defendants to reduced National's prices without affecting its profit margins. Id. at 453-54. National concealed its conduct by submitting fraudulent tax returns to the New York State Department of Taxation, sending them by mail (mail fraud) and electronically (wire fraud). Id. at 454.

Overturning the Second Circuit's decision sustaining the pleading under Rule 12(b)(6), **[**36]** the Supreme Court described Ideal's theory in the following terms: "Ideal's **[*541]** theory is that Joseph and Vincent Anza harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers." Id. at 457-58. But it then went on to say, "The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." Id. at 458. The Court concluded that this ran afoul of the proximate cause requirement of Section 1962(c). Id.

The Supreme Court observed that the directness requirement announced in Holmes was designed in part to mitigate "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action . . . the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." Id. at 458 (quoting Holmes, at 269). It noted both that National could have lowered its prices for any number of reasons--or not lowered its prices even though it was committing tax fraud--and that Ideal might **[**37]** well have lost sales for reasons other than National's alleged acts of fraud. All of this rendered damages to Ideal "speculative" while failing to avoid the "types of intricate, uncertain inquiries" that a proximate cause requirement "is meant to prevent." Id. at 460. The Court also concluded that a direct causal connection was imperative in a case where some more immediate victim of an alleged RICO violation--in Anza, the State of New York--could be expected to vindicate the law by pursuing its own claim, a claim that would (unlike Ideal's injury) be easy to prove.

In evaluating whether the plaintiffs have adequately alleged proximate cause in this case, the Court focuses on the proposed amended complaint, because it adequately alleges the commission of a pattern of racketeering activity, to wit: two or more violations of the harboring statute. The question to be answered is whether the plaintiffs' injury--the depression of their wages--was proximately cause by defendants' hiding their illegal alien employees from the Government. The answer to that question is no.

There is no direct relationship between the harboring of illegal aliens and the plaintiffs' depressed wages. Indeed, plaintiffs **[**38]** do not so allege. Rather, they contend that they were paid below-market wages because the defendants knowingly hired undocumented workers, who would and did work for wages that were lower than the prevailing rate. That act--the knowing hiring of illegal aliens--is specifically alleged to be the proximate cause of plaintiffs' lower wages. (Am. Compl. PP 45, 94, 109, 119, 128, 132.) As explained above, that act is not a RICO predicate act.

If plaintiffs had managed to plead that defendants knowingly hired 10 or more illegal aliens who defendants knew had been "brought into" the country--that is, if plaintiffs had successfully pled a violation of section 274(a)(3), which is a RICO predicate act--their proposed amended complaint might well plead proximate cause, as the Second Circuit found in analogous circumstances in Commercial Cleaning, 271 F.3d at 381-385. Of course, Commercial Cleaning is a pre-Anza case, so if plaintiffs had managed to plead that defendants knew some of their illegal employees had been "brought into" the country by others, this Court would have to consider whether Commercial Cleaning remains good law on this point. But plaintiffs' failure to allege the requisite specific **[**39]** facts moots any such inquiry.

[*542] Because hiring illegal aliens without knowing they were "brought in" is not racketeering activity, plaintiffs' allegation that hiring illegal aliens depressed wages--a correlation long recognized by courts, including the Supreme Court, see, e.g., DeCanas v. Bica, 424 U.S. 351, 356-357, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976)--does not satisfy the requirement that plaintiffs plead injury caused by a pattern of racketeering activity. To clear that hurdle, plaintiffs need to plead facts tending to show that defendants' harboring of illegal aliens proximately caused the drop in their wages. This they have not done.

Reading the plaintiffs' proposed amended complaint in the most favorable light, they do allege that the defendants were able to keep their "scheme" to employ illegal aliens going by hiding the aliens from the Government--by "harboring" them. (See Am. Compl. PP 25-45, 64, 67-73, 76.) But the fact that harboring may have allowed the alleged injury to persist for a longer period does not mean that harboring caused the injury.

Furthermore, that the only allegation in the amended complaint connecting harboring and wages concerns the duration of the harm rather than its cause underscores **[**40]** another critical point. "The key reasons for requiring direct causation include avoiding unworkable difficulties in ascertaining what amount of the plaintiff's injury was caused by the defendant's wrongful action as opposed to other external factors." First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 770 (2d Cir. 1994). Any effort to quantify how much of plaintiffs' depressed wages was caused by the harboring of illegal aliens, as opposed to hiring them or some other factor at work in the marketplace, would be even more inherently speculative than the proceeding anticipated (and condemned) by the Supreme Court in Anza.

Finally, because harboring is a direct affront to the Government, there is no need for private attorneys general like plaintiffs to bring damages actions in order to redress it. Just as the State of New York could be expected to pursue a corporation that was failing to pay state income tax, the Government can be expected to vindicate the laws against hiding aliens from the Government. This is not to say that proximate cause will be lacking every time a governmental entity has an interest in vindicating its laws. Indeed, any such result would effectively wipe the **[**41]** civil RICO statute off the books, since every RICO violation is predicated on a violation of some federal criminal statute--a violation that the United States, a "victim" whenever its laws are violated, has an incentive to remedy. However, in this case, where there is no direct or obvious connection between the racketeering activity alleged (harboring) and the harm to the plaintiffs (depressed wages), the fact that the direct victim of the harboring has the incentive to redress the harm (by capturing and deporting the aliens and by prosecuting the harboring employer) fatally undermines any contention that these plaintiffs have suffered injury *by virtue of* the alleged racketeering activity.

The amended complaint thus fails to state a claim under 18 U.S.C. § 1962(c). Because plaintiffs fails to plead any RICO violation, they also fail to plead any violation of 18 U.S.C. § 1962(d), the RICO conspiracy statute. All three RICO counts--Counts I, II and III -- are dismissed.

F. Further Leave to Replead the Civil RICO Claims is Denied

In Commercial Cleaning, 271 F.3d at 387, after concluding that the predicate act allegations were deficient, the Second Circuit remanded so that plaintiffs who **[**42]** failed **[*543]** to allege that defendants knew that at least 10 illegal aliens they had hired were "brought into" the country could insert that allegation into their pleading. Here, there is no need to grant leave to amend for that purpose, because plaintiffs have already proffered a proposed amended pleading to the Court and it has been accepted and examined. Despite knowing how defendants were attacking their original pleading, plaintiffs failed to plead all the necessary elements of a violation of section 274(a)(3). Furthermore, plaintiffs cannot possibly allege that defendants' harboring of illegal aliens in violation of section 274(a)(1)(A)(iii) proximately caused their injury. Therefore, Counts I, II and III of the amended complaint are dismissed with prejudice.

IV. Plaintiffs' Antitrust Claims are Dismissed

A. Plaintiffs' Sherman Act Claims

HN25[] *Section 1* of the Sherman Act prohibits, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." *15 U.S.C. § 1*. "To establish a *§ 1* violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between *at least* ***[**43]*** *two legally distinct economic entities*; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason." *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998)* (emphasis added). Thus, a § I plaintiff must allege that the defendants entered into some type of an agreement (tacit or express) with a separate entity. Id.; see also *Twombly, 550 U.S. at 553, 127 S. Ct. at 1964* ("the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express") (quotation and citation omitted). This is because "it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* was designed to police." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

In this case, the original pleading failed to allege an agreement. All the allegedly anticompetitive activity was committed by defendants in the course of running their own business. (See Compl. P 77 ("defendants Mahoney, EMC Contracting, Inc., EMC New York Contracting, and EMC of New York, Inc., have willingly **[**44]** conspired to depress the wages of all its hourly workers in order to underbid competitors for projects, and thereby make substantial profits.") Thus, the plaintiffs fail to plead that two separate entities entered into an agreement.

The amended complaint alleges that the defendants had an agreement with American Latin to depress wages. However, the Court need not decide whether this contention solves the problem, because there is a more fundamental problem: plaintiffs have not suffered any antitrust injury and lack standing to sue under the antitrust laws.

HN26[] A private plaintiff may not recover damages under the antitrust laws unless it demonstrates that it has suffered an "antitrust injury." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Courts colloquially refer to this requirement as "antitrust standing." It is entirely distinct from standing under Article III of the Constitution. An "antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "To **[*544]** demonstrate antitrust injury, a plaintiff must show (1) **[**45]** an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." *Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556, 568* (quotation and citation omitted). "Thus, the antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc. 467 F.3d 283, 290 (2d Cir. 2006)* (quotation and citation omitted). Antitrust standing serves the same function as RICO proximate cause (which, as noted above, derives from antitrust standing).

In addition, ***HN27***[] even if a plaintiff adequately alleges an antitrust injury, he may lack standing for other reasons. These include:

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3)

> the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Id. at 291.

Plaintiffs **[**46]** here allege that defendants committed an antitrust violation by hiring illegal workers to depress wages. Their alleged "antitrust injuries" are that 1) defendants' actions harmed competition by allowing them to underbid competitors for jobs by using cheap labor, and 2) defendants illegally inflated the labor pool of available workers by hiring workers based on the wages they would accept, instead of the workers' skill.

These conclusory allegations do not plead an antitrust injury.

Plaintiffs fail to allege how the use of illegal labor caused harm to competition in the market, rather than the competitors themselves or the workers. See *Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 479 (S.D.N.Y. 2001)* (citing *Brunswick, 429 U.S. at 488*); see also *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* (***HN28***[] "Plaintiff bears the initial burden of showing that the challenged action has had an actual *adverse effect on competition as a whole in the relevant market*.") (emphasis added). If defendants are able to underbid their competitors for jobs, plaintiffs are not the parties who are directly injured--defendants' competitors are.

Moreover, the second **[**47]** alleged antitrust injury--that defendants inflated the size of the labor pool--is the antithesis of an injury to competition, which is the type of injury the antitrust laws are intended to prevent. Defendants' complaint is not about too little competition in the market for construction labor, but too much. It is plaintiffs who are trying to "suppress competition" here, by decreasing the number of available construction workers and so driving up the price for their services. The idea that it harms competition to have more people competing for jobs, or if there are workers in the market who will compete for jobs by cutting the price (i.e., by accepting a lower wage), is ludicrous. Defendants are trying to use the antitrust laws to redress a violation of the immigration laws. It simply does not work.

Accordingly, the defendants' motion to dismiss plaintiffs' federal antitrust claim is dismissed with prejudice.

B. Plaintiffs' Donnelly Act Claim

In addition to bringing a federal antitrust claim, the plaintiffs assert New York's counterpart to the Sherman Act, the Donnelly Act, *N.Y. Gen. Bus. Law. § 340 et seq*. The Donnelly Act provides:

> **[*545]** ***HN29***[] *Every contract, agreement, arrangement or combination* **[**48]** whereby
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

N.Y. Gen. Bus. Law. § 340 (emphasis added). ***HN30***[] The Donnelly Act was modeled after the Sherman Act. *State v. Mobil Oil Corp., 38 N.Y.2d 460, 463, 344 N.E.2d 357, 381 N.Y.S.2d 426 (1976)*. In fact, it is often called the "Little Sherman Act" *Anheuser-Busch v. Abrams, 71 N.Y.2d 327, 335, 520 N.E.2d 535, 525 N.Y.S.2d 816 (1988)*, and courts are instructed that Donnelly should generally "be construed in light of Federal precedent and given a different interpretation *only where State policy, differences in the statutory language or the* ***[**49]*** *legislative history justify such a result*." Id. (emphasis added). Thus, if the plaintiffs do not have standing to assert a federal antitrust claim, they do no have standing to bring a Donnelly Act claim. See, e.g., *G.K.A. Beverage Corp. v. Honickman, 55*

F.3d 762, 766 (2d Cir. 1995) (dismissing federal and state antitrust claims for failure to allege an antitrust injury); Bio-Technology Gen. Corp. v. Genentech, Inc., 886 F. Supp. 377, 383 (S.D.N.Y. 1995) (applying federal standard to Donnelly Act claim); Ho v. Visa U.S.A., Inc., *16 A.D.3d 256, 257, 793 N.Y.S.2d 8 (1st Dep't 2005)* (same); Friedman v. E.R. Squibb & Sons, Inc., *125 A.D.2d 539, 509 N.Y.S.2d 616 (2d Dep't 1986)* (same); Lerner Stores Corp. v. Parklane Hosiery Co., Inc., 86 Misc. 2d 215, 381 N.Y.S.2d 968, 969-70 (N.Y. Sup. Ct. 1976), aff'd, *54 A.D.2d 1072, 388 N.Y.S.2d 760 (4th Dep't 1976)* (same).

The plaintiffs argue that the addition of the word "arrangements," which does not appear in the Sherman Act, broadens the scope of the State's ***antitrust law*** and gives them standing. They are wrong. In State v. Mobil Oil Corp, 38 N.Y.2d 460, 344 N.E.2d 357, 381 N.Y.S.2d 426 (1976), the New York Court of Appeals affirmed the dismissal of the plaintiff's complaint. Id. at 461-62. The Attorney General of New York claimed the defendant **[**50]** violated the Donnelly Act by engaging in unilateral price discrimination. He argued that the addition of the word "arrangements" to the Donnelly Act made the state ***antitrust law*** broader than the federal law, in that the state law prohibited any "practice" effecting restraint of trade. Id. at 464.

The New York Court of Appeals soundly rejected this argument:

> ***HN31***[] Although undoubtedly the sweep of Donnelly may be broader than that of Sherman, we conclude that under the familiar canon of statutory construction, noscitur a sociis, the term, "arrangement", *takes on a connotation similar to that of the other terms with which it is found in company, and thus must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms*, "contract", "combination" or "conspiracy". . . . To interpret the word "arrangement" as embracing any "practice", as the Attorney-General **[*546]** urges us to do, would be unwarranted as a matter of lexicology and, more significant, unjustified in the historical context of the statute. The addition of a conclusory allegation as to the effect of a described practice (here **[**51]** effecting restraint of trade) cannot operate, of course, to bring a one-sided practice which is outside the scope of the statute within its proscription.

Id. at 464 (emphasis added).

Therefore, the plaintiffs' Donnelly Act claim (Count V) is also dismissed with prejudice.

V. The Plaintiffs' Labor Law Claims

Plaintiffs' proposed amended complaint also added new allegations about defendants' failure to comply with applicable labor laws.

A. Plaintiffs Adequately Allege Fair Labor Standards Act Claims

Plaintiffs' Sixth Cause of Action alleges that defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, by intentionally refusing to pay them overtime wages and the legally required minimum wage.

Plaintiffs' federal labor and wage claims arise under ***HN32***[] section 216(b) of the FLSA, which provides a right of action to any employee whose employer violates the provisions of sections 206 or 207, which govern wages and hours, respectively. See 29 U.S.C. §§ 206, 207. Section 206(a) requires "Every employer" to pay a minimum wage to "each of his employees . . . ." 29 U.S.C. § 206. Section 207(a)(1) requires an employer to pay its employees overtime wages. 29 U.S.C. § 207. Under that **[**52]** section, employers must pay employees at a rate of not less than one and one-half times the employee's regular rate for hours worked in excess of forty per week. 29 U.S.C. § 207(a). The type of "work" covered by this section is defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily for the benefit of the employer and his business." Holzapfel v. Newburgh, 145 F.3d 516, 522 (2d Cir. 1998) (quoting Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944).

However, ***HN33***[] the minimum wage and maximum hour requirements of the FLSA apply only to employees who are "engaged in commerce or in the production of goods for commerce," or who are "employed in an enterprise engaged in commerce or in the production of goods for commerce." *29 U.S.C. §§ 206(a)*, *207(a)*; *Boekemeier v. Fourth Universalist Soc'y, 86 F. Supp. 2d 280, 285 (S.D.N.Y. 2000)*. *Section 203(s)(1)* defines an "Enterprise engaged in commerce," to include any enterprise that has employees "engaged in commerce . . . , or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce **[**53]** by any person," and that has gross annual revenues of $ 500,000 or more. See *Velez v. Vassallo, 203 F. Supp. 2d 312, 327-28 (S.D.N.Y. 2002)*.

Plaintiffs allege that, while working for the defendants, the defendants intentionally did not pay them overtime wages. (Am. Compl. P 50.) During this time, plaintiffs Moraes and Nichols worked an average of fifty and sixty-five hours per week, respectively, yet were never paid overtime for the extra hours that they worked. (Id. PP 51-52.) Plaintiffs also allege that defendants sometimes paid them by checks, which routinely bounced. (Id. P 55.) When their checks bounced, the plaintiffs allege that the defendants failed to pay them altogether, depriving them of the legally required minimum wage. (Id. P 147.)

[*547] Defendants argue that plaintiffs' complaint, even as amended, fails to adequately allege the elements of their FLSA claims under *Federal Rule of Civil Procedure 8(a)*. (Def. Reply at 15.)

Plaintiffs have sufficiently alleged that they were former employees of defendants EMC. *Zhong v. August August Corp., 498 F. Supp. 2d 625, 628-29 (S.D.N.Y. 2007)*. In this case, plaintiffs have expressly alleged an employer-employee relationship with the defendants. **[**54]** (See, e.g., Am. Compl. PP 46-48.) This is more than enough for *Rule 8* purposes.

Plaintiffs' allegations about defendants' purported violations of minimum wage and overtime provisions satisfy the requirements of *Rule 8*.***HN34***[] "[W]here a plaintiff alleges violations of the FLSA's minimum and overtime wage provisions, the complaint should, at least approximately, allege the hours worked, for which wages were not received." *Zhong, 498 F. Supp. 2d at 628*. First, defendants have notice of plaintiffs' legal theory since the complaint expressly references the FLSA. (See Am. Compl. Count VI;) see *Gordon v. Kaleida Health, No. 08 Civ. 378S, 2008 U.S. Dist. LEXIS 96144, 2008 WL 5114217, at *3 (W.D.N.Y. Nov. 25, 2008)*. Second, the pleading provides the factual grounds supporting their claims. As to the overtime claims, plaintiffs have specified the approximate time period they were employed by defendants EMC and the approximate number of overtime hours they each worked per week without receiving overtime pay. (Am. Compl. PP 50-52.) As to the minimum wage violations, plaintiffs allege that, beginning in 2006, defendants gave them bad checks, which deprived them of their earned wages. (Id. PP 53-55.) Although plaintiffs have not alleged **[**55]** how many bad check they each received, such information should be readily available to defendants from their own business records. Thus, plaintiffs' amended pleading "give[s] the defendant[s] fair notice of the [plaintiffs'] claim[s] and the grounds upon which [they] rest[]." *Twombly, 550 U.S. at 555, 127 S. Ct. at 1964*; see also *Gordon, 2008 U.S. Dist. LEXIS 96144, 2008 WL 5114217, at *4*.

The case that defendants cite in support of their argument to the contrary is distinguishable. In *Zhong, 498 F. Supp. 2d at 628*, the court dismissed plaintiff's claim that he was denied overtime compensation in violation of *section 207*. Although the plaintiff alleged that he worked beyond forty hours a week, his pleading only indicated that he worked twenty hours per week. Because the plaintiff's pleading was internally inconsistent, the court held that it failed to state a violation of *section 207*. *Id. at 630*. Here, plaintiffs' complaint is not inconsistent. They allege that they were not paid overtime and that, on average, they worked over forty hours per week. (Am. Compl. PP 50-52.)

The plaintiffs' amended pleading sufficiently alleges that the defendants "engaged in commerce" under *29 U.S.C. § 203(s)(1)*. ***HN35***[] Under this section, **[**56]** there are two ways in which an employer is considered to have "engaged in commerce:" by pleading individual or enterprise coverage. First, for an employee to qualify for individual coverage under the FLSA, he must have personally "perform[ed] work involving or related to the movement of persons or things . . . between states." *29 C.F.R. § 779.103*. The plaintiffs do not allege that they personally performed such work. Second, for enterprise coverage, the plaintiffs' employer must have engaged in interstate commerce. Plaintiffs satisfy this requirement by alleging that "the monies, supplies, equipment, and illegal workers employed by defendants EMC and provided by American Latin travel in interstate commerce." (Am. Compl. P 95); see, e.g., *Shim v. Millennium Group, No. 08 Civ. 4022, 2009 U.S. Dist. LEXIS 6014, 2009 WL 211367, at *2-3 (E.D.N.Y. January 28, 2009)*. Courts have noted that **[*548]** "virtually every enterprise in the nation doing the requisite dollar volume of business is covered by the FLSA." *Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504, 530 (S.D.N.Y. 1998)* (quoting *Dunlop v. Indus. Am. Corp., 516 F.2d 498, 501-02 (5th Cir. 1975))*.

The plaintiffs' complaint also states a claim for FLSA violations against **[**57]** individual defendant Mahoney. ***HN36***[] "Individuals with significant decision-making authority over a company may be liable as employers under the FLSA." *Gordon, 2008 U.S. Dist. LEXIS 96144, 2008 WL 5114217, at *4 (W.D.N.Y. Nov. 25, 2008)* (citing *Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 140 (2d Cir. 1999)*. Plaintiffs allege that "defendant Mahoney is the President of EMC Contracting, Inc., EMC New York Contracting, and EMC of New York, Inc. and as such, is involved in ever aspect of the business of EMC, including, but not limited to, the hiring of its workers." (Am. Compl. P 19.) As such, plaintiffs' complaint states an FLSA claim against Mahoney.

In this case, the FLSA's three year statute of limitations applies. ***HN37***[] Generally, the FLSA has a two-year statute of limitations, except in the case of willful violations, for which the statute of limitations is three years. See *29 U.S.C. § 255(a)*. Plaintiffs allege that defendants' violations of the FLSA "were willful and intentional," because the defendants consistently failed to pay any overtime wages and gave their employees bad checks. (Am. Compl. P 148.) A violation is willful, if the employer "knew or showed reckless disregard for the matter of whether its conduct was **[**58]** prohibited by the statute." *Frasier v. Gen. Elec. Co., 930 F.2d 1004, 1008 (2d Cir. 1991)* (quoting *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988))*. Thus, the three-year statute of limitations presumptively applies to plaintiffs' FLSA claims, which means that Nichols' claims for willful violations of the FLSA, filed on April 2, 2008, as pled, is timely.

B. Pendent State Law Claims

In addition, to their federal law claims, plaintiffs also allege that defendants violated *New York State Labor Law §§ 190* et seq. ("Article 6") and *§§ 650 et seq*., the state law provisions governing overtime and minimum wage compensation. ***HN38***[] The relevant portions of the Labor Law do not diverge from the FLSA. *Whalen v. J.P. Morgan Chase & Co., 569 F. Supp. 2d 327, 329-330 (W.D.N.Y. 2008)*; *Perez v. Jasper Trading, Inc., No. 05 Civ. 1725, 2007 U.S. Dist. LEXIS 92375, 2007 WL 4441062, at *2 (E.D.N.Y. Dec. 17, 2007)*. See *N.Y. Comp. Codes R. & Regs. Tit. 12, § 142-2.1* and *2.2*. Therefore, plaintiffs have also stated a claim under New York Labor Law. it is appropriate for this court to resolve the federal and state claims in one proceeding.

Conclusion

For the reasons stated above, the plaintiffs' motion for leave to amend is granted (Docket **[**59]** No. 16). The defendants' motion to dismiss (Docket No. 11) is granted in part and denied in part. Counts I, II, III (the RICO claims), IV and V (the antitrust claims) of plaintiffs' amended complaint are dismissed with prejudice.

This constitutes the decision and order of the Court.

Dated: April 2, 2009

/s/ Colleen McMahon

U.S.D.J.

End of Document

Sun Microsystems Inc. v. Hynix Semiconductor Inc.

United States District Court for the Northern District of California

April 3, 2009, Decided; April 3, 2009, Filed

No. C 06-1665 PJH

Reporter

622 F. Supp. 2d 890 *; 2009 U.S. Dist. LEXIS 28143 **; 2009-1 Trade Cas. (CCH) P76,622

SUN MICROSYSTEMS INC., Plaintiff, v. HYNIX SEMICONDUCTOR INC., et al., Defendants.

Prior History: *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc., 608 F. Supp. 2d 1166, 2009 U.S. Dist. LEXIS 27567 (N.D. Cal., Mar. 31, 2009)*

Core Terms

conspiracy, pricing, communications, subsidiary, Purchaser, adverse inference, email, summary judgment motion, summary judgment, proceedings, antitrust, sales, circumstantial evidence, competitors, collusive, employees, price information, agency theory, conspiratorial, Declaration, alleged conspiracy, conspirators, participated, price-fixing, exchanged, exhibits, cases, direct evidence, material fact, common law

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Entitlement as Matter of Law, Appropriateness**

Generally speaking, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] **Sherman Act, Claims**

Where concerted price-fixing is alleged, the plaintiff bears the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. Price-fixing is a per se violation of *15 U.S.C.S. § 1* of the Sherman

Act. In order for a plaintiff to survive defendants' motions for summary judgment, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. The plaintiff can establish a genuine issue of material fact by producing either direct evidence that the defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

With respect to proof by way of circumstantial evidence in *15 U.S.C.S. § 1* cases, special rules apply. ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Sherman Act, Claims**

With regard to summary judgment in an antitrust action, the United States Court of Appeals for the Ninth Circuit has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior.

Business & Corporate Law > Corporations > General Overview

HN5[] **Business & Corporate Law, Corporations**

As a general matter, corporate law prohibits a parent corporation from being held liable on the basis of its subsidiary's actions. It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. However, a parent corporation may be held liable for the acts of its subsidiary where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company.

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

HN6[] **Establishment, Proof of Agency**

There are two applicable agency doctrines: the representative services doctrine, and/or the traditional common law doctrine of agency. The representative services doctrine, which the United States Court of Appeals for the Ninth Circuit has acknowledged in the personal jurisdiction context, asks whether the subsidiary functions as the parent corporation's representative in performing services that are sufficiently important that if it did not have a representative to perform them, the parent would undertake to perform similar services on its own. The representative agency test permits the imputation of contacts where the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself. The question to ask is whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent. By contrast, the traditional common law agency doctrine is based on analysis of three factors: (1) manifestation by a principal that the agent would act on its behalf; (2) the agent's acceptance or consent to act on the principal's behalf; and (3) the understanding that the principal would be in control of the agent's undertaking on its behalf.

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

HN7[] **Establishment, Proof of Agency**

The foundation for a traditional agency test requires a plaintiff to demonstrate: (1) a manifestation by the principal that the agent shall act for him; (2) that the agent has accepted the undertaking; and (3) that there is an understanding between the parties that the principal is to be in control of the undertaking.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

With regard to an antitrust action and the relationship between a parent company and a subsidiary, in applying the traditional common law agency test because one of the touchstones of the test is the corporation's control over the subsidiary for purposes of a defined "undertaking," this agency test shares similar concerns with many of the other tests formulated by various courts to determine agency -- all of which also use concepts of day to day control as a touchstone. Critically, however, it is to be remembered that the majority of decisions require more than mere ownership of stock, and more than the supervision of finance and capital budget decisions, or shared directorships, in order for a finding of agency to issue. The question of agency is also highly fact specific.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Establishment > Proof of Agency > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

With regard to an antitrust action and the relationship between a parent company and a subsidiary, the degree of control exercised by the parent in order for the subsidiary to qualify as an agent must therefore exceed that which is to be expected in the normal scope of any such relationship.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

With regard to an antitrust action and summary judgment, the court must consider the circumstantial evidence in the aggregate, in determining the existence of conspiratorial conduct on the part of a defendant. The critical question in evaluating circumstantial evidence is whether all the evidence considered as a whole can reasonably support the inference that the defendant conspired with the admitted conspirators to fix prices.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Antitrust & Trade Law, Sherman Act

With regard to an antitrust action, once a defendant rebuts an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice, the burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior. If the defendants had no rational motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN12[] Summary Judgment, Evidentiary Considerations

Only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN13[] Summary Judgment, Evidentiary Considerations

At the summary judgment stage, courts do not focus on the admissibility of the evidence's form. Courts instead focus on the admissibility of its content. The nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN14[] Regulated Practices, Price Fixing & Restraints of Trade

With regard to an antitrust action, communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise. Absent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information or discussing problems common in their industry, or even exchanging information as to the cost of their product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN15[] Conspiracy to Monopolize, Elements

With regard to an antitrust action, specific discussions between competitors regarding price may give rise to inference of conspiracy.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Adverse Inferences

HN16[] Particular Instructions, Adverse Inferences

Adverse inferences based on a party's invocation of the *Fifth Amendment* are permissible in certain situations. Such adverse inferences may only be drawn when independent evidence exists of the fact to which the party refuses to answer. Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint.

Counsel: **[**1]** For Sun Microsystems Inc., a California corporation, Plaintiff: Christine Elaine Cwiertny, LEAD ATTORNEY, Daniel Allen Sasse, Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA; David Daniel Cross, Jerome A. Murphy, Kathryn D. Kirmayer, Kent A. Gardiner, Matthew J. McBurney, LEAD ATTORNEY, Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC.

For Unisys Corporation, a Delaware corporation, Plaintiff: Christine Elaine Cwiertny, Daniel Allen Sasse, LEAD ATTORNEY, Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA; David Daniel Cross, Jerome A. Murphy, Kathryn D. Kirmayer, Kent A. Gardiner, Matthew J. McBurney, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC.

For Jaco Electronics, Inc., Edge Electronics, Inc., Plaintiffs: David Daniel Cross, Crowell & Moring LLP, Washington, DC; Theresa C. Lopez, Crowell & Moring LLP, Irvine, CA.

For Hynix Semiconductor Inc., a Korean corporation, Hynix Semiconductor America Inc., a California corporation, Defendants: Kenneth Ryan O'Rourke, Steven H. Bergman, LEAD ATTORNEYS, Paul Benedict Salvaty, O'Melveny & Myers LLP, Los Angeles, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Nanya Technology Corporation, **[**2]** a Taiwanse corporation, Nanya Technology Corporation, USA, a California corporation, Defendants: Na'il Benjamin, Robert E. Freitas, LEAD ATTORNEYS, Howard Mark Ullman, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Elpida Memory Inc., a Japanese corporation, Defendant: Isabelle Anne Young, Michele Elizabeth Kemmerling, LEAD ATTORNEYS, Harrison J. Frahn, IV, Simpson Thacher & Bartlett, Palo Alto, CA; James Glenn Kreissman, Jason Matthew Bussey, LEAD ATTORNEYS, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Elpida Memory (USA) Inc., a Delaware corporation, Defendant: Harrison J. Frahn, IV, Isabelle Anne Young, LEAD ATTORNEYS, Simpson Thacher & Bartlett, Palo Alto, CA; James Glenn Kreissman, Jason Matthew Bussey, Michele Elizabeth Kemmerling, LEAD ATTORNEYS, Simpson Thacher & Bartlett LLP, Palo Alto, CA; Cathy Yunshan Lui, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Infineon Technologies AG, America Corporation, Infineon Technologies North America Corporation, Defendants: Cathy Yunshan Lui, Orrick, Herrington & **[**3]** Sutcliffe LLP, San Francisco, CA.

For Samsung Semiconductor, Inc., 3rd party defendant: Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Benchmark Electronics, Inc., Interested Party: David Daniel Cross, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC.

For Celestica Inc., Interested Party: Thomas M. Gosselin, Cook Roos Wilbur & Thompson LLP, San Jose, Ca.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON,

Opinion

[*892] ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

Defendants' motions for summary judgment came on for hearing before this court on January 21, 2009. Plaintiff Sun Microsystems, Inc. ("Sun" or "plaintiff"), appeared through its counsel, Jerome A. Murphy, and David D. Cross. Defendants Nanya Technology Corporation ("NTC") and Nanya Technology Corporation USA ("NTC USA")(collectively "Nanya") appeared through their counsel, Howard Ullman, Robert E. Freitas, and Catherine Lui. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby DENIES the motions for summary judgment, for the reasons stated at the hearing and as follows.

BACKGROUND

The instant action is part of the general opt-out category **[**4]** of cases related to In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, Case No. M 02-1486 PJH -- a multidistrict litigation ("MDL") action currently pending before the court. Both the MDL action and the opt-out cases generally allege a horizontal price-fixing conspiracy carried out by numerous DRAM manufacturer defendants, in violation of federal and state antitrust laws. While there are a total of six different individual cases that form a part of the opt-out category of cases, only Sun Microsystems, Inc. v. Hynix Semiconductor, et. al. is currently at issue.

A. Background Allegations

Sun is an original equipment manufacturer ("OEM") involved in the technology field. It is a leading maker of computer servers and workstations, among other items. In the operative amended consolidated complaint ("ACC"), Sun alleges that from 1997 through 2002 several manufacturer defendants ("defendants") [1] engaged **[*893]** in a conspiracy to control DRAM production capacity, raise DRAM prices, allocate customers, and otherwise unlawfully overcharge their DRAM customers. See, e.g., ACC PP 21, 23, 25, 27, 29, 31, & 34 (alleging that foreign defendants "manipulated the price of DRAM charged around the **[**5]** globe"). The defendants allegedly did so by participating in meetings and conversations to discuss the price of DRAM; agreeing to manipulate prices and supply so as to boost sagging DRAM sales; issuing price announcements and price quotations in accordance with the agreements reached by defendants; and selling DRAM to customers in the United States at non-competitive prices. Id. at P 83.

Sun's complaint also alleges that several defendants have already admitted both the existence of an unlawful conspiracy in the DRAM industry and their participation in it as part of a criminal investigation undertaken by the Antitrust Division of the Department of Justice ("DOJ") in 2002. The DOJ's investigation probed the existence of a conspiracy to restrict supply and raise prices for DRAM among the largest makers and sellers of DRAM globally. As a result of that investigation, four manufacturers (three of which are named defendants here) -- Infineon, Hynix, Samsung, and Elpida -- pled guilty to participation in a price-fixing conspiracy in violation of federal ***antitrust law***. See ACC PP 71-78. In addition, several of their employees and agents have also pled guilty to criminal antitrust violations, and have been sentenced accordingly.

As a result of the foregoing, Sun alleges that it suffered injury in that it paid more for DRAM than it otherwise would have in the absence of defendants' conspiracy. Sun asserts three causes of action against defendants: (1) violation of the Sherman Act **[**7]** pursuant to *15 U.S.C. § 1*; (2) violation of California's Cartwright Act pursuant to *§§ 16700 et seq of the Cal. Bus. & Prof. Code.*; and (3) violation of California's Unfair Competition Act pursuant to *§§ 17200 et seq. of the Cal. Bus. & Prof. Code*. See ACC, PP 79-106. Sun seeks treble damages as a result of the artificially inflated prices it allegedly paid for DRAM.

---

[1] Defendants are: Infineon Technologies AG, and Infineon Technologies North America Corp. (collectively "Infineon"); Hynix Semiconductor, Inc., and Hynix Semiconductor America, Inc. (collectively "Hynix"); Mosel-Vitelic Inc., and Mosel-Vitelic Corporation (collectively "Mosel-Vitelic"); Nanya Technology Corporation, and Nanya Technology Corporation USA ("NTC" and "NTC USA," respectively); Winbond Electronics Corporation, and Winbond Electronics Corporation America (collectively "Winbond"); Elpida Memory, Inc., and Elpida Memory (USA) Inc. (collectively "Elpida"); Mitsubishi Electric Corporation, Mitsubishi Electric and Electronics USA, Inc., and Mitsubishi Electric Europe B.V. (collectively "Mitsubishi"). Since the filing of the complaint, however, several of these defendant entities have been dismissed. **[**6]** Accordingly, only two sets of defendant entities remain in the case: the Hynix and Nanya entities.

Discovery in the case is now closed, and the Nanya defendants -- NTC and NTC USA -- have filed two dispositive motions for the court's resolution. [2] First, NTC has filed a motion for summary judgment on grounds that plaintiff cannot establish a triable issue of fact as to its participation in any unlawful price-fixing or other anticompetitive activity, and therefore, as to liability. Second, NTC USA -- NTC's wholly owned subsidiary -- has filed an analogous motion, similarly arguing that plaintiff's evidence fails to raise a triable issue of fact as to liability for any alleged anticompetitive conduct.

B. Related Procedural History

Of particular relevance here are **[**8]** two summary judgment motions previously filed by NTC and NTC USA in the related In re DRAM MDL litigation. [3] Their motions in the MDL proceedings, similar to their motions here, generally challenged **[*894]** the direct purchaser plaintiffs' ability to establish the Nanya entities' liability for unlawful conspiratorial conduct under the Sherman Act, although the issues with respect to each entity were distinct.

1. NTC's Previous Motion for Summary Judgment

Beginning first with NTC's motion, the court considered and ruled upon three distinct issues in the MDL case: (1) whether NTC could be held liable for NTC USA's allegedly conspiratorial actions on the basis of its parent-subsidiary relationship with NTC USA; (2) the direct evidence of NTC's independent participation in the alleged conspiracy; and (3) the circumstantial evidence of NTC's independent **[**9]** participation in the same. See MDL Direct Purchaser Order Granting Summary Judgment in Part and Denying Summary Judgment in Part ("Direct Purchaser MSJ Order") at 6. The court answered the first question in the negative, holding that plaintiff's attempt to establish NTC's liability by virtue of the alter ego doctrine failed, because the evidence as a whole did not sufficiently speak to NTC's actual day to day control over the operations and internal affairs of NTC USA, nor did the evidence demonstrate that NTC dictates "every facet of NTC USA's business." See id. at 8. The court also found that plaintiff could not demonstrate NTC's liability vis-a-vis NTC USA based on application of the single entity doctrine. See id. at 9.

As to the second issue, the court considered the direct evidence advanced in support of the charge that NTC independently participated in any of: (a) a price-fixing agreement with the other defendants; (b) an output reduction in connection with the other defendants; or (c) an unlawful exchange of price information with any other defendants. See Direct Purchaser MSJ Order at 10. After consideration of certain emails, Mr. Kau's deposition testimony, and certain industry **[**10]** news and articles, the court found that plaintiffs failed to present any direct evidence of NTC's independent participation in any of the foregoing conspiratorial conduct. Id. at 15.

As to the third and final issue -- i.e., the sufficiency of the circumstantial evidence regarding NTC's participation in the same three types of foregoing conduct -- the court once again concluded that the evidence relied on by plaintiffs failed to support an inference of collusive activity on NTC's part. See Direct Purchaser MSJ Order at 25-26. In arriving at this ultimate conclusion, the court considered and disposed of (a) the economic evidence (including evidence relating to the structure of the DRAM market, and evidence of NTC's purportedly anticompetitive conduct); (b) evidence of NTC's "frequent, high-level communications" correlated to specific collusive behavior; and (c) evidence of NTC USA employees' guilty pleas in the DOJ's related criminal antitrust proceedings. Id. at 17-25.

2. NTC USA's Previous Motion for Summary Judgment

With respect to the related dispositive motion filed by defendant NTC USA, the court came to a different conclusion and denied summary judgment. In coming to its decision, **[**11]** the court considered both the direct and indirect evidence of conspiracy against NTC USA, as it had with NTC. Regarding the direct evidence of conspiracy, the

---

[2] There are also five additional motions filed by defendants in the Sun case, all of which are addressed via separate order filed by the court on March 31, 2009.

[3] Several of the named defendants in this Sun action were also named as defendants in the related MDL litigation pending before the court, including the Nanya defendants. As part of those MDL proceedings, the court had occasion to hear and decide several defendants' dispositive motions addressing issues raised by the direct purchaser plaintiffs' claims.

court found insufficient evidence of NTC USA's participation in any underlying conspiracy, noting that plaintiffs there were relying for the most part on the same evidence they had submitted in connection with NTC -- i.e., Micron emails, and news articles in which NTC's president, Mr. Kau, is quoted. See Direct Purchaser MSJ Order at 29. The court concluded that, substantively, this evidence failed for the same reasons discussed in connection **[*895]** with NTC's motion -- i.e., the inadmissibility of certain hearsay documents, and mischaracterization of the evidence. See id. In addition, however, the court held that the evidence failed because it related to the actions of NTC and NTC's President, and *not* directly to NTC USA, or NTC USA's president, Kenneth Hurley. Id. Finally, the court noted that although plaintiffs had come forward with an additional email particular to NTC USA itself regarding a November 2001 meeting that had been scheduled between Mr. Kau, Mr. Hurley, and Mike Sadler, the email did not constitute direct evidence of **[**12]** conspiratorial conduct, because the email only indicated that such a meeting was scheduled, not that it actually took place. Id.

In analyzing the circumstantial evidence of conspiracy, the court preliminarily noted that NTC USA had come forward with evidence that its participation in any alleged conspiracy would be economically implausible, given its small market share; the expert testimony explaining that price collusion was not possible unless a seller involved in the collusion represents a significant portion of the market share; and the evidence that NTC USA was pricing aggressively during the time period in question. See Direct Purchaser MSJ Order at 30. The court found this evidence sufficient to shift the burden to plaintiffs, who were then required to come forward with evidence tending to exclude the possibility that NTC USA was engaging in permissible competitive behavior, pursuant to Matsushita standards. See id.

The court then turned to plaintiffs' circumstantial evidence, which consisted of (a) economic evidence; (b) evidence of NTC USA's "frequent, high-level communications" correlated to specific collusive behavior; and (c) evidence of co-defendants' guilty pleas in the **[**13]** DOJ's related criminal antitrust proceedings. Id. at 30-31. As to the economic evidence -- which included evidence relating to market share, and NTC USA's purportedly anticompetitive conduct in Compaq actions and its pricing policies -- the court found it insufficient to support an inference of conspiracy. Id. at 33. With respect to the numerous email communications, however, the court noted that the volume of this evidence was much higher than with NTC, and demonstrated that numerous contacts and communications took place during the relevant period between NTC USA executives -- namely, Mr. Hurley and North American Sales Director Mike Walsh -- and other defendants. Id. at 34. The court acknowledged that some of the evidence, when viewed for its substance, conveyed only innocent information, but noted that it was equally apparent that some of the evidence conveyed actions taken by NTC USA executives that may, in fact, be suggestive of collusive behavior. Id. Ultimately, therefore, given the volume of communications present, the court found that plaintiffs had successfully met their burden in arguing that the evidence, considered as a whole, might reasonably support the inference that **[**14]** NTC USA conspired with the admitted conspirators in the action. See Direct Purchaser MSJ Order at 35.

Finally, regarding the other defendants' guilty pleas and the *Fifth Amendment* invocations of certain NTC USA employees, the court found that the guilty pleas were not admissible as to NTC USA, and furthermore, that although adverse inferences based on *Fifth Amendment* invocations are permissible in certain circumstances, plaintiffs there had not made a sufficient foundational showing regarding the specific questions and facts upon which they would like adverse inferences to be drawn. See id. at 35-36. On balance, however, the evidence warranted denial of NTC USA's motion.

* * *

[*896] With this overview in mind, the court now turns to the two motions at issue.

DISCUSSION

A. Summary Judgment Standard

HN1[] Generally speaking, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The court must view the facts **[**15]** in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

HN2[] Where, as here, concerted price-fixing is alleged, the plaintiff bears the ultimate burden of presenting sufficient evidence to prove that an agreement to fix prices existed. See, e.g., *In re Citric Acid Litig., 191 F.3d 1090, 1093 (9th Cir. 1999)*(noting that price-fixing is a per se violation of *section 1 of the Sherman Act*). In order for plaintiff to survive defendants' motions for summary judgment, therefore, plaintiff must establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. See *Matsushita, 475 U.S. at 585-86*. Plaintiff can establish a genuine issue of material fact by producing either direct evidence that defendants participated in an agreement to fix prices, or circumstantial evidence from which a reasonable fact finder could conclude the same. See, e.g., *Movie 1 & 2 v. United Artists Commc'ns, 909 F.2d 1245, 1251-52 (9th Cir. 1990)*; *United States v. Gen. Motors Corp., 384 U.S. 127, 142-43, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

HN3[] With **[**16]** respect to proof by way of circumstantial evidence in section 1 cases, special rules apply. In Matsushita Elec. Indus. Co., the Supreme Court noted that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a [section 1] case…". See *475 U.S. at 588*. In addressing plaintiff's burden in proving that an issue of material fact exists on the conspiracy question, the court stated, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy…". See id. In sum, to survive a motion for summary judgment, "a plaintiff seeking damages for a violation of *[section] 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently …." Id.

HN4[] The Ninth Circuit has embraced Matsushita and has outlined a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence. First, the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Second, the burden then "shifts back to the plaintiff to provide specific **[**17]** evidence tending to show that the defendant was not engaging in permissible competitive behavior." See, e.g., *In re Citric Acid Litig., 191 F.3d at 1094*.

These standards apply here to the extent that plaintiff seeks to defeat summary judgment as to *section 1* liability on the basis of circumstantial evidence, whether in whole or in part.

B. NTC's Motion for Summary Judgment

NTC's motion generally targets plaintiff's ability to raise triable issues of material fact as to defendant's liability for **[*897]** price-fixing, or for any other unlawful activity. In service of this larger point, NTC argues that it cannot preliminarily be held liable on the basis of NTC USA's conduct, and furthermore, that plaintiff has insufficient evidence that NTC *itself* is guilty of any unlawful activity, or that NTC is guilty as a passive co-conspirator by virtue of its participation in other defendants' unlawful activities. In response, plaintiff argues that an agency theory allows the actions of NTC USA to be imputed to NTC, and furthermore, that "new" evidence combined with already existing evidence suggests NTC's direct and/or indirect participation in the alleged underlying conspiracy.

All told, the issues for the **[**18]** court's consideration can therefore be broken down into two overriding issues: (1) whether NTC may be held liable under the Sherman Act for the actions of NTC USA by virtue of its parent subsidiary relationship with NTC USA; and (2) whether any "new" evidence independently establishes NTC's participation in any unlawful price-fixing or other anticompetitive conspiracy.

1. NTC's Antitrust Liability Vis-a-Vis NTC USA

NTC claims that it has a separate legal existence from its wholly owned subsidiary, NTC USA, and that NTC itself has not engaged in any direct sales of DRAM within the United States since NTC USA's incorporation in 1998. See Declaration of Kenneth Hurley ISO NTC and NTC USA's Motions for Summary Judgment ("Hurley Decl."), Ex. A at P 2. Pursuant to basic principles of corporate law, defendant contends that plaintiff cannot therefore introduce evidence of NTC USA's conduct in attempting to create a material factual dispute with respect to NTC's antitrust liability.

Defendant is correct that, ***HN5***[] as a general matter, corporate law prohibits a parent corporation from being held liable on the basis of its subsidiary's actions. See, e.g., *United States v. Bestfoods, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*("It is **[**19]** a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."). However, a parent corporation *may* be held liable for the acts of its subsidiary "where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company." See *id. at 62-63*. It is this exception upon which plaintiff relies here, in arguing that the imposition of vicarious liability is appropriate pursuant to an agency theory.

Preliminarily, it should be noted that plaintiff's reliance on an agency theory with respect to NTC's liability is distinct from the approach taken by the direct purchaser plaintiffs in the MDL proceedings. The direct purchaser plaintiffs in the MDL relied on the alter ego theory and the single entity doctrine as a means of demonstrating NTC's liability -- not the agency theory. While they also tangentially raised **[**20]** the agency theory argument in a cursory footnote in their briefs and with a casual remark at the hearing, the court declined "to find an agency theory of liability applicable to NTC on the record before it," in view of the fact that plaintiffs had only raised the issue in passing and had furthermore failed to submit any evidence on the issue. See Direct Purchaser MSJ Order at 9, fn. 2. The court's MDL ruling presents no bar to plaintiff's presentation of the same theory here, therefore, since Sun has squarely focused on the agency theory argument and has attempted **[*898]** to make a full evidentiary showing on the issue -- making the topic ripe for consideration in a way that it was not previously.

Turning to the parties' agency arguments, plaintiff first contends that NTC may be held liable for NTC USA's actions because NTC USA can be deemed NTC's agent for liability purposes, under either of***HN6***[] two applicable agency doctrines: the representative services doctrine, and/or the traditional common law doctrine of agency. The representative services doctrine, which the Ninth Circuit has acknowledged in the personal jurisdiction context, asks whether the subsidiary functions as the parent corporation's **[**21]** representative in performing services that are sufficiently important that if it did not have a representative to perform them, the parent would undertake to perform similar services on its own. See *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1134-35 (9th Cir. 2003)*(representative agency test permits the imputation of contacts where the subsidiary was "either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself"); *Doe v. Unocal, 248 F.3d 915, 925, 928 (9th Cir. 2000)*("the question to ask is… whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent"). By contrast, the traditional common law agency doctrine -- for which both parties cite federal district court authorities -- is based on analysis of three factors: (1) manifestation by a principal that the agent would act on its behalf; (2) the agent's acceptance or consent to act on the principal's behalf; and (3) the understanding that the principal would be in control of the agent's undertaking on its behalf. See *Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1241-42 (N.D. Cal. 2004)*; **[**22]** *E&J Gallo Winery v. EnCana Energy Servs., Inc., 2008 U.S. Dist. LEXIS 46927, 2008 WL 2220396, *11 (E.D. Cal. 2008)*.

NTC initially disputes that application of the representative services doctrine to the present liability context is appropriate, arguing that the Ninth Circuit has limited the doctrine to the personal jurisdiction context. NTC does not, by contrast, object to application of the traditional common law agency doctrine; however, it argues that plaintiff cannot establish the viability of the doctrine here, since there is no evidence of an express or implied agency agreement between NTC and NTC USA, nor is there evidence that NTC USA accepted appointment as an agent, or that NTC controlled NTC USA's day to day activities

As the parties' differing takes on the matter intimate, the initial question of which agency test to apply for liability purposes in the parent-subsidiary context is not a simple choice between two alternatives. As defendant correctly observes, the representative services doctrine acknowledged by the Ninth Circuit in *Doe* did consider the agency question in light of the parent-subsidiary relationship, but only in the personal jurisdiction context. And while both *Bowoto* and *E&J Gallo* do acknowledge **[**23]** that the common law agency test is more appropriate in light of the parent-subsidiary relationship in the liability context, both cases are district court opinions that lack precedential authority. Moreover, the scope of the agency test laid out therein is less than clear. In sum, there is no Ninth Circuit authority cited by the parties, or discovered by this court, that expressly addresses the question of agency in the parent-subsidiary context for purposes of liability (let alone is there a case that deals with this question in the antitrust context specifically). [4]

[*899] While neither the **[**24]** personal jurisdiction context in Doe nor the liability context discussed in the parties' cited district court cases is directly on point or controlling, however, this is not to say that the cases are not helpful -- particularly the latter. *Bowoto* and *E&J Gallo*, for example, both correctly note that the traditional common law of agency does, in fact, provide the basis for the guiding principles that should be given effect in this case. And as both district courts acknowledge, in the area of agency, it is federal common law that controls with respect to federal claims like the Sherman Act. See *Bowoto, 312 F. Supp. 2d 1229*; *E&J Gallo, 2008 U.S. Dist. LEXIS 46927, 2008 WL 2220396 at *5*. Federal common law is in turn guided by those principles set forth in the Restatement of Agency. Turning, then, to the operative Restatement Third, it lays ***HN7***[] the foundation for a traditional agency test that requires a plaintiff to demonstrate: (1) a manifestation by the principal that the agent shall act for him; (2) that the agent has accepted the undertaking; and (3) that there is an understanding between the parties that the principal is to be in control of the undertaking. See *Restatement (Third) of Agency, § 1.01*; see also *Transamerica Leasing, Inc. v. La Republica de Venezuela, 339 U.S. App. D.C. 385, 200 F.3d 843, 849 (D.C. Cir.2000)*. **[**25]** This, therefore, is the test that the court employs here. [5]

HN8[] In applying this traditional common law agency test, the court furthermore notes that, because one of the touchstones of the test is the corporation's control over the subsidiary for purposes of a defined "undertaking," this agency test shares similar concerns with many of the other tests formulated by various courts to determine agency -- all of which also use concepts of day to day control as a touchstone. See, e.g., *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 658 F. Supp. 1061, 1084-85 (D. Del.1987)*(antitrust case holding that parent is liable for acts **[**26]** of subsidiary under agency theory only if parent "dominates" subsidiary; parent of wholly-owned subsidiary that had seats on board, took part in financing, and approved major policy decisions was not liable because parent did not have day-to-day control); *Frank v. U.S. West, Inc., 3 F.3d 1357, 1362, fn. 2 (10th Cir. 1993)*(acknowledging agency theory as possible basis for holding parent corporation liable for acts of its subsidiary in employment context; describing relevant agency test as whether "the parent exercised a significant degree of control over the subsidiary's decision-making"). Critically, however, it is to be remembered that the majority of decisions require more than mere ownership of stock, and more than the supervision of finance and capital budget decisions, or shared directorships, in order for a finding of agency to issue. See, e.g., *United States v. Bestfoods, 524* ***[*900]*** *U.S. at 72*; *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 658 F. Supp. 1061, 1084-85 (D. Del.1987)*(parent of wholly-owned subsidiary that had seats on board, took part in financing, and approved major policy decisions was not liable because parent did not have day-to-day control); *H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d*

[4] This absence of authority on the precise question before the court reflects the generally confusing state of the law on this point. As the Supreme Court itself has noted: "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *First Nat'l Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983)*(considering analogous questions of liability among differing foreign governmental entities).

[5] This ruling is consistent with the conclusion reached by the court in its March 31, 2009 order granting defendants' motion to dismiss certain of plaintiff's claims for lack of subject matter jurisdiction under the FTAIA (among other motions). Plaintiff there made the same agency arguments as here, but for the purpose of seeking a ruling that *its* third party relationships supported an agency finding for purposes of jurisdiction under the FTAIA. Here, as noted, plaintiff seeks an agency finding with respect to defendant's relationship with a subsidiary for liability purposes.

1531, 1549 (8th Cir. 1989)(briefly **[**27]** considering alternate theory of agency in antitrust context for liability purposes, and holding that any finding that subsidiary was agent of principal for purposes of liability was in error, despite evidence indicating that both companies acted jointly in several aspects). The question of agency is also highly fact specific.

Applying the traditional agency test pursuant to these standards here, the ultimate question on summary judgment is whether plaintiff can point to facts that create a triable issue of fact as to: (1) NTC's intent to have NTC USA act on NTC's behalf with regard to the pricing and sale of DRAM; (2) NTC USA's acceptance and/or understanding of its role in DRAM pricing and sales on NTC USA's behalf; and (3) an understanding between NTC and NTC USA that NTC is to be in control of NTC USA's DRAM pricing and sales activity.

Arguing that all three elements are satisfied, plaintiff submits the following purportedly undisputed facts: that NTC formed NTC USA for the very purpose of acting as its sales and marketing arm in the United States; that communications between NTC and NTC USA were regular and extensive; that NTC set and regulated NTC USA pricing policy; that the companies **[**28]** shared two directors; that NTC USA's employee, Ms. Chen, testified that NTC USA's sole purpose was to conduct NTC's DRAM sales; that NTC's audit committee performed internal audits of various functions at NTC USA; that Mr. Hurley, who is an executive for NTC USA, helped negotiate NTC's strategic alliances with Dell regarding DRAM, and was instructed by NTC to negotiate with IBM on NTC's behalf in connection with certain DRAM payments; and that NTC designated Mr. Hurley to testify as NTC's corporate representative about the authority of officers, employees and managers at NTC USA. See, e.g., Declaration of David Cross ISO MSJ Opp. ("Cross Opp. Decl."), Ex. 14 at 39-41, 170-72; Ex. 72 at PP 1-2; Ex. 76 at 177, 214-15; Ex. 77 at 60; Ex. 75 at 22-27; Declaration of David Cross ISO Plaintiffs' Submission of Newly Discovered Evidence ("Cross New Evidence Decl."), Exs. A-C.

In response, defendant contends that plaintiff has distorted these facts beyond what examination of the record actually supports, and that even as to their substance, the evidence does not rise to the level of establishing an agency relationship. Defendants note, for example: that the deposition testimony relied on by plaintiff **[**29]** as proof that NTC USA is there simply to "sell and market [NTC] product" is taken out of context and ascribed to a different question altogether; that the testimony by Mssrs. Hsu and Wang, relied on for proof of NTC's control over NTC USA's prices, is deficient and issues from employees with no actual pricing responsibility; that NTC USA had the ability to approach multinational OEMs without NTC's consent; that NTC USA's submission of audit-related paper work regarding new hires to NTC is not synonymous with NTC's approval over hiring and salaries at NTC USA; and that any contacts between NTC and NTC USA were minimal and not substantive. See Cross Opp. Decl., Ex. 73; Ex. 74 at 33; Ex. 82; Exs. 81-83; see also Reply Declaration of Michael J. O'Hara ISO Nanya's MSJ ("O'Hara Reply Decl."), Ex. C; Ex. D; Reply Declaration of Kenneth M. Hurley ISO Nanya's MSJ ("Hurley Reply Decl."), P 11.

[*901] On balance, the court concludes that the parties' competing positions highlight the existence of materially disputed facts on the question of agency. To be sure, some of plaintiff's undisputed facts -- e.g., the fact that NTC and NTC USA shared two board members, or that NTC shared some supervision of finance **[**30]** and pricing decisions -- do not justify any inference of agency as a matter of law. See, e.g., *United States v. Bestfoods, 524 U.S. at 72*; *H.J., Inc., 867 F.2d at 1549*. Notwithstanding, however, there are sufficient other facts introduced by plaintiff that raise a triable dispute of fact, in the court's view, as to whether NTC expressed a desire that NTC USA undertake certain pricing and sales on NTC's behalf, whether NTC USA agreed to do so, and whether NTC had sufficient control over pricing and sales of NTC USA. Defendant's competing view of these facts -- and the evidence marshaled by defendant in support thereof -- only serve to confirm, rather than undercut, this point.

In short, it is impossible for the court to conclude with certainty that all facts presented here cut decisively against a finding of agency as a matter of law. It is the trier of fact who must resolve the underlying questions of fact as to the relationship existing between NTC and NTC USA, so that a conclusion of law as to agency may be made.

In so ruling, the court is also mindful that, as defendant points out, some degree of control is usually even if not necessarily implicit in the parent subsidiary relationship. **[**31]** Thus, ***HN9***[] the degree of control exercised by the parent in order for the subsidiary to qualify as an agent must therefore exceed that which is to be expected in the normal scope of any such relationship.

In sum, however, the court concludes that there are disputed issues of material fact as to NTC's desire that NTC USA undertake DRAM pricing on NTC's behalf, that NTC USA viewed its role as such, and/or that NTC controlled NTC USA with respect to DRAM pricing, such that a reasonable juror could find an agency relationship satisfied. As such, plaintiff has created a triable issue of material fact with respect to NTC's vicarious liability for the overarching conspiracy alleged by plaintiff, on the basis of its relationship with NTC USA. Summary judgment in defendant's favor on this issue is accordingly DENIED.

2. Independent Evidence of NTC's Participation in Alleged DRAM Conspiracy

This brings the court to the second issue under consideration: whether, as an alternative to establishing NTC's liability via its relationship and contacts with NTC USA, plaintiff has sufficient evidence to suggest that NTC independently participated in any alleged DRAM conspiracy.

In its summary judgment order in **[**32]** the related MDL action, the court previously considered all direct and indirect evidence of NTC's participation in a conspiracy to fix DRAM prices, reduce DRAM supply, or unlawfully exchange price information, and concluded that plaintiff could not raise a triable issue of fact as to NTC's participation in any of the foregoing. To the extent plaintiff would base its present case upon the identical evidence, the court's reasoning and holding apply with equal force.

Plaintiff, however, asserts that "new" evidence demonstrates the existence of sufficient facts to support an inference that NTC itself was an active participant in the conspiracy: namely, the recent deposition testimonies of Il Ung Kim, senior vice president at Samsung, and Mike Sadler, vice president of worldwide sales for Micron. See generally, e.g., Cross MSJ Opp. Decl., Ex. 84; Ex 36. When considered in **[*902]** combination with the existing evidence in the record, plaintiff continues, the evidence collectively creates a triable issue of fact regarding NTC's participation in unlawful conspiratorial activity. Defendant, naturally, disputes that plaintiff's new evidence supports a legitimate inference of NTC's participation in any **[**33]** conspiracy, and further notes that to the extent plaintiff relies on evidence already considered and rejected by the court, the court need not reconsider such evidence here.

The court must decline, however, to pass upon the viability of plaintiff's new evidence here, in view of its finding that there are disputed issues of material fact with respect to agency. As the court has stated previously, and most recently in its March 31, 2009 order in connection with the remaining summary judgment motions pending in the current case, ***HN10***[] the court must consider the circumstantial evidence in the aggregate, in determining the existence of conspiratorial conduct on the part of a defendant. See, e.g., *In re Citric Acid Antitrust Litig., 191 F.3d 1090, 1097 (9th Cir. 1999)*(critical question in evaluating circumstantial evidence is "whether all the evidence considered as a whole can reasonably support the inference that [defendant] conspired with the admitted conspirators to fix prices"). In the event that a finding of agency -- and therefore, NTC's vicarious liability -- is ultimately deemed proper, the trier of fact will assess NTC USA's actions in addition to those of NTC itself, on the question **[**34]** of conspiratorial conduct.

Since any affirmative conspiracy finding will therefore be based on the assessment of all these facts in the aggregate, the present evidentiary record as to NTC is, in essence, incomplete. As such, and without knowing whether plaintiff has come forward with the sum total of the evidence admissible against NTC, the court is not in a position to affirmatively determine as a matter of law whether plaintiff's "new" evidence, standing on its own, is sufficient to raise a triable issue of material fact as to NTC's conspiratorial conduct. Rather, the trier of fact must consider all the evidence presented at trial, determine the underlying facts going to the question of agency, and based upon a corresponding finding, determine whether the evidence as to NTC collectively supports a finding of conspiratorial conduct.

* * *

In sum, and based on all the foregoing, the court hereby DENIES summary judgment in NTC's favor.

C. NTC USA's Motion for Summary Judgment

NTC USA also moves for summary judgment, making the same larger point that NTC made -- that there is insufficient evidence that NTC USA (as distinct from NTC) participated in any unlawful conspiracy. Thus, the same **[**35]** general framework and standards apply, and the question for the court remains: whether the evidence independently establishes NTC USA's participation in any conspiracy to fix prices, or other unlawful collusive activity.

This is the same question that NTC USA raised before the court in the MDL proceedings, and many of the arguments duplicate those made in the MDL proceedings. As a preliminary matter, however, the court is mindful that although the nature of the alleged conspiracy here is fundamentally the same as that alleged in the MDL proceedings, the focus of the parties' arguments here is somewhat different than in the MDL summary judgment motions. Sun's case, for example, focuses more particularly on defendants' participation in an underlying conspiracy to raise prices to the Target OEMs, which in turn raised prices to plaintiff, via an industry-wide price increase. In recognition of this shift **[*903]** in emphasis, NTC USA therefore takes a slightly different approach than it did in the related MDL case, proceeding along two different but parallel tracks: first, NTC USA argues that there is insufficient evidence that it participated in a Target OEM conspiracy. Second, NTC USA argues that **[**36]** there is insufficient evidence that it *otherwise* participated in any other type of unlawful conspiracy to fix DRAM prices or exchange price information. [6]

The court's inquiry, therefore, considers not only whether there is any direct or circumstantial evidence of NTC USA's participation in any unlawful conspiracy generally aimed at the DRAM industry (and by **[**37]** extension, plaintiff) but also aimed at the Target OEMs.

Turning to the evidence, NTC USA has -- as it did in the direct purchaser litigation -- initially come forward with evidence that its participation in any alleged conspiracy would be economically implausible, in view of the following: NTC USA made no sales of DRAM to Sun during the damage periods identified by plaintiff's experts; NTC USA had a small market share for worldwide DRAM sales, ranging from 1.4% to 5.5%, for the plea period in question; Dr. Alan Cox, NTC USA's expert, has opined that price collusion is not possible unless a seller involved in the collusion represents a significant portion of the market; and throughout the alleged conspiracy time frame, NTC USA priced aggressively and expanded its DRAM sales dramatically. See generally Declaration of Alan Cox ISO MSJ; Declaration of Kenneth Hurley ISO MSJ ("Hurley Decl."), PP 3-4, 8-9; Declaration of Na'il Benjamin ISO Nanya's MSJ ("Benjamin Decl."), Ex. CC at 19:15-21:12; Ex. DD, Response No. 7. NTC USA has also relied on the factual evidence to establish NTC USA's lack of participation in any underlying DRAM conspiracy: Kenneth Hurley, NTC USA's president and the senior **[**38]** NTC USA employee responsible for all sales and pricing activities during the relevant time frame, also testified that NTC USA was never aware of the existence of any industry wide conspiracy, was never told that any other DRAM manufacturers were engaged in any conspiracy, and did not itself engage in any such conspiracy. See, e.g., Hurley Decl., P 9.

All of which, combined with the lack of any direct evidence demonstrating NTC USA's participation in any collusive activity, is sufficient to shift the burden to plaintiff, who is required to come forward with evidence tending to *exclude* the possibility that NTC USA was engaging in permissible competitive behavior. See, e.g., *In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)*(***HN11***[]) once defendant rebuts an allegation of conspiracy by showing a "plausible and justifiable reason for its conduct that is consistent with proper business practice," the burden then "shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in

[6] The court also notes that, as was the case in connection with the direct purchaser motions, NTC USA declines here to focus on any evidence of a supply reduction. This makes sense, as NTC USA did not manufacture DRAM; it simply sold the DRAM manufactured by NTC. It bears repeating, however, that even if NTC USA did not itself engage in a reduction in DRAM output, it may nonetheless be held liable for the actions of other co-defendants in reducing their DRAM output, if it is proven that NTC USA otherwise participated in an unlawful conspiracy with those defendants. See, e.g., *BBD Transp. Co., Inc. v. Southern Pac. Transp. Co., 627 F.2d 170, 173 (9th Cir. 1980)*("To be liable as a co-conspirator for the anticompetitive acts of [other co-conspirators], the railroads need not have known of or participated in those acts themselves.").

permissible competitive behavior"); see also *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 596-97, 106 S. Ct. 1348, 89 L. Ed. 2d 538* ***[*904]*** *(1986)*("if [the defendants] had no rational **[**39]** motive to conspire, and if [their] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy").

To make this showing, plaintiff relies on circumstantial evidence that overlaps in large part with the circumstantial evidence submitted by direct purchaser plaintiffs in the MDL proceedings. That evidence primarily consists of: (1) email communications; and (2) inferences drawn from *Fifth Amendment* invocations by three senior employees of NTC USA. [7]

1. Email Communications

As the direct purchaser plaintiffs did previously, plaintiff here relies on a voluminous record of email correspondence in its effort to establish an inference of conspiracy. Generally, this email correspondence can be broken down into two general categories: communications from or to NTC USA regarding NTC USA's contacts with defendants; and communications from or to non-NTC USA sources regarding NTC USA's contacts with defendants. All of these email communications contain some reference to pricing, or reference different defendant competitors, or contain statements as to what some defendant competitors knew of NTC USA's pricing. According to Sun, these communications prove the existence of detailed exchanges of pricing information and meetings between defendants, all of which purportedly track alleged coordinated production cuts and price increases, thereby demonstrating NTC USA's participation in collusive conduct.

As noted, plaintiff first relies on communications **[**41]** that come "from NTC USA's own mouth" -- the majority of which involve senior NTC USA executives Kenneth Hurley (President) and Mike Walsh (North American Sales Director). See, e.g., Cross MSJ Opp. Decl., Exs. 2-7, 13, 16, 19; id., Ex. 14 at 64-71, 90-91, 98-100, 111, 163. These communications establish: the fact that NTC USA sent spreadsheets to the VP of Sales at Elpida, which spreadsheets contained "Nanya" price targets, including detailed information about part numbers and associated pricing; that Mr. Hurley and Mr. Walsh communicated with each other about "checking with [their] competitors to see where [they] were in relation to their quotes;" that Mr. Walsh regularly exchanged information related to DRAM price forecasts with an Elpida contact; that Mr. Hurley regularly spoke and communicated with senior executives of NTC USA's competitors about the DRAM business; and that on occasion, when Dell would give NTC USA "competitive feedback on pricing that major suppliers had been providing to [Dell]," Mr. Hurley would contact Mr. Sadler of Micron to ask him "if he had heard the same ranges of prices that Dell was providing to Nanya." See id.

The second group of email correspondence **[**42]** that plaintiff relies on includes those communication exchanges that stem from **[*905]** other competitors' employees, and which purportedly implicate NTC USA. See, e.g., Cross MSJ Opp. Decl., Exs. 37 (Kevin Chen of Mosel "directly checked with the marketing people of Nanyan [sic]" who "told [him] that they had stopped 128MB SD and the inventory level is very small, so they insist price at $ 1.75"); 38 ("Nanaya [sic] told me their lowest price on last Friday was $ 2.5 but they quoted and keep price $ 2.6 today"); 39 (Mr. Liu of Mosel knew in advance that "Nanya … will try to quote $ 4.0 next Monday"); id. at Exs. 41-44, 45-55.

As a preliminary matter, NTC USA has filed numerous objections to the admissibility of this evidence on hearsay grounds, relying on the well-settled rule that ***HN12***[] "only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." See, e.g., *Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181-82 (9th Cir. 1988)*. As the parties undoubtedly recall, it was in service of this rule that the court previously

---

[7] As did the direct purchaser plaintiffs, Sun also relies on economic evidence relating to the structure of the DRAM market for proof that it makes economic sense for NTC USA to have participated in the alleged conspiracy. Specifically, plaintiff relies on the report by its expert, Dr. Robert Marshall. See Cross MSJ Opp. Decl., Ex. 96 at 71. However, even assuming that Dr. Marshall's testimony is capable of successfully refuting defendants' evidence as to whether the DRAM market would be receptive to a defendant's participation in the underlying conspiracy, the testimony does not opine that the market would have been receptive to *NTC USA itself* (as opposed to the defendants collectively) **[**40]** engaging in a conspiracy, as NTC USA points out. For that reason, this type of economic evidence, standing alone, cannot support an inference of NTC USA's participation in any underlying conspiracy.

excluded several of plaintiffs' similar exhibits containing email correspondence and industry news bulletins, holding that the documents **[**43]** constituted inadmissible hearsay and failed to qualify for the co-conspirator exception advanced by defendant. See Direct Purchaser MSJ Order at 11-12.

A similar ruling is not warranted here, however. First, both the parties' arguments and the showing made as to this issue here are distinct. Defendants' objections, for example, respond to each exhibit in boiler plate fashion, without distinguishing the excerpt of each exhibit that purportedly constitutes hearsay. See generally Nanya's Objections to Plaintiffs' Exhibits ISO MSJ Opp. ("Nanya Objections"). This makes it difficult if not impossible for the court to determine -- as it was able to do in the MDL proceedings -- whether a given statement in an exhibit is being offered for the truth of the matter asserted therein or, as plaintiff urges, as evidence of conduct from which the trier of fact is to infer something else. Only the former constitutes hearsay. To that end, and for the same reasons, the court is also hard pressed on the record of objections before it to determine the viability of the various exceptions to hearsay that plaintiff asserts apply. This evaluation is a necessary component to determining admissibility of the **[**44]** exhibits in the event the exhibits do, in fact, constitute hearsay.

Second, and moreover, the court is also mindful that with respect to many of the exhibits that constitute communications from or to NTC USA, the content contained therein would likely be authenticated and admissible at trial via the testimony of the out of court declarants themselves, thus suggesting that their submission and the court's reliance thereon at the summary judgment stage is proper. See, e.g., *Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003)*("***HN13***[] At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents"); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co., 953 F.2d 478, 485 (9th Cir. 1991)* ("the nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment."). Indeed, this is the same observation made by the court in the MDL proceedings with respect to similar evidence. See Direct Purchaser MSJ Order at 34 n.7. All of which compels the court to overrule defendant's inadmissibility objections to the above exhibits. [8]

[*906] Putting aside defendant's admissibility objections, defendant more fundamentally disputes the weight that should be given the substance of the above exhibits. Defendant argues, for example, that while the emails may suggest the possibility of competitor contacts or meetings, they do not actually demonstrate that any such contact or meeting took place. See, e.g., Cross MSJ Opp. Decl., Ex. 2. Similarly, they point out that some of the emails do not discuss DRAM pricing at all, but rather reflect innocuous discussions and meetings about generic industry information, or events like employee interviews. See, e.g., id., Ex. 6; Ex. 7. And still other exhibits, continues defendant, do not establish a NTC USA contact at all, but merely reflect undifferentiated Nanya pricing from potentially unreliable sources. See, e.g., id., Ex. 39; Ex. 40. Plaintiff cannot withstand its summary judgment burden, asserts defendant, in light of these seemingly innocent explanations and/or unreliable communications.

Defendant's position is not without some merit. It seems apparent, for example, that some of the communications relied **[**46]** upon by plaintiff convey only innocent information, standing alone. Furthermore, as the court has previously held, to the extent that some of plaintiff's cited communications discuss generic pricing or industry information, there is nothing inherently wrong with the exchange of such information among competitors in the same industry. See *In re Citric Acid, 191 F.3d at 1103*, citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)*("***HN14***[] [C]ommunications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'"); *Rutledge v. Elec. Hose & Rubber Co., 327 F. Supp. 1267, 1271 (C.D. Cal. 1971)*("Absent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information or discussing problems common in their industry, or even exchanging information as to the cost of their product."). [9]

---

[8] Defendant is, of course, free to renew its hearsay **[**45]** objections at trial, to the extent such exhibits are relied upon in the future.

[9] The court also notes that certain of the email correspondence relied on by plaintiff fails to distinguish between NTC and NTC USA, referring only generically to "Nanya." This is problematic, since it makes it impossible for the court to determine which **[**47]** of the Nanya entities the information contained therein should be deemed admissible against. However, many of these

It is in the aggregate, however, that the court must ultimately judge the relevant evidence. And taken in the aggregate, the evidence -- much of which is the same as was before the court in the MDL proceedings -- demonstrates that numerous contact and communications that took place between NTC USA executives and other defendants during the relevant time period, of varying degrees and kind. It is undisputed that at least some of the discussion therein concerned DRAM pricing, even if some can be classified as generic shop talk. See, e.g., *In re Citric Acid, 191 F.3d at 1103* (***HN15***[] Specific discussions between competitors regarding price may give rise to inference of conspiracy). The court is ultimately persuaded, as it was by the direct purchaser plaintiffs in the MDL proceedings, that on balance, the volume of contact **[**48]** and communications (and considering the fact that some of the defendants and individuals with whom NTC USA was communicating are admitted conspirators), might reasonably support the inference that NTC USA conspired with the admitted conspirators in this action to engage in **[*907]** collusive activity regarding the industry-wide sale of DRAM at artificial prices.

2. *Fifth Amendment* Invocations and Possibility of Adverse Inferences

In attempting to overcome NTC USA's initial showing that any conspiracy defies plausible economic justification, plaintiff also argues that adverse inferences of conspiracy should be made against three of NTC USA's employees -- Mr. Walsh, Mr. Donahue, and Mr. Dwyer -- all of whom invoked the *Fifth Amendment* at their depositions in response to certain relevant questions.

The court previously denied a similar request made by the direct purchasers in the MDL proceedings to draw adverse inferences. As the court noted there, the seminal case on this issue, *Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)*, holds that ***HN16***[] adverse inferences based on a party's invocation of the *Fifth Amendment* are permissible in certain situations. Lower courts interpreting Baxter, however, have been uniform **[**49]** in suggesting that the key to the Baxter holding is that such adverse inferences may only be drawn when independent evidence exists of the fact to which the party refuses to answer. See, e.g., *LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir. 1995)*; *Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3d Cir.1988)*. Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint. See *Nat'l Acceptance Co. v. Bathalter, 705 F.2d 924, 930 (7th Cir. 1983)*.

The court denied the direct purchasers' request for adverse inferences, because plaintiffs there had not made a sufficient foundational showing regarding the specific questions and facts upon which they were requesting that adverse inferences be drawn. Here, plaintiff has sought to distinguish its attempt from the direct purchasers' previous attempt by setting forth the specific grounds upon which it requests an adverse inference, as well as the evidence that independently supports the answers to the questions that the three deponents at issue refused to **[**50]** answer.

Specifically, plaintiff requests that the court make the following adverse inference with respect to all three NTC USA witnesses at issue: that each NTC USA employee "exchanged DRAM pricing or other competitive information" with NTC USA's rivals. See, e.g., Pl. Opp. Br. at 33:5-34:2. Plaintiff bases this request on each employee's *Fifth Amendment* invocation taken in response to the question whether the employee had exchanged pricing or other competitive information with NTC USA's competitors. See id. As independent evidence supporting the requested inference, plaintiff points to testimony by employees and executives of the various competitor defendants that purportedly reveal that all three NTC USA employees *did*, in fact, exchange DRAM pricing or other competitive information with them. See id.

The court concludes that plaintiff has laid a sufficient foundation for its request. First, with respect to Mr. Walsh, plaintiff has correctly pointed out that Mr. Donabedian of Elpida and Mr. Elliot of Samsung both testified that they had communications with Mr. Walsh regarding DRAM pricing. See Cross MSJ Opp Decl., Ex. 30, PP 2, 4; Ex. 31 at 78, 82-83, 166. Thus, an adverse inference **[**51]** that Mr. Walsh exchanged DRAM pricing information with Elpida

---

emails can readily be sourced to an NTC USA employee or origin. Moreover, when viewed in the aggregate with the totality of the evidence submitted by plaintiff, the affected emails do not justify the court's wholesale rejection of plaintiff's evidence or arguments.

and Samsung, to the extent detailed by Mssrs. Donabedian and Elliot, is appropriate. Similarly, and with respect to Mr. Donahue, plaintiff has noted that Mr. Elliot also testified that he had communications with Mr. Donahue regarding **[*908]** "market trends and general price information." See id. at Ex. 31 at 80-81. Thus, an inference that Mr. Donahue exchanged market trend and general price information with Mr. Elliot is also proper. Finally, with respect to Mr. Dwyer, plaintiff has pointed out that Mr. Grifo of Samsung testified that he had communications with Mr. Dwyer regarding DRAM pricing, and furthermore, that email correspondence between Mr. Dwyer and Mr. Hurley independently establishes that Mr. Dwyer had asked Mr. Grifo for Samsung's DRAM pricing on at least one occasion. Id., Ex. 34 at 17-18, Ex. 35. Thus, an inference that Mr. Dwyer exchanged DRAM pricing information, to the extent detailed by Mr. Grifo and set forth in the email communication in evidence, is also appropriate.

In sum, to the extent plaintiff has relied on independent evidence establishing that Samsung employees (plus Elpida, in the case of Mr. Walsh) had **[**52]** discussions with each NTC USA employee regarding DRAM pricing, an adverse inference is proper. In granting plaintiff's request for such adverse inferences, however, the court notes that any adverse inferences are limited to what the independent evidence actually corroborates. Thus, the court does not sanction the use of adverse inferences against the three NTC USA employees to the extent plaintiff seeks inferences as to competitors whose corroborative testimony or evidence has not been submitted.

Even after making these inferences, the court is mindful that, standing alone, a single inference is insufficient to establish NTC USA's participation in any conspiracy to fix prices, either to the Target OEMs, or within the industry at large. Moreover, as already noted, "shop talk" is not actionable. Again, however, the question is whether the inferences, together with the aggregate evidence, can support an inference of collusive activity. The court answers this question in the affirmative, for the reasons discussed herein.

* * *

Accordingly, as it found previously in connection with the MDL proceedings, the court once again concludes that plaintiff has presented disputed issues of material **[**53]** fact as to proof of NTC USA's involvement in the overarching conspiracy alleged by plaintiff. Summary judgment is therefore DENIED.

D. Conclusion

For all the foregoing reasons, the court hereby DENIES both NTC's motion for summary judgment, and NTC USA's corresponding motion for summary judgment.

IT IS SO ORDERED.

Dated: April 3, 2009

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

William O. Gilley Enters., Inc. v. Atl. Richfield Co.

United States Court of Appeals for the Ninth Circuit

February 13, 2008, Argued and Submitted, Pasadena, California; April 3, 2009, Filed

No. 06-56059

Reporter
561 F.3d 1004 *; 2009 U.S. App. LEXIS 7161 **; 2009-1 Trade Cas. (CCH) P76,569

WILLIAM O. GILLEY ENTERPRISES, INC., a Nevada corporation doing business in California and the estate of William O. Gilley, deceased; DENNIS DECOTA, an individual; PATRICK PALMER, an individual on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. ATLANTIC RICHFIELD COMPANY; CHEVRON CORPORATION; EXXON CORPORATION; MOBIL OIL CORPORATION; EXXON/MOBIL CORPORATION; SHELL OIL COMPANY; TEXACO INC.; TOSCO CORPORATION; ULTRAMAR DIAMOND SHAMROCK; VALERO CORPORATION; CONOCO-PHILIPS PETROLEUM CORPORATION; CHEVRON/TEXACO CORPORATION; TESORO CORPORATION, Defendants-Appellees.

Subsequent History: Opinion withdrawn by, Substituted opinion at *William O. Gilley Enters. v. Atl. Richfield Co., 2009 U.S. App. LEXIS 26249 (9th Cir. Cal., Dec. 2, 2009)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. CV-98-0132-BTM. Barry T. Moskowitz, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

exchange agreement, conspiracy, aggregation, district court, allegations, anticompetitive, effects, prices, gasoline, Sherman Act, refining, restraint of trade, antitrust, market power, contracts, bilateral agreement, bilateral, petroleum company, Defendants', marketers, coordinate, collusion, amended complaint, cause of action, asserting, purchaser, second amended complaint, unlawful conspiracy, alleged conspiracy, unfair competition

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a dismissal for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*. All allegations of material fact are taken as true and construed in the light most favorable to the non-party.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN2[] **Estoppel, Collateral Estoppel**

Issue preclusion is decided under the law of the state where judgment was entered. Under California law, issue preclusion applies only if a number of conditions are satisfied. Among those conditions are the issue must have been actually litigated in the former proceeding and the decision in the former proceeding must be final and on the merits.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

Aguilar v. Atlantic Richfield Co., precludes a claim that depends upon proof of collusion by defendants to use exchange agreements to control supply and prices, notably in the form of a per se claim of a horizontal price-fixing conspiracy, but it does not preclude a claim that the bilateral exchange agreements have an anticompetitive effect on competition, despite the absence of collusion, under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

With regard to an antitrust action, the determination of whether an agreement unreasonably restrains trade can be based upon per se condemnation or under a rule of reason analysis. A per se claim and a rule of reason claim are distinct. Courts will condemn as per se illegal only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. For example, price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, are condemned as per se illegal.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

With regard to an antitrust action, for a rule of reason claim, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Regulated Practices, Private Actions**

Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Fed. R. Civ. P. 8(a)(2)*. A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. Dismissals for failure to state a claim are disfavored in antitrust actions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN7[] **Per Se Rule & Rule of Reason, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. However, it has long been recognized that Congress did not intend to give literal meaning to those words, but instead only intended to make unlawful unreasonable restraints on trade. Therefore, to establish a claim under *§ 1* of the Sherman Act, the plaintiff must show (1) that there was a contract, combination, or conspiracy; (2) that unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Sherman Act, Claims**

Under the first element of a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claim, a plaintiff must plead the existence of a contract, combination, or conspiracy, meaning a defendant did not operate unilaterally, but instead, at least two entities acted in concert.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

Antitrust law is clear that a plaintiff need not prove intent to control prices or destroy competition to demonstrate the element of an agreement among two or more entities. The intent of the parties is to be evaluated under the second element of the *15 U.S.C.S. § 1* analysis.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

Under the second element of a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, claim, a plaintiff must show the challenged agreement unreasonably restrains trade by establishing anticompetitive effects. To make this showing under the rule of reason analysis, a plaintiff generally must establish market power. Market power is the ability to raise prices above those that would be charged in a competitive market.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] **Sherman Act, Claims**

With regard to an antitrust action, an aggregation of claims may produce sufficient proof of violation or injury where violation requires that a certain legal threshold be met and no claim standing alone is sufficient to meet the threshold.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

With regard to an antitrust action, a defendant who restrains trade by an obvious pattern and practice of entering into individual contracts should not be allowed to do piecemeal what he would be prohibited from doing all at once. Creating such a distinction will require courts to enforce arguably innocuous single contracts that belong to a pattern of contractual relations that significantly restrain trade in a relevant market.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN13[] **Motions to Dismiss, Failure to State Claim**

At the stage of a motion to dismiss for failure to state a claim, it is not a court's role to determine the soundness of a plaintiff's economic theory.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

That exchange agreements like "exclusive dealing" and "tying" arrangements, may be efficiency-enhancing and thus procompetitive does not necessarily mean that the anticompetitive effects of those types of arrangements or agreements are always outweighed by procompetitive justifications.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

With regard to an antitrust action, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN16[] **Sherman Act, Scope**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, liability is directed not only at inherent anticompetitive conduct, but also at conduct that has anticompetitive effects.

Counsel: Charles M. Kagay, Spiegel, Liao & Kagay LLP, San Francisco, California, for the plaintiffs-appellants.

Timothy D. Cohelan, Cohelan & Khoury, San Diego, California, for the plaintiffs-appellants.

Hojoon Hwang, Munger, Tolles & Olson LLP, San Francisco, California, for the defendants-appellees.

Peter H. Mason, Fulbright & Jaworski LLP, Los Angeles, California, for the defendant-appellee.

David M. Foster, Fulbright & Jaworski LLP, Washington DC, for the defendant-appellee.

Judges: Before: Stephen S. Trott, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges. Opinion by Judge Trott; Dissent by Judge Callahan.

Opinion by: Stephen S. Trott

Opinion

[*1006] TROTT, Circuit Judge:

The district court granted Defendants' motion to dismiss Plaintiffs' antitrust claim founded on *§ 1 of the Sherman Act*, holding that 1) *Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493 (Cal. 2001)*, precludes the allegations made in the operative pleading; 2) Defendants' exchange agreements can not be aggregated to establish market power and anticompetitive effect; and 3) even **[**2]** if the exchange agreements could be aggregated, the absence of a conspiracy to limit supply and raise prices eliminates a causal connection between the exchange agreements and anticompetitive effect. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse and remand.

I

BACKGROUND

Plaintiff-Appellant William O. Gilley filed this class-action lawsuit in 1998 on behalf of himself and other wholesale purchasers of CARB gasoline in the state of California. CARB gas is a cleaner-burning fuel, and since 1996 it is the only type of gas that can be sold in California. The complaint alleged that Defendants-Appellees, major oil producers, violated *§ 1 of the Sherman Act* by entering into a conspiracy to limit the supply of CARB gasoline and to raise prices.

The allegations of the complaint were similar to those alleged in *Aguilar*, a class-action suit filed in California Superior Court in 1996. That suit was brought under the Cartwright Act, *CAL. BUS. & PROF. CODE § 16720 et seq.*, California's equivalent to the Sherman Act. *Aguilar, 24 P.3d at 502*. The plaintiff in *Aguilar* was a retail purchaser and consumer of gasoline and sought to represent a class of retail purchasers. The plaintiff in **[**3]** this action was a wholesale purchaser and retail dealer of gasoline and sought to represent a class of wholesale purchasers. Both plaintiffs were represented by the same attorneys, and both actions targeted the same defendants for essentially the same allegedly unlawful conduct. Because of the similarity in the cases, the district court hearing this case stayed the suit pending the outcome of *Aguilar*.

In *Aguliar*, the state superior court granted summary judgment to the defendants, concluding that there was insufficient evidence presented by the plaintiffs to allow a reasonable juror to find a conspiracy to limit supply and raise prices among the several gasoline companies. *Id. at 503*. The California Supreme Court affirmed. *Id. at 521*. As a result, Defendants in this case brought a motion for summary judgment arguing that Gilley's claims were barred by collateral estoppel. In response, Gilley offered a **[*1007]** proposed amended complaint, which the court found insufficient. The district court, however, granted Gilley leave to provide another proposed amended complaint, which he did.

On May 6, 2002, the district court granted Defendants' motion for summary judgment on that complaint, holding that **[**4]** Gilley was precluded by *Aguilar* from relitigating whether a conspiracy existed to limit supply and raise prices. However, the court granted Gilley further leave to amend the complaint to allege that "each of the bilateral agreements, entered into independently between various defendant gasoline companies, ha[s] anti-competitive effects and therefore violate[s] the Sherman Act."

On May 24, 2002, Gilley filed the third *post-Aguilar* complaint, alleging that forty-four bilateral exchange agreements had the effect of unreasonably restraining trade in violation of *§ 1 of the Sherman Act* and in violation of *CAL. BUS. & PROF. CODE § 17200*. On March 27, 2003, the district court granted Defendants' motion to dismiss that complaint with prejudice. With respect to the § 1 claim, the court explained that Gilley had not alleged any theory as to how any individual exchange agreement, which accounts for a small percentage of the relevant market, is able to inflate the price of CARB gasoline. The district court rejected Gilley's argument that the court could consider the aggregate effects of the individual bilateral agreements to allege an anticompetitive effect--namely higher gas prices.

Gilley appealed **[**5]** to this Court, which reversed and remanded, holding that the district court erred in not giving Gilley an opportunity to correct the newly identified deficiencies. After the remand, the second amended complaint ("SAC") was filed. Most of the allegations of anticompetitive conduct and effect are stated in the following terms:

> [Defendant] entered into the following sales/ exchange agreements for delivery of CARB gas in [geographic market]: [list of exchange agreements.]
>
> [Defendant's] intent and purpose in entering into these sales/exchange agreements was to limit refining capacity for CARB gas and/or to keep CARB gas out of the spot market and away from unbranded marketers.
>
> These agreements have had the effect of raising CARB gas prices in [geographic market] above competitive levels, without any countervailing procompetitive benefit.

The district court granted Defendants' motion to dismiss the SAC, holding that Plaintiffs failed to allege that the exchange agreements, when considered individually, would be capable of producing significant anticompetitive effects. We now review the district court's summary dismissal of the SAC.

II

DISCUSSION

A. Standard of Review

HN1[] We review de novo a dismissal **[**6]** for failure to state a claim pursuant to *Rule 12(b)(6)*. *Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)*. All allegations of material fact are taken as true and construed in the light most favorable to the non-party. *Id*.

B. Analysis

We address the following issues in this appeal: 1) the preclusive effect of the California Supreme Court's decision in *Aguilar*; 2) the pleading standard for § 1 claims; 3) the sufficiency of Plaintiffs' SAC; 4) Plaintiffs' standing to add Tesoro as a Defendant in the SAC; and 5) the state law claim under *CAL. BUS. & PROF. CODE § 17200*.

1. The Preclusive Effect of the California Supreme Court's *Aguilar* Decision.

Gilley does not dispute that the decision in *Aguilar* has some preclusive effect in **[*1008]** the current lawsuit, but he contends that his current claim is not entirely extinguished by *Aguilar*. In contrast, Defendants argue that all of the allegations in the SAC are precluded by *Aguilar*. We conclude that Gilley has stated a claim that is not precluded by the California Supreme Court's decision.

The critical determination in *Aguilar* was that the plaintiff failed to provide sufficient proof of a fact necessary for the claim she had pled, specifically that Defendants **[**7]** conspired and acted collectively through exchange agreements to fix prices and/or control supply. As the California Supreme Court explained: "Aguilar had to present evidence that tended to exclude the possibility that the petroleum companies acted independently rather than collusively. This she did not do." *Aguilar, 24 P.3d at 518*. In the order granting Defendants' motion to dismiss, the district court in this case summarized its understanding of that finding: "With respect to exchange agreements specifically, the court found that the evidence showed independent action on the part of the petroleum companies rather than a collusive web of bilateral exchange agreements to control supply and prices." The district court, applying the doctrine of issue preclusion (or collateral estoppel), accepted as an established fact the finding that the defendants did not collude to control supply and prices through the exchange agreements.

The California Supreme Court was clear in *Aguilar*, however, that the failure to prove that fact did not necessarily mean that plaintiff did not have a legally viable claim against Defendants:

> In alleging facts for her Cartwright Act cause of action, Aguilar proceeded **[**8]** on a theory, which was legally sound, that the assertedly unlawful conspiracy consisted of an agreement among the petroleum companies as competitors to restrict the output of CARB gasoline and to raise its price, and was unlawful per se without regard to any of its effects. In granting the petroleum companies summary judgment, the superior court did so on that theory. On appeal, Aguilar apparently attempted to introduce an alternative theory, which was also legally sound, that the assertedly unlawful conspiracy consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects. The Court of Appeal rejected any such attempt as too late. To the extent that Aguilar makes the same attempt on review, we reject it for the same reason.

Id. at 521, n. 35 (citations omitted). Plaintiff was not allowed to proceed with the alternative theory based on the effects of the exchange agreements, without proof of collusion, because the theory had not been timely pleaded, not because it was held to be defective, either legally or factually.

The *Aguilar* decision does not preclude the latter theory in subsequent litigation.***HN2***[] Issue preclusion **[**9]** is decided under the law of the state where judgment was entered. *Ross v. Alaska, 189 F.3d 1107, 1110 (9th Cir. 1999)*. Under California law, issue preclusion applies only if a number of conditions are satisfied. *Calvert v. Huckins, 109 F.3d 636, 638 (9th Cir. 1997)*. Among those conditions are "[the] issue must have been actually litigated in the former proceeding" and "the decision in the former proceeding must be final and on the merits." *Id*.

HN3[] *Aguilar* precludes a claim that depends upon proof of collusion by Defendants to use exchange agreements to control supply **[*1009]** and prices, notably in the form of a per se claim of a horizontal price-fixing conspiracy, [1] but it does not preclude a claim that the bilateral exchange agreements have an anticompetitive effect on competition, despite the absence of collusion, under the rule of reason. [2]

---

[1] ***HN4***[] The determination of whether an agreement unreasonably restrains trade can be based upon per se condemnation or under a rule of reason analysis. *See Texaco Inc. v. Dagher, 547 U.S. 1, 5-7, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (noting that a per se claim and a rule of reason claim are distinct). Courts will condemn as per se illegal only those agreements that are "so plainly anticompetitive **[**10]** that no elaborate study of the industry is needed to establish their illegality." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. For example, "[p]rice-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements," are condemned as per se illegal. *Dagher, 547 U.S. at 5*.

[2] ***HN5***[] For a rule of reason claim, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its

The SAC may include allegations which are precluded by *Aguilar*, but not of all of what the SAC alleges is precluded. To the extent that the SAC alleges a claim that Defendants have entered into exchange agreements, without a conspiracy to control supply or to set prices, and that those agreements aggregated together have an anticompetitive effect on competition in the relevant market, it has stated a claim that is not precluded by *Aguilar*.

2. The Pleading Standard [11] for § 1 Claims**.

To successfully state a claim under *§ 1 of the Sherman Act*, a plaintiff need only meet the notice pleading standard articulated in *Fed. R. Civ. P. 8(a)(2)*. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. at 1964 (2007)*. ***HN6***[] *Rule 8(a)(2)* requires "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id*. (quoting *Fed. R. Civ. P. 8(a)(2)*). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id. at 1965*. Additionally, dismissals for failure to state a claim are disfavored in antitrust actions. *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983)*.

3. The SAC is a Sufficient Pleading.

HN7[] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. However, it has long been recognized **[**12]** that Congress did not intend to give literal meaning to those words, but instead only intended to make unlawful *unreasonable* restraints on trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Therefore, "to establish a claim under *§ 1 of the Sherman Act*, the plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that . . . unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." [3] *Bhan, 929 F.2d at 1410*.

[*1010] a. The First Element--Existence of an Agreement.

HN8[] Under the first element of a § 1 claim, a plaintiff must plead the existence of a contract, combination, or conspiracy, meaning a defendant did not operate unilaterally, but instead, at least two entities acted in concert. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Defendants argue that the exchange agreements are not concerted action.

"Our ***HN9***[] ***antitrust law*** is clear that [a plaintiff] need not prove intent to control prices or destroy competition to demonstrate the element of an agreement . . . among two or more **[**13]** entities." *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1153-54 (9th Cir. 2003)* (internal quotation marks omitted) (noting that intent of the parties is to be evaluated under the second element of the § 1 analysis). The exchange agreements are "contracts." As a result, each bilateral exchange agreement, even without intent to control prices, provides an agreement that meets the first element of a § 1 Sherman Act claim.

b. The Second Element--When Aggregated, the Exchange Agreements Unreasonably Restrain Trade.

HN10[] Under the second element of a § 1 claim, a plaintiff must show the challenged agreement unreasonably restrains trade by establishing anticompetitive effects. *Bhan, 929 F.2d at 1410*. To make this showing under the rule of reason analysis, a plaintiff generally must establish market power. *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 951 (9th Cir. 1998)*. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

---

condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

[3] Neither party disputes that the exchange agreements affect interstate commerce.

Because each of the exchange agreements arguably affects only a small amount of CARB gas, Plaintiffs pleaded the cumulative effect of **[**14]** a single Defendant's exchange agreements to show market power and anticompetitive effect.

Plaintiffs argue correctly that the district court erred in not allowing them to allege the cumulative effects of a single Defendant's exchange agreements. They find support in Ninth Circuit and United States Supreme Court precedent, which has allowed the aggregation of multiple contracts when evaluating the legality of an individual contract. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir. 1982)*; *Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*; *Standard Oil Co. of Cal. & Standard Stations, Inc., v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*; *cf*. 2 AREEDA & HOVENKAMP P 310c1, p. 201 ("***HN11***[] An aggregation of claims may produce sufficient proof of violation or injury where violation requires that a certain legal threshold be met and no claim standing alone is sufficient to meet the threshold.").

In *Twin City*, we were presented with the issue of "whether a district court, in assessing the antitrust liability of a defendant, may look to the overall effects of a defendant's conduct in the relevant market, or is limited to looking at the market implications of the **[**15]** one contract between the antitrust plaintiff and defendant." *676 F.2d at 1302*. We allowed aggregation, reasoning that a***HN12***[] defendant who restrains trade by an obvious pattern and practice of entering into individual contracts should not be allowed to do piecemeal what he would be prohibited from doing all at once. *Id*. We held that, "[c]reating such a distinction would require courts to enforce arguably innocuous single contracts that belong to a pattern of contractual relations that significantly restrain trade in a relevant market." *Id. at 1303*.

[*1011] The district court and Defendants concede that aggregation of agreements is appropriate in some cases. Both, however, contend that aggregation should be allowed only in the context of "exclusive dealing" and "tying" cases because of the predictably anticompetitive effect of those practices--market foreclosure to competitors. The district court reasoned that only those types of contracts can be aggregated because they have "a clear purpose and an identifiable effect" and because "[d]etermining the cumulative effect of such contracts can be done with relative ease." We disagree, as no general rule requires that only the easiest cases may be aggregated. **[**16]** As noted by the California Supreme Court, plaintiffs have a viable legal theory. *See Aguilar, 24 P.3d at 521 n.35* (noting an "alternative theory, which [is] also legally sound, that the assertedly unlawful conspiracy consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects") (citation omitted).

HN13[] At the stage of a motion to dismiss for failure to state a claim, it is not our role to determine the soundness of Plaintiffs' economic theory. Even if we, as a savvy court, view actual proof of the facts pleaded in the SAC as improbable and conclude that a recovery is remote and unlikely, the complaint should still proceed. *Bell Atl. Corp., 127 S. Ct. at 1965*. The analysis we would have to undertake to dismiss the complaint here is not appropriate at the Rule 12 stage. [4]

Defendants also argue that bilateral exchange agreements, in general, are an efficiency-enhancing distribution practice that promotes, not hinders, competition. The allegations contained in the SAC, however, are that *these exchange agreements* ***[**17]*** *have anticompetitive effects*.

HN14[] That exchange agreements like "exclusive dealing" and "tying" arrangements, may be efficiency-enhancing and thus procompetitive does not necessarily mean that the anticompetitive effects of those types of arrangements or agreements are *always outweighed* by procompetitive justifications. *See* *Brown v. Hansen Publ'ns, Inc., 556 F.2d 969, 971 (9th Cir. 1977)* (noting that "exclusive dealing" contracts may be procompetitive); *NCAA, 468 U.S. at 104 n.26* (noting that "tying" arrangements may be procompetitive).

This loggerhead is precisely what a rule of reason analysis would address. The formulation of the dispute at issue was long ago laid out. "***HN15***[] The true test of legality is whether the restraint imposed is such as merely

[4] We note that the decision in *Aguilar* concerned a summary judgment, not a dismissal for failure to state a claim.

regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of Chicago v. United States, 246 U.S. 231, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)*. This point of contention is yet another reason to allow the complaint to proceed.

Defendants offer a number of other arguments against aggregation. None of the arguments, however, can sidestep our precedent.

Defendants argue that Plaintiffs waived the aggregation **[**18]** argument by not challenging the district court's Order Granting Leave to Amend in their first appeal to the Ninth Circuit. That order reads, "The court GRANTS leave to amend plaintiff's complaint only to the extent that it alleges that each of the bilateral agreements, entered into independently between various **[*1012]** defendant gasoline companies, have unreasonable anti-competitive effects and therefore violate the Sherman Act." The purpose behind the district court's decision to grant leave to amend was so Plaintiffs could plead a claim different than the per se violation pled in *Aguilar*. Plaintiffs complied by pleading a rule of reason claim based on the aggregate effects of the exchange agreements.

Defendants also argue also that *Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002)*, forecloses aggregation of the bilateral exchange agreements to establish a violation of *§ 1*. In that case the plaintiff "alleged discrete conspiracies between Microsoft and two original equipment manufactures (OEMs): Dell and Compaq. *Id. at 210*." The Fourth Circuit affirmed the district court's determination "that it could not consider the cumulative harm of Microsoft's agreements with *all OEMs* but instead **[**19]** was required to consider--individually--Microsoft's agreements with Compaq and Dell" because the complaint "did not allege a conspiracy among Microsoft and *all OEMs*; it alleged discrete conspiracies between Microsoft and Compaq and Microsoft and Dell." *Id*. (emphases added). In other words, because the plaintiff did not allege the cumulative effect of Microsoft's agreements with "all OEMs" in the complaint, the Fourth Circuit declined considering their aggregate effects. *Dickson* is distinguishable from the present case, as the plaintiffs here do expressly allege that each Defendant's agreements considered in the aggregate have anticompetitive effects.

Defendants also contend that aggregation would subject firms to unwarranted liability and great uncertainty regarding the validity of independent business dealings that do not carry inherent anticompetitive potential. ***HN16***[] Section 1 liability, however, is directed not only at inherent anticompetitive conduct, but also at conduct that has *anticompetitive effects. Khan, 522 U.S. at 10*. Furthermore, aggregation of the agreements does not lessen a plaintiff's burden of demonstrating anticompetitive effects of a given agreement.

Because the district **[**20]** court's application of the law was incorrect, and because we reject Defendants' arguments against aggregation, we conclude that the district court erred in not allowing Plaintiffs to aggregate the agreements to demonstrate their anticompetitive effects.

c. The Allegations in the SAC Are Not Necessarily Premised on a Conspiracy to Limit Supply and Raise Prices.

The district court concluded that, even if aggregation were proper, the complaint alleges the existence of a network of exchange agreements that allow Defendants to limit supply and raise the price of CARB gas. The district court based that conclusion on language of the complaint stating that each Defendant obtained market power "through the use of [the Defendant's] exchange agreements, coupled with its own refining capacity and that of its contracting partners." However, that language says nothing more than the exchange agreements provide access to refining capacity of Defendant's competitors through the exchange agreements themselves. Furthermore, that language, read in the light most favorable to Plaintiffs, *Knievel, 393 F.3d at 1072*, certainly does not plead a "network", a "precise dance of give-and-take", or any other nomenclature **[**21]** for the operation of a conspiracy to limit supply or raise prices.

The district court concluded also that "Plaintiffs cannot avoid the fact that their Sherman Act claim is, at its core, a conspiracy claim." To come to that conclusion, the district court did not rely on the allegations made in the SAC. Instead, the **[*1013]** court, in effect, probed the soundness of Gilley's economic theory, concluding that the alleged anticompetitive effects could not result without the intentional collusion precluded, as a factual allegation, by *Aguilar*. The district court illustrated its analysis with a hypothetical:

> Defendant A enters into separate exchange agreements with B, C, D, E, and F. If B overproduces CARB gasoline at some point in time, A may be able to take the excess amount and adjust its production accordingly. However, in the absence of a conspiracy, C, D, E, and F may also produce excess CARB gasoline which cannot be absorbed by A because A has already taken the overproduction from B.

The district court may be correct in its understanding of how the economy or the oil business works, but that is a factual assessment, not left to the court, even a savvy judge, to decide on a Rule 12 motion. The **[**22]** hypothetical is not what has been pled in the SAC. The SAC alleges that anticompetitive effects have resulted from the exchange agreement, even in the absence of collusion, and under *Rule 12(b)(6)*, allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Knievel, 393 F.3d at 1072*.

A review of the SAC shows that it alleged that the existence of the exchange agreements allows a given Defendant in a given geographic market control of enough refining capacity of CARB gas to keep CARB gas out of the spot market and away from unbranded marketers, with the overall *effect* of creating supracompetitive prices. Plaintiffs did not allege that Defendants entered into a conspiracy to limit supply or raise prices, and did not assert a conspiracy to enter into the exchange agreements. That the district court believes that the allegedly anticompetitive effects would not actually occur without a conspiracy does not justify dismissal of the SAC for failure to state a claim.

Furthermore, the absence of a conspiracy to limit supply and raise prices does not eliminate a causal connection between the exchange agreements and anticompetitive effect. As discussed **[**23]** above, Plaintiffs must first identify an agreement that unreasonably restrains trade. Here, the SAC properly identifies a number of agreements satisfying the contract, combination, or conspiracy requirement of *§ 1*. Next, Plaintiffs must plead facts that if taken as true would allow Plaintiffs to recover for an antitrust injury. Here, Plaintiffs' SAC, construed in the light most favorable to them, alleges that each Defendant's control of its refining capacity, coupled with that of its contracting partners, establishes requisite market power in the relevant geographic market sufficient to establish anticompetitive effects.

We conclude that the SAC is a sufficient pleading to move beyond *Rule 12(b)(6)*.

4. Plaintiffs Have Standing Against Tesoro.

Although a plaintiff must directly purchase from a defendant to have standing to recover damages, *Ill. Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, an indirect purchaser may nevertheless have standing to seek injunctive relief. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998)*.

Taking Plaintiffs' allegations as true, and construing them in the light most favorable to Plaintiffs, at least an indirect purchaser **[**24]** scenario exists in the SAC. In addition to Plaintiffs' allegations that they are "direct purchaser[s] from [D]efendants," the allegation that Tesoro acquired the Avon refinery from UDS, and that "Tesoro entered into the same sales and/or exchange agreements that UDS had formerly **[*1014]** entered into with other refiners . . . in connection with the ownership and operation of the Avon refinery" provides sufficient pleading to conclude that Plaintiffs have standing to include Tesoro in the SAC.

5. We Remand the State Law Claim.

The district court dismissed Plaintiffs' claim under *CAL. BUS. & PROF. CODE § 17200* as follows:

> Plaintiffs' state unfair competition claim rests on the same facts as their Sherman Act claim. Because the Sherman Act claim is being dismissed at an early stage of litigation, the Court finds that the factors underlying the assertion of supplemental jurisdiction . . . weigh against retention of jurisdiction over the remaining state law claim.

Because we reverse the dismissal of the Sherman Act claims, we also reverse the district court's dismissal of the state law claim.

III

CONCLUSION

We agree with the California Supreme Court that the *Aguilar* trial court only adjudicated a per se **[**25]** claim of horizontal price fixing. Therefore, Plaintiffs' rule of reason claim alleging that the bilateral exchange agreements have anticompetitive effects is not precluded. In addition, Ninth Circuit and Supreme Court precedent allow for aggregation of the individual exchange agreements to demonstrate market power and anticompetitive effect in a given market. Though the district court may think the prospects of Gilley actually proving the allegations contained in the SAC to be highly improbable--and may be correct in that assessment--that is not a valid basis for Rule 12 dismissal.

REVERSED and **REMANDED**.

Dissent by: CALLAHAN

Dissent

CALLAHAN, Circuit Judge, dissenting:

I write separately because I think that the majority reads the California Supreme Court's opinion in *Aguilar v. Atl. Richfield Co., 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493 (Cal. 2001)*, too narrowly and fails to appreciate the pleading standard set forth in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. When Gilley's Second Amended Complaint (sometimes referred to as "SAC") is viewed in light of these cases, it is too broad and amorphous and fails to limit his claims to those that are not precluded by *Aguilar*. Furthermore, because Gilley has been on **[**26]** notice since 2002 that his complaint must be limited to those claims not precluded by *Aguilar*, has had several opportunities to submit a properly circumscribed amended complaint, and has failed to do so, I would affirm the district court's dismissal of the Second Amended Complaint.

I

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. The Supreme Court has clearly established that the section is limited to prohibiting unreasonable restraints of trade. *See Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Whether a plaintiff pursues a per se claim or a rule of reason claim under *§ 1*, the first requirement is to allege a "contract, combination in the form of trust or otherwise, or conspiracy."

I agree with the majority that the core of the plaintiff's claims in *Aguilar* was a per se claim based on an alleged unlawful conspiracy among petroleum companies. I also agree that the California Supreme Court in *Aguilar* recognized that plaintiffs **[*1015]** "attempted to introduce an alternative theory, which was also legally sound [ ], that the assertedly unlawful conspiracy **[**27]** consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects." *Aguilar, 24 P.3d at 521, n.35*. The California Supreme Court agreed with the Court of Appeal that this attempt came too late and rejected it for that reason. *Id*.

The California Supreme Court's opinion in *Aguilar*, however, is broader than the footnote referenced by the majority. The *Aguilar* opinion goes on to state:

> Just as the superior court's order granting the petroleum companies summary judgment was not erroneous as to Aguilar's primary cause of action for an unlawful conspiracy under section 1 of the Cartwright Act to restrict the output of CARB gasoline and to raise its price, neither was it erroneous as to her derivative cause of action, which was for an unlawful conspiracy under the unfair competition law for the same purpose.
>
> . . .
>
> The petroleum companies carried their burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law as to Aguilar's unfair competition law cause of action. They did so by doing so as to her Cartwright Act cause of action. Again, they carried their **[**28]** burden of production to make a prima facie showing of the absence of any conspiracy, but she did not carry her shifted burden of production to make a prima facie showing of the presence of an unlawful one.
>
> It is true, as Aguilar argues, that her unfair competition law cause of action is not based on allegations asserting a conspiracy *unlawful under the Cartwright Act*. But it is indeed based on allegations asserting a *conspiracy*, specifically, one unlawful at least under the unfair competition law itself. As stated, the petroleum companies showed that there was no triable issue of the material fact of conspiracy. Aguilar claims that conspiracy is not an element of an unfair competition law cause of action in the abstract as a matter of law. Correctly so. (See *Bus. & Prof. Code, § 17200*). But she simply cannot deny that conspiracy is indeed a component of the unfair competition law cause of action *in this case as a matter of fact*.

Id. at 521 (emphasis in original).

This portion of *Aguilar* holds that the plaintiffs had failed to demonstrate the existence of a conspiracy that was per se illegal or otherwise illegal under the Sherman Act. With this understanding, if Gilley were not asserting **[**29]** that the defendants entered into a conspiracy in violation of the Sherman Act, I could agree with the majority that "a claim that Defendants have entered into exchange agreements, without a conspiracy to control supply or to set prices," would state a claim that is not precluded by *Aguilar*. However, even assuming that in the abstract the Second Amended Complaint can be interpreted as alleging such a limited claim, it clearly alleges much more than that and it is far too late in the litigation process to presume that this is anything but intentional.

II

The preclusive effect of *Aguilar* is woven through the numerous court decisions in Gilley's federal action. Gilley filed this class action in 1998, and its proceedings were stayed pending the outcome of *Aguilar*. After the California Supreme Court issued its opinion in *Aguilar*, the defendants filed a motion for summary judgment. Gilley opposed the motion and also offered to file an amended complaint. The district court granted the motion for summary **[*1016]** judgment. The district court held that pursuant to the doctrine of issue preclusion, Gilley was barred from relitigating the conspiracy alleged in *Aguilar*. The court denied Gilley's request to **[**30]** amend the complaint to allege continuing violations of antitrust laws subsequent to the time period involved in *Aguilar*, reasoning:

> The exchange agreements were already judged by the California Supreme Court not to be evidence of a conspiracy. The court finds that the proposed amended complaint merely alleges the ongoing use of these supply agreements and not any new conduct. Issue preclusion therefore bars Gilley from relitigating whether use of the ongoing agreements constitute an illegal conspiracy under the Sherman Act.

The district court, however, agreed with Gilley that "his rule-of-reason claim has not been litigated to the extent that he is alleging that the individual bilateral exchange agreements violate the anti-trust laws due to their anti-competitive effect." Accordingly, it granted Gilley leave to file an amended complaint "only to the extent that it alleges that each of the bilateral agreements, entered into independently between various defendant gasoline companies, have unreasonable anti-competitive effects and therefore violate the Sherman Act."

Gilley amended his complaint. Defendants responded by filing a motion to dismiss the First Amended Complaint ("FAC"). The district **[**31]** court granted the motion, explaining:

> After careful scrutiny of the FAC, the court has been unable to discern any allegation that any of the parties in any of the bilateral agreements entered these agreements with an unlawful intent or purpose to restrain competition. In the few instances that Plaintiff does allege an improper purpose, he does so by alleging joint action among all, or substantially all of the defendants. As discussed below, Plaintiff's pleading of such joint purpose or action regarding the various defendants is improper and will not be considered by the court. Therefore, Plaintiff has failed to properly allege "concerted action" regarding any individual bilateral exchange agreement.

The district court dismissed the case with prejudice, commenting that because "Plaintiff was already granted leave to amend his complaint previously, and at this late date was unable to set forth a valid anti-trust claim, it appears that Plaintiff cannot allege sufficient facts constituting a valid § 1 claim."

Gilley appealed, and we reversed and remanded to allow Gilley an opportunity to file a further amended complaint. We held that the district court had abused its discretion by denying **[**32]** Gilley an opportunity to amend his complaint.

When Gilley filed a Second Amended Complaint, defendants again moved to dismiss, and the district court granted the motion. It explained:

> Plaintiffs do not allege that each exchange agreement has a discrete effect on competition which can be viewed together with the separate effects of the other exchange agreements. Instead, Plaintiffs allege the existence of a network of exchange agreements that allow Defendants to coordinate their production and output, thereby limiting the amount of CARB gasoline on the rack or spot market and allowing Defendants to raise prices to branded dealers.
>
> Even if a single defendant and all of the defendants who contracted with that defendant cumulatively had sufficient market power to substantially impair competition, Plaintiffs would need to make the further showing that all of these defendants worked together through the use **[*1017]** of the exchange agreements and strategic shutdowns or decreased production to stabilize the spot market and avoid the depression of gasoline prices. . . .
>
> Plaintiffs cannot avoid the fact that their Sherman Act claim is, at its core, a conspiracy claim. Plaintiffs' theory of recovery rests **[**33]** upon the existence of a web of exchange agreements that allegedly allows all of the Defendants to engage in a precise dance of give-and-take with the goal of maintaining the delicate balance of CARB production. Coordinated action is essential to Plaintiffs' claim.
>
> After four attempts to plead around a conspiracy claim, Plaintiffs still fail to allege that the bilateral exchange agreements, *viewed independently*, constitute an unreasonable restraint on trade. Plaintiffs' inability to establish a causal connection between the individual exchange agreements, and anticompetitive harm is fatal to Plaintiffs' Sherman Act claim.

A critical aspect of the district court's perspective is its determination that the SAC does not allege "that each exchange agreement has a discrete effect on competition which can be viewed together with the separate effects of other exchange agreements." Rather, the district court sees the SAC as alleging "a network of exchange agreements" that "allow Defendants to coordinate their production and output." In essence, the district court reads the SAC as not alleging that the bilateral agreements "violate the anti-trust laws due to their anti competitive effect," but **[**34]** rather that the agreements facilitate coordinated action by the defendants that unlawfully restrains trade.

This distinction is critical. If the bilateral agreements in themselves have an illegal effect on competition (when aggregated), then the bilateral agreements constitute the "contract, combination or conspiracy" required for a claim under *§ 1* of the Sherman Act. If, however, the bilateral agreements only facilitate coordinated activity, then to maintain a claim under *§ 1* of the Sherman Act, Gilley must show some meeting of the minds, some "contract, combination or conspiracy," between those defendants whom Gilley alleges coordinated their actions. Although a plaintiff might well be able to do so in the abstract, here, Gilley is precluded by *Aguilar* from asserting that the defendants so conspired.

III

The Second Amended Complaint implicitly, if not explicitly, asserts a conspiracy. The charging paragraphs of the SAC describe the defendants' parallel actions and imply the existence of a conspiracy. The SAC asserts:

> California's CARB gas supply is generally manufactured primarily by defendants, California branded refiners, who are engaged in the business of refining, distributing and **[**35]** selling almost 100% of the CARB gas in the state of California during the class period. California remains largely isolated from external sources of supply.
> All California refiners, now also major retail marketers, control supply and pricing from production to distribution, in part, through supply agreements that require dealers to purchase gasoline exclusively at each branded refiner's present DTW price, a price that is always greater than the rack price and cost of distribution.
> California refiners' weekly refinery production decisions are influenced by, among other things, spot price impact, refiner margins, bilateral exchange partners' market needs, ability to draw inventory from bilateral exchange partners, and overall market supply.
>
> With the impending introduction of CARB gasoline in 1996, each of the **[*1018]** defendants or their predecessors in interest, entered into new sales and/or exchange agreements with other defendants, many of which provided for the provision of CARB gas "as mutually agreed" (AMA) with no minimum or maximum.

The determination that these paragraphs assert a conspiracy is reinforced by the next paragraph of the SAC which reads:

> The sales and exchange agreements known **[**36]** to plaintiffs that are subject of this action are listed on the attached Exhibit . . . . On information and belief, plaintiffs allege that defendants have entered into other sales and exchange agreements, presently unknown to plaintiffs, with similar intent and effect.

Certainly the tenor of this paragraph is that the "similar intent and effect" violates antitrust laws. Moreover, in light of the preceding paragraphs and the failure to assert any other specific violation of the Sherman Act, the alleged violation must be one of conspiracy or collusion.

This allegation of conspiracy is carried forward in the SAC's allegations against particular defendants, starting with Chevron. [1] It lists three exchange agreements that Chevron entered into with Exxon, Shell, and Tosco Refining Co., and alleges, on information and belief, that Chevron has entered similar agreements "for the delivery of CARB in Northern California." The SAC then alleges:

> Chevron's intent and purpose in entering into these exchange agreements was to limit refining capacity for CARB gas and/or to keep CARB gas out of the spot market and away from unbranded marketers.
>
> Through the use of these exchange agreements, **coupled with [**37] its own refining capacity and that of its contracting partners**, Chevron has obtained sufficient market power to limit the supply of CARB gas to unbranded marketers and to raise the price at which it sells CARB gas in Northern California to supracompetitive levels. These agreements have had the effect of raising CARB gas prices in Northern California above competitive levels, without any countervailing procompetitive benefit.

(Emphasis added).

These paragraphs reveal, as the majority notes, how Gilley proposes to meet the market power requirement for a claim under *§ 1* of the Sherman Act, but they leave the reader uninformed as to how the individual exchange agreements allegedly violated the Sherman Act "without a conspiracy to control supply or to set prices." In his brief, Gilley responds by pointing to the paragraphs concerning the relationship between Chevron and Tosco. These paragraphs set forth various reasons for why the defendants purportedly entered into particular agreements, [2]

---

[1] The allegations against the other defendants are similar to the allegations against Chevron.

[2] For example, the SAC sets forth a 1994 individual exchange agreement between Chevron and Tosco and alleges:

suggest an industry-wide **[*1019]** conspiracy, [3] and assert that the individual agreements facilitated a combination or **[**38]** conspiracy. [4] Again, the paragraphs seem to allege a conspiracy. They certainly do not clearly allege that the exchange agreements themselves constitute a restraint of trade or suggest why the defendants' actions were "collusive, rather than independent, action." *See Aguilar, 24 P.3d at 519*.

In sum, the SAC, fairly read, is not limited to alleging that the bilateral exchange agreements are themselves restraints of trade. Instead, its broad allegations encompass conspiracy claims that are precluded by *Aguilar*. Indeed, the **[**40]** majority so concludes when it states "[t]he SAC may include allegations which are precluded by *Aguilar*, but not of all of what the SAC alleges is precluded."

IV

It is this breadth of the SAC that concerns me as it is inconsistent with the spirit of *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*. Although *Twombly* involved an alleged conspiracy based on parallel conduct and this case is ostensibly not a conspiracy case, nonetheless the Supreme Court's concerns reverberate in this case. The Supreme Court reiterated that *Federal Rule of Civil Procedure 8(a)(2)* requires "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly, 127 S. Ct. at 1964* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. [5] It commented that a plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" and that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id. at 1965* (internal citations omitted). The Supreme Court reaffirmed its earlier decisions holding that "something **[**41]** beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value," and that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, **[*1020]** this basic

---

> Chevron's intent and purpose in entering into this agreement with Tosco was to place its surplus CARB gas with other branded refiners to maximize returns. Chevron intended to and did rearrange its CARB gas supply to avoid a market imbalance caused by CARB gas flowing to independent marketers.

If Chevron and Tosco agreed to restrain the production of gas, the individual exchange agreement might well be a contract to restrain trade pursuant to *§ 1* of the Sherman Act. The paragraph, however, does not say that the parties agreed. Instead, it only addresses Chevron's intent and purpose. This purpose and intent would presumably motivate Chevron to act independently or interdependently without any agreement as to purpose or intent with Tosco.

[3] For example, the SAC alleges that "[t]hrough the use of **[**39]** these exchange agreements, coupled with its own refining capacity and that of its contracting partners, Chevron has obtained sufficient market power to limit the supply of CARB gas to unbranded marketers and to raise the price at which it sells CARB gas." This implies a conspiracy and does not allege that there was a meeting of the minds of the parties to any of the individual exchange agreements to raise the price of gasoline.

[4] For example, the SAC alleges that "Tosco's intent and purpose in entering into this agreement with Chevron was [to] join the 'club' of major branded refiners and to give Chevron the opportunity to place its surplus CARB gas with other branded refiners to maximize returns." This is confusing, as it indicates that Tosco's intent was to give Chevron "the opportunity" to maximize its return. This seems to suggest that the individual exchange agreement facilitated, but did not in itself provide for, the maximization of Chevron's return.

[5] The Court went on to disapprove the language in *Conley* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly, 127 S. Ct. at 1968* (quoting *Conley, 355 U.S. at 45-46*). The Court held that:

> [t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported **[**42]** by showing any set of facts consistent with the allegations in the complaint.

Twombly, 127 S. Ct. at 1969.

deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id. at 1966* (internal quotation marks and citations omitted). The Court concluded that allegations of parallel conduct in themselves do not provide a sufficient basis to sustain a conspiracy claim. [6]

Similarly, in this case the district court read the complaint as not stating a viable cause of action. It determined that the SAC did not allege that "each exchange agreement has a discrete effect on competition which can be viewed together with the separate effects of other exchange agreements," but rather as alleging "the existence of a network of exchange agreements that allow Defendants to coordinate their production and output." I agree with the district court. I read the SAC as not asserting that the bilateral agreements, in themselves, restrain trade, but that they facilitate or make it easier for the defendants to coordinate their actions to restrain trade. [7] The majority seems to admit that the SAC includes allegations of conspiracy, but contends that the SAC must be allowed because it can also be read to allege only that each exchange agreement has a discrete effect on competition. This is the type of "*in terrorem* increment of the settlement value" that the Supreme Court mentioned in *Twombly. Id. at 1966*. Moreover, when viewed in the light of the preclusive effect of *Aguilar*, the SAC "does not raise **[**44]** a claim of entitlement to relief." *Id*.

Furthermore, there can be little doubt that the broad scope of the SAC was intentional. Gilley has known since 2002 that following *Aguilar*, he was precluded from alleging a conspiracy. Nonetheless, he has thrice been given the opportunity to amend his complaint to limit it to a claim based solely on the alleged anti-competitive effect of the individual exchange agreements absent a conspiracy, and has thrice proffered amended complaints that continue to assert, albeit ever more subtly, the existence of a conspiracy. I do not necessarily quarrel with the majority that it might be possible for Gilley to allege an antitrust claim limited to issues that are not precluded by *Aguilar*, but he has declined **[**45]** to do so. Accordingly, the district court properly struck the SAC. Furthermore, **[*1021]** the district court's denial of leave to amend does not appear to me to have been an abuse of discretion. [8]

---

[6] The Court noted:

> We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, . . . there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost **[**43]** any group of competing businesses would be a sure thing.

127 S. Ct. at 1971.

[7] The district court explained:

> Even if a single defendant and all of the defendants who contracted with that defendant cumulatively had sufficient market power to substantially impair competition, Plaintiffs would need to make the further showing that all of these defendants worked together through the use of the exchange agreements and strategic shutdowns or decreased production to stabilize the spot market and avoid the depression of gasoline prices. . . .

[8] In *Griggs v. Pace Amn. Group, Inc., 170 F.3d 877, 880 (9th Cir. 1999)*, we held that the "district court determines the propriety of a motion to amend by ascertaining the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." Generally, "this determination should be performed with all inferences in favor of granting the motion." *Id*. Nonetheless, "we have noted that a district court does not abuse its discretion in denying a motion to amend a complaint . . . when the movant presented no new facts but only new theories and provided no satisfactory explanation for his failure to fully develop his contentions originally." *Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004)* (quoting *Vincent v. Trend W. Technical Corp., 828 F.2d 563, 570-71 (9th Cir.1987))* (internal quotation marks omitted). Here, assuming that Gilley could, in the abstract, amend his complaint to state a claim that is not precluded by *Aguilar*, his repeated failure to do just that suggests **[**46]** that it would be futile to offer him another chance to do so.

V

Although much of what the majority has to say about aggregation may be correct, I do not think that aggregation cures the defects in the SAC. Initially, I note that in an oligopoly, aggregation cannot be as broad as alleged in the SAC. More importantly, aggregation, which addresses the second prong of a § 1 claim, cannot overcome the SAC's failure to adequately identify the agreements that allegedly violate the Sherman Act.

In *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1302 (9th Cir. 1982)*, we addressed the question of aggregation on a claim for an unreasonable restraint of trade under *§ 1* of the Sherman Act. We held:

> the issue is whether a district court, in assessing the antitrust liability of a defendant, may look to the overall effects of a defendant's conduct in the relevant market, or is limited to looking at the market implications of the one contract between the antitrust plaintiff and defendant. At least in the factual context of the instant litigation, we think the district court correctly assessed Sportservice's aggregate pattern of conduct in the relevant market.

I agree with the majority **[**47]** that pursuant to *Twin City*, Gilley may aggregate the contracts entered into by each defendant in determining that defendant's marketpower. The allegations in the SAC, however, are not so limited. Rather, they appear to allow the aggregation of all the bilateral agreements by all of the defendants. I know of no authority or reason that would allow such an aggregation, as it would include the entire market. Accordingly, I think that Gilley is limited to aggregating, for example, Chevron's contracts with Exxon, Shell and Tosco, in asserting that Chevron has sufficient market power to effect the price of CARB gasoline, and may not include in the calculation of Chevron's alleged market share any bilateral agreements entered into by Exxon, Shell or Tosco with any party other than Chevron.

Whatever the proper scope of aggregation, and accepting that the aggregation of each defendant's bilateral agreements gave each defendant sufficient market power to affect the price of gasoline, the SAC still fails to meet the first requirement for a § 1 claim -- an allegation of a meeting of the defendants' minds. *See Twombly, 127 S. Ct. at 1965*. *Twin City* does not help Gilley on this issue. There, Sportservice **[**48]** had a practice of entering into exclusive concessionaire contracts, which were in themselves agreements to restrain trade. The only question was whether Sportservice had sufficient market power. Here, because the SAC does not clearly allege that the individual exchange agreements **[*1022]** inherently restrain trade, the aggregation of Chevron's individual agreements might show market power, but it would not meet the requirement that Gilley assert an agreement to restrain trade.

The majority's over-reliance on aggregation may be seen in its conclusion that the SAC alleges "that the existence of the exchange agreements allows a given Defendant in a given geographic market control of enough refining capacity of CARB gas to keep CARB gas out of the spot market and away from unbranded marketers, with the overall *effect* of creating supracompetitive prices." This conclusion allows effect to take the place of intent in precisely the way that the Supreme Court criticized in *Twombly, 127 S. Ct. at 1971*.

"Spot market" is defined in the SAC as "a market for short-term bulk gasoline purchases," and "unbranded marketers" refer to "jobbers and dealers who sell unbranded product not associated with the name brand **[**49]** of a branded refiner such as the defendants herein." These definitions indicate that "spot markets" exist only when a refiner produces more gasoline than can be sold by its "branded dealers." It follows that because "spot markets" produce a lower return to the refiner of gasoline than the refiner obtains through branded dealers, spot markets are a result of inefficiencies on the part of refiners. Accordingly, even without any collusion, a refiner is strongly motivated to avoid having to sell gasoline in the spot markets. Thus, a narrow focus on effect as a result of aggregation would convert self-interest parallel action, similar to that found to be legal in *Twombly*, into an antitrust violation, even when the plaintiff is precluded from showing any agreement between the competing businesses.

VI. Conclusion

We recently reiterated in *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*, that "[t]o state a claim under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; **[**50]** (2) by which the persons or entities intended to harm or restrain trade or commerce . . . (3) which actually injures competition." Gilley, in order to state a § 1 claim, must plead "a contract . . . by which the persons or entities intended to harm or restrain trade." Despite its length and detail, the SAC does not clearly assert which individual agreement or agreements constitute in themselves a "contract . . . by which the persons or entities intended to harm or restrain trade." Rather, the SAC is fairly read as alleging the existence of a network of exchange agreements that arguably allowed the defendants to unlawfully coordinate their production and output. But given the preclusive effect of *Aguilar*, Gilley cannot show such coordination. The SAC is not saved by the argument that it could be read to encompass a claim that the individual agreements in themselves constitute a restraint of trade because the SAC does not provide the defendants fair notice of such a claim and the grounds upon which it rests. *See* *Twombly, 127 S. Ct. at 1964*. Moreover, aggregation does not save the SAC because it does not show that the defendants' adjustments of CARB production were part of any agreement **[**51]** or conspiracy, rather than independent efforts to maximize profits. *See* *Twombly, 127 S. Ct. at 1971*. Finally, I note that, as written, the SAC might allow Gilley to seek discovery on, and to assert, allegations of conspiracy that Gilley concedes he is precluded by *Aguilar* from asserting as a cause of action. For these reasons, I would affirm the district court's dismissal of the Second **[*1023]** Amended Complaint without leave to amend.

End of Document

PSKS, Inc. v. Leegin Creative Leather Prods.

United States District Court for the Eastern District of Texas, Marshall Division

April 6, 2009, Decided; April 6, 2009, Filed

CV 2:03 CV 107 (TJW)

Reporter

2009 U.S. Dist. LEXIS 28505 *; 2009-1 Trade Cas. (CCH) P76,592

PSKS, INC. d/b/a KAY'S KLOSET, ET AL., Plaintiffs. v. LEEGIN CREATIVE LEATHER PRODUCTS, INC., Defendant.

Subsequent History: Affirmed by *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 2010 U.S. App. LEXIS 17175 (5th Cir. Tex., Aug. 17, 2010)*

Prior History: *PSKS, Inc. v. Leegin Creative Leather Prods., 498 F.3d 486, 2007 U.S. App. LEXIS 20957 (5th Cir. Tex., 2007)*

Core Terms

retailers, allegations, argues, horizontal, rule of reason, accessories, price fixing, interchangeable, manufacturer, products, relevant market, brand, hub and spoke, submarket, tenable, distributor, conspiracy, motion to dismiss, alleged facts, geographic, markets, cartel, brand name, anticompetitive, purchaser, wholesale, consumer, vertical, dual, wholesale market

Counsel: **[*1]** Robert M Parker, Mediator, Pro se, Tyler, TX.

For PSKS Inc, doing business as Kay's Kloset….Kay's Shoes, Toni Cochran LLC, doing business as Toni's, Plaintiffs: David Neil Smith, Nelson James Roach, LEAD ATTORNEYS, Nix Patterson & Roach LLP - Daingerfield, Daingerfield, TX; Ken M Peterson, Kristen D Wheeler Maloney, Robert W Coykendall, Tim J Moore, Will B Wohlford, Morris Laing Evans Brock & Kennedy Chartered, Wichita, KS.

For Leegin Creative Leather Products Inc, Defendant: Otis W Carroll, Jr, LEAD ATTORNEY, Collin Michael Maloney, Ireland Carroll & Kelley, Tyler, TX; Aaron Myers, Howrey LLP East Palo Alto, East Palo Alto, CA; Christopher S Walton, Tyler Alexander Baker, Fenwick & West - Mountain View, Mountain Valley, CA; Jeffrey Scott Levinger, Carrington Coleman Sloman & Blumenthal LLP, Dallas, TX; Jeffrey I Weinberger, PRO HAC VICE, Munger Tolles & Olson LLP - LA, Los Angeles, CA; Kathryn K Anderson, Munger Tolles & Olson LLP - LA, Los Angeles, CA; Rohit K Singla, PRO HAC VICE, Munger Tolles & Olson - San Francisco, San Francisco, CA.

For Leegin Creative Leather Products Inc, Counter Claimant: Otis W Carroll, Jr, LEAD ATTORNEY, Ireland Carroll & Kelley, Tyler, TX; Christopher S **[*2]** Walton, Fenwick & West - Mountain View, Mountain Valley, CA; Jeffrey I Weinberger, PRO HAC VICE, Munger Tolles & Olson LLP - LA, Los Angeles, CA.

Judges: T. JOHN WARD, UNITED STATES DISTRICT JUDGE.

Opinion by: T. JOHN WARD

Opinion

MEMORANDUM OPINION AND ORDER

Before the court is Leegin Creative Leather Products, Inc.'s ("Leegin") Motion to Dismiss (Dkt. No. 152). On March 12, 2009, the court heard oral arguments on the Motion. The court has carefully considered the parties' submissions and arguments of counsel. The court GRANTS Leegin's Motion for the following reasons.

I. BACKGROUND

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S.Ct. 2705, 168 L. Ed. 2d 623 (2007)*, the Supreme Court reversed the jury verdict in plaintiff's favor in this case. In doing so, the Supreme Court changed the standard by which to judge price fixing agreements between manufacturers and the entities to whom they sell (vertical price fixing agreements). The Supreme Court announced that a "rule of reason" standard should apply to vertical price fixing agreements, rather than the *per se* standard that was applied by this court. The Supreme Court remanded the case to this court to apply the "rule of reason" at retrial. This court granted the PSKS leave **[*3]** to file a second amended complaint (SAC) and gave the parties a briefing schedule for any Motion to Dismiss. The plaintiff has filed its amended complaint, and Leegin has filed its Motion to Dismiss.

II. LEGAL STANDARD

The legal standard for dismissing claims under *FED. R. CIV. P. 12* ("*Rule 12*") is well established. *Rule 8(a)* requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *FED. R. CIV. P. 8(a)(2)*. The Supreme Court has held that a complaint does not need detailed factual allegations to survive a *Rule 12(b)(6)* motion to dismiss, but the plaintiff's obligation to state the grounds of entitlement to relief requires "more than labels and conclusions." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)*. The factual allegations must be sufficient to raise a "right to relief above the speculative level." *Id. at 1965*. The Court must assume that the allegations in the complaint are true. *See id; Neitzke v. Williams, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)*. "What *Rule 12(b)(6)* does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Id. at 328*. The "issue is not whether [the plaintiffs] **[*4]** will ultimately prevail, but whether [they are] entitled to offer evidence to support [their] claim." *Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999)*.

III. ANALYSIS

Leegin challenges PSKS's allegations as being insufficient to allege a rule of reason antitrust case. Leegin argues that the two relevant product markets PSKS attempts to define in its SAC are untenable under ***antitrust law***. Further, Leegin argues PSKS has not alleged facts demonstrating that Brighton has market power in the purported relevant product markets. Brighton's market power in the relevant product markets is necessary for the alleged price fixing agreement to have the requisite anticompetitive effect to be illegal in a rule of reason case. PSKS responds that it has in fact pleaded sufficiently, and the Supreme Court's opinion in *Leegin* did not require market power for a showing of an anticompetitive effect in a rule of reason analysis for vertical price fixing agreements.

In an attempt to bootstrap its case into a *per se* illegality case, PSKS added allegations in its SAC to support horizontal price-fixing and a retailer cartel. PSKS alleges that because the manufacturer in this case is also a distributor and **[*5]** retailer, the pricing agreement is horizontal as well as vertical. Additionally, PSKS alleges the conduct amounts to a classic hub and spoke conspiracy. Leegin makes two arguments for dismissing PSKS's horizontal allegations from its SAC. First, Leegin argues that because PSKS did not originally proceed on a horizontal theory, it is precluded from doing so now. Second, Leegin argues, PSKS's horizontal restraints theories fail as a matter of law.

A. Relevant Product and Geographic Market

The first step in a rule of reason analysis is determining the relevant market. *Apani Southwest Inc. v. Coca-Cola Enterprises Inc., 300 F.3d 620, 627 (5th Cir. 2002)*. "Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason." *Hornsby Oil Co. V. Champion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir. 1983)*. A relevant product market includes the line of goods or services reasonably interchangeable in use. *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 396, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The relevant geographic market "is the area of effective competition . . . in which the seller operates, **[*6]** and to which the purchaser can practicably turn for supplies." *Tampa Elect. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. The Fifth Circuit requires plaintiffs to define their market with reference to the rule of reasonable interchangeability. *Apani, 300 F.3d at 628*. Where "the relevant market is legally insufficient . . . a motion to dismiss may be granted." *Id. at 627*.

1. Relevant Product market

A relevant product market includes the line of goods or services reasonably interchangeable in use. *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. at 393*. "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for one another." *Id.* "[I]t is the use or uses to which the commodity is put that control." *Id. at 396*.

PSKS alleges two product markets in its SAC. The first is "retail market for Brighton's women's accessories." SAC P 24. The second is the "wholesale sale of brand-name women's accessories to independent retailers." SAC P 24. Leegin argues that neither market is tenable under current law.

i. "Retail market for Brighton's women's **[*7]** accessories"

Leegin first argues that the market definition "retail market for Brighton's women's accessories" fails because countless brands are "reasonably interchangeable in use" with Brighton's products. Dfts. MTD at 7. Indeed, courts have regularly held that a single brand, no matter how distinctive or unique, cannot be its own market. *Little Ceasar Enterprises, Inc. v. Smith, 34 F.Supp. 2d 459, 477 n.30 (E.D. Mich. 1998)* (collecting cases). "Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market." *Green Country Food Market, Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1282 (10th Cir. 2004)*. The Fifth Circuit has held that "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d. 480, 488 (5th Cir. 1984)*

PSKS attempts to circumvent the law by arguing that the SAC alleges special factors that could make the "retail market for Brighton's women's accessories" a unique submarket that should be considered separately for antitrust purposes. Pls. Reply at 8. Indeed, "***antitrust law*** recognizes . **[*8]** . . economically significant submarkets . . . which themselves constitute relevant product markets." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc. 732 F.2d 480, 487-88 (5th Cir. 1984)*. PSKS points out that "[t]he fact finder may determine a submarket exists by 'examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* (citing *Brown Shoe v. U.S., 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

PSKS, however, has failed to allege a tenable dominant market to its alleged submarket. PSKS attempts to argue there can be some submarket without a tenable dominant market. Further, PSKS ignores that a submarket is still a "market." While PSKS may have pleaded facts sufficient to define a submarket, that alone will not get PSKS past the clear law that a single brand cannot be its own market. *See id.* There is no law supporting PSKS's apparent position that submarkets are exempt from the law requiring a market to constitute more than a single brand. "Retail market for Brighton's women's **[*9]** accessories," therefore, is not a tenable product market under the law.

ii. "Wholesale sale of brand-name women's accessories to independent retailers"

Next, PSKS argues that "wholesale sale of brand-name women's accessories to independent retailers" is a relevant product market. Leegin argues that this alternative product market fails because it excludes products reasonably interchangeable with Brighton's products. Leegin breaks down into different components what it calls the "gerrymandered" product market: 1) wholesale sale, 2) brand-name 3) women's accessories, and 4) independent retailers.

First, as Leegin points out, "wholesale sale" is inappropriate because it does not focus on how any agreement impacts consumers. Relevant markets must be defined in terms of the product itself without regard to the distribution level. *See, e.g., Assam Drug Co. Inc. v. Miller Brewing Co., Inc., 798 F.2d 311 (8th Cir. 1986)* (relevant market was the "interbrand beer market" not limited to the wholesale market); *R.D. Imports Ryno Indus. v. Mazda Distribs. 807 F.2d 1222, 1225 (5th Cir. 1987)* (relevant market was cars, foreign and domestic, that consumers viewed as substitutes with no limitation to wholesale **[*10]** market).

PSKS attempts to circumvent this law by arguing the Supreme Court distinguished the "effect that this type of constraint poses for manufacturer cartels." For example, PSKS argues "by imposing a fixed margin, manufacturers can easily police competing manufacturer sales and more easily fix wholesale prices. . . The economic injury of this activity falls not only on the consumer, who is charged more than a competitive price for the goods, but also on those dealers purchasing their goods at wholesale." Dfts. Resp. at 5. However, PSKS has failed to define the relevant *market* in terms of the product itself and not the distribution level of the product. This must be done without regard to how the wholesale market is affected. Therefore, "wholesale market," adds nothing to PSKS's alternative product market.

Second, Leegin argues that including "brand name" in the product market definition is wrong, because it is consclusory and unsupported by any facts. Leegin cites to *Star Tobacco, Inc. v. Darilek, 298 F.Supp 2d 436, 446 (E.D. Tex 2003)* granting a Motion to Dismiss because the plaintiff had failed to allege facts supporting "brand name" and "discount" or "generic" cigarettes were not **[*11]** interchangeable. The *Star Tabacco* court held "[b]ecause Defendant's counterclaim fail[ed] to make any factual allegations to the effect that discount cigarettes and branded cigarettes are not interchangeable, Defendants have submitted an inadequate pleading." *Id.*

PSKS responds that including "brand name" does add something to the purported product market. *See Babyage.com Inc. v. Toys "R" Us, Inc., 558 F.Supp.2d 575 (E.D.Pa. 2008)* (allowing products to be defined by "*high-end* baby and juvenile strollers"). *Babyage* is distinguishable from the case at bar, however. In *Babyage,* the plaintiff had pleaded why "*high-end*" baby strollers were not interchangeable with other types of strollers. *Id.* Here, PSKS fails to allege facts that support "brand names" are important to interchangeability in this case. PSKS fails to allege facts that would support a showing that consumers in the market for "brand name" women's accessories, whatever those accessories are, may only turn to other brand-name products. All of PSKS's facts are couched in terms of why the "Brighton" brand is unique and high end. As already discussed, a single brand can not be its own market. *See Domed Stadium, 732 F.2d at 487-88*. **[*12]** It is plausible that PSKS would be able to amend its complaint to allege facts necessary to support an allegation that "brand name" accessories are important to its product definition. However, granting leave to do so would be in vain, because alleging such facts would not be enough to salvage the case in light of the its other deficiencies.

"Women's Accessories," Leegin argues, is not an appropriate product market because it groups together products that are not interchangeable with each other. In a sister case to this one, Judge Greer in the Eastern District of Tennessee held "picture frames do not compete with women's handbags and shoes do not compete with jewelry." *Spahr v. Leegin, 2008 U.S. Dist. LEXIS 90079, 2008 WL 3914461, at *9 n.3*. This court agrees. "Women's accessories" is too broad and vague to constitute a market.

Lastly, Leegin argues, including "independent retailers" is in error, because it inappropriately limits the relevant market to a subset of retailers. Leegin argues that "independent retailers" lacks specificity, therefore, leaves the relevant market too vague to be a tenable definition. Further, Leegin argues, to the extent "independent retailers" is intended to describe some subset of retailers, **[*13]** such as stores like PSKS, the complaint fails to allege why it should be so limited. The court agrees. PSKS has cited no law or support as to how defining the market in the bounds of "independent retailers," no matter what they are, makes the alternative product market tenable. Relevant product markets include goods that are reasonably interchangeable in use. *E.I. Du Pont de Nemours & Co., 351 U.S. at 393*. PSKS has failed to allege the interchangeability, or lack thereof, between one subset of retailers and other retailers selling exactly the same products. *See Apani, 300 F.3d at 628*.

2. Geographic Market

The relevant geographic market "is the area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elect. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. PSKS alleges that it purchases most of its products from the Dallas Market (SAC P7) and alleges a product market of the greater Dallas area. SAC P24. Because, as discussed above, the wholesale market cannot be the relevant product market, the geographic area where PSKS purchases its products is irrelevant. Leegin does not "concede that [the Greater Dallas **[*14]** Area] is appropriate for the retail sale market; however, it is not moving to dismiss on these grounds." Dfts. MTD at 11 n. 4. "The Greater Dallas area" may be a tenable geographic market for the retail sales of Brighton Products. However, that matters little in that PSKS has not pleaded a tenable product market.

B. Anticompetitive Effect

Leegin also argues that PSKS's failure to allege anticompetitive effects provides further reason for dismissing the case. The parties dispute whether the Supreme Court intended that a showing of a defendant's market power is a requisite for finding that a vertical price fixing agreement has an anticompetitive effect. The court need to reach this issue, however. Because PSKS has not defined a relevant market, the court cannot assess the alleged price fixing agreement's anticompetitive effect.

C. Addition of Horizontal Restraint Theories

PSKS attempts to allege facts supporting a horizontal price fixing agreement and a horizontal hub and spoke conspiracy, both of which are illegal *per se.* PSKS's horizontal theories are based on the fact that Leegin is also a distributor of its own products. Leegin argues these new theories are barred because they were not **[*15]** raised in the original jury trial, the facts PSKS allege are still analyzed under the rule of reason, and the alleged facts fall short of supporting a cartel.

1. The Mandate Rule

PSKS cannot now plead a horizontal restraint case that it failed to raise in the original trial. The Mandate Rule "bars litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court." *U.S. v. Lee, 358 F.3d 315, 321 (5th Cir. 2004)*.

PSKS cites to *Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003)* for the proposition that when a higher court changes well established precedent, a party may pursue a claim it did not raise in the lower court out of non-necessity. In *Castellano,* the Fifth Circuit changed the law regarding the elements of a number of the plaintiff's federal claims such that a malicious prosecution claim previously asserted by the plaintiff was no longer redundant of his federal claims. On remand, the Fifth Circuit ordered that the plaintiff could re-file and pursue his malicious prosecution claim, despite the fact that he had previously voluntarily dismissed the claim. *Id.*

The case at bar is different from **[*16]** *Castellano,* however. Here, the Supreme Court did not specifically allow PSKS to re-plead allegations it had previously abandoned. First, the horizontal allegations were never raised in the original trial. Second, the Supreme Court did not mention what PSKS could plead on remand. More analogous to this case is *Continental TV, Inc. v. GTE Sylvania Inc., 461 F.Supp. 1046 (N.D. Cal. 1978)*, *aff'd* *694 F.2d 1132 (9th Cir. 1982)*. In *Continental,* the district court did not allow the plaintiff to plead horizontal allegations after the Supreme Court overruled *per se* illegality for the restraint at issue, and remanded the case to be tried under the rule of reason. *Id. at 1051-52*. In this case, nothing prevented PSKS from raising its horizontal agreement and conspiracy allegations in the original trial, and it cannot do so now.

2. Dual Distributorship Situations

Even if the court were to allow PSKS to plead it its horizontal restraint allegations, those allegations fail as a matter of law. Where a manufacturer is both a wholesale distributor and retail distributor it is called a "dual distribution system." *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1004-1007 (5th Cir. 1981)*. **[*17]** Restraints in "dual distribution systems" are analyzed under the rule of reason. *Id.* The Fifth Circuit has held that in situations like Leegin's, where the manufacturer also distributes some of its own goods, restraints are properly analyzed under the rule of reason. *Id.* Eight other circuits have reached the same result. [1] PSKS argues that those cases are distinguishable because they did not deal with price fixing agreements, but instead dealt with other types of restraints.

PSKS urges that in *this type* of "dual distribution setting," where the restraints are price fixing agreements, "the natural checks and balances provided by the countervailing interests of manufacturer/consumer against those of the retailer as to retail and retail margins simply are not present." Pls. Response at 16. PSKS relies on *United States v. McKesson & Robbins, Inc., 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1956)* to support its position. In *McKesson,* the defendant, a manufacturer and wholesale distributor, had entered price fixing agreements with other competing wholesale distributors of products manufactured by the defendants. Because the defendant participated as a wholesaler and manufacturer in the market, the court held the agreements in question were between "firms [or] corporations in competition with each other." As the Tennessee court pointed out, however, PSKS's reliance on *McKesson* is misplaced. *Spahr, 2008 U.S. Dist. LEXIS 90079, [WL] at *6*. "The issue before the Supreme Court was one of statutory interpretation . . . [it] did not address or discuss wether the restraints at issue were horizontal or vertical for Sherman Act purposes **[*19]** and its analysis has little, if any, application to the issue before the Court." *Id.*

The law in the Fifth Circuit is that these types of arrangements are dual distributorships and should be analyzed under the rule of reason. *Red Diamond Supply 637 F.2d at 1004-1007*. The *Red Diamond* court did not distinguish between price fixing and other types of restraints. Therefore, the same deficiencies in the rule of reason analysis above are present in PSKS's dual distributorship case.

3. Hub and Spoke Conspiracy

PSKS next attempts to have its case fit into a *per se* analysis by arguing it has pleaded facts showing that Leegin's price fixing activities are in furtherance of a "hub and spoke" retailer cartel.

---

[1] *See, e.g., AT & T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 531 (3d Cir. 2006)* (agreement involving dual distributor arrangement remained "vertical" and analyzed under the rule of reason); *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 243 (2d Cir. 1997)* (same); ***Glacier Optical, Inc. v. Optique du Monde, 46 F.3d 1141 (9th Cir. 1995)*** (not for publication) (same); *Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993)* (same); ***Hampton Audio Electronics, Inc. v. Contel Cellular, Inc., 966 F.2d 1442 (4th Cir. 1992)***, as amended, (Aug. 6, 1992) (same); *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751, 753 (7th Cir. 1989)* (same); *International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 906 (6th Cir. 1989)*; **[*18]** *Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1230, 92 A.L.R. Fed. 387 (8th Cir. 1987)*, (same).

> "A hub and spoke conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes. Each of the three parts is integral in establishing a *per se* violation under the hub and spoke theory."

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430, 435 n.3. **[*20]** "The critical issue for establishing a *per se* violation with the hub and spoke system is how the spokes are connected to each other . . ." *Id. at 436*. PSKS argues it "intends to prove that there are a series of agreements between Leegin and independent retailers to fix prices of Brighton goods (spoke); that Leegin's independent retailers have formed a cartel with each other and with Leegin as a retailer to prevent discounting and price competition (wheel); that in response to pressure from retailers involved in the cartel, Leegin has enforced its price fixing agreements against discounters to stamp-out price competition (hub); that retailers have discussed and indeed come to agreements as to the terms of the price fixing agreements and exceptions thereto (wheel)." Pls. Response at 12-13. In analyzing the complaint in *Spahr,* the court explained:

> There is no allegation by plaintiffs here that retailers have agreed to fix prices and then compelled the manufacturer, Leegin, to utilize resale price maintenance. In fact, plaintiffs have affirmatively alleged the opposite, *i.e.,* that Leegin coerced retailers and forced upon retailers the resale price maintenance agreements.

*Spahr, 2008 U.S. Dist. LEXIS 90079, [WL] at *12*.

It **[*21]** appears that PSKS has attempted to resolve this deficiency in its SAC in this case by adding the following paragraph (14):

> Brighton would, following the suggestion and concurrence of retail dealers, from time to time amend the Policy. One such instance occurred in January 2003, when Brighton invited some of its most successful retail dealers to Hawaii. One topic discussed at this conclave of retailers was the Brighton pricing policy. **A consensus of the retailers was reached, and the result of that meeting resulted in a policy being announced:** "What we have decided is OK after talking to more than 100 retailers is a birthday Club that on your birthday (or within a short time of your birthday) a consumer can get a discount on 1 piece of merchandise in your store (everything not only Brighton)."

This addition, however, is insufficient to properly plead a hub and spoke conspiracy. There is no allegation that retailers agreed to the alleged RPM among themselves. The allegations suggest not a retailer cartel, but that Leegin's interests were the driving force behind the program. PSKS argues that a jury could infer that because these retailers arrived at a consensus as to an exception to the **[*22]** pricing policy, they discussed the pricing policy in more detail, discarded various other proposals for exceptions to the policy, and agreed to maintain the policy as a whole. This argument is unpersuasive, however.

PSKS must ***allege*** an agreement among the retailers. *Rule 8* "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1965*. In *Twombly,* the Supreme Court rejected an antitrust claim because the horizontal conspiracy was alleged without the level of detail--the who, what, when, where, and how. Here, PSKS has likewise failed to allege what is necessary, and there is no evidence that there are facts that would support such a claim. Without those facts, PSKS is missing the requisite wheel in the classic hub and spoke arrangement.

D. State Law Claims

PSKS alleges that Brighton also violated *Texas Business and Commerce Code § 15.05 et seq.* SAC P 34. Leegin argues that PSKS cannot now bring this cause of action because it already abandoned those claims before the previous trial. PSKS does not respond to Leegin's argument. PSKS's state law claims, therefore, are dismissed.

IV. CONCLUSION

PSKS has not **[*23]** pleaded a tenable product market for a rule of reason analysis. PSKS cannot now bring horizontal restraint claims it never brought in the original trial in this case. Regardless of whether the court allows PSKS to add allegations to its SAC which support its horizontal restraints theories, those theories also fail as a matter of law. PSKS has likewise abandoned its state law claims in this case. Leegin's Motion to Dismiss is GRANTED.

SIGNED this 6th day of April, 2009.

/s/ T. John Ward

T. JOHN WARD

UNITED STATES DISTRICT JUDGE

In re Chocolate Confectionary Antitrust Litig.

United States District Court for the Middle District of Pennsylvania

April 8, 2009, Decided; April 8, 2009, Filed

MDL DOCKET NO. 1935; (Civil Action No. 1:08-MDL-1935)

Reporter

607 F. Supp. 2d 701 *; 2009 U.S. Dist. LEXIS 31701 **; 2009-1 Trade Cas. (CCH) P76,594

IN RE: CHOCOLATE CONFECTIONARY ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL CASES

Subsequent History: Motion to strike denied by *In re Chocolate Confectionary Antitrust Litig., 2009 U.S. Dist. LEXIS 66326 (M.D. Pa., July 9, 2009)*

Prior History: *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 2009 U.S. Dist. LEXIS 20975 (M.D. Pa., 2009)*

Core Terms

Memorandum, interlocutory appeal, certification, certify, anticompetitive, defendants', complaints, discovery, allegations, conspiracy, antitrust, increased price, subsidiaries, parties, prices

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[ ] **Judges, Discretionary Powers**

Denials of *Fed. R. Civ. P. 12(b)(6)* motions to dismiss are not final orders, and a losing party may not ordinarily pursue an immediate appeal from them. Nevertheless, a court may certify a nonfinal order for interlocutory appeal under *28 U.S.C.S. § 1292(b)* if: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists with regard to the issue involved; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *28 U.S.C.S. § 1292(b)*. The certification decision rests with the discretion of a district court, and the court may decline to certify an order even if the parties have satisfied all elements enumerated in the statute.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN2[ ] **Appellate Jurisdiction, Interlocutory Orders**

An order involves a controlling question of law for *28 U.S.C.S. § 1292(b)* purposes if either: (1) an incorrect disposition would constitute reversible error if presented on final appeal; or (2) the question is serious to the conduct of the litigation, either practically or legally.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN3[] **Appellate Jurisdiction, Interlocutory Orders**

A substantial ground for difference of opinion exists for *28 U.S.C.S. § 1292(b)* purposes when controlling authority fails to resolve a pivotal matter. A genuine doubt must exist about the legal standard governing a particular case. The existence of conflicting judicial opinions provides support for certification of an interlocutory appeal, as does a lack of binding precedent. However, a court should not certify questions of relatively clear law merely because the losing party disagrees with the court's analysis.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN4[] **Motions to Dismiss, Failure to State Claim**

Twombly communicates multiple linguistic signals about the standard of review that a court must apply on a *Fed. R. Civ. P. 12(b)(6)* motion. On one hand, Twombly has superseded the pleading standard of Conley v. Gibson, under which a complaint was not to be dismissed unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Twombly has concluded that this standard is an incomplete, negative gloss on pleading practice and instead requires complaints to set forth plausible averments that possess enough heft to show that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)* At the same time, however, Twombly expressly rejects a requirement of heightened fact pleading of specifics. Since Twombly's issuance, the U.S. Supreme Court has reaffirmed that a complaint must simply give a defendant fair notice of what the claim is and the grounds upon which it rests. Several courts have observed that Twombly's varied analytical cues expose it to multiple interpretations.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN5[] **Motions to Dismiss, Failure to State Claim**

A narrow reading of Twombly construes it as a formalistic change, designed to give voice to a pleading standard that was already commonplace in many courts. Under a robust interpretation, however, Twombly requires a court to scrutinize the plausibility of a complaint's allegations and dismiss claims that lack sufficient factual underpinning for the relief requested. The United States Court of Appeals for the Third Circuit has recognized that Twombly's exact location on the continuum between these interpretations is unclear. The court has concluded that Twombly does not institute a new pleading regime, but requires a plaintiff to describe enough facts to raise a reasonable expectation that discovery will reveal evidence of the claims alleged in the complaint. The plaintiff must allege facts that justify moving the case beyond the pleadings to the next stage of litigation. However, the precise quorum of facts necessary to reach this point remains uncertain, causing the Third Circuit to prognosticate that the issues raised by Twombly are not easily resolved and likely will be a source of controversy for years to come.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN6[] **Sherman Act, Claims**

The issues regarding pleading requirements under Twombly hold particular significance in the antitrust arena, where plaintiffs often lack direct evidence of a conspiratorial agreement and must rely upon circumstantial allegations to surmount a *Fed. R. Civ. P. 12(b)(6)* challenge. The United States District Court for the Middle District of Pennsylvania has concluded that a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiff may satisfy Twombly by describing parallel price increases, clear opportunity for collusion, anti-competitive activity in foreign markets intertwined with those in the U.S., transnational management of corporate subsidiaries, and allegations of anti-competitive conduct that are economically sensible in light of mature market characteristics. The court remains convinced of the propriety of this conclusion. Nevertheless, the Twombly standard is in its infancy, and capable jurists may disagree about its effect on such plaintiffs' pleading obligations. Such disagreement could lead to differing outcomes, sufficient to satisfy the second criterion of *28 U.S.C.S. § 1292(b)*.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN7[] **Appellate Jurisdiction, Interlocutory Orders**

Any question certified for appeal must materially advance the ultimate termination of the litigation. *28 U.S.C.S. § 1292(b)*. A court must evaluate whether an appeal could eliminate the need for a trial, simplify a case by foreclosing complex issues, or enable the parties to complete discovery more quickly or at less expense. Cases in which discovery has closed are generally inappropriate for interlocutory appeal because they are rapidly approaching conclusion under their own momentum.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN8[] **Judges, Discretionary Powers**

A district court possesses discretion to deny certification of an appeal even if the parties satisfy the statutory criteria of *28 U.S.C.S. § 1292(b)*. A district court should exercise this discretion and certify issues for interlocutory appeal only sparingly and in exceptional circumstances.

Counsel: [1]** Michael McNamara, on behalf of himself and all others similarly situated, Plaintiff: Christopher Lovell, LEAD ATTORNEY, Peggy J. Wedgworth, Lovell Stewart Halebian, LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Katherine Woodman, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Gregory P. Hansel, LEAD ATTORNEY, Preti, Flaherty, Beliveau, Pachios & Haley, LLC, Portland, Me; Roger P. Poorman, Steven Dane Irwin, LEAD ATTORNEYS, David V. Weicht, Leech Tishman Fuscaldo & Lampl, Pittsburgh, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Glenn Coffey, t/d/b/a Candy Man, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David V. Weicht, Roger P. Poorman, Steven Dane Irwin, LEAD ATTORNEYS, Leech Tishman Fuscaldo & Lampl, Pittsburgh, PA; Gregory P. Hansel, LEAD ATTORNEY, **[**2]** Preti, Flaherty, Beliveau, Pachios & Haley, LLC, Portland, Me; Joseph C. Kohn, LEAD ATTORNEY, Kohn, Savett, Klein & Graf, Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Douglas A. Abrahams, William E. Hoese, Kohn Swift & Graf, P.C., Philadelphia, PA; Joshua R. Carver, PRO HAC VICE, Randall B. Weill, Preti Flaherty Beliveau & Pachios LLP, Portland, ME.

For The Lorain Novelty Co., Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Allen D. Black, Gerard A. Dever, Ria C. Momblanco, Roberta D. Liebenberg, LEAD ATTORNEYS, Donald L Perelman, Fine, Kaplan and Black, R.P.C., Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Howard J. Sedran, LEAD ATTORNEY, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Jeffrey B. Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA; Joseph Goldberg, LEAD ATTORNEY, Freedman Boyd Hollander, Albuquerque, NM; Rees Griffiths, LEAD ATTORNEY, CGA Law Firm, York, PA; Simon B. Paris, LEAD ATTORNEY, Saltz, Mongeluzzi, **[**3]** Barrett & Bendesky, P.C., Philadelphia, PA; Thomas A. Muzilla, LEAD ATTORNEY, The Muzilla Law Firm LLP, Cleveland, OH; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; William D. Marvin, LEAD ATTORNEY, Cohen Placitella & Roth, P.C., Philadelphia, PA.

For Mandel Tobacco Company, Inc., on behalf of itself and all others similarly situated, Plaintiff: Adam J. Levitt, Fred T. Isquith, LEAD ATTORNEYS, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Lee C. Swartz, Stephen M. Greecher, Jr., LEAD ATTORNEYS, Tucker, Arensberg, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Mary J. Fait, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

For Stephen L. LaFrance Pharmacy, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Dianne M. Nast, LEAD ATTORNEY, Roda & Nast, P.C. Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Richard Miller, Marcia Miller, on behalf of themselves and all others similarly situated, Eugenia **[**4]** Miceli, on behalf of herself and all others similarly situated, Plaintiffs: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Krishna B. Narine, LEAD ATTORNEY, Law Office of Krishna B. Narine, PC, Huntingdon Valley, PA; Rachel S. Black, LEAD ATTORNEY, Susman Godfrey, LLP - Seattle, Seattle, WA; Stephen D. Susman, LEAD ATTORNEY, Susman & Godfrey, LLP, Houston, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Western Skier, Ltd., individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Warren Rubin, LEAD ATTORNEY, Law Offices Bernard M. Gross, P.C., Philadelphia, PA.

For CNS Confectionery Products, LLC, Plaintiff: Bernard Persky, Gregory S. Asciolla, Morissa R. Falk, LEAD ATTORNEYS, Labaton Sucharow LLP, New York, NY; Kevin P Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer P.A., Woodbridge, NJ; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, **[**5]** Washington, DC; Klari Neuwelt, LEAD ATTORNEY, Law Office of Klari Neuwelt, New York, NY; Mark S.

Shane, LEAD ATTORNEY, Shane and White, LLC, Edison, NJ; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Winn Corporation, on behalf of themselves and all others similarly situated, Plaintiff: Bernard Persky, Gregory S. Asciolla, Morissa R. Falk, LEAD ATTORNEYS, Labaton Sucharow LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Mark S. Shane, LEAD ATTORNEY, Shane and White, LLC, Edison, NJ; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Akisa Matsuda, on behalf of herself and all others similarly situated, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Faucher LLP, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Kevin P Roddy, LEAD ATTORNEY, Wilentz Goldman & Spitzer P.A., Woodbridge, NJ; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Jane A. Balzer, Afrim Dzelili, on behalf of themselves and all others similarly situated, Daphne Matalene, Julia Isenhower, **[**6]** on behalf of herself and all others similarly situated, D Controls, Inc., on behalf of itself and all others similarly situated, Jonathan Benjamin, on behalf of himself and all others similarly situated, Adrianne Shienvold, on behalf of herself and all others similarly situated, Autry Greer & Sons, Inc., Tanya O. Butts, on behalf of themselves and all others similarly situated, Marc Lavin, Jill Lavin, on behalf of themselves and all others similarly situated, Daniel Klein, on behalf of himself and all others similarly situated, Ellen Widom, on behalf of herself and all others similarly situated, George Patterson, individually and on behalf of a class action of all others similarly situated, Carmen Pellitteri, individually and on behalf of all similarly situated, Dacia Lower, on behalf of herself and all others similarly situated, Molly Wagman, on behalf of herself and all others similarly situated, VME Distributors, Inc., individually and on behalf of a class of all those similarly situated, Cheryl Currie, Long Leaf Vending Inc., Individually and on behalf of a class of all those similarly situated, Northlake Pizza and Subs, LLC, Superior Office Snacks, Inc., Superior Office Snacks **[**7]** of Nebraska, Inc., Snacks for a Purpose, Inc., Honor Snack, Inc., Oasis Distributors, Inc., LLG Enterprises of SE Wisconsin, LLC, d/b/a The Snack Store, on Behalf of Themselves and All Others Similarly Situated, Wendy M. Cresswell, Erin Goss, John H. Brosius, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Diane Chiger, on behalf of herself and all others similarly situated, Plaintiff: Aaron M. Sheanin, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth C. Pritzker, Girard Gibbs LLP, San Francisco, CA; Jonathan Shub, Seeger Weiss LLP, Philadelphia, PA.

For Stephen Snow, Comwest Industries Inc., Plaintiff: Benjamin F. Johns, LEAD ATTORNEY, Chimicles & Tikellis LLP, Haverford, PA; Bernard Persky, Gregory S. Asciolla, Morissa R. Falk, LEAD ATTORNEYS, Labaton Sucharow LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter **[**8]** W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Michael W. DeMarshall, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Eugene A. Spector, Jay S. Cohen, LEAD ATTORNEYS, William G. Caldes, Spector Roseman Kodroff & Willis, P.C., Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For STLE Corporation, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael M. Buchman, LEAD ATTORNEY, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Webb's Candies, Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher J. Cormier, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Hilary K. Ratway, Michael D. Hausfeld, Robert G. Eisler, LEAD ATTORNEYS, Hausfeld LLP, Washington, DC; Seth R Gassman, LEAD ATTORNEY, Cohen,

[9]** Milstein, Hausfeld & Toll, PLLC, New York, NY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For International Wholesale, Inc., on behalf of itself and all others similarly situated, United Customs Distribution, on behalf of itself and all others similarly situated, United Wholesale, on behalf of itself and all others similarly situated, Weaver Nut Company, on behalf of itself and all others similarly situated, Royal Enterprises Corporation, Plaintiffs: Beverly L Tse, Daniel Hume, David E Kovel, Peter S. Linden, LEAD ATTORNEYS, Kirby McInerney LLP, New York, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Robert Philipson, Individually and on behalf of all others similarly situated, Valos House of Candy, individually and on behalf of all others similarly situated, Original Fowler's Chocolate Co., Inc., Paula Wolner on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann **[**10]** Maxwell & Hippel LLP, Harrisburg, PA; Manuel J. Dominguez, Berman DeValerio, Palm Beach Gardens, FL.

For Stephanos Sgouros, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Timothy D Battin, Straus & Boies, LLP, Fairfax, VA.

For Shirley A. Dresen, Shirley A. Dresen, Craig Stephenson, on behalf of himself and all others similarly situated, Kevin Tierney, on behalf of himself and all others similarly situated, Shirley A. Dresen, Lisa Blackwell, Linda K. Davis, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Safeway Inc., Walgreen Co., Hy-Vee, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Douglas H Patton, James T Almon, Joseph T. Lukens, Richard Alan Arnold, Scott E Perwin, Steven D. Shadowen, William J. Blechman, LEAD **[**11]** ATTORNEYS Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Affiliated Foods, Inc., Meijer, Inc., Publix Super Markets, Inc., Plaintiff: Anthony J. Bolognese, LEAD ATTORNEY, Bolognese& Associates, LLC, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; David P. Germaine, LEAD ATTORNEY, VANEK VICKERS & MASINI PC, CHICAGO, IL; Joseph T. Lukens, Steven D. Shadowen, LEAD ATTORNEYS; Joseph M. Vanek, LEAD ATTORNEY, Vanek, Vickers & Masini, P.C., Chicago, IL; Linda Nussbaum, Robert N. Kaplan, LEAD ATTORNEYS, Kaplan Fox & Kilsheimer LLP, New York, NY; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joshua H. Grabar, Bolognese& Associates, LLC, Philadelphia, PA.

For Canteen Company of Utica-Rome, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; W. Joseph Bruckner, Lockridge, Grindal & Nauen, Minneapolis, MN.

For Lori Ann Hongach, on behalf of herself and all **[**12]** others similarly situated, Esther Naomi Lieberman, Plaintiff: Barry C. Barnett, LEAD ATTORNEY, Susman Godfrey LLP, Dallas, TX; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Rachel S. Black, LEAD ATTORNEY, Susman Godfrey, LLP - Seattle, Seattle, WA; Stephen D. Susman, LEAD ATTORNEY, Susman & Godfrey, LLP, Houston, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Brothers, Ltd., on behalf of itself and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Ruthanne Gordon, Berger & Montague, PC, Philadelphia, PA.

For Thomas Rode, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Ronald J. Aranoff, Bernstein Liebhard & Lifshitz, LLP, New York, NY.

For CVS Pharmacy, **[**13]** Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, Steven D. Shadowen, LEAD ATTORNEYS; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Donald Webster, on behalf of himself and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joshua D. Snyder, Kohn Swift & Graf PC, Philadelphia, PA; Marc H. Edelson, Edelson & Associates, LLC, Doylestown, PA; Michael J. Boni, Theresa J. Henson, Boni & Zack LLC, Bala Cynwyd, PA.

For Giant Eagle, Inc., a Pennsylvania Corporation, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, Steven D. Shadowen, LEAD ATTORNEYS; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bernard D. Marcus, Marcus & Shapira, Pittsburgh, PA; Moira Cain-Mannix, Marcus & Shapira LLP, Pittsburgh, PA.

For Debra L. Damaske, Plaintiff: Daniel A. Small, LEAD ATTORNEY, **[**14]** Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Isabelle Dikland, on behalf of themselves and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Elizabeth K. Tripodi, Richard M. Volin, Finkelstein Thomspon LLP, Washington, DC.

For Ben Lee Distributors, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; David S. Stellings, New York, NY.

For Seth E. Ellis, P.A., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Kevin B. Love, Criden & Love, P.A., South Miami, FL.

For Cindy **[**15]** Elan-Mangano, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Aaron M. McParlan, Michael E. Jacobs, Richard M. Hagstrom, Zelle, Hofmann, Voelbel, Mason & Getter LLP, Minneapolis, MN; James S. Reece, Zelle Hofmann Voelbel & Mason LLP, Minneapolis, MN.

For John Candido, on behalf of himself & all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Joseph M. Patane, Law Office of Joseph M. Patane, San Francisco, CA; Lauren Clare Russell, Trump Alioto Trump & Prescott, LLP, San Francisco, CA; Mario N. Alioto.

For Marcy Linder, on behalf of herself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Amber M. Nesbitt, Edward A. Wallace, Kenneth A. Wexler, Wexler Wallace LLP, Chicago, **[**16]** IL; Mark J. Tamblyn, Wexler Toriseva Wallace LLP, Sacramento, CA.

For NMJ Consultant Group, Inc., individually and on behalf of a class of all those similarly situated, Plaintiff: Christopher J. Cormier, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Hilary K. Ratway, Michael D. Hausfeld, LEAD ATTORNEYS, Hausfeld LLP, Washington, DC; Seth R Gassman, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA.

For Canteen Vending Company, individually and on behalf of a class of all those similarly situated, Plaintiff: Arthur N. Bailey, Arthur N. Bailey & Associates, LEAD ATTORNEY, Jamestown, NY; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Tanya S Chutkan, William A. Isaacson, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Jones Vend and OCS Distributing, **[**17]** Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bruce L. Simon, Pearson, Soter, Warshaw & Penny, LLP, San Francisco, CA; Jane Gowen Penny, Killian & Gephart, LLP, Harrisburg, PA.

For Russell Traub, individually and on behalf of all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Bonny E. Sweeney, Katherine A Morgan, Coughlin Stoia Geller Rudman & Robbins LLP, San Diego, CA.

For C.W. Brower, Inc., on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Clinton P Walker, Fred A Silva, Kathy L Monday, Roger M. Shrimp, Damrell, Nelson, Schrimp, Pallios, Pacher & Silva, Modesto, CA.

For Treat America Limited, on behalf of itself and all others similarly situated, **[**18]** Plaintiff: Bernice Conn, LEAD ATTORNEY, PRO HAC VICE, Los Angeles, CA. Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph B. Smith, Michael C. Maher, LEAD ATTORNEYS, The Maher Law Firm, Winter Park, FL; K. Craig Wildfang, Michael A. Geibelson, Roman M. Silberfeld, LEAD ATTORNEYS, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Thomas J. Undlin, LEAD ATTORNEY, PRO HAC VICE, Minneapolis, MN; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Christopher H. Casey, Joseph U. Metz, Joshua D. Wolson, Dilworth Paxson LLP, Philadelphia, PA; Steven R. Maher, The Maher Law Firm, Winter Park, FL.

For T. Levy Associates, trading as Beautyland, on behalf of itself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Adam S. Levy, Donald E Haviland, Michael J. Lorusso, The Haviland Law Firm LLC, Philadelphia, PA.

For Judith Bishop, Eric Rodman Cohen, James Miles, Darla Jackson, David Levy, Frank Gerencser, Sarah Allder, Timothy Duffy, Korey **[**19]** James Christensen, Susan Jones, Abbie Soule, Stephanie Aceto, Donna Siler, Timothy Emmer, Sarina Vlock, Robert Allder, Michelle Bounderate, Amy K. Luminoso, Katherine Mary Ferlic, Mark Moynahan, Douglas Dillard Glenn, Monica Browne, Mike Carrels, Layna M. Rose, James Veneziano, Marlene Smith, Mike Davis, Arnie Enz, individually and on behalf of all others similarly situated, Plaintiff: Barrett C. Hester, LEAD ATTORNEY, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Kevin J. Miller, Steven F. Benz, LEAD ATTORNEYS, Kellogg, Huber, Hansen, Todd, Evans & figel, PLLC, Washington, DC; Richard A. Saveri, LEAD ATTORNEY, Saveri & Saveri, Inc., San Francisco, CA; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Food Lion, LLC, Hannaford Bros. Co., Kash N' Karry Food Stores, Inc., individually and on behalf of a class of all those similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, **[**20]** Steven D. Shadowen, LEAD ATTORNEYS; R. Laurence Macon, LEAD ATTORNEY, Akin, Gump, Strauss, Hauer & Feld, Et al, San Antonio, TX; Richard L. Wyatt, Jr., LEAD ATTORNEY, Hunton & Williams, Washington, DC; Todd M. Stenerson, LEAD ATTORNEY, Hunton & Williams, Washington, DC; Torsten M. Kracht, LEAD ATTORNEY, Hunton & Williams, LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For VME Distributors, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hilary K. Ratway, Robert G. Eisler, Hausfeld LLP, Washington, DC; Seth R Gassman, LEAD ATTORNEY, Cohen, Milstein, Hausfeld & Toll, PLLC, New York, NY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Card & Party Mart II Ltd., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Steven A. Kanner, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Edward S Hesano, Individually **[**21]** and on behalf of all other similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Andrew J Morganti, Peter G Safirstein, Milberg LLP, New York, NY.

For Karin Jacobs, on Behalf of Herself and All Others Similarly Situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Michael A. McShane, Audet & Partners, LLP, San Francisco, CA.

For Weis Markets, Inc., Individually and on behalf of a class of all those similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA; Mark R. Cuker, Williams Cuker Berezofsky, Philadelphia, PA.

For Cyrus T.G., d/b/a Alta Cucina, on behalf of himself and all others similarly situated, Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel **[**22]** LLP, Harrisburg, PA; Gordon Ball, Ball & Scott, Knoxville, TN.

For Longs Drug Stores California, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, Steven D. Shadowen, LEAD ATTORNEYS; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Associated Grocers of Florida, Inc., Plaintiff: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, Steven D. Shadowen, LEAD ATTORNEYS; Richard L. Coffman, LEAD ATTORNEY, The Coffman Law Firm, Beaumont, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Kelsey French, Pernell Larsen, Plaintiffs: Daniel A. Small, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; James J. McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Terry Gross, Adam C. Belsky, LEAD ATTORNEY; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For Brookshire Grocery Company, United Supermarkets, L.L.C., Plaintiffs: Brian Wade McKay LEAD ATTORNEY, Haynes and Boone - Dallas, Dallas, TX; Daniel A. Small, LEAD **[**23]** ATTORNEY, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Joseph T. Lukens, LEAD ATTORNEY; Lawrence Andrew Gaydos, LEAD ATTORNEY, Haynes & Boone - Dallas, Dallas, TX; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For A - DIRECT PURCHASERS, Plaintiff: H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Michael D. Hausfeld, LEAD ATTORNEY, Hausfeld LLC, Washington, DC; Walter W. Cohen, LEAD ATTORNEY, Obermayer Rebmann Maxwell & Hippel LLP, Harrisburg, PA.

For B - INDIRECT PURCHASERS FOR RESALE, Plaintiff: H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Joseph U. Metz, Dilworth Paxson LLP, Philadelphia, PA; Roman M. Silberfeld, LEAD ATTORNEY, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi LLP, Minneapolis, MN; Steven R. Maher, The Maher Law Firm, Winter Park, FL.

For C - INDIRECT END USERS, Plaintiff: Christopher Lovell, LEAD ATTORNEY, Lovell Stewart Halebian, LLP, New York, NY; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; James J.

McCarthy, Jr., LEAD ATTORNEY, McCarthy Weisberg Cummings, P.C., Harrisburg, PA; Steven F. Benz, LEAD ATTORNEY, Kellogg, Huber, **[**24]** Hansen, Todd, Evans & figel, PLLC, Washington, DC.

For D - INDIVIDUAL PLAINTIFFS, Plaintiff: H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Steven D. Shadowen, LEAD ATTORNEY, Hangley Aronchick Segal & Pudlin, Harrisburg, PA.

For The Hershey Company, Defendant: Brian M. English, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; Jonathan D. Brightbill, LEAD ATTORNEY, Kirkland & Ellis LLP, Washington, DC; Thomas D. Yannucci, LEAD ATTORNEY, Kirkland & Ellis, Washington, DC; Alan R. Boynton, Jr., David E. Lehman, McNees, Wallace & Nurick, Harrisburg, PA; Craig S. Primis, Kirkland & Ellis LLP, Washington, DC; Kimberly M. Colonna, McNees Wallace & Nurick LLC, Harrisburg, PA.

For Mars, Incorporated, Defendant: Brian J. McMahon, Guy V. Amoresano, Jennifer Mara, Michael F. Quinn, LEAD ATTORNEYS, Gibbons PC, Newark, NJ; David Marx, Jr., LEAD ATTORNEY, McDermott Will & Emery LLP, Chicago, IL; Frederick E. Blakelock, Thomas S. Brown, LEAD ATTORNEYS, Gibbons, P.C., Philadelphia, PA; Nicole L. Castle, Stefan M. Meisner, LEAD ATTORNEYS, McDermott Will & Emery LLP, Washington, DC.

For Nestle S.A., Nestle Canada Inc., Defendants: Roxann E. Henry.

For Cadbury **[**25]** Adams Canada, Inc., Defendant: Anh P Le, Bridget E. Montgomery, Dennis P. Orr, Jennifer L. Eul, Thomas M Mueller, LEAD ATTORNEYS; Leah A. Ramos, LEAD ATTORNEY, Morrison & Forester LLP, New York, NY.

For Mars Canada Inc., Defendants: Brian J. McMahon, Guy V. Amoresano, Michael F. Quinn, LEAD ATTORNEYS, Gibbons PC, Newark, NJ; Frederick E. Blakelock, Thomas S. Brown, LEAD ATTORNEYS, Gibbons, P.C., Philadelphia, PA; Nicole L. Castle, Stefan M. Meisner, LEAD ATTORNEYS, McDermott Will & Emery LLP, Washington, DC.

For Mars Snackfood US LLC, Defendant: Nicole L. Castle, LEAD ATTORNEY, McDermott Will & Emery LLP, Washington, DC. Thomas S. Brown, Gibbons, P.C., Philadelphia, PA.

For Cadbury Holdings Ltd., Cadbury PLC, Defendant: Leah A. Ramos, Thomas M Mueller, LEAD ATTORNEY, Morrison & Forester LLP, New York, NY.

For Government of Canada, Intervenor Defendant: Bradley H. Blower, Katherine A. Gillespie, LEAD ATTORNEYS, PRO HAC VICE, Relman & Dane, PLLC, Washington, DC; John P. Relman, LEAD ATTORNEY, Relman & Dane, PLLC, Washington, DC; Joseph K. Goldberg, Law Office of Joseph K. Goldberg, Harrisburg, PA.

Judges: CHRISTOPHER C. CONNER, United States District Judge.

Opinion by: CHRISTOPHER C. CONNER

Opinion

[*703] **MEMORANDUM**

Presently **[**26]** before the court is defendants' motion (Doc. 588) to certify an interlocutory appeal from the memorandum and order of court (Doc. 582) dated March 4, 2009 (hereinafter "the March 4 Memorandum"). For the reasons that follow, the motion will be granted.

I. Procedural History and Background [1]

---

[1] The March 4 Memorandum provides a comprehensive description of plaintiffs' averments. The court recounts only those allegations necessary to facilitate disposition of the instant motion.

Plaintiffs in the above-captioned matters allege that defendants conspired to fix prices **[*704]** in the United States market for chocolate candy in violation of § 1 of the Sherman Act, *15 U.S.C. § 1*. Defendants allegedly implemented three coordinated prices increases from 2002 to 2007, raising prices in nearly identical proportion to one another on each occasion. During the same period, formidable barriers to entry protected the chocolate candy market, defendants' raw material costs remained stable, and consumer demand waned, thereby providing defendants with the market power and motive to act in an anticompetitive manner.

Defendants also allegedly engaged in price fixing in Canada. In mid-2007, Canadian antitrust authorities **[**27]** released documents depicting an orchestrated conspiracy by defendants' Canadian subsidiaries to exchange pricing information, control retail promotion costs, and implement price increases in the Canadian chocolate market. Defendants have allegedly integrated their American and Canadian operations through, *inter alia*, coordinated manufacturing and distribution systems, cross-border licensing agreements, and fusion of corporate oversight. Plaintiffs contend that, in light of this market integration, evidence of defendants' Canadian conduct lends plausibility to the alleged pricing conspiracy in the United States.

All defendants filed motions to dismiss the amended complaints pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. On March 4, 2009, the court denied the motions of certain defendants [2] under the Supreme Court's recent decision in *Bell Atlantic Co. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. (See Doc. 582, Part III.B.1.) Defendants presently move to certify an interlocutory appeal of the court's application of Twombly. The parties have fully briefed the motion, which is now ripe for disposition.

II. Discussion

HN1[] Denials of motions to dismiss are not final orders, and a losing party may not ordinarily pursue an immediate appeal from them. Nevertheless, a court may certify a non-final order for interlocutory appeal under *28 U.S.C. § 1292(b)* if (1) the order "involves a controlling question of law," (2) "a substantial ground for difference of opinion" exists with regard to the issue involved, and (3) an immediate appeal "may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*; *Simon v. United States, 341 F.3d 193, 199 (3d Cir. 2003)*. The certification decision rests with the discretion of the district court, and the court may decline to certify an order even if the parties have satisfied all elements enumerated in the statute. *Knipe v. SmithKline Beecham, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008)*; *L.R. v. Manheim Twp. Sch. Dist, 540 F. Supp. 2d 603, 608 (E.D. Pa. 2008)*.

A. [**29] Criteria for Certification under *28 U.S.C. § 1292(b)*

Defendants in the present matter request certification of the following two issues for interlocutory appeal:

> (1) [W]hether Twombly, as a matter of ***antitrust law***, allows a court on a motion to dismiss to draw an inference of conspiracy in a parallel pricing case based on market characteristics, **[*705]** absent any direct allegations of actual agreement; and
>
> (2) [W]hether allegations stemming from a foreign antitrust investigation can lend "plausibility" under Twombly to state a claim of U.S. conspiracy.

(Doc. 589 at 4.) The court will evaluate these questions to determine whether they satisfy the interlocutory appeal standard under *§ 1292(b)*.

1. Controlling Question of Law

---

[2] These defendants include Cadbury Adams Canada, The Hershey Company, Hershey **[**28]** Canada, Mars, Mars Snackfood U.S., and Nestle U.S.A. The remaining defendants filed simultaneous motions contesting personal jurisdiction, and the court deferred their *Rule 12(b)(6)* motions pending a period of jurisdictional discovery and resolution of threshold jurisdictional issues. (See Doc. 582 at 54.)

HN2[] An order involves a controlling question of law if either (1) an incorrect disposition would constitute reversible error if presented on final appeal or (2) the question is "serious to the conduct of the litigation either practically or legally." *Katz v. Carte Blanche Corp, 496 F.2d 747, 755 (3d Cir. 1974)*; see also *Knipe, 583 F. Supp. 2d at 599*. In the matter *sub judice*, the parties dispute whether defendants' proposed questions accurately describe the foundation of the March **[**30]** 4 Memorandum. Defendants posit that the memorandum relied primarily upon domestic market characteristics and foreign anticompetitive conduct when denying the motions to dismiss. (Doc. 589 at 4.) Plaintiffs contend that defendants unduly confine the court's holding and fail to acknowledge the significance of additional factual context alleged in the amended complaints, such as market integration between the United States and Canada and other "indicia of collusion." (Doc. 596 at 7.)

The court concludes that defendants' proposed questions paint the amended complaints and the March 4 Memorandum with too fine a stroke. The pertinent issue is not whether *either* characteristics of a mature market *or* anticompetitive foreign conduct satisfy Twombly when placed alongside allegations of parallel conduct. The more befitting inquiry is whether the *totality of the amended complaints* raise a plausible inference of price fixing. Any question certified for appeal must account not merely for market characteristics and foreign conduct, but also for the affinity between the U.S. and Canadian chocolate markets, the economic reasonableness of the alleged conspiracy, and defendants' opportunity for consultation. **[**31]** Defendants' success in effectuating three separate, uniform price increases and the allegedly overlapping management of their Canadian and American subsidiaries also influence the Twombly analysis. Therefore, the following single question more accurately encapsulates the gravamen of the court's ruling on the *Rule 12(b)(6)* motions:

> Does Twombly, as a matter of law, authorize a court in a § 1 case to draw an inference of conspiracy from the collective effect of repeated parallel price increases, averments of anticompetitive activity in closely related foreign markets, transnational management of corporate subsidiaries, opportunity for collusion, and descriptions of anti-competitive conduct that are economically sensible in light of mature market characteristics? [3]

The March 4 Memorandum provided an affirmative response to this question. Disposition of the motions would unquestionably change were this question answered in the negative. Accordingly, this question presents a controlling issue of law appropriate for appellate **[**32]** certification.

2. Substantial Ground for Difference of Opinion

HN3[] A substantial ground for difference of opinion exists when controlling authority fails to resolve a pivotal matter. *Knipe, 583 F. Supp. 2d at 599*; *EBC, Inc. v. [*706] Clark Bldg. Sys., No. Civ.A. 05-01549, 2008 U.S. Dist. LEXIS 21018, 2008 WL 728541, at *2 (W.D. Pa. Mar. 17, 2008)*. A genuine doubt must exist about the legal standard governing a particular case. *Knipe, 583 F. Supp. 2d at 600*. The existence of conflicting judicial opinions provides support for certification of an appeal, as does a lack of binding precedent. See id.; *Morgan v. Ford Motor Co., No. Civ.A. 06-1080, 2007 U.S. Dist. LEXIS 5455, 2007 WL 269806, at *3 (D.N.J. Jan. 25, 2007)*; *Chase Manhattan Bank v. Iridium Africa Corp., 324 F. Supp. 2d 540, 545 (D. Del. 2004)*. However, the court should not certify questions of relatively clear law merely because the losing party disagrees with the court's analysis. *Elec. Mobility Corp. v. Bourns Sensors/Controls, 87 F. Supp. 2d 394, 398 (D.N.J. 2000)*.

In the present matter, defendants observe that HN4[] Twombly communicates "multiple linguistic signals" about the standard of review that a court must apply on a *Rule 12(b)(6)* motion. (Doc. 589 at 9 (quoting *City of Moundridge v. Exxon Mobil Corp., 250 F.R.D. 1, 6 n.5 (D.D.C. 2008)*). **[**33]** On one hand, Twombly superceded the pleading standard of Conley v. Gibson, under which "a complaint [was] not [to be] . . . dismissed . . . unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief." *355 U.S. 41, 46-47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Twombly concluded that this standard was "an incomplete, negative gloss" on pleading practice, *550 U.S. at 563*, and instead required complaints to set forth

[3] This question effectively merges the two issues identified by defendants into a single inquiry and reflects the court's duty to evaluate the amended complaints *in toto*.

plausible averments that possess "enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly, 550 U.S. at 557* (quoting *FED. R. CIV. P. 8(a)(2)* (alteration in original)). At the same time, however, Twombly expressly rejected a requirement of "heightened fact pleading of specifics." *Id. at 570*. Since Twombly's issuance, the Supreme Court has reaffirmed that a complaint must simply "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, ___, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (quoting *Twombly, 550 U.S. at 555*).

Several courts have observed that Twombly's varied analytical cues expose it to multiple interpretations. See, e.g., *Iqbal v. Hasty, 490 F.3d 143, 155-57 (2d Cir. 2007)*; **[**34]** *Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541-42 (6th Cir. 2007)*; *Moundridge, 250 F.R.D. at 6 n.5*; *Arista Records LLC v. Doe, 584 F. Supp. 2d 240, 244 & n.6, 245 & n.7, 246-47 (D. Me. 2008)*; *Accenture Global Servs. GMBH v. Guidewire Software, Inc., 581 F. Supp. 2d 654, 661 & n.5 (D. Del. 2008)*. Prior to Twombly, courts and commentators had maligned the Conley standard for many years, and complaints infrequently received the absolute deference required by a literal reading of the decision. See, e.g., *McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 43 (6th Cir. 1988)*; *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)*; *O'Brien v. Di Grazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976)*; Christopher M. Fairman, The Myth of Notice Pleading, *45 ARIZ. L. REV. 987, 1014-21 (2003)*; Yoichiro Hamabe, Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach, 15 CAMPBELL L. REV. 119, 130-34 (1993); Richard L. Marcus, The Revival of Fact Pleading under the Federal Rules of Civil Procedure, *86 COLUM. L. REV. 433, 463-65 (1986)*. Hence, ***HN5***[🡅] a narrow reading of Twombly construes it as a formalistic change designed to give voice to a pleading standard **[**35]** that was already commonplace in many courts. Under a robust interpretation, however, Twombly requires a court to scrutinize the plausibility of a complaint's allegations and dismiss claims that lack sufficient factual underpinning for the relief requested.

[*707] The United States Court of Appeals for the Third Circuit's decision in *Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008)*, recognized that Twombly's exact location on the continuum between these interpretations is unclear. Phillips concluded that Twombly did not institute a new pleading regime but required the plaintiff to describe "enough facts to raise a reasonable expectation that discovery will reveal evidence of" the claims alleged in the complaints. *Id. at 234* (quoting *Twombly, 550 U.S. at 556*). The plaintiff must allege facts that "justify moving the case beyond the pleadings to the next stage of litigation." *Id. at 234-35*. However, the precise quorum of facts necessary to reach this point remains uncertain, causing the Third Circuit to prognosticate that "[t]he issues raised by Twombly are not easily resolved, and likely will be a source of controversy for years to come." *Id. at 234*.

HN6[🡅] These issues hold particular significance **[**36]** in the antitrust arena, where plaintiffs often lack direct evidence of a conspiratorial agreement and must rely upon circumstantial allegations to surmount a *Rule 12(b)(6)* challenge. The March 4 Memorandum concluded that a § 1 plaintiff may satisfy Twombly by describing parallel price increases, clear opportunity for collusion, anticompetitive activity in foreign markets intertwined with those in the U.S., transnational management of corporate subsidiaries, and allegations of anti-competitive conduct that are economically sensible in light of mature market characteristics. (Doc. 582 at 59-62.) The court remains convinced of the propriety of this conclusion. Nevertheless, the court recognizes that the Twombly standard is in its infancy and that capable jurists may disagree about its effect on plaintiffs' pleading obligations. Such disagreement could lead to differing outcomes between this matter and analogous cases addressing motions similar to those raised by defendants. Hence, the question of controlling law formulated by the court satisfies the second criterion of *§ 1292(b)*.

3. Materially Advances the Termination of the Litigation

Finally, ***HN7***[🡅] any question certified for appeal must "materially **[**37]** advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*. The court must evaluate whether an appeal could eliminate the need for a trial, simplify a case by foreclosing complex issues, or enable the parties to complete discovery more quickly or at less expense. *Knipe, 583 F. Supp. 2d at 599*; *Patrick v. Dell Fin. Servs., 366 B.R. 378, 387 (M.D. Pa. 2007)*. Cases in which discovery has closed are generally inappropriate for interlocutory appeal because they are rapidly approaching conclusion under their own momentum. *Patrick, 366 B.R. at 387*; *FDIC v. Parkway Executive Office Ctr., No. Civ.A. 96-121, 1997 U.S. Dist. LEXIS 14939, 1997 WL 611674, at *3 (E.D. Pa. Sept. 24, 1997)*.

Certifying an interlocutory appeal could significantly advance the termination of the instant matter. Discovery on class and merits issues has not yet commenced [4] and will likely implicate reams of documents, weeks of depositions, and a battery of interrogatories and requests for admissions. [5] Expenses in the form of attorney **[*708]** time, document storage, and parties' involvement will likely mount as discovery progresses. The parties' proposed class certification schedules provide stark portraits of the time and expense associated with **[**38]** this process: Defendants allot 370 days for discovery. Plaintiffs request at least 500. [6] Appellate review of the motions to dismiss could eliminate the need for this period of prolonged and costly discovery. Alternatively, affirmance of the March 4 Memorandum would validate these significant expenditures. The court therefore concludes that the March 4 Memorandum satisfies the criteria for certification of an interlocutory appeal under *§ 1292(b)*.

B. Discretionary Certification

The***HN8***[] court possesses discretion to deny certification of an appeal **[**39]** even if the parties satisfy the statutory criteria of *§ 1292(b)*. *Bachowski v. Usery, 545 F.2d 363, 368 (3d Cir. 1976)*. "[A] district court should exercise this discretion and certify issues for interlocutory appeal only sparingly and in exceptional circumstances." *Sabree v. Williams, No. Civ.A. 06-2164, 2008 U.S. Dist. LEXIS 78255, 2008 WL 4534076, at *1 (D.N.J. Oct. 2, 2008)*; see also *Knipe, 583 F. Supp. 2d at 599*.

In the instant matter, the Twombly issues associated with the March 4 Memorandum will effectively pass beyond the reach of appellate review unless the court certifies an interlocutory appeal. These issues directly confront Twombly's effect on the law of pleading and its application to antitrust complaints subject to a *Rule 12(b)(6)* motion. Although the Third Circuit has applied Twombly outside of the antitrust context, see *Phillips, 515 F.3d at 234*, it has yet to consider Twombly's application to a § 1 claim based upon allegations of parallel conduct. Therefore, the court's certification will materially advance the instant matter and bring clarity to a still-developing area of law.

III. Conclusion

The court will certify for appeal Part III.B.1 of the March 4 Memorandum along with the question formulated **[**40]** in Part II.A.1 above. [7]

An appropriate order is attached.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United States District Judge

Dated: April 8, 2009

---

[4] The parties are currently engaged in a period of limited jurisdictional discovery to facilitate disposition of certain defendants' challenges to personal jurisdiction. See supra note 2; (Doc. 582 at 50-53).

[5] The parties dispute the need to separate discovery into class certification and merits phases. The identification of these two forms of discovery does not constitute the court's endorsement of a bifurcated discovery schedule. The court has separately identified these types of discovery to illustrate the incipient nature of this matter.

[6] The parties submitted proposed schedules for class certification discovery via facsimile on January 14, 2009.

[7] Defendant Cadbury Adams Canada has filed a motion for reconsideration (Doc. 590) of the March 4 Memorandum on Twombly grounds. The motion will be denied as moot pending the outcome of proceedings under *§ 1292(b)*. Cadbury Adams Canada will be permitted to reassert the motion in the event that the Third Circuit declines an appeal or that an appellate decision fails to resolve the issues raised therein.

ORDER

AND NOW, this 8th day of April, 2009, upon consideration of defendants' motion to certify an interlocutory appeal (Doc. 588), and of defendant Cadbury Adams Canada's motion for reconsideration (Doc. 590) of the memorandum and order of court (Doc. 582) dated March 4, 2009, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The motion to certify an interlocutory appeal (Doc. 588) is GRANTED. Part III.B.1 of the memorandum and order of court (Doc. 582) dated March 4, 2009 is CERTIFIED for interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*. The following question is further CERTIFIED pursuant to **[**41]** *28 U.S.C. § 1292(b)*:

> Does Twombly, as a matter of law, authorize a court in a § 1 case to draw an inference of conspiracy from the collective effect of repeated **[*709]** parallel price increases, averments of anticompetitive activity in closely related foreign markets, transnational management of corporate subsidiaries, opportunity for collusion, and descriptions of anti-competitive conduct that are economically sensible in light of mature market characteristics?

2. The appellate certification granted in the preceding paragraph shall have no effect on the provisions of Case Management Order No. 9 (Doc. 583). Jurisdictional discovery shall continue during the pendency of any appeal accepted by the United States Court of Appeals for the Third Circuit.

3. The motion for reconsideration (Doc. 591) is DENIED as moot in light of the certification of an interlocutory appeal. Cadbury Adams Canada may reassert the motion in the event that the Third Circuit declines to accept an appeal or that an appellate decision fails to resolve the issues raised therein. Any renewed motion for reconsideration shall be filed within five days of the conclusion of appellate proceedings under *28 U.S.C. § 1292(b)*.

/s/ Christopher **[**42]** C. Conner

CHRISTOPHER C. CONNER

United States District Judge

In re Flonase Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

April 15, 2009, Decided; April 16, 2009, Filed

CIVIL ACTION NO. 08-CV-3301

Reporter

610 F. Supp. 2d 409 *; 2009 U.S. Dist. LEXIS 33038 **; 2009-2 Trade Cas. (CCH) P76,702

In re: FLONASE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: Indirect Purchasers Actions

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 2010 U.S. Dist. LEXIS 4707 (E.D. Pa., Jan. 21, 2010)*

Prior History: *In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 2009 U.S. Dist. LEXIS 63193 (E.D. Pa., Apr. 15, 2009)*

Core Terms

purchasers, named plaintiff, antitrust, indirect, motion to dismiss, state law, allegations, antitrust claim, generic, cause of action, trade practice, Deceptive, principal place of business, anticompetitive conduct, consumer protection, standing to bring, Practices, documents, petitions, Unfair, prices, reside, unjust enrichment, Monopolization, infer, class certification, anti trust law, district court, do business, Consumer

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Federal Food, Drug and Cosmetic Act, drug manufacturers must receive Food and Drug Administration (FDA) approval before selling a new drug. A prospective manufacturer of a generic drug must demonstrate to the FDA that the generic version is the "bioequivalent" of the brand name drug before the generic version is approved for sale. In other words, the generic version must contain the same active ingredient(s), dosage form, route of administration, and strength. Once a generic drug enters the market, the price of the name-brand drug and the sales volume typically drop. While the approval of a generic version is pending, "citizens petitions" may be filed with the FDA to express legitimate concerns regarding a product and request that the FDA take, or refrain from taking, administrative action. Because citizens petitions can delay a generic drug's approval, they are often abused by pharmaceutical companies attempting to prolong their monopoly in the market.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] Justiciability, Standing

Under *Fed. R. Civ. P. 12(b)(1)*, a court must grant a motion to dismiss if it lacks subject matter jurisdiction to hear a claim. A motion to dismiss for want of standing is also properly brought pursuant to R. 12(b)(1), because standing is a jurisdictional matter.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] Motions to Dismiss, Failure to State Claim

Under *Fed. R. Civ. P. 12(b)(6)*, a court must grant a motion to dismiss if the plaintiff fails to state a claim upon which relief can be granted. In deciding a motion to dismiss pursuant to R. 12(b)(6), a court must accept, as true, the well-pleaded allegations of the complaint and draw all reasonable inferences in the plaintiff's favor. While a complaint attacked by a R. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN4[] Class Actions, Class Action Fairness Act

The Class Action Fairness Act of 2005 grants district courts original jurisdiction over any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interests and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a state different from any defendant. *28 U.S.C.S. § 1332(d)(2)*.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN5[] Justiciability, Standing

Unless at least one named plaintiff can state a claim for relief under each count of a complaint, plaintiffs do not have standing to bring claims as part of a putative class action.

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN6[] Standing, Elements

U.S. Const. art. III limits the power of federal courts to resolving cases or controversies. The case or controversy requirement is met when there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The doctrine of standing helps identify which disputes are justiciable under the case or controversy requirement. At a minimum, there are three elements needed to establish constitutional standing under *U.S. Const. art. III: 1*) injury-in-fact; 2) causation (or traceability); and 3) redressability.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

***HN7*[]** **Prerequisites for Class Action, Adequacy of Representation**

In some situations it is appropriate for a court to decide whether or not to certify a class before addressing U.S. Const. art. III standing. Class certification may be decided first if that issue is logically antecedent to U.S. Const. art. III concerns. It is unchallenged, however, that to be a class representative on a particular claim, a plaintiff himself must have a cause of action on that claim.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

***HN8*[]** **Prerequisites for Class Action, Adequacy of Representation**

The claims of the representative party must be typical of the claims of the class. *Fed. R. Civ. P. 23(a)*. Adequacy of representation must be established before an action may proceed on behalf of a class. *Fed. R. Civ. P. 23(a)* Therefore there is no abuse of discretion in a district court's refusal to consider certification of a class before determining whether a named plaintiff, and a fortiori any putative class which the named plaintiff might properly seek to represent, has a federal cause of action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Class Actions > Class Members > Named Members

***HN9*[]** **Class Actions, Certification of Classes**

Even if class certification is logically antecedent to analyzing the plaintiffs' standing to bring claims under the laws of states where the named plaintiffs have not suffered any injury, it is still appropriate to analyze whether a named plaintiff has a cause of action under each claim in a complaint before deciding whether to certify a class. At least one named plaintiff must have a cause of action on a claim for each claim to survive a motion to dismiss.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN10[] **State Regulation, Claims**

In Illinois Brick Co. v. Illinois, the U.S. Supreme Court determined that indirect purchasers do not have standing to bring a cause of action under the federal antitrust statute. Illinois Brick, however, does not preempt state law, and states may provide antitrust remedies to indirect purchasers under their own law. Some states follow the logic of Illinois Brick and bar indirect purchasers from bringing antitrust claims. Cases from Texas, Colorado, Washington, Louisiana, Iowa, Kentucky, Connecticut, Arizona, Massachusetts, Florida, Oklahoma, and New Hampshire hold that indirect purchasers do not have standing to bring antitrust claims. Conversely, many states have authorized antitrust suits by indirect purchasers. Nineteen states, the District of Columbia, and Puerto Rico have statutes authorizing indirect purchasers to bring an antitrust suit. To further complicate the issue, some states that do not allow indirect purchasers to bring antitrust claims allow them to bring suit under state consumer protection laws or unfair trade practices statutes. State laws clearly conflict over whether indirect purchasers can bring antitrust claims.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN11[] **Federal & State Interrelationships, Choice of Law**

The U.S. Supreme Court has held that it is unconstitutional to apply one state's laws over a nationwide class action, even if a class is to be certified, if that state does not have significant contact or significant aggregation of contacts to the claims asserted by the class members.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN12[] **Motions to Dismiss, Failure to State Claim**

Generally, in ruling on a motion to dismiss, a district court relies on the complaint, attached exhibits, and matters of public record. The United States Court of Appeals for the Third Circuit has also held that in deciding a motion to dismiss, courts can consider documents integral to or explicitly relied upon in the complaint. A court may consider undisputable authentic documents on which the plaintiffs have based their complaint.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN13[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act, *Tenn. Code. Ann § 47-25-101 et seq.*, has a plurality requirement and does not cover unilateral monopolization claims.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN14[] **Motions to Dismiss, Failure to State Claim**

As a case comes to a court, for purposes of a dismissal motion, the court must assume that the plaintiff can prove the facts alleged in its complaint. It is not, however, proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated laws in ways that have not been alleged.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN15[] **State Regulation, Claims**

Where a complaint does not allege that the defendant acted in concert with any other party, plaintiffs fail to state a claim of monopolization against the defendant under the Tennessee Trade Practices Act, *Tenn. Code. Ann § 47-25-101 et seq.*

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN16[] **State Regulation, Claims**

An allegation that the anticompetitive conduct had a substantial effect on Tennessee commerce is required under the Tennessee Trade Practices Act, *Tenn. Code. Ann § 47-25-101 et seq.*

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN17[] **Trade Practices & Unfair Competition, State Regulation**

The Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1 et seq.*, prohibits unfair methods of competition and unfair or deceptive acts or practices, including, but not limited to, the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression, or omission of such material fact, in the conduct of any trade or commerce, whether or not any person has in fact been misled, deceived or damaged thereby. *815 ILCS 505/2*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under Illinois law, classic antitrust claims, such as price-fixing allegations, cannot be brought under the Illinois Consumer Fraud and Deceptive Business Practices Act (ILCFA), *815 ILCS 505/1 et seq.* The ILCFA is limited to conduct that defrauds or deceives consumers or others, and to construe the ILCFA to give a cause of action for discriminatory pricing that the legislature has refused to give under the Illinois Antitrust Act would be incongruous. Allegations that defendants conspired to fix, maintain, or stabilize prices are classic examples of price-fixing and must be brought under the Antitrust Act, not the IlCFA.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN19[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under Illinois law, indirect purchasers cannot bring a claim under the Illinois Antitrust Act. *740 ILCS 10/7(2)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN20[] **State Regulation, Claims**

While Illinois Brick does not preempt state ***antitrust law***, some states, including Illinois, have followed the U.S. Supreme Court's lead in denying indirect purchasers standing to bring antitrust claims. Because indirect purchasers do not have standing to bring antitrust claims, these jurisdictions have further established that indirect purchasers cannot bring state consumer protection claims based on allegations of antitrust violations.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN21[] **Regulated Practices, Price Fixing & Restraints of Trade**

The prototypical example of antitrust injury is an allegation by consumers that they have to pay higher prices as a result of a defendant's anticompetitive conduct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN22[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Illinois Court of Appeals (pursuant to the Supreme Court of Illinois' holding in Laughlin) has held that claims that are covered by the Antitrust Act must be brought under the Antitrust Act and not the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1 et seq.*

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN23[] **Motions to Dismiss, Failure to State Claim**

In a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a court can consider the complaint, attached exhibits, public records, and authentic documents relied on in the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN24[] **Motions to Dismiss, Failure to State Claim**

A district court ruling on a motion to dismiss is not permitted to go beyond the facts alleged in the complaint and the documents on which the claims made therein are based.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN25[] **Motions to Dismiss, Failure to State Claim**

There is no law stating that, in ruling on a *Fed. R. Civ. P. 12(b)(6)* motion, a district court can consider allegations only mentioned in a party's memorandum of law.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN26[] **Types of Contracts, Quasi Contracts**

States analyze unjust enrichment claims differently.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN27[] **Standing, Injury in Fact**

Named plaintiffs cannot establish standing merely by relying on claims of putative class members and must establish their own standing to assert each claim. In order to have standing, the named plaintiffs must allege personal and particularized injury.

Counsel: **[**1]** For IBEW - NECA LOCAL 505 HEALTH & WELFARE PLAN, Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; CHRISTOPHER E. COLEMAN, LEAD ATTORNEY, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; ERIC B. FASTIFF, JORDAN ELIAS, JOSEPH R. SAVERI, LEAD ATTORNEYS, LIEFF CABRASER HEIMAN & BERNSTEIN, LLP, SAN FRANCISCO, CA; J CECIL GARDNER, LEAD ATTORNEY, THE GARDNER FIRM, MOBILE, AL; JENNIFER FOUNTAIN CONNOLLY, LEAD ATTORNEY, WEXLER WALLACE LLP, CHICAGO, IL; MICHAEL M. BUCHMAN, LEAD ATTORNEY, POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS LLP, NEW YORK, NY; MARVIN A. MILLER, MILLER LAW LLC, CHICAGO, IL.

For A.F. OF L.-A.G.C. BUILDING TRADES WELFARE PLAN, MC - UA LOCAL 119 HEALTH AND WELFARE PLAN, PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, SHEET METAL WORKERS LOCAL 441 HEALTH & WELFARE PLAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; MARVIN A. MILLER, MILLER LAW LLC, CHICAGO, IL.

For INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS LOCAL NO. 79 HEALTH FUND, **[**2]** Plaintiff: ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA; J. GERARD STRANCH, IV, JOE P. LENISKI , JR., LEAD ATTORNEYS, BRANSTETTER STRANCH & JENNINGS PLLC, NASHVILLE, TN; JAMES G. STRANCH, III, R. JAN JENNINGS, LEAD ATTORNEYS, PRO HAC VICE, BRANSTETTER STRANCH & JENNINGS PLLC, NASHVILLE, TN; MARVIN A. MILLER, MILLER LAW LLC, CHICAGO, IL.

For SMITHKLINE BEECHAM CORPORATION, doing business as GLAXOSMITHKLINE PLC, Defendant: EDWARD D. ROGERS, STEPHEN J. KASTENBERG, LEAD ATTORNEYS, ARTHUR MAKADON, JASON A. LECKERMAN , BALLARD, SPAHR, ANDREWS AND INGERSOLL, PHILADELPHIA, PA; LESLIE E. JOHN, LEAD ATTORNEY, JOB MICHAEL ITZKOWITZ, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA.

Judges: Anita B. Brody, United States District Judge.

Opinion by: Anita B. Brody

Opinion

[*411] **MEMORANDUM**

I. Introduction

On September 3, 2008, Plaintiffs A.F. of L.- A.G.C. Building Trades Welfare Plan ("AFL"), International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local No. 79 Health Fund ("IABORI"), IBEW-NECA Local 505 Health and Welfare Plan ("IBEW"), MC-UA Local 119 Health and Welfare Plan ("UA"), Painters District Council No. 30 Health & Welfare Fund ("Painters"), **[**3]** and Sheet Metal Workers Local 441 Health and Welfare Plan ("Sheet Metal"), collectively "Plaintiffs," filed an amended class action complaint against Defendant SmithKline Beecham Corporation, doing **[*412]** business as GlaxoSmithKline, Inc. ("GSK"). Plaintiffs are all indirect purchasers of the prescription drug Flonase (i.e. they did not purchase the drug for resale) who allege that GSK filed sham citizens petitions with the Food and Drug Administration ("FDA") in order to delay the entry of generic Flonase into the market. Plaintiffs bring three counts against GSK under numerous states' laws: 1) Monopolization, 2) Unfair and Deceptive Practices, and 3) Unjust Enrichment. On October 17, 2008, GSK filed a Motion to Dismiss the amended complaint. That motion will be granted without prejudice because none of the named Plaintiffs have stated a claim under the laws of the states in which they reside or do business.

II. Background [1]

HN1[] Under the Federal Food, Drug and Cosmetic **[**4]** Act ("FDCA"), drug manufacturers must receive FDA approval before selling a new drug. A prospective manufacturer of a generic drug must demonstrate to the FDA that the generic version is the "bioequivalent" of the brand name drug before the generic version is approved for sale. In other words, the generic version must contain the same active ingredient(s), dosage form, route of administration, and strength. Once a generic drug enters the market, the price of the name-brand drug and the sales volume typically drop. While the approval of a generic version is pending, "citizens petitions" may be filed with the FDA to express legitimate concerns regarding a product and request that the FDA take, or refrain from taking, administrative action. Because citizens petitions could delay a generic drug's approval, [2] they were often abused by pharmaceutical companies attempting to prolong their monopoly in the market. Plaintiffs contend that in 2004, as the end of GSK's exclusivity period for the drug Flonase approached, GSK filed four successive sham citizens petitions solely to delay generic approval of the drug and with no reasonable basis for objecting to the approval. Because of this unlawful **[**5]** behavior, Plaintiffs' ability to purchase lower-priced generic versions of Flonase was delayed and they were denied the benefits of unrestrained competition.

III. Standard of Review and Jurisdiction

HN2[] Under *Federal Rule of Civil Procedure 12(b)(1)*, a court must grant a motion to dismiss if it lacks subject matter jurisdiction to hear a claim. "A motion to dismiss for want of standing is also properly brought pursuant to *Rule 12(b)(1)*, because standing is a jurisdictional matter." *Ballentine v. U.S., 486 F.3d 806, 810, 48 V.I. 1059 (3d Cir. 2007)*. ***HN3***[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a court must grant a motion to dismiss if the plaintiff fails "to state a claim upon which relief can be granted." In deciding a motion to dismiss pursuant to *Rule 12(b)(6)*, the court must accept as true the well-pleaded allegations of the complaint and draw all reasonable inferences in the plaintiff's favor. *Brown v. Card Serv. Ctr., 464 F.3d 450, 452 (3d Cir. 2006)*. **[**6]** "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more **[*413]** than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). Jurisdiction over this action is proper under ***HN4***[] the Class Action Fairness Act of 2005, which grants district courts original jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interests and costs, and is a class action in which … any member of a class of plaintiffs is a citizen of a State different from any defendant." *28 U.S.C. § 1332(d)(2)*); *Kaufman v. Allstate N.J. Ins. Co., Nos. 08-4911, 08-4912, 08-4913, 561 F.3d 144, 2009 U.S. App. LEXIS 6429, 2009 WL 779759 at *1 (3d Cir. March 26, 2009)*.

IV. Discussion

In the amended complaint, Plaintiffs assert that GSK's actions denied them (1) the benefits of free and unrestrained competition, and (2) the opportunity to purchase lower-priced generic versions of Flonase. GSK contends that because Plaintiffs do not assert **[**7]** in which state(s) they suffered injury they do not have standing to bring any state law claims, and even if the Court infers that named Plaintiffs have standing to assert claims under the laws of the states in which they reside or have a principal place of business, the entire complaint must be dismissed because the named Plaintiffs have failed to state claims under those laws. ***HN5***[] Unless at least one named Plaintiff can state a claim for relief under each count Plaintiffs do not have standing to bring claims as part of a putative class action. GSK further contends that even if the named Plaintiffs themselves have standing under the

[1] All facts were considered in the light most favorable to Plaintiffs, the non-moving parties. Additionally, all facts in this section were taken from Plaintiffs' opposition to defendant's motion to dismiss, unless stated otherwise.

[2] In 2007, after the citizens petitions in this case were filed, Congress passed a law that allows the FDA to dismiss citizens petitions summarily in order to prevent pharmaceutical companies from using this process to unlawfully extend their monopolies.

laws of states where they were injured, they do not have standing to assert claims on behalf of putative class members under the laws of states where no named Plaintiff was injured. Plaintiffs respond that the named Plaintiffs have stated claims under the laws of Tennessee, Illinois and Florida, states in which named Plaintiffs suffered injury. Furthermore, Plaintiffs assert that it would be "premature to rule on defendant's argument that named Plaintiffs cannot state antitrust claims in jurisdictions where they do not reside or do business" because class certification **[**8]** should be decided prior to analyzing standing. (Plaintiffs' Opposition to Motion to Dismiss, p. 10). Plaintiffs request that should the Court decide GSK's Motion is timely, that the Plaintiffs be allowed to amend their complaint or, alternatively, that the Court dismiss any claims for lack of standing without prejudice so that named Plaintiffs from additional states could join the case.

Article III of the Constitution ***HN6***[] limits the power of federal courts to resolving cases or controversies. The case or controversy requirement is met when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (citations omitted). The doctrine of standing helps identify which disputes are justiciable under the case or controversy requirement. At a minimum, there are three elements needed to establish constitutional standing under Article III: 1) injury-in-fact, 2) causation (or traceability), and 3) redressability. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

The Supreme Court has held that ***HN7***[] in some situations it is appropriate for a court to decide whether or not to certify a **[**9]** class before addressing Article III standing. See *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* (holding that class certification may be decided first if that issue is "logically antecedent" to Article III concerns). **[*414]** It is unchallenged, however, that "to be a class representative on a particular claim, the plaintiff himself must have a cause of action on that claim." *Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987)*. The Zimmerman court held that the district court did not err in dismissing plaintiff's claim for failure to state a claim before considering class certification, even though the plaintiff argued that other class members might be able to make the necessary allegations needed to state a claim:

> ***HN8***[] The claims of the representative party must be typical of the claims of the class. *Fed.R.Civ.P. 23(a)*. Adequacy of representation must be established before an action may proceed on behalf of a class. *Id*. Therefore we find no abuse of discretion in the district court's refusal to consider certification of a class before determining whether the named plaintiff, and *a fortiori* any putative class which the named plaintiff might properly seek to represent, had a **[**10]** federal cause of action.

Id.

HN9[] Even if class certification is "logically antecedent" to analyzing Plaintiffs' standing to bring claims under the laws of states where the named Plaintiffs did not suffer injury, it is still appropriate to analyze whether a named plaintiff has a cause of action under each claim before deciding whether to certify a class. It would not be premature, therefore, to first determine if Plaintiffs have stated a claim under the laws of jurisdictions where they reside or do business, because at least one named Plaintiff must have a cause of action on a claim for that claim to survive a motion to dismiss.

A. State Law Governing Plaintiffs' Claims

HN10[] In Illinois Brick Co. v. Illinois, the Supreme Court determined that indirect purchasers do not have standing to bring a cause of action under the federal antitrust statute. *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Illinois Brick, however, does not preempt state law and states may provide antitrust remedies to indirect purchasers under their own law. *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. Some states follow the logic of Illinois Brick and bar indirect purchasers from bringing antitrust claims. See William H. Page, The Limits Of State **[**11]** Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick, 67 Antitrust L.J. 1, note 7 (1999) (citing cases from Texas, Colorado, Washington, Louisiana, Iowa, Kentucky, Connecticut, Arizona, Massachusetts, Florida, Oklahoma, and New Hampshire holding that indirect purchasers do not have standing to bring antitrust claims). Conversely, many states have authorized antitrust suits by indirect purchasers. See *Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa Dist. Ct. 2002)* (stating that nineteen states, the District of Columbia, and Puerto Rico have statutes authorizing indirect purchasers to bring an antitrust suit). To further complicate the issue, some states that do not allow indirect purchasers to bring antitrust claims allow them to bring suit under state consumer protection laws or unfair trade practices statutes. *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303 (2002)*; *Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 795 A.2d 833 (N.H. 2002)*; *Mack v. Bristol-Myers Squibb Co.., 673 So. 2d 100 (Fla. App. 1996)*.

State laws clearly conflict over whether indirect purchasers can bring antitrust claims. Furthermore, ***HN11***[] the Supreme Court has held that it is unconstitutional to apply one **[**12]** state's laws over a nationwide class action, even if the class were to be certified, **[*415]** if that state does not have "significant contact or significant aggregation of contacts" to the claims asserted by the class members. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. The Plaintiffs have alleged injury, but have not tied this injury to any particular state(s). At this stage, I will infer that each named Plaintiff can establish enough contacts in the state where they reside or have a principal place of business to allege injury under that state's law. In other words, I will infer that the named Plaintiffs have alleged particularized and personal injury under the laws of the states where they have a principal place of business.

There are six named Plaintiffs in this action. IBEW, AFL, UA, and Sheet Metal are welfare funds with principal places of business in Alabama. Painters is an employee welfare benefit plan located in Illinois. IABORI is a welfare fund administered in Tennessee. Plaintiffs contend that they have stated a claim on Count I (Monopolization under State Law) under Tennessee law and that they have stated a claim on Count II (Unfair and Deceptive Trade Practices **[**13]** Under State Law) under Illinois law and Florida law. Although Plaintiffs do not bring any claims under Alabama law, they contend in their Opposition to Defendant's Motion to Dismiss that the Plaintiffs who have principal places of business in Alabama traveled to Florida and made purchases there.

B. Count I: Monopolization Under State Law

i. Claims under Tennessee Law

The complaint alleges that GSK violated the Tennessee Trade Practices Act ("TTPA"), *Tenn. Code. Ann §§ 47-25-101, et seq*., with respect to purchases of Flonase in Tennessee. GSK responds that Plaintiffs have not stated a claim under Tennessee law because the TTPA only prohibits antitrust conspiracies and because Plaintiffs have not alleged any nexus between the alleged antitrust violation and intrastate commerce.

HN12[] "Generally, in ruling on a motion to dismiss, a district court relies on the complaint, attached exhibits, and matters of public record." *Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007)*. The Third Circuit has also held that in deciding a motion to dismiss courts can consider documents "integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997)* **[**14]** (internal citations omitted); see *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)* (holding that a court may also consider undisputable authentic documents on which the plaintiffs have based their complaint).

Plaintiffs concede that ***HN13***[] the TTPA has a "plurality requirement" and does not cover unilateral monopolization claims. (Plaintiff's Opposition to Motion to Dismiss pp. 30-31). Plaintiffs allege that they satisfy this pleading requirement by listing numerous individuals possessing discoverable information in their initial disclosures under *Federal Rule of Civil Procedure 26* and because in GSK's Motion to Bifurcate Discovery GSK claimed that two law firms filed petitions on behalf of an "unidentified client." In essence, Plaintiffs claim, and ask the Court to infer from the above documents, that GSK conspired with one or more law firms in filing the alleged sham petitions. The Plaintiffs point to no allegations in the complaint, however, indicating that GSK acted in concert with any law firms or other parties. Even if this court could consider the Rule 26 disclosures in a Motion to Dismiss as authentic documents, these are not documents on **[**15]** **[*416]** which the Plaintiffs have based their complaint, nor does listing individuals with discoverable information indicate that GSK acted in concert with another party in an alleged monopoly. Nor can Plaintiffs rely on GSK's Motion to Bifurcate discovery to satisfy this pleading requirement under the TTPA. At this stage the Court will interpret all facts in Plaintiffs' favor, however, for this claim to survive a motion to dismiss, the Plaintiffs must at least include allegations in their complaint that, if true, would satisfy the elements of a cause of action under the TTPA. As the Supreme Court said, **HN14**[] "[a]s the case comes to us, we must assume that the [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Because Plaintiffs' **HN15**[] complaint did not allege that GSK acted in concert with any other party, Plaintiffs have failed to state a claim of monopolization against GSK under the TTPA.

Even if Plaintiffs' complaint **[**16]** had **HN16**[] sufficiently alleged that GSK acted in concert with another party, they failed to allege that the anticompetitive conduct had a substantial effect on Tennessee commerce, as required under the TTPA. *Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 524 (Tenn. 2005)*. All claims against GSK under the TTPA are dismissed without prejudice to amend.

C. Count II: Unfair and Deceptive Trade Practices Under State Law

i. Claims under Illinois Law

Plaintiffs assert a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1, et seq*. ("ILCFA"). Defendant responds that this claim is essentially an antitrust claim under the guise of a consumer protection claim, and that Illinois law bars indirect purchasers from bringing antitrust claims. Defendants further assert that Plaintiffs have not stated a claim under the ILCFA because they have not alleged deceptive practices, as required by the statute, nor have they alleged that the conduct occurred primarily and substantially in Illinois. **HN17**[] The ILCFA prohibits:

> [u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, **[**17]** false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact … in the conduct of any trade or commerce … whether [or not] any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2

HN18[] Under Illinois law, classic antitrust claims, such as price-fixing allegations, cannot be brought under the ILCFA. See *Laughlin v. Evanston Hosp., 133 Ill. 2d 374, 550 N.E. 2d 986, 140 Ill. Dec. 861 (Ill. 1990)* (holding that the Consumer Fraud Act is limited to conduct that defrauds or deceives consumers or others and that "[t]o construe the Consumer Fraud Act to give a cause of action for discriminatory pricing that the legislature refused to give under the Antitrust Act would be incongruous."); *Gaebler v. N.M. Potash Corp., 285 Ill. App. 3d 542, 676 N.E.2d 228, 221 Ill. Dec. 707 (Ill. App. Ct. 1997)* (holding that allegations that defendants conspired to 'fix,' 'maintain,' or 'stabilize' prices are classic examples of price-fixing and must be brought under the Antitrust Act and not the Consumer Fraud Act). Furthermore, **[*417]** **HN19**[] under Illinois law, indirect purchasers cannot bring a claim under the Antitrust Act. *Gaebler, 676 N.E.2d at 230* **[**18]** (citing *740 ILCS 10/7(2)*).

HN20[] While Illinois Brick does not preempt state ***antitrust law***, some states, including Illinois, have followed the Supreme Court's lead in denying indirect purchasers standing to bring antitrust claims. Because indirect purchasers do not have standing to bring antitrust claims, these jurisdictions have further established that indirect purchasers cannot bring state consumer-protection claims based on allegations of antitrust violations. For example, the Supreme Court of Ohio held that:

> The defendants' attempt to control the supply and to charge excessive prices for the prescription drugs is typical anticompetitive conduct, for which a remedy is provided in the antitrust statutes. . . . Thus, a complaint that alleges a violation of the Ohio Consumer Sales Practices Act predicated upon monopolistic pricing practices does not state a claim upon which relief can be granted because the Valentine Act, not the CSPA,

> provides the exclusive remedy for engaging in such conduct . . . . [A]n indirect purchaser of goods may not file a Valentine Act claim for violations of Ohio ***antitrust law***.

Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791, 801 (Ohio 2005); see also *Blewett v. Abbott Lab.., 86 Wn. App. 782, 938 P.2d 842, 846 (Wash. Ct. App. 1997)* **[**19]** (holding in a case alleging that drug manufacturers conspired to overcharge for drugs that indirect purchasers lack standing to sue under Washington state ***antitrust law*** and that an unfair trade practices claim is the "same claim with a different label."); *Vacco v. Microsoft Corp., 260 Conn. 59, 793 A.2d 1048 (Conn. 2002)* (holding that indirect purchasers lacked standing to sue under Connecticut ***antitrust law*** and could not recover under the Connecticut Unfair Trade Practices Act for the same anticompetitive conduct); *Abbott Lab. (Ross Lab. Div.) v. Segura 907 S.W.2d 503, 505-6 (Tex. 1995)* (holding that indirect purchaser intervenors could not seek damages under the Deceptive Trade Practices-Consumer Protection Act because "[a]llowing the intervenors to sue under the DTPA on allegations that are virtually identical to the antitrust allegations made by both the Texas Attorney General and the multi-district litigation plaintiffs in Florida would essentially permit an end run around the policies allowing only direct purchasers to recover under the Antitrust Act.). Even in Tennessee, where indirect purchasers are able to bring antitrust claims under the Tennessee Trade Practice Act, plaintiffs cannot bring claims **[**20]** based on anticompetitive conduct under the Tennessee Consumer Protection Act. *Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9-CV 2003 Tenn. App LEXIS 539, at *110 (Tenn. Ct. App. July 31, 2003)* ("[a]ccordingly, we must presume that the legislature intended that antitrust actions, those involving harm to competition, continue to be brought under the existing antitrust statute, the TTPA [Tennessee Trade Practice Act]. Consequently, we conclude that claims based upon anticompetitive conduct are not cognizable under the TCPA [Tennessee Consumer Protection Act]. Plaintiffs' TCPA claims based on allegations of anticompetitive conduct must be dismissed.")

Plaintiffs acknowledge that GSK's alleged wrongdoing in this case was motivated by desire to preserve a monopoly and that the result of this alleged illegal behavior was higher prices for the indirect purchasers. Plaintiffs claim that GSK filed sham petitions to "unlawfully extend the company's monopoly," "den[y] plaintiffs the benefits of free and unrestrained **[*418]** competition," "den[y] plaintiffs the opportunity to purchase lower-priced . . . generic versions of Flonase, and thus force[] Plaintiff and members of the Class to pay supra-competitive **[**21]** prices for fluticasone propionate." Complaint PP 64-66. All of Plaintiffs claims allege anticompetitive, monopolistic behavior resulting in illegal overcharging for a drug. Plaintiffs themselves cite a case in which the court stated that ***HN21***[] "the prototypical example of antitrust injury is an allegation by consumers that they have had to pay higher prices . . . as a result of defendant's anticompetitive conduct." *Mathias v. Daily News, L.P., 152 F.Supp. 2d 465, 478 (S.D.N.Y. 2001)*. Plaintiffs contend that their claims are not inconsistent with the Illinois Antitrust Act (under which indirect purchasers do not have standing) because that Act also prohibits the monopolization alleged here. (Plaintiffs Opposition to Motion to Dismiss, p. 15). ***HN22***[] The Illinois Court of Appeals (pursuant to the Supreme Court of Illinois' holding in Laughlin) has held that claims that are covered by the Antitrust Act "must be brought under the Antitrust Act and not the Consumer Fraud [and Deceptive Business Practices] Act." *Gaebler, 676 N.E.2d at 230 (Ill. App. Ct. 1997)*. Plaintiffs do not state how their allegations are different from classic antitrust allegations that are covered by the Antitrust Act and cannot **[**22]** be brought under ILCFA, therefore, Plaintiffs' claim under the ILCFA is dismissed without prejudice to amend the complaint.

ii. Claims under Florida Law

Plaintiffs assert that the Alabama Plaintiffs' claims are not defeated simply because Plaintiffs do not allege any claims under Alabama law. The Alabama Plaintiffs are welfare funds with principal places of business in Alabama. Plaintiffs assert, however, that the Alabama Plaintiffs can bring claims under Florida's consumer protection statute because they "are journeymen who purchased Flonase in various states, including Florida." (Plaintiffs Opposition to Motion to Dismiss, p. 18). Plaintiffs concede that they cannot bring claims under Florida's antitrust statute (Plaintiffs Opposition to Motion to Dismiss, p. 20). Plaintiffs do not, however, point to any instance in the complaint where they stated, or inferred, that the Alabama Plaintiffs had purchased Flonase in Florida.

As cited above,***HN23***[] in a 12(b)(6) motion to dismiss, a court can consider the complaint, attached exhibits, public records and authentic documents relief on in the complaint. In Burlington Coat Factory, the Third Circuit said:

> As far as we can see, the only source of information **[**23]** before the district court that could have provided a basis for the conclusion it reached was defendants' brief in support of their motion to dismiss. Indeed, the district court's opinion specifically cites to an affidavit proffered by defendants on this point. [Citation omitted]. However, since the ***HN24***[] district court was ruling on a motion to dismiss, it was not permitted to go beyond the facts alleged in the Complaint and the documents on which the claims made therein were based.

114 F.3d at 1424-25.

Not only do the Plaintiffs cite no instance in their complaint in which they alleged that the Alabama Plaintiffs purchased Flonase in Florida, but they cite ***HN25***[] no law stating that this Court can consider allegations only mentioned in a party's memorandum of law. Because no named Plaintiff has alleged injury in Florida or sufficient contact with Florida, the named Plaintiffs have not stated a claim under Florida's consumer protection statute. The claim **[*419]** brought under Florida's consumer protection statute is dismissed without prejudice.

C. Count III: Unjust Enrichment

Plaintiffs contend that they are bringing an unjust enrichment claim under state common law, and because the elements of an unjust enrichment **[**24]** claim are materially the same nationwide, they do not need to specify under which states' laws they bring this claim. Defendants respond that the Court cannot proceed without knowing which states' laws to apply, and therefore should dismiss this claim. Because ***HN26***[] states analyze unjust enrichment claims differently [3], I will allow Plaintiffs to amend their complaint to state the laws under which they are bringing an unjust enrichment claim.

V. Conclusion

HN27[] Named Plaintiffs cannot establish standing merely by relying on claims of putative class members and must establish their own standing to assert each claim. *Zimmerman, 834 F.2d at 1169*. In order to have standing, the named Plaintiffs must allege personal and particularized injury. In the case at hand, I inferred that the named Plaintiffs **[**25]** alleged injury in the states where they reside or have a principal place of business. Because none of the named Plaintiffs in this action have sufficiently stated a claim under the laws of the states where they reside or do business, the entire complaint is dismissed without prejudice.

End of Document

[3] For example, the Supreme Court of Tennessee held that to maintain an unjust enrichment claim under Tennessee law, the plaintiffs must provide more than a bare assertion that attempting to exhaust their remedies against the party with whom they are in privity would be futile (in the case at hand this would be the direct purchasers). *Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 525-26 (Tenn. 2005)*.

Hoffman v. Northern States Power Co.

Supreme Court of Minnesota

April 16, 2009, Filed

A06-2275

Reporter

764 N.W.2d 34 *; 2009 Minn. LEXIS 84 **

Irene Hoffman, et al., Appellants, vs. Northern States Power Company, d/b/a Xcel Energy, Respondent.

Prior History: **[**1]** Court of Appeals.

Hoffman v. Northern States Power Co., 743 N.W.2d 751, 2008 Minn. App. LEXIS 2 (2008)

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

tariff, filed rate doctrine, customer's, rates, district court, courts, injunctive relief, electrical, doctrine of primary jurisdiction, appellants', damages, wires, appellant's claim, ambiguous, regulated, terms, court of appeals, inspection, allegations, conductors, certified question, expertise, pleadings, questions, metering, exclusive jurisdiction, compensatory damages, antitrust, installation, obligations

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > Contracts for Service

HN1[] **Utility Companies, Contracts for Service**

The services that the Northern States Power Company (NSP) is obligated to perform for Minnesota customers are set forth under the tariff that NSP files with the Minnesota Public Utilities Commission (MPUC). *Minn. Stat. § 216B.05* (2008). As a public utility, NSP is a regulated monopoly under Minn. Stat. ch. 216B (2008). Thus, NSP files its tariffs with regulatory agencies in each state in which it operates, and the tariffs govern the terms of the legal relationship between NSP and its customers. *Minn. Stat. § 216B.05* (2008).

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

HN2[] **Rates, Ratemaking Factors**

See *Minn. Stat. § 216B.05* (2008).

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Appellate Jurisdiction, Certified Questions**

On a petition for review, the question originally certified is a question of law that an appellate court reviews de novo.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN4[] **Pretrial Judgments, Judgment on Pleadings**

Where a case arises from a district court's denial of a defendant's motion on the pleadings, under *Minn. R. Civ. P. 12.03*, the factual allegations in the complaint are accepted as true and an appellate court construes those allegations in the light most favorable to the appellants.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

HN5[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine is grounded in justiciability and separation of powers concerns and non-discrimination principles. With regard to separation of powers and justiciability concerns, the doctrine recognizes that rate-setting is a legislative function and that courts are ill-suited to determine the reasonableness of rates established by the agency. As compared with the expertise of regulating agencies, courts do not approach the same level of institutional competence to ascertain reasonable rates. Regarding non-discrimination, the doctrine recognizes that a judicial damages award based on a speculative rate that might have been set absent the violation at issue in the case would create discrimination in the rate schedule by compensating some customers but not others. Because Congress delegated ratemaking authority to the Interstate Commerce Commission for the purpose of preventing discriminatory rate schedules, courts lack the power to order refunds to customers who allege that they have paid an unjust price for the services provided by the regulated entity.

Energy & Utilities Law > Utility Companies > General Overview

HN6[] **Energy & Utilities Law, Utility Companies**

The public regulation of utilities as an intricate, ongoing process subject to an ever-widening set of consequences and adjustments.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

HN7[] **Exemptions & Immunities, Filed Rate Doctrine**

In Chapter 216B the Minnesota Legislature vested extensive power in the Minnesota Public Utilities Commission (MPUC) to set and prospectively regulate rates for Minnesota's public utility companies. For example, the electrical utility regulatory scheme requires all public utilities to file schedules showing all rates, tolls, tariffs and charges, as well as all rules and contracts relating to rates and services, with the MPUC. *Minn. Stat. § 216B.05*. The MPUC further enjoys broad power to ascertain and fix just and reasonable policies for all public utilities. *Minn. Stat. § 216B.09, subds. 1*, *2* (2008). The MPUC actively regulates rate reasonableness, *Minn. Stat. § 216B.16* (2008), and may adjust rates according to its own investigations and judgment, *Minn. Stat. § 216B.23* (2008). Allowing courts to examine a utility rate structure that has been approved by the MPUC would infringe upon the authority delegated by the legislature to the MPUC, and would therefore run afoul of the filed rate doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN8[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine applies to challenges that require courts to evaluate the reasonableness of an Minnesota Public Utilities Commission-approved tariff.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN9[] **Exemptions & Immunities, Filed Rate Doctrine**

A determination as to the manner in which the filed rate doctrine impacts upon plaintiff's complaint requires an examination of the asserted causes of action.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN10[] **Exemptions & Immunities, Filed Rate Doctrine**

At least in the absence of a legislative decision to vest exclusive jurisdiction in an agency, the filed rate doctrine does not bar a court from considering a request to enforce the clear terms of an agency-approved tariff. Judicial enforcement of the clear terms of a tariff cannot be said to infringe on discretionary authority vested in the agency or lead to discriminatory rate-making. The judiciary is simply asked to enforce the terms of a tariff as written, just as it would in an ordinary contract action.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN11[] **Exemptions & Immunities, Filed Rate Doctrine**

Claims that merely seek enforcement of an existing tariff do not question the reasonableness of rates charged under the tariff or require courts to determine the services to be provided by the regulated entity in exchange for those rates. Judicial enforcement of the clear terms of a tariff, therefore, cannot be said to infringe on discretionary authority vested in the agency or lead to discriminatory rate-making. The judiciary is simply asked to enforce the terms of a tariff as written, just as it would in an ordinary contract action.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN12[] **Exemptions & Immunities, Filed Rate Doctrine**

Claims that seek to expand services beyond what is provided for in the tariff indirectly challenge the reasonableness of the filed rates, and the filed rate doctrine bars the judiciary from considering such claims. The filed rate doctrine barred a state law breach of contract claim because the relief sought in the plaintiff's state-law claims would conflict with the provisions of the filed tariff. Rates do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. Claims based in breach of contract for a regulated entity's misrepresentation of the services promised in exchange for payment of the filed rate cannot be enforced through the courts. If the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN13[] **Pretrial Judgments, Judgment on Pleadings**

When reviewing a *Minn. R. Civ. P. 12.03* motion for judgment on the pleadings, an appellate court accepts the factual allegations in the pleading under attack as true and the appellate court liberally construes the complaint and draws all inferences and assumptions in favor of the nonmoving party. A motion for judgment on the pleadings will not be sustained if by a liberal construction the pleading can be held sufficient.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN14[] **Exemptions & Immunities, Filed Rate Doctrine**

If a complainant has paid a filed tariff rate, courts do not have power to order a refund of any portion of that rate. Such an attempt to measure damages with reference to the filed rate would interfere with the schedule of rates approved by the agency and would constitute a retroactive rate adjustment contrary to the separation of powers principles that underlie the filed rate doctrine. In addition, judicial interference with approved rates would create a discriminatory rate schedule among customers, with customers who receive damages effectively paying less than those who do not. For both of these reasons, courts have recognized that the filed rate doctrine bars claims for money damages to remedy breach of a provision in an agency-approved tariff.

Energy & Utilities Law > ... > Rates > Ratemaking Factors > General Overview

HN15[] **Rates, Ratemaking Factors**

The rate-setting process is an intricate proceeding by which the agency takes into account many aspects of cost and capital. The costs incurred by a utility to render its services necessarily are accounted for when the agency engages in the procedure to set the rate. *Minn. Stat. § 216B.16, subd. 6* (2008) explains that the commission considers the consumer's need and cost for providing adequate, efficient, and reasonable services when exercising authority to set just and reasonable rates. The judiciary is not competent to engage in rate analysis, nor, consistent with separation of powers principles, should the courts encroach on this legislative function.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN16[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine is designed to protect against such discrimination between ratepayers.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN17[] **Appellate Jurisdiction, Certified Questions**

Where a jurisdictional question comes to an appellate court within the context of a certified question, the appellate court reviews the application of the primary jurisdiction doctrine using a de novo standard.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN18[] **Reviewability, Jurisdiction & Venue**

The primary jurisdiction doctrine is a judicially-created doctrine that is concerned with the orderly and sensible coordination of the work of agencies and courts. The doctrine seeks to strike a proper relationship between courts and agencies, especially if an issue before the court requires the particular competence and expertise of the agency. The primary jurisdiction doctrine promotes regulatory uniformity.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN19[] **Exemptions & Immunities, Filed Rate Doctrine**

Courts recognize several factors in assessing whether to apply the filed rate doctrine. The Supreme Court of Minnesota has acknowledged at least two factors: (1) whether the legislature explicitly granted the agency exclusive jurisdiction; and (2) whether the issues raised are inherently judicial.

Syllabus

1. The filed rate doctrine applies to private claims challenging the reasonableness of a rate established for an electrical utility under the administration of the Minnesota Public Utilities Commission.

2. The filed rate doctrine bars appellants' breach of contract claim for compensatory damages, but it does not bar appellants' claim for injunctive relief.

3. The district court should have referred resolution of appellants' claim for injunctive relief to the Minnesota Public Utilities Commission under the primary jurisdiction doctrine.

4. The district court's jurisdiction over claims by North Dakota and South Dakota residents was not properly before the court of appeals.

Counsel: Vincent J. Esades, Lori A. Johnson, Scott W. Carlson, Heins Mills & Olson, P.L.C., Minneapolis, Minnesota; and C. Andrews Waters, Charles S. Siegel, Waters & Kraus, LLP, Dallas, Texas; and Mark R. Stanley, Roger L. Mandel, Martin Woodward, Stanley, Mandel & Iola, L.L.P., Dallas, Texas; and Jay E. Stuemke, Simon Eddins & Greenstone LLP, Dallas, Texas, for appellants.

Timothy Thornton, Kevin M. Decker, Jonathan P. Schmidt, Briggs and Morgan, P.A., Minneapolis, **[**2]** Minnesota, for respondent.

Lori Swanson, Attorney General, Karen D. Olson, Ronald M. Giteck, William T. Stamets, Assistant Attorneys General, St. Paul, Minnesota, for amicus curiae Office of the Minnesota Attorney General--Residential and Small Business Utilities Division.

Lori Swanson, Attorney General, Alison C. Archer, Assistant Attorney General, St. Paul, Minnesota, for amicus curiae Minnesota Public Utilities Commission.

David M. Cialkowski, Zimmerman Reed P.L.L.P., Minneapolis, Minnesota; and Hart L. Rabinovitch, Zimmerman Reed P.L.L.P., Scottsdale, Arizona; and Stephen Gardner, National Consumer Law Center, Dallas, Texas, for amicus curiae National Association of Consumer Advocates.

Judges: Gildea, J. Concurring, Dietzen, J. Took no part, Magnuson, C.J.

Opinion by: GILDEA

Opinion

[*38] GILDEA, Justice.

Respondent Northern States Power Company ("NSP") supplies appellants Irene and David Hoffman (Minnesota), Jerry Ustanko (North Dakota), and Mulugeta Endayehu (South Dakota) with electrical power. [1] Appellants initiated a breach of contract action against NSP alleging that NSP failed to inspect and maintain the point of connection between NSP's service facilities and each customer's electrical equipment. Appellants argued **[**3]** that the filed tariff required the inspection and maintenance. Appellants demanded relief in the form of compensatory damages and either specific performance or an injunction to require NSP to perform what they alleged to be its tariff obligations. The district court denied NSP's motion for judgment on the pleadings and certified two questions to the court of appeals regarding whether the filed rate doctrine or the primary jurisdiction doctrine precluded the district court from adjudicating the action. The court of appeals held that the filed rate doctrine barred all of appellants' claims, *Hoffman v. N. States Power Co., 743 N.W.2d 751, 756 (Minn. App. 2008)*, and we **[*39]** granted appellants' petition for further review.

We conclude that the filed rate doctrine applies to claims challenging the reasonableness of a rate the Minnesota Public Utilities Commission ("MPUC") has established for an electrical utility, and that the doctrine does not bar the claim for injunctive relief, but it does bar appellants' claim for compensatory **[**4]** damages. We further conclude that under the doctrine of primary jurisdiction, the district court should have referred appellants' claim for injunctive relief to the MPUC. Finally, we reverse the court of appeals' dismissal of claims brought by non-Minnesota residents and remand those claims for proceedings consistent with this opinion.

---

[1] The appellants seek to represent a class of plaintiffs. No action has been taken on class certification, and this appeal does not involve any class certification issues.

According to the complaint, NSP's wires connect to each customer's wires within a meter box, usually attached to the side of the customer's home. NSP sets up the meter box by attaching the utility's wires to grooved channels with brass lugs, which allows electricity to flow through the meter to the customer's wires. NSP then seals or locks the meter box, preventing customers from gaining access to its contents. The complaint alleges that the brass lugs within the box loosen and may corrode over time. These changes, according to the complaint, increase the electrical resistance at the connection site, generate heat, and create a fire hazard. Appellants contend that inspections, along with cleaning and tightening the connection sites as needed, would prevent the dangerous condition. The complaint does not allege that any of customers in the proposed class **[**5]** have been the victim of any particular fire. Nor does the complaint allege that any NSP customer has engaged a third party to perform the inspection and maintenance services.

HN1[] The services that NSP is obligated to perform for Minnesota customers are set forth under the tariff that NSP files with the MPUC. [2] As a public utility, NSP is a regulated monopoly under Minn. Stat. ch. 216B (2008). Thus, NSP files its tariffs with regulatory agencies in each state in which it operates, and the tariffs govern the terms of the legal relationship between NSP and its customers. *See, e.g., Minn. Stat. § 216B.05* (2008).

The complaint alleges that two separate provisions of the NSP tariff require NSP to inspect and maintain "the point of connection" between the company's wires and the customer's wires. The complaint first points to the tariff section titled "Service **[*40]** Connections," which provides for maintenance of NSP's equipment:

> The customer, without expense to the Company, will grant the Company right-of-way on his premises for **[**7]** the installation and maintenance of the necessary distribution lines, service conductors, and appurtenances, and will provide and maintain on the premises, at a location satisfactory to the company, proper space for the Company's transformers, metering equipment, and appurtenances.
> The service conductors as installed by the company from the distribution line to the point of connection with the customer's service entrance conductors will be the Company's property and will be maintained by the Company at its own expense.
> The customer will provide for the safekeeping of the Company's meters and other facilities and reimburse the Company for the cost of any alterations to the Company's lines, meters, or other facilities necessitated by customer and for any loss or damage to the Company's property located on the premises. The exception is when such loss or damage is occasioned by the Company's negligence or causes beyond control of the customer.

Northern States Power Company Tariff, General Rules and Regulations § 5.5 (1998) [NSP Tariff].

---

[2] The Minnesota Legislature has provided that all public utility schedules, rules, and service agreements will be filed with the MPUC:

> ***HN2***[] Subdivision 1. **Public rate filing.** Every public utility shall file with the commission schedules showing all rates, tolls, tariffs, and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it.
>
> Subd. 2. **Schedule and rules filing.** Every public utility shall file with and as a part of the filings **[**6]** under subdivision 1, all rules that, in the judgment of the commission, in any manner affect the service or product, or the rates charged or to be charged for any service or product, as well as any contracts, agreements, or arrangements relating to the service or product or the rates to be charged for any service or product to which the schedule is applicable as the commission may by general or special order direct; provided that contracts and agreements for electric service must be filed as required by subdivision 2a.
>
> Subd. 2a. **Electric service contract.** A contract for electric service entered into between a public utility and one of its customers, . . . must be filed for approval by the commission pursuant to the commission's rules of practice.

Minn. Stat. § 216B.05 (2008).

The complaint further points to the tariff provision governing the "Customer's Wiring, Equipment, and Property." This provision makes the customer responsible **[**8]** for maintaining certain pieces of equipment but exempts the customer from responsibility for maintaining "metering equipment":

> All wiring and equipment on customer's side of the point of connection, except metering equipment, will be furnished, installed, and maintained at the customer's expense in a manner approved by the public authorities having jurisdiction over the same.
> Customer will protect all electrical equipment and systems with devices that conform to the industry accepted standard for the various classes of electrical equipment and systems to prevent fire or damage to equipment from electrical disturbances or fault occurring in the customer's system or in the supplying system. The "industry accepted standard" will be as required in the National Electric Code and such additional devices as are prescribed by any public authority with jurisdiction over the installation of all electrical facilities.
>
> Any inspection of a customer's wiring and equipment by the Company is for the purpose of avoiding unnecessary interruptions of service to its customers or damage to its property and for no other purpose, and will not be construed to impose any liability upon the Company to a customer **[**9]** or any other person by reason thereof. In addition, the Company will not be liable or responsible for any loss, injury, or damage that may result from the use of or defects in a customer's wiring or equipment.
>
> The Company may, however, at any time require a customer to make such changes in his electrical or nonelectrical property or use thereof as may be necessary to eliminate any hazardous condition or any adverse effect which the operation of the customer's property or equipment may have on said customer, other customers of the Company, the public, or the Company's employees, equipment or service. In lieu of changes by the customer, the Company may require reimbursement from the customer for the cost incurred by the Company in alleviating an adverse effect **[*41]** on the Company's facilities caused by the customer's property.
> The transformers, service conductors, meters, and appurtenances used in furnishing electric service to a customer have a definite capacity. Therefore, no material increase in load or equipment will be made without first making arrangements with the Company for the additional electrical supply.

Id. § 4.2.

Based on these tariff provisions, the complaint alleges a general **[**10]** obligation for NSP to inspect and maintain "points of connection." The tariff does not otherwise define a point of connection, but the complaint provides a varied list of equipment that might comprise the components of a point of connection. Specifically, the complaint states that NSP is to inspect and maintain: "its electrical wiring and equipment up through and including the connection between its wires and the customer's wires located within the meter box"; "its service facilities"; "the actual point of connection of its facilities to customers' equipment"; and "the connections which comprise the point of connection between its and its customers' service conductors." Appellants allege that NSP is in material breach of its inspection and maintenance obligations, and that the breach caused them damages in the amount of the fair market value for services not received over a six-year period. Because the tariff remains in effect, the complaint also demands specific performance and injunctive relief to cause NSP to comply with the tariff.

NSP moved the district court for judgment on the pleadings under *Minn. R. Civ. P. 12.03*. NSP argued that the filed rate doctrine bars appellants' claims, **[**11]** or, in the alternative, that the claims should be referred to the MPUC under the primary jurisdiction doctrine. NSP additionally argued that Minnesota courts lack jurisdiction over the out-of-state claimants and that the tariff does not mandate the services that appellants allege NSP must perform under the tariff. The district court denied the motion, holding that: (1) the filed rate doctrine does not bar appellants' claims, (2) the primary jurisdiction doctrine did not require the court to refer appellants' claims to the responsible agency, and (3) the language of the tariff is ambiguous and does not clearly support NSP's interpretation that appellants sought to impose additional inspection and maintenance obligations beyond those set forth in the tariff.

NSP then moved the district court under *Minn. R. Gen. Pract. 115.04* and *Minn. R. Civ. App. P. 103.03(i)* to certify three issues for immediate appellate review. The district court certified two questions to the court of appeals: (1) "Does the filed rate doctrine bar [appellants'] claims?" and (2) "Does the primary jurisdiction doctrine require the court to [refer] resolution of the services required by the applicable tariffs to the **[**12]** responsible administrative agency?" [3] Concluding that the filed rate doctrine bars all of the claims, the court of appeals reversed the district court. *Hoffman, 743 N.W.2d at 757*. Because of its ruling on the filed rate doctrine, the court of appeals did not reach the primary jurisdiction issue. *Id. at 752*. The court also separately dismissed claims against NSP presented by North Dakota and South Dakota residents. *Id.* We granted appellants' petition to review the questions certified to the court of appeals.

[*42] This case comes to us within the context of the two questions the district court certified. ***HN3***[] On petition for review, the question originally certified is a question of law that we review de novo. *Watson by Hanson v. Metropolitan Transit Comm'n, 553 N.W.2d 406, 411 (Minn. 1996)*. In addition, ***HN4***[] because the case arises from the district court's denial of NSP's motion on the pleadings, the factual allegations in the complaint are accepted as true and we construe those allegations in the light most favorable to appellants. *Stephenson v. Plastics Corp. of Am., 276 Minn. 400, 150 N.W.2d 668 (1976)*. **[**13]** As noted above, NSP moved for judgment on the pleadings on the basis of both the filed rate doctrine and the primary jurisdiction doctrine. We examine each doctrine in turn.

I.

We consider first the filed rate doctrine. The United States Supreme Court provided one of the earliest articulations of the filed rate doctrine in *Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*. The *Keogh* Court determined that the federal courts did not have jurisdiction to adjudicate an antitrust claim brought by a manufacturer against several carriers whose shipping rates were set and regulated by the Interstate Commerce Commission. *Id. at 159-60*. Jurisdiction did not exist in the federal court on an otherwise cognizable antitrust claim in that case because an award of damages would have caused the court to interfere with the Commission's rate-making function. *Id. at 162*.

Courts have recognized that ***HN5***[] the filed rate doctrine as applied in *Keogh* is grounded in justiciability and separation of powers concerns and non-discrimination principles. *Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 312-313 (Minn. 2006)* (discussing rationale for doctrine as reflected in several cases). With regard to separation **[**14]** of powers and justiciability concerns, the doctrine recognizes that rate-setting is a legislative function and that courts are "ill-suited" to determine the reasonableness of rates established by the agency. *Id. at 312*; *see also* *Wegoland Ltd. v. Nynex Corp., 27 F.3d 17, 21 (2d Cir. 1994)* ("As compared with the expertise of regulating agencies, courts do not approach the same level of institutional competence to ascertain reasonable rates."). Regarding non-discrimination, the doctrine recognizes that a judicial damages award based on a speculative rate that might have been set absent the violation at issue in the case would create discrimination in the rate schedule by compensating some customers but not others. *Schermer, 721 N.W.2d at 311*; *see also* *Keogh, 260 U.S. at 163-64* (finding that because Congress delegated ratemaking authority to the Interstate Commerce Commission for the purpose of preventing discriminatory rate schedules, courts lack the power to order refunds to customers who allege that they have paid an unjust price for the services provided by the regulated entity).

We first expressly recognized the filed rate doctrine in *Schermer, 721 N.W.2d at 317*. We held in *Schermer* **[**15]** that "the filed rate doctrine applie[d] generally to rates filed with and approved by" the Minnesota Department of Commerce (DOC) and therefore barred a class action brought against an insurance company to recover a surcharge on homeowner's insurance rates. *Id.* The insurance company based the surcharge on the age of the insured dwellings' electrical systems. *Id. at 310*. Customers complained that the surcharge created a discriminatory rate schedule based on race, in violation of a Minnesota statute prohibiting unfair discrimination for insurance rates. *Id. at 309-10*. **[*43]** We pointed to the special expertise of agencies--their investigative capacities and experience with the insurance industry--to support the conclusion that "courts are ill-suited to second-guess" agency decisions regarding rate reasonableness. *Id. at 312*. We also acknowledged that the non-discrimination principle of the filed rate doctrine precluded relief for the *Schermer* plaintiffs because courts do not have power to retroactively reallocate rates. *Id. at 315* ("Even though the amount of the surcharges actually paid by class members can be calculated, an award of that amount as damages would require the court to speculate **[**16]** about whether the

[3] The district court declined to certify the third issue regarding whether the tariff is ambiguous.

DOC would have approved this lower, nonsurcharge rate as the reasonable and lawful rate."). Ultimately, we denied relief to the *Schermer* plaintiffs based on the comprehensive powers delegated from the legislature to the DOC to determine the reasonableness of insurance rates. *Id. at 317*.

Our analysis of the filed rate doctrine in *Schermer* applies with equal force to private claims challenging the reasonableness of a rate established for an electrical utility under the administration of the MPUC. We have described **HN6**[] the public regulation of utilities as "an intricate, ongoing process" subject to "an ever-widening set of consequences and adjustments." *Peoples Natural Gas Co. v. Minn. P.U.C., 369 N.W.2d 530, 535 (Minn. 1985)*. In *Schermer,* we concluded that the filed rate doctrine applies to the insurance industry even though "the insurance regulatory scheme is less stringent than, for example, the scheme for electrical, gas, and telephone utilities." *Schermer, 721 N.W.2d at 318*.

The legislature's broad grant of authority to the MPUC confirms what we implied in *Schermer* about the nature of the regulatory scheme for electrical utilities. **HN7**[] In Chapter 216B the Minnesota Legislature **[**17]** vested extensive power in the MPUC to set and prospectively regulate rates for Minnesota's public utility companies. For example, the electrical utility regulatory scheme requires all public utilities to file "schedules showing all rates, tolls, tariffs and charges," as well as all rules and contracts relating to rates and services, with the MPUC. *Minn. Stat. § 216B.05*. The MPUC further enjoys broad power to "ascertain and fix just and reasonable" policies for all public utilities. *Minn. Stat. § 216B.09, subds. 1* & *2* (2008). The MPUC actively regulates rate reasonableness, *Minn. Stat. § 216B.16* (2008), and may adjust rates according to its own investigations and judgment, *Minn. Stat. § 216B.23* (2008). Allowing courts to examine a utility rate structure that has been approved by the MPUC would infringe upon the authority delegated by the legislature to the MPUC, and would therefore run afoul of the filed rate doctrine.

Our decision that **HN8**[] the filed rate doctrine applies to challenges that require courts to evaluate the reasonableness of an MPUC-approved tariff does not answer the question, however, of whether the doctrine operates to bar the claims appellants bring in this case. In order **[**18]** to make that determination, we must examine the nature of appellants' claims. *See Richardson v. Standard Guar. Ins. Co., 371 N.J. Super. 449, 853 A.2d 955, 965 (N.J. Super. Ct. App. Div. 2004)* (noting that **HN9**[] "a determination as to the manner in which the filed rate doctrine impacts upon plaintiff's complaint requires an examination of the asserted causes of action"). For NSP's alleged breach of contract, the complaint seeks both injunctive relief (count II) and compensatory damages (count I). We turn next to an examination of whether the filed rate doctrine bars either or both of these claims.

A.

We look first at appellants' request for **[*44]** injunctive relief. [4] Appellants argue that they are not questioning the reasonableness of the filed rate; they are simply asking the court to enforce the clear terms of the tariff. NSP, in essence, argues that the filed rate doctrine bars even judicial enforcement of clear tariff language. NSP also argues that even if the court could, consistent with the filed rate doctrine, enforce clear language in the tariff, appellants' claim would still be barred because appellants are not seeking to enforce terms in the tariff, but are seeking to add terms to the tariff.

We agree with appellants that, **HN10**[] at least in the absence of a legislative decision to vest exclusive jurisdiction in the agency, the filed rate doctrine does not bar a court from considering a request to enforce the clear terms of an agency-approved tariff. [5] *See Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002)* (holding that the filed rate doctrine did not bar a class action suit against a telephone company for a faulty system of account-number assignments that resulted in charging customers for more accounts than actual

---

[4] Our discussion **[**19]** of appellants' claim for injunctive relief applies equally to the claim for specific performance of tariff obligations.

[5] Where the legislature provides for exclusive agency jurisdiction, the separation of powers principles that underlie the filed rate doctrine may bar the judiciary from acting. But we need not resolve that question in this case because, as discussed below, the legislature did not provide for exclusive jurisdiction in the MPUC.

phone lines because enforcement of the per-phone-line charge did not challenge the rate per phone line directly or indirectly); *Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 189 (D.D.C. 2001)* (holding that the filed rate doctrine did not bar the plaintiff's challenge to the telephone company's compliance with a tariff because the plaintiff did not seek to "alter the terms and conditions" or enforce an agreement separate from the tariff); *see also Richardson, 853 A.2d at 967* (holding that the filed rate doctrine **[**20]** did not bar a claim "that the insurer breached the policy as written"). The judiciary may act in such a case because ***HN11***[] claims that merely seek enforcement of an existing tariff do not question the reasonableness of rates charged under the tariff or require courts to determine the services to be provided by the regulated entity in exchange for those rates. Judicial enforcement of the clear terms of a tariff, therefore, cannot be said to infringe on discretionary authority vested in the agency or lead to discriminatory rate-making. The judiciary is simply asked to enforce the terms of a tariff as written, just as it would in an ordinary contract action. *See Penn Cent. Co. v. General Mills, Inc., 439 F.2d 1338, 1340 (8th Cir. 1971)* (applying principles of contract construction to tariff).

HN12[] Claims that seek to expand services beyond what is provided for in the tariff, **[**21]** on the other hand, indirectly challenge the reasonableness of the filed rates, and the filed rate doctrine bars the judiciary from considering such claims. *See, e.g., ICOM Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 222-23 (2d Cir. 2001)* (holding that the filed rate doctrine barred a state law breach of contract claim because "the relief sought in the plaintiff's state-law claims would conflict with the provisions of the filed tariff"). The United States Supreme Court has noted that "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Am. Tel. & Tel. Co. v. Cent. Off.* ***[*45]*** *Tel., 524 U.S. 214, 223, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)* (holding that claims based in breach of contract for a regulated entity's misrepresentation of the services promised in exchange for payment of the filed rate cannot be enforced through the courts). If the services requested in the litigation are not part of the original tariff obligations, the courts cannot, consistent with the filed rate doctrine, require performance of those services.

Whether the filed rate doctrine **[**22]** bars appellants' claim for injunctive relief therefore depends on whether appellants seek to enforce the language of the tariff, as appellants contend, or whether they seek to add to the terms of the tariff, as NSP contends. The procedural posture of this case requires that we construe the complaint in favor of appellants and leads us to conclude that the filed rate doctrine does not bar appellants' claim for injunctive relief.

NSP moved the district court to enter judgment on the pleadings under *Minn. R. Civ. P. 12.03*, asserting that the plaintiffs' complaint failed to state a claim upon which relief can be granted. ***HN13***[] When reviewing a *Rule 12.03* motion for judgment on the pleadings, we accept the factual allegations in the pleading under attack (here, the complaint) as true and we liberally construe the complaint and draw all inferences and assumptions in favor of the nonmoving party (appellants). *Lorix v. Crompton Corp., 736 N.W.2d 619, 623 (Minn. 2007)*; *see also State ex rel. City of Minneapolis, 238 Minn. 218, 223, 56 N.W.2d 564, 567 (1953)*; *Gostomezik v. Gostomezik, 191 Minn. 119, 120, 253 N.W. 376, 377 (1934)* (noting that a motion for judgment on the pleadings "will not be sustained **[**23]** if by a liberal construction the pleading can be held sufficient").

We have examined the tariff sections at issue in the complaint. These sections, especially when construed in the light most favorable to appellants, establish that NSP must maintain certain equipment. For example, the tariff requires that customers give NSP access to their premises "for the installation and *maintenance* of the necessary distribution lines, service conductors, and appurtenances." NSP Tariff § 5.5 (emphasis added). In addition, the service conductors that NSP installs, being the company's property that runs "from the distribution line to the point of connection with the customer's service entrance conductors . . . *will be maintained* by [NSP] at its own expense." *Id.* (emphasis added). Finally, the tariff provides under section 4.2, "[a]ll wiring and equipment on customer's side of the point of connection, *except metering equipment,* will be furnished, installed, and *maintained* at the customer's expense." NSP Tariff § 4.2 (emphasis added).

Appellants allege that NSP has breached its maintenance obligation. We cannot completely define the scope of NSP's maintenance obligation at this early stage of the litigation. **[**24]** But, as set forth above, when the tariff is construed in the light most favorable to appellants, NSP bears a duty to maintain some "metering equipment," and "service conductors," as well as "distribution lines" and components constituting "appurtenances." Construing the complaint liberally and making assumptions in favor of appellants' contentions, that equipment may include components found at points of connection. Given that the tariff requires that NSP maintain some equipment, we cannot conclude that there is no set of facts under which appellants could prevail on their claim that they are simply seeking to enforce the tariff as approved by MPUC. We therefore hold that the filed rate doctrine does not bar **[*46]** the district court from proceeding with appellants' claim for injunctive relief. [6]

B.

We turn next to consider appellants' claim for compensatory damages. ***HN14***[] If a complainant has paid the filed tariff rate, courts do not have power to order a refund of any portion of that rate. *Keogh, 260 U.S. at 163*. Such **[**27]** an attempt to measure damages with reference to the filed rate would interfere with the schedule of rates approved by the agency and would constitute a retroactive rate adjustment contrary to the separation of powers principles that underlie the filed rate doctrine. In addition, judicial interference with approved rates would create a discriminatory rate schedule among customers, with customers who receive damages effectively paying less than those who do not. For both of these reasons, courts have recognized that the filed rate doctrine bars claims for money damages to remedy breach of a provision in an agency-approved tariff. *Ark. La. Gas Co. v. Hall (Arkla), 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)* (holding that filed rate doctrine bars a consumer of a regulated product from paying any rate other than the filed rate); *see also Crumley v. Time Warner Cable, Inc., 554 F. Supp. 2d 933, 936-37 (D. Minn. 2008)* (concluding that the filed rate doctrine barred claim for damages and declaratory relief based on services not performed under settlement agreement because claim challenged rate reasonableness); *Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 739 (S.D. Iowa 2007)* (concluding that the **[**28]** filed rate doctrine barred claim for rescission on insurance policy because return for full amount of paid premiums would challenge the agency-approved rates).

[*47] We recognized these dual reasons for barring the claim for damages in *Schermer.* In that case, we determined that plaintiffs' claim that a surcharge on insurance rates for homes older than 39 years was unlawful would have caused the court to "necessarily interfere with the function delegated by the legislature to the [agency, without] the expertise [or] the mechanisms to deal with the entire rate structure or the adequacy of the return to the regulated entity." *721 N.W.2d at 315*. Our decision in *Schermer* also recognizes the potential for discriminatory rates in the event that courts assess damages for breach of agency-approved tariff provisions. We recognized that "if the court were to retroactively adjust the rates of only the Class members, it would inevitably disrupt the

---

[6] The concurrence contends that we should decline to answer the certified question as to the claim for injunctive relief because "[u]nder appellants' interpretation of the tariff, the claim for injunctive relief can go forward; [but] under NSP's interpretation of the tariff, the claim is barred by the filed rate doctrine." The question certified, however, assumes precisely the conflicting interpretations **[**25]** the concurrence cites, and asks whether the filed rate doctrine bars the court from proceeding when the tariff is open to those conflicting interpretations. This case therefore presents a situation appropriate for certification because "the record is developed to the point where the question is relevant and presents a substantive issue." *Thompson v. State, 284 Minn. 274, 277, 170 N.W.2d 101, 103 (1969)*. The certified question presented here is not similar to the question certified in the cases the concurrence cites where we determined that the question posed was not appropriate for certification. The result in *Staples v. Zinn, 302 Minn. 149, 152-53, 223 N.W.2d 415, 416-17 n.2 (1974)*, illustrates this difference. The question certified there was whether res judicata applies to a judgment entered in conciliation court. Because the judgments that had been entered in conciliation court had been vacated, the question certified was merely hypothetical and thus not appropriate for certification. *See also F. & H. Invest. Co. v. Sackman-Gilliland Corp., 305 Minn. 155, 158, 232 N.W.2d 769, 772 (1975)* ("[T]he question [of the constitutionality of the foreclosure by advertisement statute as applied] **[**26]** is not appropriate for certification because of the outstanding issues of fact which must necessarily be determined and, as well, because certified questions of law must be brought to this court after having been decided by the lower court. The mere denial of a motion for judgment because of a broad allegation of unconstitutionality is not the kind of question contemplated for certification within the rule."); *Thompson, 284 Minn. at 277, 170 N.W.2d at 103* (holding that certification was not appropriate because question presented was "abstract [and] unnecessarily general"); *Rude v. Rude, 283 Minn. 524, 525, 166 N.W.2d 719, 719 (1969)* (per curiam) (holding that question as to "the 'standard of care required by a plaintiff in the act of rescuing personal property'" would not be considered under appellate rule allowing for certified questions because the standard of care "has already been fully stated" (quoting *Henjum v. Bok, 261 Minn. 74, 77, 110 N.W.2d 461, 463 (1961))*).

balancing of interests achieved by the [agency] . . . because the court has no jurisdiction to reallocate rates among other customer classes . . . ." *Id.*

Appellants, in essence, argue that the rule we applied in *Schermer* does not control here because they are **[**29]** not seeking a "refund of approved rates." Rather, they are seeking compensatory damages based on the amount of the fair market value of inspection and maintenance services. The complaint seeks damages that would give appellants the benefit of their bargain and put them in the same position as they would have been if NSP had performed the inspection and maintenance services that the appellants claim NSP is obligated to perform under the tariff. Appellants allege that this measure of damages would not require calculation of damages based on rates, but based on the market value of the services not performed, and therefore would not create an effective rate refund.

But appellants essentially claim an overcharge for services actually performed under the tariff, compared to the services appellants claim the tariff required to be performed. These damages are measured as the difference between what the appellants actually paid for the performance of the service not received and the presumably lesser amount they would have paid had the services not been required in the tariff. *See, e.g.,* *Marcus v. AT&T Corp., 138 F.3d 46, 60-61 (2d Cir. 1998)* (stating that compensatory damages for fraud have **[**30]** the effect of creating a discounted rate where appellants based measure of damages on "best alternative rate available"); *H.J., Inc. v. Nw. Bell. Tel. Co., 954 F.2d 485, 492 (8th Cir. 1992)* (holding that damages for telephone company's wrongdoing challenge rate reasonableness and "fall[] squarely within the filed rate doctrine"). The measure of damages in this case is therefore inextricably linked to the filed rate. ***HN15***[] The rate-setting process is an intricate proceeding by which the agency takes into account many aspects of cost and capital. *Peoples Natural Gas Co., 369 N.W.2d at 535*. The costs incurred by NSP to render its services necessarily are accounted for when the agency engages in the procedure to set the rate. *Minn. Stat. § 216B.16, subd. 6* (2008) (explaining that the commission considers the consumer's need and cost for providing adequate, efficient, and reasonable services when exercising authority to set just and reasonable rates). The judiciary is not competent to engage in rate analysis, nor, consistent with separation of powers principles, should the courts encroach on this legislative function. [7]

[*48] Finally, awarding appellants money damages for services they claim NSP was required to perform, but that they did not receive, would result in appellants paying less for the electrical services than non-class members. As we recognized in *Schermer,* ***HN16***[] the filed rate doctrine is designed to protect against such discrimination between ratepayers. *721 N.W.2d at 315*.

Because appellants' claim for compensatory damages implicates the reasonableness of the agency-approved rate and would lead to discrimination between ratepayers, we hold that the filed rate doctrine bars this claim.

II.

---

[7] Some courts have recognized that the filed rate doctrine does not bar every **[**31]** claim for damages that must be measured with respect to the filed rate. For example, in *Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002)*, the Ninth Circuit concluded that the filed rate doctrine would not bar an award of damages in the amount that the customer was overcharged above the enforceable rate. *Brown* is distinguishable from this case because appellants do not allege that they paid more than the specific rate set forth in the tariff. Instead, appellants allege that their damages arise from a deficiency of services. Appellants' claim suggests that the filed rate is too high if, in fact, NSP did not perform the services that the tariff prescribes. A court may not entertain such a claim without implicating rate reasonableness under the filed rate doctrine. *See, e.g.,* *Wegoland Ltd., 27 F.3d at 21-22* (filed rate doctrine barred RICO action that would require the court to determine a reasonable rate absent the fraud because court was incompetent to evaluate rate reasonableness); *H.J., Inc., 954 F.2d at 493* (dismissing RICO action because damages sought to compensate for excessive service charges constituted a retroactive rate adjustment); *Taffet v. Southern Co., 967 F.2d 1483, 1491-92 (11th Cir. 1992)* **[**32]** (same); *Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1472 (5th Cir. 1987)* (en banc) (filed rate doctrine barred breach of contract claims seeking "relief based on a rate different from the filed rate," but did not bar fact question about the quantity of electrical power sold, where contract was between two utilities and not filed with agency).

Because of its conclusion that the filed rate doctrine bars both of appellants' claims, the court of appeals did not reach the primary jurisdiction doctrine question certified by the district court. As set forth above, we have concluded that the filed rate doctrine **[**33]** does not bar appellants' claim for injunctive relief. Accordingly, NSP's contention that the primary jurisdiction doctrine bars the claim for injunctive relief must be addressed.

Although we could remand consideration of the primary jurisdiction question to the court of appeals, the interests of judicial economy counsel that we address the question here. We thus turn to consider whether the district court should have referred appellants' injunctive relief claim to the MPUC under the primary jurisdiction doctrine. ***HN17***[] Because this question comes to us within the context of a certified question, we review the application of the primary jurisdiction doctrine using a de novo standard. *Watson by Hanson v. Metro. Transit Comm'n, 553 N.W.2d 406, 411 (Minn. 1996)*.

HN18[] The primary jurisdiction doctrine "is a judicially-created doctrine [that] is concerned with the orderly and sensible coordination of the work of agencies and courts." *State, by Pollution Control Agency v. United States Steel Corp., 307 Minn. 374, 380, 240 N.W.2d 316, 319 (1976)*. The doctrine seeks to strike a proper relationship between courts and agencies, especially if an issue before the court requires the particular competence and **[**34]** expertise of the agency. *City of Rochester v. People's Co-op. Power Ass'n, 483 N.W.2d 477, 480 (Minn. 1992)* (citing *United States v. W. Pac. R.R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956))*; *see also S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 751 (10th Cir. 2005)* (noting that primary **[*49]** jurisdiction doctrine promotes regulatory uniformity).

The United States Supreme Court recognizes the primary jurisdiction doctrine as a prudential measure under which a court acknowledges that, even if the court may review the claims before it, the claims involve some issues that are better suited to the special competence and expertise of a regulating agency. *Reiter v. Cooper, 507 U.S. 258, 268, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)*. Putting off the judicial proceedings for a time allows the parties to seek resolution of those issues in the agency before resuming litigation in court. *Id.* In such a situation, the district court has discretion to determine whether to stay the proceeding or dismiss the claims without prejudice. Dismissal may be appropriate if the parties would not be unfairly disadvantaged. *Id.*

HN19[] Courts have recognized several factors in assessing whether to apply the doctrine. We have acknowledged at least two **[**35]** factors: (1) whether the legislature explicitly granted the agency exclusive jurisdiction; and (2) whether the issues raised are "inherently judicial." *City of Rochester, 483 N.W.2d at 480*. [8] The district court applied these two factors in determining that the primary jurisdiction doctrine did not "bar[]" appellants' action.

Turning to the exclusive jurisdiction question, NSP argues that the comprehensive powers for ratemaking and regulation delegated to the MPUC under Minn. Stat. ch. 216B amount to exclusive jurisdiction in the agency. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 222-23 (Tex. 2002)* **[**36]** (noting that a "pervasive regulatory scheme" can create exclusive jurisdiction, but finding that the statute at issue explicitly provided for "exclusive, original jurisdiction" in the agency). But NSP points to no statutory provision, nor do we find one, that explicitly confers exclusive jurisdiction on the agency over tariff interpretation and enforcement. This silence weighs in favor of judicial jurisdiction. *See Abraham v. County of Hennepin, 639 N.W.2d 342, 346-47 (Minn. 2004)* ("Ordinarily, unless a statute provides that its remedy is exclusive, a party should not be prevented from bringing concurrent claims."); *City of Rochester, 483 N.W.2d at 480* ("The [primary jurisdiction] doctrine is inapplicable if the issues raised are 'inherently judicial,' unless the legislature has *explicitly granted* exclusive jurisdiction to the administrative body.'" (quoting *Manchester Terminal Corp. v. Tex. TX TX Marine Transp., Inc.,*

---

[8] Other courts have examined the doctrine using these factors: (1) the traditional experience of judges; (2) agency expertise and prerogative for discretion; (3) the likelihood that the court's ruling will differ from the agency and erode uniformity; and (4) whether the parties have already applied for agency adjudication. *AT&T v. MCI Commc'ns Corp., 837 F. Supp. 13, 16 (D.D.C. 1993)*; *see also MCI Commc'ns Corp. v. AT&T, 496 F.2d 214, 223 (3d Cir. 1974)* (assuming that questions raised were "within the ordinary experience of the judiciary," but staying the action under the primary jurisdiction doctrine for additional prudential considerations).

781 S.W.2d 646, 649 (Tex. Ct. App. 1989) (emphasis added))). We agree with the district court that the Minnesota Legislature has not vested in the MPUC exclusive jurisdiction over claims related to the tariffs of regulated utilities.

But this determination is not dispositive **[**37]** for purposes of the primary jurisdiction doctrine. We must still examine whether issues raised in the case are "inherently judicial." In making this determination, we look to whether the case "'rais[es] issues of fact not within the conventional experience of judges," or whether the case "'require[s] the exercise of administrative **[*50]** discretion.'" *State, by Pollution Control Agency, 307 Minn. at 380, 240 N.W.2d at 319* (quoting *Far E. Conference v. United States, 342 U.S. 570, 574-75, 72 S. Ct. 492, 96 L. Ed. 576 (1952))*. Apparently because this case sounded in breach of contract, the district court concluded that the issues raised in the case did not "require any 'special competence,'" and therefore were inherently judicial. We disagree.

Appellants contend that tariff interpretation is as inherently judicial as contract interpretation because the tariff language plainly and unambiguously creates a duty for NSP to inspect and maintain "the point of connection." *See* *Minn.-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 303 (Minn. 1980)* (concluding that the court is competent to adjudicate whether a contract between a regulated TV station and a nonprofit organization violates state ***antitrust law***). **[**38]** We agree that the court is competent to enforce duties plainly described in the tariff. But in this action, as the district court found, the tariff is open to interpretation. To interpret the tariff and therefore define NSP's obligations, the court must construe technical terms relating to particular electrical utility equipment, such as "point of connection," "appurtenances," "meter box," and "service conductors." Where, as in this case, the judiciary's role in construing the tariff is complicated because the dispositive terms "are used in a peculiar or technical sense," and "extrinsic evidence is necessary to determine their meaning or proper application," the primary jurisdiction doctrine counsels referral to the agency. *W. Pac. R.R. Co., 352 U.S. at 66*.

Several courts have referred matters to administrative agencies in precisely such a circumstance. For example, in *Western Pacific,* the Supreme Court was presented with a tariff that would have required the Court to determine whether the railroad shipping rates for "incendiary bombs" included steel casings filled with napalm gel. *Id. at 60-61*. The Court acknowledged that tariff construction is appropriate in some cases, but nevertheless **[**39]** referred the matter to the agency for a definition of "incendiary bombs." *Id. at 66*. The rate set for shipping the "incendiary bombs," according to the Court, had been determined after a cost-allocation analysis that considered safety measures for "handling, supervising, and insuring an inherently dangerous cargo." *Id.* Because the agency was familiar with the factors that informed the decision to create the particular rate for shipping the particular freight in question, the Court concluded that the agency would be better suited to rule on the applicable rate. *Id. at 67*. The Court explained that, "where . . . the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass on them." *Id. at 69*.

The Eighth Circuit similarly applied the primary jurisdiction doctrine to invoke agency expertise for construction of a telephone company tariff. *Access Telecomm. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998)*. The company argued that when more than 6,000 feet of wire were required to provide the requested service, the **[**40]** company had to use a different set of wires with the result of bumping the customer into a more costly category of rates. *Id.* The tariff, however, did not provide for a length of the wire that would limit the application of the less-expensive-rate category. *Id.* To determine whether the 6,000-foot limitation was reasonable, the court referred the matter to the agency under the primary jurisdiction doctrine in order to take advantage of agency expertise **[*51]** and experience with such technical items as "circuit designs, signal transmissions, noise attenuation, and echo return loss." *Id. at 609*. This deference was appropriate, the court held, even though the claim alleged mere violation of the tariff as written, because of the technical nature of the questions before the court. *Id. at 608-09*.

The Third Circuit considered an action brought by MCI Communications Corporation against AT&T Company in which MCI alleged that AT&T was responsible for providing certain connection services mandated by the Federal Communications Commission pursuant to the filed tariff. *MCI Commc'ns Corp. v. AT&T, 496 F.2d 214, 215-16 (3d Cir. 1974)*. The court of appeals vacated the preliminary injunction issued by the **[**41]** district court that ordered AT&T to provide these services because agency expertise was needed to interpret precisely which interconnection services were owed under the FCC order and because an action to resolve the same issues was pending before the agency. *Id. at 221*. The court found that, in addition to uncertainty about the scope of the duties, the nature of the issue involved a "comparative evaluation of complex technical, economic, and policy factors, as well as a consideration of the public interest" that the agency was in the best position to handle. *Id. at 222*.

Like the claims in all of these cases, appellants' claim for injunctive relief requires technical knowledge and experience that makes the tariff construction issue in this case best suited for a first consideration by the MPUC. Because the scope of NSP's services is dependent upon technical, undefined terms in the tariff, agency expertise will provide much-needed perspective for the construction of the NSP tariff. Moreover, the MPUC is in the best position to consider these questions, as the legislature entrusted the commission with setting the rates based on the scope of the services NSP was to perform. We therefore **[**42]** hold that the injunctive relief claim should be referred first to the agency under the primary jurisdiction doctrine.

Upon referral of this claim to the agency, the court has discretion to dismiss the action or simply stay it. *See* *Reiter, 507 U.S. at 268-69*. A stay is warranted where, after appropriate issues have been referred to the proper agency, claims remain over which the court retains jurisdiction. *Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 302, 305-06, 93 S. Ct. 573, 34 L. Ed. 2d 525 (1973)* (affirming court of appeal's stay of antitrust action predicated on violation of a Commodity Exchange Commission rule so that the commission could first decide whether its rule was violated before the court would address the immunity question raised under the antitrust statute). Courts may also stay litigation where a party would find great difficulty in resurrecting a valid claim on account of a statute of limitations that might expire while the parties pursue proceedings in the agency. *Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 222-23, 383 U.S. 932, 86 S. Ct. 781, 15 L. Ed. 2d 709 (1966)* (reversing the court of appeal's dismissal of the action and ordering a stay because the treble damages sought under the antitrust statute would likely be barred **[**43]** by the statute of limitations before the commission resolved the referred issue and distinguishing a claim seeking injunctive relief based on continuing conduct that would not be barred); *Laveson v. Trans World Airlines, 471 F.2d 76, 83 (3d Cir. 1972)* (vacating district court dismissal and ordering stay of proceedings because the antitrust cause of action seeking treble damages would be subject to a four-year statute of **[*52]** limitations which could expire before the agency acted on the claim).

By contrast, courts may dismiss the litigation without prejudice if all claims turn on one central claim that will be resolved by the agency. *Total Telecomm. Servs. v. AT&T Co., 919 F. Supp. 472, 483-84 (D.D.C.)*, *aff'd, 321 U.S. App. D.C. 309, 99 F.3d 448 (D.C. Cir. 1996)* (finding dismissal proper where central claims alleging violation of the Communications Act now referred to the agency would be dispositive of other claims based in breach of contract, intentional interference with business relations, and quantum meruit). Likewise, a court will not abuse its discretion by dismissing litigation that would not be barred from future judicial consideration by a statute of limitations. *Far E. Conference v. United States, 342 U.S. 570, 577, 72 S. Ct. 492, 96 L. Ed. 576 (1952)* **[**44]** (concluding that dismissal was proper and a stay was not necessary for a claim seeking to enjoin violations of ***antitrust law*** because the claim could be appealed to the courts after the agency proceeding and any future claim could be "easily initiated later"); *Access Telecomm., 137 F.3d at 609* (affirming district court's dismissal of suit because the statute of limitations that would have applied to the action in the district court was not implicated in light of the agency's statutory timeline for addressing the complaint).

The decision to stay or dismiss without prejudice, however, is at the discretion of the district court. *See* *Access Telecomm., 137 F.3d at 609*. The parties did not argue this issue to the district court, nor was the issue briefed to the court of appeals or to this court. We therefore remand the question of whether the injunctive relief claim should be dismissed without prejudice or stayed to the district court for a disposition consistent with this opinion.

IV.

We turn finally to consider the court of appeals' dismissal of claims asserted on behalf of North Dakota and South Dakota residents. *Hoffman, 743 N.W.2d at 757*. The district court in this case did not certify **[**45]** to the court of appeals the question of whether to dismiss the out-of-state claims. This issue therefore was not properly before the court of appeals. We reverse the court of appeals ruling and reinstate the claims of the North Dakota and South Dakota residents. We remand those claims to the district court for disposition consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Concur by: DIETZEN

Concur

DIETZEN, Justice (concurring).

I agree with the majority's conclusion that appellants' claim for compensatory damages is barred under the filed rate doctrine, but I disagree that appellants' claim for injunctive relief is not barred under the filed rate doctrine. Because I conclude that the relevant provisions of the tariff are ambiguous, I would decline to answer the certified question as to whether the filed rate doctrine bars the claim for injunctive relief. I would simply refer appellants' claim for injunctive relief to the Minnesota Public Utilities Commission (MPUC) to resolve the ambiguity in the tariff.

Like the majority, I conclude that the filed rate doctrine does not bar a claim for injunctive relief that merely seeks to enforce the terms of an existing tariff. *See, e.g.,* ***[**46]*** *Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002)*; *Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 189 (D.D.C. 2001)*. **[*53]** Therefore, the dispositive issue here is whether appellants merely are seeking to enforce the terms of the tariff or whether they are seeking to add obligations to the tariff. The resolution of this issue depends on the scope of NSP's maintenance obligation as set forth in the tariff, which requires interpretation of the tariff.

Courts typically interpret tariffs using the same principles as contract interpretation. *See* *Carrier Serv., Inc. v. Boise Cascade Corp., 795 F.2d 640, 642 (8th Cir. 1986)*. Unless ambiguous, the construction and effect of a contract constitutes a question of law. *Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003)*. The determination of whether a contract is ambiguous also constitutes a question of law. *Id.* "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998)*. When material contractual provisions are ambiguous, judgment on the pleadings is improper. *See, e.g.,* *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 178 (2d Cir. 2004)*; **[**47]** *cf.* *In re Turners Crossroad Dev. Co., 277 N.W.2d 364, 368 (Minn. 1979)* (stating that if contractual terms at issue are ambiguous or uncertain, summary judgment is not appropriate).

The purpose of certification is to provide answers to important and doubtful legal questions. *See* *Hawkins v. Thorp Credit & Thrift Co., 441 N.W.2d 470, 472 (Minn. 1989)* (explaining that the district court "must specify the precise legal question certified and make specific findings of fact" relevant to the certified question). Certification should not be used "to secure an advisory opinion." *Rude v. Rude, 283 Minn. 524, 525, 166 N.W.2d 719, 719 (1969)* (per curiam). We consistently have declined to answer certified questions that are hypothetical or based on insufficient facts. *Zobel & Dahl Constr. v. Crotty, 356 N.W.2d 42, 47 (Minn. 1984)*; *see, e.g.,* *F. & H. Inv. Co. v. Sackman-Gilliland Corp., 305 Minn. 155, 158, 232 N.W.2d 769, 772 (1975)*; *Staples v. Zinn, 302 Minn. 149, 152-53, 223 N.W.2d 415, 417-18 (1974)*.

The certified question here is: "Does the filed rate doctrine bar [appellants'] claims?" In considering whether the filed rate doctrine bars appellants' claim for injunctive relief, the majority does **[**48]** not consider the threshold question of whether the tariff is ambiguous. Instead, the majority focuses on the standard of review for judgment on the pleadings. Construing the tariff provisions "in the light most favorable to appellants," the majority concludes that "NSP must maintain certain equipment" and, therefore, that the filed rate doctrine does not bar the claim for injunctive relief. [9]

---

[9] In reviewing a ruling on a motion for judgment on the pleadings, we accept appellants' *factual* allegations in the pleading as true. *Lorix v. Crompton Corp., 736 N.W.2d 619, 623 (Minn. 2007)*. We are not required to accept appellants' allegations with respect to the construction of the tariff. *See* *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995)* (but

I disagree with the analysis of the majority. At this preliminary stage of the proceedings, appellants' allegations in the complaint are only allegations. Because appellants and NSP offer different, reasonable interpretations of the tariff, I conclude that the tariff is ambiguous. **[**49]** In fact, in the section on primary jurisdiction, the majority agrees that the tariff is ambiguous and determines that the scope of NSP's obligations under the tariff "is best suited for a first consideration by the MPUC." As a result of the ambiguity, the **[*54]** certified question of whether the claim for injunctive relief is barred by the filed rate doctrine is not ripe for determination by this court. I agree with the majority that the ambiguity in the tariff must first be resolved by the MPUC.

Under appellants' interpretation of the tariff, the claim for injunctive relief can go forward; under NSP's interpretation, the claim is barred by the filed rate doctrine. Consequently, the answer to the certified question depends on which of the two reasonable interpretations of the tariff will prevail. The majority attempts to side-step this problem by assuming the allegations in the complaint are true. But appellants' allegations ask this court to assume not only that the facts of the complaint are true, but also that the proposed interpretation of the ambiguous tariff will be the one adopted by the MPUC. Essentially, appellants seek an advisory opinion on whether the claim is barred by the filed **[**50]** rate doctrine if the MPUC accepts appellants' proposed interpretation of the tariff. In short, the majority goes too far in answering the certified question based on appellants' allegations in the complaint. *See* *F. & H. Inv. Co., 305 Minn. at 158, 232 N.W.2d at 772* (stating that the court will not consider a certified question that "'might result in one answer to one set of circumstances but another answer to a different set of circumstances.'" (quoting *Thompson v. State, 284 Minn. 274, 277, 170 N.W.2d 101, 103 (1969))*). Because the tariff is ambiguous, I would decline to answer the certified question and refer the interpretation of the tariff to the MPUC.

End of Document

---

noting that courts "strive to resolve any contractual ambiguities" in favor of the nonmoving party in reviewing the dismissal of a complaint).

[Garrard v. Gateway Fin. Servs.](#)

Supreme Court of Utah

April 17, 2009, Filed

No. 20070968

Reporter

207 P.3d 1227 *; 2009 Utah LEXIS 62 **; 2009 UT 22; 628 Utah Adv. Rep. 7; 2009-1 Trade Cas. (CCH) P76,571

Ray William Garrard, Plaintiff and Appellant, v. Gateway Financial Services, Inc.; Civil Process Services & Investigations, LLC; and Granite Furniture Company, Defendants and Appellees.

Subsequent History: Released for Publication June 9, 2009.

Rehearing denied by *Gerrard v. Gateway Fin., 2009 Utah LEXIS 111 (Utah, Apr. 17, 2009)*

Prior History: [1]** Third District, Salt Lake. The Honorable Deno G. Himonas. No. 040912063.

Core Terms

unfair, Practices, consumers, Federal Trade Commission Act, commerce, discriminatory, Cigarette, deceptive, civil process, anticompetitive, unambiguous, financing

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN1[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The Unfair Practices Act (Utah Act), codified in *Utah Code Ann. §§ 13-5-1 to -18* (2005), safeguards the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. *Utah Code Ann. § 13-5-17* (2005). Similarly, the Federal Trade Commission Act (federal Act) declares unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce unlawful. *15 U.S.C.S. § 45(a)(1)*. To determine whether an act is unfair or deceptive under the federal Act, the Cigarette Rule provides a three-part test that considers whether the act is unlawful or violates public policy, whether it is immoral or unethical, and whether it injures consumers. The Utah Act is unambiguous in its focus on competition and monopolistic behavior; therefore, the Supreme Court of Utah does not look to outside sources to define the practices the Utah Act would deem unfair or deceptive.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] Judgment as Matter of Law, Directed Verdicts

In reviewing the district court's grant of a directed verdict, the Supreme Court of Utah reviews the facts in the light most favorable to the losing party.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN3[] Trade Practices & Unfair Competition, State Regulation

The Utah Unfair Practice Act (Act), *Utah Code Ann. §§ 13-5-1 to -18* (2005), makes unlawful unfair methods of competition in commerce or trade. *Utah Code Ann. § 13-5-2.5(1)* (2005). Specifically, the Act prohibits anticompetitive discriminatory pricing and advertising goods the retailer is not prepared to supply. *Utah Code Ann. §§ 13-5-3*, -8 (2005). Additionally, the Act gives the Utah Division of Consumer Protection authority to prevent the use of unfair methods of competition and to enforce the prohibitions of the chapter through agency adjudications. *Utah Code Ann. § 13-5-2.5(2)-(3)* (2005).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN4[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

The Federal Trade Commission uses the Cigarette Rule, which was originally adopted to regulate unfair or deceptive advertising or labeling of cigarettes, to determine whether an act is unfair under the Federal Trade Commission Act. Under the rule, the federal agency considers three factors in determining whether an act is unfair or discriminatory: (1) whether the act offends public policy as established by statute, common law, or otherwise; (2) whether the act is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers or competitors.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN5[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The Federal Trade Commission Act (federal Act) is broad in scope and can allow the Federal Trade Commission to prohibit practices that are not per se ***antitrust law*** violations. There is a critical difference, however, between the language in the Federal Trade Commission Act and Utah's Unfair Practices Act, *Utah Code Ann. §§ 13-5-1 to -18* (2005). The federal Act makes unlawful unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. *15 U.S.C.S. § 45(a)(1)*. The addition of this language indicates that the scope of the federal Act extends beyond anticompetitive practices.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] **Trade Practices & Unfair Competition, State Regulation**

In contrast to the Federal Trade Commission Act, Utah's Unfair Practices Act (Act), *Utah Code Ann. §§ 13-5-1 to -18* (2005), makes unlawful only unfair methods of competition in commerce. *Utah Code Ann. § 13-5-2.5(1)* (2005). Lacking an independent reference to unfair acts or practices, there is no indication that the Utah Legislature intended the Act to reach any practices beyond anticompetitive behavior.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN7[] **Trade Practices & Unfair Competition, State Regulation**

See *Utah Code Ann. § 13-5-17* (2005).

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN8[] **Trade Practices & Unfair Competition, State Regulation**

While *Utah Code Ann. § 13-5-17* (2005) does indicate the Utah Division of Consumer Protection may prohibit unfair and discriminatory practices, the phrase is modified by a reference to preserving competition. Thus, it is unambiguous that the Utah Legislature intended the Utah Unfair Practices Act, *Utah Code Ann. §§ 13-5-1 to -18* (2005), to apply only to anticompetitive behavior.

Governments > Legislation > Interpretation

HN9[] **Legislation, Interpretation**

Where statutory language is plain and unambiguous, the Supreme Court of Utah will not look beyond the same to divine legislative intent. Rather, the Supreme Court of Utah is guided by the rule that a statute should generally be construed according to its plain language.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN10[] **Trade Practices & Unfair Competition, State Regulation**

The Unfair Practices Act (Act), *Utah Code Ann. §§ 13-5-1 to -18* (2005), makes unlawful only unfair methods of competition. The Act contains no language prohibiting unfair or deceptive practices in commerce.

Counsel: James E. Magleby, Jason A. McNeill, Christopher M. Von Maack, Salt Lake City, for plaintiff.

Reed R. Braithwaite, St. George,John D. Richards, Salt Lake City, for defendant.

Judges: DURHAM, Chief Justice. Associate Chief Justice Durrant, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

Opinion by: DURHAM

Opinion

[*1228] *DURHAM, Chief Justice*:

INTRODUCTION

The Utah Legislature enacted ***HN1***[] the Unfair Practices Act, codified in *Utah Code sections 13-5-1 to -18*, to "safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." *Utah Code Ann. § 13-5-17* (2005). Similarly, the Federal Trade Commission Act declares "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" unlawful. *15 U.S.C. § 45(a)(1) (2006)*. To determine whether an act is unfair or deceptive under the federal Act, the United States Supreme Court adopted what is now known as the Cigarette Rule--a three-part test that considers **[**2]** whether the act is unlawful or violates public policy, whether it is immoral or unethical, and whether it injures consumers. Ray Garrard, the appellant in this matter, asks us to incorporate this test into the Utah Unfair Practices Act. We decline to do so. The Utah Act is unambiguous in its focus on competition and monopolistic behavior; therefore, we do not look to outside sources to define the practices the Utah Act would deem unfair or deceptive.

BACKGROUND

HN2[] In reviewing the district court's grant of a directed verdict, we review the facts in the light most favorable to the losing party. *Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, P 10, 104 P.3d 1185*.

In July 1999, Ray and Marva Garrard purchased a bedroom set for $ 2,419.95 from Granite Furniture Company. On the advice of a sales associate, they agreed to a six-month financing agreement. The Garrards understood this financing agreement to waive any finance charges if the balance of the account was paid within six months. However, the contract required monthly minimum payments, which the Garrards failed to make. Instead, the Garrards made two sporadic payments and then paid the remaining amount due on January 11, 2000, believing **[**3]** the six-month financing period to expire on January 24.

On March 5, 2004, the Garrards received a letter with an enclosed copy of a default judgment of $ 897.52 for unpaid interest and finance charges from Gateway Financial Services, Inc. (Gateway), a collection agency. Prior to this letter, the Garrards were unaware that any legal action had been taken against them. The Garrards immediately contacted legal counsel to resolve the matter. A few days later, the Garrards' legal counsel requested that Gateway provide proof of service for a small claims affidavit delivered to the Garrards. Gateway responded the same day by faxing a proof of service, which indicated that a service processor from Civil Process Services & Investigations, **[*1229]** LLC (Civil Process Services) had personally served Marva Garrard on November 28, 2003 at 12:10 p.m. This was impossible; Marva Garrard passed away November 13, 2002, over a year before the reported date of service. In response to Mr. Garrard's challenge to the proof of service, on March 26, 2004, Gateway produced another proof of service. This second proof of service indicated that a service processor had instead personally served Ray Garrard on November 28, **[**4]** 2003 at 12:10 p.m. Again, this was impossible; Mr. Garrard was not home at that time. Gateway eventually agreed to remove the judgment and an order vacating the judgment was entered on September 30, 2004.

Garrard sued Civil Process Services [1] to recover treble damages under the Unfair Practices Act arguing that falsifying the civil process documents constituted unfair competition because it violated public policy, was unethical and immoral, and caused substantial injury to consumers. *See* *Utah Code Ann. § 13-5-14* (2005). Garrard also sued Granite Furniture Company for violating the Unfair Practices Act. The matter was tried to a jury. Following the close of evidence, Civil Process Services and Granite Furniture Company moved for a directed verdict on the basis that Garrard failed to prove that they had violated the Unfair Practices Act. The district court granted the motion for directed verdict, and Garrard now appeals. [2] We have jurisdiction pursuant to *Utah Code section 78A-3-102(3)(j)*. We review the trial court's grant of a directed verdict for correctness. *Goebel, 2004 UT 80, P 10, 104 P.3d 1185*.

ANALYSIS

HN3[] The Utah Unfair Practice Act makes unlawful "[u]nfair methods of competition in commerce or trade." *Utah Code Ann. § 13-5-2.5(1)* (2005). Specifically, the Act prohibits anticompetitive discriminatory pricing and advertising goods the retailer is not prepared to supply. *See id*. *§§ 13-5-3*, *-8*. Additionally, the Act gives the Division of Consumer Protection authority to prevent the use of unfair methods of competition and to enforce the prohibitions of the chapter through agency adjudications. *Id*. *§ 13-5-2.5(2)-(3)*.

Mr. Garrard urges us to expand the reach of the Unfair Practice Act beyond anticompetitive methods to unfair and discriminatory practices as defined by the federal Cigarette Rule. ***HN4***[] The Federal Trade Commission uses the Cigarette Rule, which was originally adopted to regulate unfair or deceptive advertising or labeling of cigarettes, to determine whether an act is unfair under the federal Act. *FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)* [hereinafter *Sperry*]. Under the rule, the federal agency considers three factors in determining whether an act is unfair or discriminatory: (1) whether the act offends public **[**6]** policy as established by statute, common law, or otherwise; (2) whether the act is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers or competitors. *Id*. The United States Supreme Court acknowledged and implicitly approved of the Cigarette Rule in *Sperry. Id. at 244*.

Utah's Unfair Practices Act, Garrard argues, is so similar to the Federal Trade Commission Act that this court should interpret it in the same manner as the United States Supreme Court interpreted the federal Act in *Sperry*. In *Sperry*, the Court found that ***HN5***[] the Federal Trade Commission Act was broad in scope and could allow the Federal Trade Commission to prohibit practices that are not per se ***antitrust law*** violations. *See id*. There is a critical difference, however, between the language in the Federal Trade Commission Act, as interpreted by *Sperry*, and Utah's Unfair Practices Act. The federal Act makes unlawful "[u]nfair methods of competition in or affecting commerce, *and unfair or deceptive acts or practices in or affecting commerce*." *15 U.S.C. § 45(a)(1) (2006)*(emphasis added). In reviewing the scope of the Federal Trade Commission Act, the *Sperry* court found that **[**7]** the addition of this language indicated that the scope of the Act extended beyond anticompetitive practices. **[*1230]** *Sperry, 405 U.S. at 244*. In fact, the Court noted, the House Report for the amendment explicitly said so.

[1] Garrard also sued Gateway. Gateway settled and was dismissed as a party to the suit.

[2] Granite Furniture **[**5]** Company did not participate in this appeal.

Id. The Report summarized Congress's purpose for the amendment as "mak[ing] the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." *Id*.

HN6[] In contrast to the Federal Trade Commission Act, Utah's Unfair Practices Act makes unlawful only "[u]nfair methods of competition in commerce." *Utah Code Ann. § 13-5-2.5(1)*. Lacking an independent reference to unfair acts or practices, there is no indication that the Utah Legislature intended the Act to reach any practices beyond anticompetitive behavior.

Garrard argues that the legislature did intend the Act to have a broader scope and points to the purpose stated in *Utah Code section 13-5-17* as proof. This section states:

> ***HN7***[] The Legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, *by prohibiting unfair* ***[**8]*** *and discriminatory practices by which fair and honest competition is destroyed or prevented*. This act shall be liberally construed that its beneficial purposes may be subserved.

Utah Code Ann. § 13-5-17 (emphasis added).

HN8[] While this section does indicate the Division of Consumer Protection may prohibit unfair and discriminatory practices, the phrase is modified by a reference to preserving competition. Thus, we find it unambiguous that the legislature intended the Act to apply only to anticompetitive behavior. Garrard urges us to look to the authority of our sister states on this subject, some of whom have adopted the Cigarette Rule under their statutes, usually in reliance on expansive language similar to that contained in the Federal Trade Commission Act. Because the language of this statute is unambiguous, we will not do so. *Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989)* (***HN9***[] "Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather, we are guided by the rule that a statute should generally be construed according to its plain language."). For this same reason, we do not look to the language of other Acts under **[**9]** the same title, such as the Consumer Sales Practices Act, or administrative rules adopted pursuant to these additional Acts to interpret the plain language of the Unfair Practices Act.

Accordingly, we hold that ***HN10***[] the Unfair Practices Act makes unlawful only unfair methods of competition. The Act contains no language prohibiting unfair or deceptive practices in commerce, and therefore we decline to adopt the reasoning of the Supreme Court in *Sperry*. Further, because the language of the Act unambiguously addresses unfair methods that impact fair competition, we do not look to the jurisprudence of our sister states to interpret the statute. The district court's decision is affirmed.

We note that in interpreting the current statute, we make no judgment on the wisdom of a legislative expansion of the Unfair Practices Act to protect consumers as well as commercial competitors. The legislature has already adopted an extensive framework of consumer protection laws in other areas, and there are numerous public policy reasons for extending the Unfair Practices Act to also protect consumers. We leave it to the legislature to consider those policy concerns.

Associate Chief Justice Durrant, Justice **[**10]** Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

[Logo: LexisNexis]

Bonanno v. Quizno's Franchise Co., LLC

United States District Court for the District of Colorado

April 20, 2009, Decided

Civil Action No. 06-cv-02358-CMA-KLM

Reporter

2009 U.S. Dist. LEXIS 37702 *; 2009 WL 1068744

RAYMOND BONANNO, ANTHONY BONANNO, ROBERT PETER, RAJAN DESAI, NISHA DESAI, ELISA WHITEHALL, DAJIT PARMAR, MANJIT PARMAR, IRVING BROTHMAN, JOANNE KJOLSEN, KRISTI LEWIS. MEGAN MAKKI, MUKAND MALHI, PREETINDER MALHI, ALI NAQBI, ANDRZEJ SLIWOWSKI, RICHARD VARRADO, and BARTON CLATT, Plaintiffs, v. THE QUIZNO'S FRANCHISE COMPANY, LLC, QUIZNO'S FRANCHISING, LLC, QUIZNO'S FRANCHISING II, LLC, QFA ROYALTIES, LLC., RICHARD E. SCHADEN, RICHARD F. SCHADEN, and TQCS LLC, Defendants.

Subsequent History: Related proceeding at *Siemer v. Quizno's Franchise Co. LLC, 2010 U.S. Dist. LEXIS 82433 (N.D. Ill., Aug. 13, 2010)*

Related proceeding at *Horowitz v. QFA Royalties, 2012 U.S. Dist. LEXIS 178456 (S.D.N.Y., Sept. 27, 2012)*

Prior History: *Bonanno v. Quizno's Franchise Co. LLC, 255 F.R.D. 550, 2009 U.S. Dist. LEXIS 5908 (D. Colo., 2009)*

Core Terms

class action, franchisees, unconscionable, franchise agreement, parties, franchise, restaurant, arbitration, Plaintiffs', courts, class certification, cases, sales, district court, antitrust, signing, terminate, rights, unfair, target area, open house, contractual, consumer, lawsuits, arbitration clause, anti trust law, real estate, advertisements, circumstances, unenforceable

LexisNexis® Headnotes

Civil Procedure > Parties > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN1[ ] **Civil Procedure, Parties**

Typically, named parties conduct litigation on behalf of themselves; a class action is an exception to this rule.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN2[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23 governs class certification and district courts have discretion to certify or deny certification of a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Class Actions, Certification of Classes**

In order to certify a class, the class proponent must clearly satisfy four prerequisites contained in *Rule 23(a)*: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

HN4[] **Class Actions, Prerequisites for Class Action**

Only if a class proponent can satisfy the prerequisites of *Fed. R. Civ. P. 23(a)*, does the court need to determine if the matter falls within one of the categories identified in *Rule 23(b)*. *Fed. R. Civ. P. 23(b)*. Courts have held that the same rigorous analysis under *Rule 23(a)* also applies under the *Rule 23(b)* categories.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] **Class Actions, Certification of Classes**

In ruling on class certification, district courts should not delve deeply into the merits of the parties' claims or defenses. Thus, courts should analyze whether the class proponent has met its burden based on the substantive allegations in the complaint and evidence submitted along with the motion for class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN6[] **Class Actions, Certification of Classes**

As to *Fed. R. Civ. P. 23*, the Tenth Circuit Court of Appeals falls into the liberal interpretation camp and has held that courts in the Tenth Circuit should err in favor of certifying a class.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Governments > Courts > Rule Application & Interpretation

HN7[] Special Proceedings, Class Actions

Fed. R. Civ. P. 23 clearly remains a procedural tool, not a substantive or jurisdictional right.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Contracts Law > Contract Conditions & Provisions > General Overview

HN8[] Class Actions, Certification of Classes

Class certification is a procedural mechanism, not a substantive right. As such, the United States District Court for the District of Colorado believes that a lesser level of scrutiny is applicable to an agreement by a party not to proceed as a class, as compared to the level of scrutiny that the court would apply to a similar agreement purporting to waive a substantive right, such as the constitutional right to a jury trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Contracts Law > Contract Conditions & Provisions > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN9[] Class Actions, Certification of Classes

The ability to proceed as a class is not akin to the right to a jury trial (or any other substantive or Constitutional right, for that matter). Because a jury trial is guaranteed by the Constitution, courts do not have discretion with respect to deciding whether or not to allow a trial by jury--that is a decision made by the parties. Notably, the history of class litigation reflects that the courts, not the parties, determine whether a suit should proceed on a class basis. Courts make this decision as a matter of judicial efficiency, not out of an obligation to uphold the parties' substantive rights, a fact that the U.S. Supreme Court continues to reiterate. In short, plaintiffs do not have a substantive "right" to proceed as a class. Thus, a jury trial waiver provision is not analogous to a class action bar provision.

Contracts Law > Defenses > Unconscionability > General Overview

Evidence > Burdens of Proof > Allocation

HN10[] Defenses, Unconscionability

The party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability.

Contracts Law > Contract Conditions & Provisions > General Overview

Evidence > Burdens of Proof > Allocation

Contracts Law > Defenses > Unconscionability > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN11[ ] **Contracts Law, Contract Conditions & Provisions**

Courts applying Colorado law start with the presumption that a contract clause is enforceable. The fact that the contract benefits one party more than the other does not alter the presumption of enforceabilty. As such, the party seeking to avoid application of a contractual provision bears the burden of showing that it is unconscionable.

Contracts Law > Defenses > Unconscionability > General Overview

HN12[ ] **Defenses, Unconscionability**

The Colorado Supreme Court has adopted a seven factor test to determine whether a particular contractual provision is unconscionable. The Colorado Supreme Court has listed seven non-exclusive factors that courts can consider in determining whether to enforce a contract provision: (1) Is the agreement a standardized/form agreement made by parties with unequal bargaining power? (2) Did the parties have an opportunity read and become familiar with the document before signing it? (3) Did the document bury the provision in fine print? (4) Is the provision commercially reasonable?(5) Is the provision substantively unfair? (6) What is the relationship between the parties? Was there notice or surprise? (7) What are the remaining circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect? No one factor predominates and courts should examine each of the factors in conjunction with the entirety of the circumstances surrounding the transaction. If the entirety of the circumstances discloses evidence of "overreaching" by one party that causes a contract provision to unreasonably favor that party to the detriment of the other party, a court should decline to enforce the provision.

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

HN13[ ] **Contracts Law, Contract Conditions & Provisions**

Regardless of the test used, the question of unconscionability is a matter of law, and the results obtained by any formulation of the test are the same; if a contract clause is unconscionable, a court should not enforce it. On the other hand, if a party cannot meet its burden to show that the contract clause is unconscionable, the court will enforce it.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

HN14[ ] **Unconscionability, Adhesion Contracts**

Under Colorado law, a take-it-or-leave-it contract does not automatically render the agreement unconscionable.

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

Contracts Law > ... > Negotiable Instruments > Enforcement > General Overview

HN15[] Unconscionability, Adhesion Contracts

Colorado does not require bilaterality for a contract to be enforceable.

Antitrust & Trade Law > Consumer Protection > General Overview

Business & Corporate Law > Distributorships & Franchises > General Overview

HN16[] Antitrust & Trade Law, Consumer Protection

Colorado law does not automatically afford special protection to franchisees in the same manner that it protects consumers.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > Parties > Joinder of Parties > Compulsory Joinder

HN17[] Class Actions, Certification of Classes

Despite the fact that *Fed. R. Civ. P. 23* is, first and foremost, a tool intended to enhance economy and management, modern district courts cannot certify a class under *Rule 23* on their own initiative without a request from one or both of the parties. Indeed, unlike other federal rules, e.g., *Fed. R. Civ. P. 13* and *19*, there is nothing compulsory about bringing a claim under *Rule 23*; thus, there is nothing jurisdictional about *Rule 23*.

Counsel: **[*1]** For Raymond Bonanno, Anthony Bonanno, Robert Peter, Rajan Desai, Nisha Desai, also known as Nisha Bhansali, Elisa Whitehall, Dajit Parmar, Manjit Parmar, Irving Brothman, Binita Patel, Hemlatta Patel, individually and on behalf of all others similarly situated, Richard Varrado, Megan Makki, Barton Clatt, Joanne Kjolsen, Kristi Lewis, Ali Naqbi, Andrzej Sliwowski, Mukand Malhi, Preetinder Malhi, Plaintiffs: Justin M. Klein, LEAD ATTORNEY, Marks & Klein, LLP, Red Bank, NJ; Joseph S. Goode, Mark M. Leitner, Kravit Hovel & Krawczyk, S.C., Milwaukee, WI; Kristin M. Bronson, Michael D. Plachy, Rothgerber Johnson & Lyons, LLP-Denver, Denver, CO.

For Quiznos Master LLC, The, Quiznos Corporation, The, S&S Company, Defendants: Fredric Adam Cohen, LEAD ATTORNEY, Cheng Cohen, LLC, Chicago, IL; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL; Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO; William Frederick Jones, Moye White, LLP, Denver, CO.

For Quiznos Franchise Company LLC, The, QFA Royalties LLC, Defendants: Fredric Adam Cohen, LEAD ATTORNEY, Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL; Jess Alexander Dance, Kathrin Helene Weston, Michael Alex Sink, Perkins Coie LLP-Denver, **[*2]** Denver, CO; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL; Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO; William Frederick Jones, Moye White, LLP, Denver, CO.

For Quiznos Franchise Realty Company, Quiznos Franchise Licensing Company, Peter Argow, James Cozine, Michael Gordon, Kevin Bednowski, Defendants: Fredric Adam Cohen, LEAD ATTORNEY, Cheng Cohen, LLC, Chicago, IL; Jess Alexander Dance, Perkins Coie LLP-Denver, Denver, CO; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL; Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO; William Frederick Jones, Moye White, LLP, Denver, CO.

For Robert Tobias, Defendant: Fredric Adam Cohen, LEAD ATTORNEY, Cheng Cohen, LLC, Chicago, IL; Jess Alexander Dance, Perkins Coie LLP-Denver, Denver, CO; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL; Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO; Russell Scott Burnside, Greenberg Dauber Epstein & Tucker, P.C., Newark, NJ; William Frederick Jones, Moye White, LLP, Denver, CO.

For Quizano's Franchising II LLC, TQCS LLO, Richard E. Schaden, Defendants: Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL; Fredric Adam Cohen, LEAD ATTORNEY, Jess Alexander **[*3]** Dance, Kathrin Helene Weston, Michael Alex Sink, Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO.

For Quizno's Franchising LLC, Defendant: Leonard H. MacPhee, Jess Alexander Dance, Kathrin Helene Weston, Michael Alex Sink, Perkins Coie LLP-Denver, Denver, CO; Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL.

For Quizano's Franchising II LLC, TQCS LLO, Richard E. Schaden, Counter Claimants: Jess Alexander Dance, LEAD ATTORNEY, Fredric Adam Cohen, Michael Alex Sink, Leonard H. MacPhee, Perkins Coie LLP-Denver, Denver, CO; Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL.

For Quiznos Franchise Company LLC, The, Counter Claimant:Fredric Adam Cohen, LEAD ATTORNEY, Cheng Cohen, LLC, Chicago, IL; Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL; Leonard H. MacPhee, Michael Alex Sink, Perkins Coie LLP-Denver, Denver, CO; William Frederick Jones, Moye White, LLP, Denver, CO.

For Quizno's Franchising LLC, Counter Claimant: Leonard H. MacPhee, LEAD ATTORNEY, Michael Alex Sink, Perkins Coie LLP-Denver, Denver, CO; Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL.

For QFA Royalties LLC, Counter Claimant: Fredric Adam Cohen, **[*4]** Jess Alexander Dance, LEAD ATTORNEYS, Leonard H. MacPhee, Michael Alex Sink, Perkins Coie LLP-Denver, Denver, CO; Andrew Peter Bleiman, Cheng Cohen, LLC, Chicago, IL; John Aaron Hughes, DLA Piper US, LLP-Chicago, Chicago, IL.

For Robert Peter, Rajan Desai, Nisha Desai, Elisa Whitehall, Dajit Parmar, Manjit Parmar, Richard Varrado, Megan Makki, Barton Clatt, Joanne Kjolsen, Kristi Lewis, Andrzej Sliwowski, Mukand Malhi, Preetinder Malhi, Raymond Bonanno, Anthony Bonanno, Counter Defendants: Justin M. Klein, Marks & Klein, LLP, Red Bank, NJ.

Judges: CHRISTINE M. ARGUELLO, United States District Judge.

Opinion by: CHRISTINE M. ARGUELLO

Opinion

ORDER DENYING MOTION FOR CLASS CERTIFICATION

This matter is before the Court on Plaintiffs' Motion for Class Certification. (Doc. # 212). For the following reasons, the Motion is DENIED.

INTRODUCTION

This is a franchise dispute. Plaintiffs claim that defendants (referred to collectively as "Quiznos") misled prospective franchisees with sparkling promises of exclusive restaurant market areas and expert assistance to help them locate real estate for their restaurants. Plaintiffs allege that after they signed the thirty-plus-page franchise agreement, Quiznos revealed that the market **[*5]** areas were not as profitable as Quiznos had promised. Further, Quiznos left Plaintiffs without any of the promised expert help. Despite allegedly leaving Plaintiffs in the lurch, Quiznos still required Plaintiffs to open a restaurant within the one-year deadline required by the franchise agreement. If a franchisee failed to open his or her restaurant, as often happened, Quiznos would terminate the franchise agreement or otherwise alienate the franchisee from the organization and keep the franchise fee.

Plaintiffs filed this suit on behalf of themselves and two classes of these "sold-but-not-opened-franchisees" ("SNOs"). The first class is comprised a group of SNOs that Quiznos has elected to terminate for failing to open their restaurant within one year of signing the franchise agreement. The second class is generally comprised of a smaller group of SNOs that also failed to open a restaurant, but that Quiznos has elected not to terminate. Pursuant to Federal *Rule 23*, Plaintiffs seek to certify these two classes for resolution of their claims.

Quiznos opposes class certification and generally denies that its sales pitch misled franchisees about the franchise requirements. Relying on a **[*6]** class action bar contained in the relevant franchise agreement, Quiznos contends that Plaintiffs agreed not to proceed as a class. [1] Section 21.4 of the franchise agreement states in part:

> The parties agree that any proceeding will be conducted on an individual, not a class-wide, basis, and that any proceeding between Franchisor and Franchisee or the Bound Parties may not be consolidated with another proceeding between Franchisor and any other entity or person.

Quiznos argues that this provision is enforceable and precludes class certification. Alternatively, Quiznos argues that Plaintiffs cannot satisfy the elements of class certification under Federal *Rule 23*.

Given the class action bar provision, Plaintiffs' Motion nicely frames the question this Court must answer in deciding the Motion for Class Certification: "The most significant issue . . . is whether, in light of the provision of the franchise agreements that purports **[*7]** to bar class actions, this case can be maintained as a class action in the first instance." To answer this question, the Court held a hearing specifically on the issue of the enforceability of the class action bar and invited supplemental briefing on the issue. On the basis of the facts and argument developed during the hearing and in the various briefs and supplements, the Court answers Plaintiffs' question in the negative, this case cannot be maintained as a class action.

BACKGROUND

I. FACTS

A detailed description of the facts will help elucidate the Court's decision to enforce the class action bar.

A. A Brief History of Quiznos and the SNOs

Quiznos sells submarine sandwiches at franchised restaurants across the country and internationally. The chain started with a single restaurant in Denver in 1981 and soon began to franchise itself. (Doc. # 259 at 3.) In 1991, Defendant Schaden and his father purchased the entire operation, which consisted of 18 restaurants. *(Id.)* The company grew rapidly, and by the end of the millennium, Quiznos had opened over 1,100 restaurants. *(Id.)* That growth continues through today: at the time Quiznos filed its Response to Plaintiff's Motion for Class Certification, **[*8]** it had over 4,440 restaurants in the United States and an additional 600 stores in twenty-three foreign countries. *(Id.)*

However, as this lawsuit makes clear, not every signed franchise agreement results in a functioning restaurant. In fact, Plaintiffs allege that more than 3,200 so-called SNOs exist in the Quiznos system. In most instances, Quiznos terminates the franchise agreement if a franchisee fails to open a restaurant within the one-year deadline. However, Quiznos does not terminate all of the SNOs that fail to open. In many other instances, Quiznos has pledged to continue working with the SNOs to open a restaurant. Around the same time that Plaintiffs filed this lawsuit, Quiznos began to recognize that the SNO backlog presented a business problem and, potentially, a legal problem. Thus, as the number of SNOs continued to grow, Quiznos reorganized itself to change the way it sold franchises and to "instill some integrity into the development process." (Doc. # 235 at 8.)

---

[1] Plaintiffs refer to the clause as a "waiver," but the Court believes that it is more properly labeled a class action "bar" because, as shown below, Plaintiffs do not have a substantive right to proceed as a class, and, therefore, have not really "waived" anything.

B. Plaintiffs' Theory of Fraud and the Franchise Sales Pitch

Plaintiffs' theory is essentially that Quiznos operated a type of quasi-Ponzi scheme by fraudulently selling franchises, accepting the franchise fee, **[*9]** terminating the franchise when the franchisee could not open a restaurant within the deadline because Quiznos failed to assist the franchisee, and then re-selling the same franchise.

1. *Quiznos' Alleged Misrepresentations Regarding Franchise Ownership*

Plaintiffs highlight Quiznos' overhaul of the SNO system as evidence that Quiznos knew of a problem. They also attempt to spin Quiznos' growth in their favor. (Doc. # 89, PP 25, 26.) According to Plaintiffs, Quiznos developed its franchise sales "script" with the goal of simply selling as many franchises (Plaintiffs call them "pieces of paper") as possible, without regard for whether a franchisee ever opened a restaurant or whether a restaurant would ever turn a profit. *(See, e.g.,* Doc. # 235 at 6-7; Doc. # 299 at 3.)

Plaintiffs' allegations focus on Quiznos' dealings with prospective franchisees on the topics of "target areas" [2] and restaurant location assistance and approval. Plaintiffs claim that Quiznos routinely inflated the economic potential of particular targets areas, even though Quiznos knew that the areas had little or no likelihood of sustaining a viable restaurant. (Doc. # 89 PP 34-36.) When a target area proved unworkable for **[*10]** a franchisee (sometimes because of Quiznos' refusal to approve a restaurant site), Quiznos terminated the franchise, kept the franchise fee, and resold the target area to a new franchisee. *(Id.)* Plaintiffs also claim that Quiznos promoted target areas as being "exclusive" *(i.e.,* limited to one franchisee) even though those "exclusive" target areas already contained another Quiznos franchise. *(Id.)*

As this lawsuit has progressed, Plaintiffs have moved away from their target area allegations and focused more on their claim that Quiznos made misrepresentations regarding real estate assistance. [3] Plaintiffs allege that Quiznos promised that it would assist franchisees in locating and securing real estate for their new restaurants. *(Id.* P 41; Doc. # 235 at 8-9.) Plaintiffs allege that Quiznos touted its "real estate experts" and that potential franchisees could expect hands-on assistance with real estate and business matters after signing onto the Quiznos team. (Doc. # 235 at 9.) But, Plaintiffs allege, after the franchisee had signed the agreement and committed to opening a restaurant, Quiznos **[*11]** provided none of the expert assistance it previously pledged to provide. *(Id.* at 12-13) Plaintiffs further contend that any "assistance" Quiznos provided actually impeded the franchisee's ability to open a restaurant on time. For example, Plaintiffs claim that Quiznos directed franchisees to unworkable restaurant sites and unreasonably denied corporate approval of sites based on constantly changing approval criteria. *(Id.)* Plaintiffs allege that Quiznos' goal was simply to sabotage the franchisee's ability to open a restaurant on time. *(Id.)* The crux in Plaintiffs' theory is that while Quiznos trumpeted these allegedly non-existent benefits of franchise ownership to potential franchisees, Quiznos also concealed the growing list of SNOs and the restrictive one-year deadline during which the franchisees had to open their restaurants. (Doc. # 89 P 42; Doc. # 235 at 10-11.)

2. *Quiznos' Franchise Sales Script*

To support their Motion for Class Certification, Plaintiffs provide declarations from the named Plaintiffs and various Quiznos documents produced in discovery. [4] The record discloses that Quiznos' franchise marketing followed a

---

[2] A "target area" is Quiznos' slang for a franchisee's particular geographic area of responsibility.

[3] This lawsuit is not the first time Quiznos has dealt with this type of allegation in court. *See, e.g., RHC, LLC v. Quizno's Franchising, LLC,* No. 04CV985, 2005 WL 1799536 (Dist. **[*12]** Ct., City and County of Denver July 19, 2005) (lawsuit by former Quiznos franchisee against Quiznos for failure to provide real estate assistance).

[4] Plaintiffs also requested an evidentiary hearing, but to their credit, between Plaintiffs' personal declarations and the Quiznos documents, Plaintiffs describe the Quiznos franchise sales program with reasonable particularity.

fairly uniform "script" [5] around the country. (Doc. # 235 at 4-5.) Indeed, the common theme in Quiznos' franchise marketing was the chain's rapid growth and high rankings among various trade groups and publications.

Plaintiffs discovered Quiznos through various channels. Multiple named Plaintiffs describe how they initially learned about Quiznos on the internet. Potential franchisees could also learn about franchise opportunities from direct mailings and newspaper advertisements. But, this being the internet age, even Quiznos' printed materials directed interested parties to check out Quiznos' website for more information. The materials invited potential franchisees to visit Quiznos' website with snazzy phrases like, "If you love our subs, try a whole store!" *(See, e.g.,* Doc. # 218, Ex. B at Bates No. Q-REF 006694.) Some of Quiznos' direct mailings even promoted franchise sales with a sweepstakes to "Win a Franchise Fee!" by attending a Quiznos' sales seminar. (Doc. # 218, Ex. B at Bates No. Q-REF 006672.)

The printed materials provided very little substantive information regarding franchise ownership. Thus, Plaintiffs claim that they relied largely on Quiznos' website for franchisee information after learning about Quiznos from other sources. Plaintiffs submit internet screen-shots of Quiznos' website. The screen-shots disclose a basic financial survey **[*14]** that, when completed, will answer the question everybody wants to know, "Are you ready for the toasty taste of success?" *(See, e.g.,* Doc. # 218, Ex. A at Bates No. Q-REF 006996.) The survey first probes prospective franchisees with questions about their net worth (greater than $ 125,000?) and liquid cash assets (greater than $ 70,000?). *(Id.)* It then moves on to rather generic personality-type questions, *e.g.,* "Do you usually, finish what you start [or s]tart more projects than you complete?" and "Do you [a]void situations involving risk [or f]eel reasonably comfortable with risk?" *(Id.)* The survey then returns to the money issue, asking about a prospective franchisee's liquid assets and total net worth with more specific questions, *(id.* at Bates No. Q-REF 007000-01.) including other financial and legal issues like prior bankruptcy and non-competition agreements.

Plaintiffs point out that the screen-shots boast that "Quiznos has a proven economic model which has brought more than 3000 stores worldwide into business" and that Quiznos offers "[o]ngoing local support once your store is open." *(Id.* at Bates No. Q-REF 007008.) Notably, Quiznos' website also indicated that Quiznos has "an **[*15]** experienced real estate team who will help you with site selection and lease negotiation" and that it will take "[a]pproximately 4 months from securing a site" to open a restaurant. *(Id.* at Bates No. Q-REF 007009.) Quiznos' website also stated that franchisees would find a restaurant location by "[w]orking with [Quiznos'] network of brokers" who would "help [franchisees] select a location within Quiznos Sub stringent site criteria." *(Id.)* However, like the printed advertising materials, the screen-shots submitted by Plaintiffs contain very little substantive information regarding the franchise agreement or franchisee duties.

In addition to written materials and the internet, Quiznos put on live shows, or "open houses" to sell restaurants. The open houses typically took place in local hotels or conference centers and apparently focused on coordinated Power Point presentations given by trained Quiznos sales representatives. (Doc. # 232.) To provide a behind-the-scenes view of the open houses, Plaintiffs submit a declaration from a former Quiznos sales person, Dave Sharma, whom Quiznos allegedly fired for failing to meet his sales goals. (Doc. # 217.) Mr. Sharma declares that Quiznos required **[*16]** presenters like himself to attend sales training in Denver and that Quiznos' corporate office provided all of the materials used during the seminars. *(Id.* P 14.) According to Mr. Sharma, Quiznos' open houses informed prospective franchisees that Quiznos would help them with real estate matters at each step of the sales process. *(Id.)* He also stated that Quiznos used printed advertisements and materials at the open houses to promote franchise sales. *(Id.* PP 12-14.)

3. *The Plaintiffs' Experiences*

Each named Plaintiff purchased the right to open a Quiznos franchise in 2003 or 2004, but none of them opened a restaurant. *(See, e.g.,* Doc. # 89, PP 3-13.) Some Plaintiffs have had their franchise agreements terminated, others

[5] At various points in their briefing, Plaintiffs resort to rhetorical and inflammatory language to describe Quiznos' sales practices, *e.g.,* "charade," "dupe," calling Quiznos personnel "hucksters," etc. These discretions from legal civility do not help Plaintiffs' case and the Court encourages counsel to pause a moment before resorting to the computer **[*13]** thesaurus tool when writing their briefs.

have signed release agreements, and others remain as SNOs within the Quiznos system. Their stories demonstrate how Quiznos put its multifaceted marketing campaign to work. Although mailings, internet research, and seminars often began the franchisee sales process, in each case, a prospective franchisee met with a Quiznos representative face-to-face before signing a franchise agreement. Plaintiffs allege that these representatives simply parroted Quiznos' misleading marketing **[*17]** materials. Notably, Plaintiffs allege that Quiznos' representatives told them that Quiznos would provide expert assistance in locating real estate and opening the store. But, when it came time to sign the franchise agreement, instead of providing assistance or answering questions, the Quiznos representative would sit them down and quickly and forcefully guide them through the thirty-plus page contract and addendums. Plaintiffs claim the representatives simply told them where to sign and deflected any questions regarding the terms of the agreement.

For example, Plaintiff Anthony Bonanno went to Quiznos' website, filled out the financial survey application and began to receive mailings from Quiznos inviting him to attend an open house. (Doc. # 214 P 2.) In response to the mailings, Plaintiff Anthony Bonanno's father, Plaintiff Raymond Bonanno, attended an open house at a local hotel. The older Bonanno must have liked the presentation because the younger Bonanno then set up a face-to-face meeting with a Quiznos representative who had presented at the open house. *(Id.* P 6.) The Bonannos allege that the Quiznos representative then pressured them into purchasing a particular target area by **[*18]** saying that all of the good areas would be sold quickly. *(Id.)*

Like the Bonannos, Plaintiff Sliwowski also met with a Quiznos representative, this time at a Quiznos store in Connecticut. (Doc. # 213 P 4.) He alleges that the Quiznos representative pressured him into purchasing a franchise by telling him that all of the good locations were "going fast." *(Id.)* Plaintiff Klatt [6] learned about a Quiznos open house from advertisements in the local paper. (Doc. # 215 P 2.) At the time he first learned about Quiznos, Plaintiff Klatt lived in Washington state but wanted to move back to California. He states that Quiznos representatives encouraged him to move by promoting target areas in and around San Diego. [7] *(Id.* PP 5-6.)

Regardless of how they learned about Quiznos, Plaintiffs never opened a restaurant. [8] Some named Plaintiffs sought legal advice regarding the return of their franchise fee, but claim to have been repelled by the cost of individual case litigation. Interestingly, given that this is a Motion for Class Certification, Plaintiffs never specifically address how the class action bar or any other term of the Franchise Contract relating to dispute resolution played into Quiznos' allegedly deceptive scheme. Nor do Plaintiffs mention any efforts by Quiznos representatives to discuss and explain, on one hand, or hide or conceal, on the other, the class action bar provision or any other particular provision in Section 21.4.

C. <u>Quiznos' Side of the Story: The Uniform Franchise Offering Circular and the Franchise Agreement Terms</u>

Quiznos concedes that it used a number of channels to sell its franchises, including the internet, print media, radio and television, and live seminars. (Doc. # 259 at 5.) Quiznos states that it has taken "great care" to ensure that its marketing materials provide the correct information regarding its franchises and that the materials conform with the terms of the franchise agreement. Quiznos also states that the degree of assistance Quiznos provided to named Plaintiffs varied, but that it provided such assistance in a manner consistent with the marketing materials and represen-tations made by its sales people. Quiznos also points out that it was required by law to provide a Uniform

---

[6] In his declaration, Plaintiff Klatt's last name is spelled "Klatt." (Doc. # 152.) However, the case caption refers to Plaintiff "Clatt." The Court assumes this the same person and will refer to Plaintiff Klatt as his named is spelled in his declaration.

[7] Plaintiffs have submitted numerous additional descriptions of how they came to sign a Quiznos franchise agreement, but none of them differ in any meaningful way from the Bonannos, Mr. Sliwowski or Mr. Klatt's experience -- **[*19]** each allege that Quiznos pressured them into purchasing a franchise without properly explaining the duties that accompanied franchise ownership or the one-year deadline. *(See, e.g.,* Docs. # 223, 224, 225 & 226.)

[8] Quiznos argues that failure of Plaintiffs to open a restaurant was not a result of any fraud, but because Plaintiffs failed to propose suitable restaurant sites pursuant to the terms of the franchise agreement or, as in the case of Plaintiff Whitehall, they failed to **[*20]** propose any site at all. (Doc. # 259 at 14.)

Franchise Offering Circular (now known as the "Uniform Franchise Disclosure Document," and referred to herein as "UFOC") to each franchisee and that the marketing materials conform to the UFOC. *(Id.* at 6.)

Quiznos contends that, although the marketing materials are accurate, the UFOC and franchise agreement clearly set forth the rights and obligations of the **[*21]** franchisees and the one-year deadline. Quiznos points out that the UFOC states in all capital, bold letters that:

> WE MAY TERMINATE YOUR FRANCHISE AGREEMENT IF YOU DO NOT OPEN YOUR RESTAURANT WITHIN 12 MONTHS AFTER YOU SIGN THE FRANCHISE AGREEMENT. THE FRANCHISE FEE IS NONREFUNDABLE.

(Id. at 8.) Additionally, Quiznos argues that the UFOC makes clear that it is the franchisee's obligation to "propose the location" for Quiznos' approval. Furthermore, Quiznos asserts that, in UFOCs used since 2001, it has disclosed the number of purchased franchises that failed to open a restaurant, *i.e.,* the number of SNOs. *(Id.* at 7-8.) Notably, Plaintiffs do not deny that Quiznos provided them with the UFOCs at least ten days prior to their signing of their respective franchise agreements, although they argue that they did not necessarily read them.

Quiznos also identifies a number of terms in the franchise agreement that it believes refutes Plaintiffs' claims. These terms often mimic the disclosures in the UFOC, *e.g.,* Franchise Agreement § 3.1 states, "Franchisee shall choose and acquire a location for its Restaurant within the nonexclusive Target Area set for in Exhibit 1;" § 9.1(a) states, "Franchisee **[*22]** acknowledges that Franchisor has no obligation to select or acquire a site on behalf of Franchisee;" and § 23.2 states, "Franchisee further acknowledges and agrees that no representations have been made to it by Franchisor or its affiliates regarding projected sales volumes, market potential, revenues, profits of Franchisee's Restaurant, or operational assistance provided by Franchisor or its representatives." (Doc. # 259 at 10.) The franchise agreements also contain a choice of law and choice of venue clause that mandates the application of Colorado law and requires a franchisee to file a claim in Colorado, either in the District Court for the City and County of Denver or this Court. *(See* Doc. # 1-4 § 21.1.)

In essence, Quiznos does not seriously refute the facts alleged by Plaintiff, but instead challenges the conclusions that Plaintiffs reach regarding the franchise sales script. Quiznos contends that Plaintiffs' fraud theory defies logic and business sense because Quiznos and its representatives had a financial incentive, in the form of sales royalties and bonuses, to open the restaurants they sold.

However, despite all of the parties' factual allegations and arguments on the merits **[*23]** of the case, the critical issue before the Court is the enforceability of Section 21.4, which contains the class action bar.

II. PROCEDURAL HISTORY

Turning now to the history of this case, Plaintiffs originally filed suit in New Jersey state court in February 2006. (Doc. # 1-2.) In March 2006, Quiznos removed the case to the U.S. District Court for the District of New Jersey pursuant to the Class Action Fairness Act. *(See* Doc. # 1-1.) Quiznos then quickly moved to dismiss the case based on the venue selection clause in the franchise agreement. [9] However, instead of dismissing the case, the District Court in New Jersey transferred the matter to this Court pursuant to *28 U.S.C. § 1404(a)*. (Doc. # 24.)

---

[9] Plaintiffs made similar arguments against enforcement of the venue selection clause that they make here against enforcement of the class action bar. However, Judge Cavanaugh rejected each of Plaintiffs' arguments. First, he found that Quiznos had not fraudulently induced Plaintiffs into agreeing to the venue selection clause. (Doc. # 23 at 5-6.) He held that to avoid application of the clause Plaintiffs must show that the venue selection clause itself, as opposed to the entire contract, had **[*24]** been fraudulently induced and Plaintiffs failed to meet that burden. *(Id.)* Judge Cavanaugh further rejected Plaintiffs' contention that the unequal bargaining power between Quiznos and prospective franchisees rendered the venue selection clause unenforceable. *(Id.* at 6-7.) Judge Cavanaugh also rejected Plaintiffs' claim that the franchise agreement was unreasonable or unconscionable because Quiznos presented it on a "take-it-or-leave-it" basis. *(Id.* at 9-10.)

This Court received the case in December 2006, at which time Quiznos filed a motion to dismiss pursuant to Federal *Rule 12(b)(6)*. (Doc. # 41.) Before the Court could rule on that motion, Plaintiffs amended their Complaint. (Doc. # 89.) In August 2007, Quiznos filed a second Rule 12(b)(6) motion to dismiss (Doc. # 103), which the Court denied. (Doc. # 174.) Because the parties had agreed to attempt mediation, Quiznos sought numerous extensions of time to respond to the Amended Complaint. When mediation proved unsuccessful, the parties proceeded with discovery. Quiznos eventually filed an answer to the amended complaint and a counterclaim, which Plaintiffs have moved to dismiss. (Doc. ## 229 and 249.) Quiznos amended the counterclaim **[*25]** in November 2008. [10] (Doc. # 255.)

On the issue of class certification, Plaintiffs first moved for class certification in January 2008. (Doc. # 140.) The Court denied that motion as premature, but indicated that Plaintiffs could re-file after they had completed discovery. (Doc. # 197.) In September 2008, Plaintiffs re-filed their Motion for Class Certification (Doc. # 212) and requested a hearing on the issue. (Doc. # 282.) The Court granted the request for a hearing, which it scheduled for April 23-24, 2009, but it also held oral argument on the distinct issue of the enforceability of class action bar on March 2, 2009. The Court invited the parties to submit supplemental briefing solely on the class action bar issue, and both parties have submitted such briefing. (Doc. ## 299 and 301.) [11]

III. STANDARD OF REVIEW

HN1[] Typically, named parties conduct litigation on behalf of themselves; a class action is an exception to this rule. *See General Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (citing *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. ***HN2***[] Federal *Rule 23* governs class certification and district courts have discretion to certify or deny certification of a class. *Shook v. El Paso County, 386 F.3d 963, 968 (10th Cir. 2004)*; *Paton v. New Mexico Highlands Univ., 275 F.3d 1274, 1278 (10th Cir. 2002)*. ***HN3***[] In order to certify a class, the class proponent must clearly satisfy four prerequisites contained in *Rule 23(a)*:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Shook, 386 F.3d at 968* (noting that district court should perform **[*27]** "rigorous analysis of whether the prerequisites of *Rule 23(a)* have been satisfied") (internal quotations and citations omitted); *Clark v. State Farm Mut. Auto. Ins. Co., 245 F.R.D. 478, 481 (D. Colo. 2007)* (noting the "strict burden of proof" under *Rule 23(a)*).

HN4[] Only if the class proponent can satisfy the prerequisites of *Rule 23(a)*, does the court need to determine if the matter falls within one of the categories identified in *Rule 23(b)*. *See Fed. R. Civ. P. 23(b)* ("A class action may be maintained if *Rule 23(a)* is satisfied); *see also Moore's Federal Practice § 23.40[1]* (3d. ed. 2007). Courts have held that the same rigorous analysis under *Rule 23(a)* also applies under the *Rule 23(b)* categories. *See In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 33 n.3 (2d Cir. 2006)*.

HN5[] In ruling on class certification, district courts should not delve deeply into the merits of the parties' claims or defenses. *See J.B. v. Valdez, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999)* ("We recognize that, when deciding a

---

[10] The Counterclaim pleads a breach of contract claim against Plaintiffs for failing to open their restaurants within one-year. (Doc. # 255.)

[11] The parties have filed other motions since the Motion for Class Certification, including Plaintiffs' Motion for a Protective Order to Enjoin Improper Communications with the Putative Class (Doc. # 268), Plaintiffs' Motion for Rule 11 Sanctions (Doc. # 270), and, **[*26]** most recently, Quiznos' Motion for Summary Judgment. (Doc. # 312.) The Court will address the other outstanding motions in separate orders.

motion for class certification, the district court should accept the allegations contained in the complaint as true."); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ("We **[*28]** find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 380-81 (D. Colo. 1993) (noting that inquiry into the merits is "inappropriate" when determining whether action meets the requirements of Rule 23). Thus, courts should analyze whether the class proponent has met its burden based on the substantive allegations in the complaint and evidence submitted along with the motion for class certification.

Courts disagree on whether they should interpret Rule 23 liberally or strictly. *See* Moore's Federal Practice § 23.03 (3d ed. 2007) (arguing for "flexible approach" to Rule 23); *see also* Roby v. St. Louis S.W. Ry. Co., 775 F.2d 959, 961 (8th Cir. 1985) (noting that Rule 23 should be strictly applied). However, **HN6**[] the Tenth Circuit Court of Appeals falls into the liberal interpretation camp and has held that courts in this Circuit should err in favor of certifying a class. *See* Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968) ("any error, if there is to be one, should be committed in **[*29]** favor of allowing the class action"); *see also* Clark, 245 F.R.D. at 481 ("where the case is close, I will err in favor of allowing maintenance of the class action").

While the Court is cognizant of this standard of review, as discussed below, this standard is only tangentially relevant to the Court's analysis because the real issue at this point is not whether Plaintiffs can comply with Rule 23, but whether the Court should enforce the class action bar.

DISCUSSION AND ANALYSIS

As Plaintiffs note in their Motion, the "most significant issue" at this point is whether this Court should enforce the class action bar in the franchise agreements. Plaintiffs argue that the class action bar is unenforceable because (1) it is unconscionable, and (2) Quiznos cannot demonstrate the Plaintiffs knowingly and voluntarily "waived" their "right" to proceed as a class. Quiznos responds that Plaintiffs cannot prove that the bar is unconscionable and that, like any "right," Plaintiffs can "waive" their "right" to proceed as a class. Alternatively, Quiznos argues that Plaintiffs cannot satisfy Rule 23. The Court need not address the merits under Rule 23 because it finds the class action bar enforceable and, **[*30]** therefore, it concludes that the franchise agreement precludes class certification in this matter.

The Court first discusses the history and evolution of class action litigation, which leads the Court to conclude that Plaintiffs can preclude themselves from proceeding as a class. After that, the Court discusses which party bears the burden to show that the class action bar is enforceable or unenforceable, as the case may be. The Court then reviews previous treatment of class action bars and/or waivers. Finding little guidance in the case law treatment of class action bars, the Court turns to an analysis of the class action bar under the law of unconscionability in Colorado. Finally, the Court will briefly address its own jurisdictional and prudential concerns regarding enforcement of the class action bar.

IV. THE HISTORY AND EVOLUTION OF CLASS ACTION LITIGATION

The historic origin and modern evolution of class action lawsuits offer insight into the elements the Court should consider when deciding whether to enforce the class action bar.

A. Evolution of Class Actions as a Procedural Tool

Class actions grew out of the English common law. *See* 1 Newberg on Class Actions § 1:9 (4th ed. 2008) **[*31]** (hereafter "Newberg"). Under the old divided law and chancery court system, English chancery courts developed the "Necessary Parties Rule." *Id.* The Rule mandated the joinder of all interested persons in one suit, so as to avoid multiplicative litigation. *Id.; See* Geoffrey C. Hazard, John L. Gedid & Stephen Sowle, *A Historical Analysis of the Binding Effect of Class Suits,* 146 U. Pa. L. Rev. 1849, 1858-59 (1998).

As was the case with many English legal doctrines, the Necessary Parties Rule was incorporated into the United States' legal system. *See* Hazard, Gedid & Sowle, *146 U. Pa. L. Rev. at 1858-59*. As early as the 1840s, the Federal Equity Rules, a precursor to the modern Federal Rules of Civil Procedure, had codified the mandatory joinder concept. *See* Newberg § 1:9. By 1912, the Equity Rules contained two provisions, Rules 27 (stockholders' bill) and 38 (representative of a class) that allowed absent parties to be bound by a judgment obtained by a representative member. *Id.; see also Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 35 S. Ct. 692, 59 L. Ed. 1165 (1915)* (group of plaintiffs brought suit against insurer "in their own behalf and on behalf of all others similarly situated").

In the 1930s, upon the merger **[*32]** of law and chancery, the first version of the Federal Rules of Civil Procedure contained Federal *Rule 23*, an offshoot of the Equity Rules and the Necessary Parties Rule that had preceded it, but which was far more flexible than its predecessors. According to some commentators, the new Federal *Rule 23* was adopted as a result of difficulty in joining the increasing numbers of litigants under the older equity rules. *See* Hazard, Gedid & Sowle, *146 U. Pa. L. Rev. at 1878*. *Rule 23* substantially revised former Equity Rules 27 and 38 by expanding the reach of class litigation outside the equity courts to allow representative suits, wherein a select group of litigants enforced or defended the rights of a larger class of parties, even if members of the class had not been joined. *See* Newberg § 1.9. Thus, although equity jurisprudence had allowed class-like suits in the past, the Federal Rules now allowed, for the first time, class suits for damages in the United States. *See* Newberg § 1.9.

Early opposition to class actions came largely from prospective class plaintiffs who resisted the possibility of being bound by a judgment obtained without their participation in the litigation. *See* Abram Chayes, **[*33]** *Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 26 (1982)*. Perhaps because of this resistance, the early class action rule required a more concrete "jural" relationship between the proposed class members and the subject of the litigation than do modern class actions. *See Ortiz v. Fibreboard Corp., 527 U.S. 815, 823, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*; Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action,* 77 Colum. L. Rev. 866, 877 (1977). Each member of the class had to have an interest in the subject matter before the court, such that any member of the class could proceed in her own right. Chayes, *96 Harv. L. Rev. at 26*. However, as litigation evolved, the depth of personal interest in the subject of the litigation that a prospective class member needed to have to sustain membership in the class began to erode and the role of the class action began to change.

The most critical step in the evolution of class litigation came in 1966, when the Advisory Committee adopted a substantial revision of the much-maligned original Federal *Rule 23* and brought class actions into the modern era. *See Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty & Maritime Claims Rules of Criminal Procedure,* 39 F.R.D. 69, 97 (1966). **[*34]** The Advisory Committee acknowledged that the rather arcane definitions used in the previous version of Federal *Rule 23* and the uncertainty regarding the "proper extent of the judgments in class actions" impeded the usefulness of *Rule 23*. 39 F.R.D. at 99; *see also Ortiz, 527 U.S. at 842*. Thus, the Committee sought to make the class action rule more "practical" for courts and parties. *Id.* at 99-100. By doing so, it ushered in the era of widespread use of class actions in American courts.

The new Federal *Rule 23* accompanied (and likely helped to precipitate) the paradigm shift towards the use of class actions for so-called "impact litigation." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 5-6 (1971) ("The impact [of the 1966 revisions to *Rule 23*] has been due not so much to the literal text of the new rule as to the broad and far-reaching use to which it has been put by the attorneys representing treble damage claimants."). Substantively, the 1966 revision broadened Federal Rule 23's scope by eliminating the previous rule's requirement of a strict "jural relationship" among putative **[*35]** class members. *See* Newberg § 1:10. The new rule also proved far more flexible from a procedural aspect, and, as the American economy and consumer culture grew more widespread, class actions under the revised Federal *Rule 23* became an important procedural stick for marginalized plaintiffs to wield against powerful defendants. *See Amchem Prods. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quotations and citations omitted); *Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d*

1100, 1109 (Cal. 2005); *cf. generally* Handler, 71 Colum. L. Rev. 1 (arguing that "blockbuster" class actions in treble damages antitrust suits shift focus away from substantive law by adding "needlessly to the scope and complexity of litigation").

B. Class Actions Remain a Procedural Tool, Not a Substantive Right

There is no question that class actions serve the goals of judicial efficiency and practicality by making multi-party litigation more expeditious and economical. *See* Califano, 442 U.S. at 701 ("[T]he class-action **[*36]** device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."); Gottlieb v. Wiles, 11 F.3d 1004, 1007 (10th Cir. 1993) ("Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments.") *overruled in part on other grounds by* Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002). Nonetheless, ***HN7***[] Federal Rule 23 clearly remains a procedural tool, not a substantive or jurisdictional right. *See* Ortiz, 527 U.S. at 846 ("The Rules Enabling Act [for the 1966 revisions to the Federal Rules] underscores the need for caution. As we said in *Amchem,* no reading of the Rule can ignore the Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'") (quotations omitted); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

Thus, the history and evolution of class action litigation demonstrates **[*37]** that ***HN8***[] class certification is a procedural mechanism, not a substantive right. As such, this Court believes that a lesser level of scrutiny is applicable to an agreement by a party not to proceed as a class, as compared to the level of scrutiny that the Court would apply to a similar agreement purporting to waive a substantive right, such as the constitutional right to a jury trial. *See, e.g.,* Dreiling v. Peugeot Motors of Amer., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982) (discussing contractual waiver of jury trial right). With the theoretical and historical considerations of class litigation in mind, the Court now turns to the initial step in its analysis of whether the class action bar provision should be enforced in this case, *i.e.,* which party bears the burden regarding its enforceability or unconscionability.

V. PLAINTIFFS BEAR THE BURDEN OF SHOWING THE CLASS ACTION BAR IS UNENFORCEABLE OR UNCONSCIONABLE

Plaintiffs analogize the class action bar provision of Section 21.4 to a jury trial waiver provision. Based on this analogy, Plaintiffs argue that Quiznos bears the burden to show that Plaintiffs voluntarily and knowingly relinquished their "right" [12] to proceed as a class. *(See,* ***[*38]*** *e.g.,* Doc. # 296 at 11.) In support of their argument, Plaintiffs rely heavily on *Dreiling,* which involved a jury trial waiver in a contract between an auto manufacturer and its dealership. 539 F. Supp. at 403. According to Plaintiffs, *Dreiling* supports the idea that a powerful franchisor like Quiznos cannot enforce a class action "waiver" contained in a take-it-or-leave-it franchise agreement.

Quiznos responds that the right to proceed in a class action is procedural only and is distinct from a Constitutional right like a the right to a jury trial. Quiznos contends that the clause is not a waiver in the true sense of that term and, therefore, Plaintiffs, as the parties seeking to avoid application of a contractual term, bear the burden of showing that the class action bar is unconscionable. Thus, Quiznos contends that it does not have to make the same showing that would be required if dealing with a jury trial waiver. Alternatively, Quiznos **[*39]** contends that Plaintiffs have knowingly waived their "right" to proceed as a class.

The Court finds that ***HN9***[] the ability to proceed as a class is not akin to the right to a jury trial (or any other substantive or Constitutional right, for that matter). Because a jury trial is guaranteed by the Constitution, courts do not have discretion with respect to deciding whether or not to allow a trial by jury - that is a decision made by the parties. Notably, the history of class litigation reflects that the courts, not the parties, determine whether a suit

[12] The parties refer to class certification as a "right," so the Court will use this terminology as well. However, as discussed below, this terminology is questionable. At most, the "right" to proceed as a class is procedural rather than substantive.

should proceed on a class basis. Courts make this decision as a matter of judicial efficiency, not out of an obligation to uphold the parties' substantive rights, a fact that the Supreme Court continues to reiterate. *See Califano, 442 U.S. at 701*. In short, Plaintiffs do not have a substantive "right" to proceed as a class. *See, e.g., Ortiz, 527 U.S. at 846*; *Amchem, 521 U.S. at 617*; *Roper 445 U.S. at 332*. Thus, a jury trial waiver provision is not analogous to a class action bar provision.

This distinction leads the Court to conclude that *Dreiling* is inapposite to the facts of this case. As the parties seeking to escape application of an unambiguous **[*40]** contractual provision, the burden rests on Plaintiffs to show that the Court should not enforce the class action bar provision. *See, e.g., Harris v. Green Tree Fin. Corp., 183 F.3d 173, 182 (3d Cir. 1999)* (***HN10***[] "The party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability."). As shown below, Plaintiffs have not satisfied that burden in this case. [13]

VI. PREVIOUS OPINIONS REGARDING CLASS ACTION BAR PROVISIONS OFFER LITTLE GUIDANCE

Numerous earlier cases have addressed class action and/or class arbitration bars, usually in the context of mandatory arbitration clauses. Unfortunately, these cases offer little precedential value because, in most instances, they rely on wholly inapplicable legal standards or specific state laws that do not translate well to Colorado law. Even the one case the Court has located that deals specifically with a non-arbitration class action bar provision provides very little guidance. Regardless, because the parties have raised these cases in their briefs and at oral argument, the Court will address them and note any applicable holdings.

A. The *Kristian* and *American Express* Decisions Do Not Apply

Plaintiffs devote much of their argument to **[*42]** the First Circuit Court of Appeals' decision in *Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006)*, and the Second Circuit Court of Appeals' decision in *In re Amer. Express Merchs. Litig., 554 F.3d 300 (2d Cir. 2009)*. In both cases, the respective appellate courts declined to enforce arbitration clauses that would have precluded the plaintiffs from pursuing their antitrust claims in a class context.

In *Kristian,* the class of plaintiffs consisted of cable television customers who claimed that the defendants, a group of cable television providers, had violated antitrust laws by unlawfully attempting to consolidate the market for cable television. *446 F.3d at 30*. Defendants moved to compel arbitration under a provision in their consumer contract. *Id. at 31*. Notably, the contract also precluded class or consolidated arbitration. *Id.* The plaintiffs opposed enforcement of the arbitration provision because they said it would prevent them from "vindicating their statutory rights." *Id. at 37*. [14] The *Kristian* plaintiffs also argued that the arbitration clause/class action bar was unconscionable under state law. *446 F.3d at 63*. However, the First Circuit Court of Appeals did not perform an **[*43]** unconscionability analysis

---

[13] Alternatively, if Quiznos did have to show that Plaintiffs knowingly and voluntarily waived their ability to proceed as a class, Quiznos has met that burden for many of the same reasons the Court finds that the waiver is not unconscionable under Colorado law. *See infra.* For example, the following facts indicate that Plaintiffs knowingly and voluntarily agreed to "waive" their right to proceed as a class: Plaintiffs understood what the language in Section 21.4 meant, Quiznos allowed and encouraged prospective franchisees to consult with an attorney before signing the franchise agreement, and many Plaintiffs had previous business experience, if not previous franchise experience. Moreover, as noted below in the discussion on unconscionability, the waiver was printed in normal typeface, and **[*41]** was not hidden from other contract terms. Contrary to Plaintiffs' position that prospective franchisees should be treated with deference because Quiznos offered them the franchise agreement on a take-it-or-leave-it basis, this fact alone does not render a waiver unenforceable. *See Postnet Int'l Franchise Corp. v. Amercis Int'l, Inc. 2006 U.S. Dist. LEXIS 42794, 2006 WL 1775599 (D. Colo. June 26, 2006)*.

[14] The "vindication of statutory rights" argument stems from the Supreme Court case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. In *Mitsubishi,* the Supreme Court enforced a contractual arbitration provision and forced the counterclaimant to arbitrate its antitrust claims. *See generally id.* The Court held that a clause requiring arbitration of statutory claims was valid "so long as the prospective litigant effectively may **vindicate its statutory cause of action** in the arbitral forum." *Id.* (emphasis added).

because it concluded that the federal substantive law of arbitrability *(i.e., Mitsubishi* and the Federal Arbitration Act) supplied the more appropriate rule of decision. *Id.*

In arriving at its decision, the *Kristian* court acknowledged that the balance of other circuits favored enforcement of the class action bar, but only slightly. *See* *id. at 55* (noting that decisions from the Third, Seventh, and Eleventh Circuits have upheld consumer class action bars). However, *Kristian* distinguished the applicability of these cases largely on the ground that each of the previous circuit court decisions enforcing class arbitration **[*44]** bars involved claims against financial lenders under the Truth In Lending Act ("TILA"), whereas the claims in *Kristian* involved the Sherman Act and other antitrust laws. *Id. at 56-57*. The *Kristian* court found that the "sheer complexity" of an antitrust claim required an intensive factual analysis and prohibitively expensive expert testimony that a TILA claim did not. *Id. at 59*. Because of the costs and legal intricacy involved in the claims at issue, *Kristian* concluded that the plaintiffs could not enforce their rights, except on a class basis. *Id. at 59-61*. Thus, the *Kristian* court concluded that the class arbitration bar ran afoul of the economic and social goals contemplated by ***antitrust law***. *Id. at 61* ("[T]he social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the *de facto* liability shield."). The court, therefore, refused to enforce the class-precluding arbitration provision. *Id.*

Similarly, *American Express* involved a motion to compel arbitration of claims under ***antitrust law***. *554 F.3d at 307-08*. The *American Express* plaintiffs, a group of merchants that had contracted with American Express for credit card services, alleged **[*45]** that American Express had forced them to accept supracompetitive billing rates for credit card services in violation of *Section 1* of the Sherman Act. *Id. at 308*. American Express moved to compel arbitration pursuant to the applicable contracts, which also contained a provision barring class or representative arbitration. *Id.* The district court granted American Express' motion and left the question of enforceability of the class arbitration bar for the arbitrator to decide. *See* *In re Amer. Express Merchs. Litig., 2006 U.S. Dist. LEXIS 11742, 2006 WL 662341, at *4-*5 (S.D.N.Y. Mar. 16, 2006)*. The plaintiffs appealed, arguing that the district court had erred in referring the enforceability of the class arbitration bar to the arbitrator and that enforcement of the class bar precluded them from vindicating their rights under the Sherman Act. The Second Circuit Court of Appeals agreed with the plaintiffs and reversed.

The Second Circuit found that enforceability of the class arbitration bar was a question for the court, not the arbitrator. *554 F.3d at 310-11*. Then, like the *Kristian* court, the Second Circuit found that the unique and prohibitively expensive aspects of antitrust litigation precluded the plaintiffs from **[*46]** pursuing their claims on an individual basis:

> Concluding that Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration, we find ourselves in agreement with the plaintiffs' contention that enforcement of the class action bar in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws.'

Id. at 319.

As with *Kristian,* the impetus behind the decision in *American Express* was the "public interest in vigilant enforcement of the **antitrust laws** through the instrumentality of the private treble-damage action," which could not be squared with an agreement that conferred *de facto* immunity from civil liability to American Express. *Id.* (quotations omitted and emphasis added) (citing *Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)*. Significantly, *American Express* did not address whether the class waiver was enforceable under the state law of unconscionability. *See* *id. at 320* (citing cases decided under state unconscionability laws and noting that "We do not follow **[*47]** these cases because they all rely on findings of unconscionability under state law, while we have relied here on a vindication of statutory rights analysis, which is party of the federal substantive law of abitrability.")

In addressing *Kristian* and *American Express,* Quiznos argues that this Court should follow *Ornelas v. Sonic-Denver T, Inc., 2007 U.S. Dist. LEXIS 6214, 2007 WL 274738 (D. Colo. Jan. 29, 2007)*, a previous decision from this district that declined to follow *Kristian (American Express* had not been decided). In *Ornelas,* the plaintiff sought to bring a class action against a local Toyota dealership because of alleged discrimination against non-English speakers in its leasing practices. *2007 U.S. Dist. LEXIS 6214, [WL] at *1*. The dealership moved to compel arbitration and the plaintiff resisted claiming that the arbitration clause was unenforceable. *2007 U.S. Dist. LEXIS 6214, [WL] at *3*. Like *Kristian* and *American Express,* the arbitration clause in *Ornelas* precluded class arbitration. *2007 U.S. Dist. LEXIS 6214, [WL] at *5*. Judge Figa rejected the plaintiff's argument that *Kristian* should apply because he found that *Kristian* was limited to antitrust cases. *2007 U.S. Dist. LEXIS 6214, [WL] at * 6*. Although Judge Figa did not go into great depth on the issue, he also found that at least one other court in the Tenth **[*48]** Circuit had upheld a consumer arbitration agreement precluding class arbitration and he saw no reason why such a provision would be automatically unconscionable or unenforceable. *See id.; see also Edwards v. Blockbuster, Inc., 400 F. Supp. 2d 1305 (E.D. Okla. 2005)*.

Ornelas, *Kristian* and *American Express* are all distinguishable from the instant case because this case does not involve an arbitration clause that also contains a class arbitration bar. The franchise agreement in the case at hand does not mandate arbitration; rather it precludes class or consolidated actions in this Court. Thus, the vindication of statutory rights analysis applied in *Kristian* and *American Express* is not directly applicable here because the enforceability question is not one of arbitrability, but of unconscionability under Colorado law. [15]

The arbitration distinction notwithstanding, this Court agrees with Judge Figa's decision in *Ornelas* **[*49]** and finds that this case is distinguishable from *Kristian* and *American Express.* As Judge Figa noted in *Ornelas,* the critical distinction between *Kristian* or *American Express* and this case is the nature of the claims at issue: antitrust versus what is essentially common law fraud. In *Kristian* and *American Express,* the courts relied on the unique, *i.e.,* complicated and expensive, aspects of ***antitrust law*** to support their refusal to enforce the arbitration clauses/class arbitration bars at issue. In both cases, the plaintiffs had presented evidence that their claims would require intricate legal analysis and expert testimony that might cost the plaintiffs upwards of one million dollars in expert fees alone. *See, e.g., 554 F.3d at 317*. When the appellate courts weighed this massive initial expense with the relatively small amount of individual monetary damages, both courts concluded that no plaintiff could or would pursue an individual antitrust claim against the defendants. Thus, under the circumstances of those antitrust cases, the class arbitration bars provided *de facto* immunity to the defendants.

In this case, by contrast, Plaintiffs' claims involve comparatively simple fraud and consumer **[*50]** protection-type claims. The majority of Plaintiffs' evidence will come from the plaintiffs themselves, rather than paid experts. Indeed, this evidentiary distinction is borne out by the number of personal declarations that Plaintiffs have submitted with their class certification briefs (over a dozen) versus the number of expert declarations (one). In other words, although Plaintiffs may hire an expert to support their case, the nature of their claims does not require the massive investment of resources that was required in *Kristian* or *American Express.*

This case also differs from *Kristian* and *American Express* in terms of the amount of Plaintiffs' prospective individual monetary recovery. In *Kristian,* the court found that recovery would likely be limited to hundreds or perhaps several thousand dollars per plaintiff. In *American Express,* the median individual recovery, **after trebling,** was just over $ 5,000. In the instant case, both parties agree that Plaintiffs typically paid between $ 20,000 and $ 25,000 for their initial franchise fee. [16] Thus, if they prevail, Plaintiffs in the instant case stand to receive an average of $ 60,000 to $ 75,000 after trebling, *i.e.,* significantly more **[*51]** damages than either the *American Express* or the *Kristian* plaintiffs. [17] This larger potential for individual recovery cuts against Plaintiffs' argument that the class action bar in this case is analogous to the provisions at issue in *Kristian* or *American Express.*

---

[15] *Kristian* acknowledged that "there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis." *446 F.3d at 63*. However, this similarity notwithstanding, *Kristian* explicitly declined to analyze state unconscionability law.

[16] Although, in some cases, the amount was lower and, in some cases, Plaintiffs paid multiple fees, by far the most common amounts were either $ 20,000 or $ 25,000.

[17] Moreover, Plaintiffs can recover the attorneys fees pursuant to the CCPA and they can recover their costs pursuant to Federal *Rule 54(d)*.

The vindication of statutory rights analysis upon which the decisions in *American Express* and *Kristian* were based, does not apply to Plaintiffs' claims in the instant case. Moreover, this case lacks the massive cost and the *de minimus* individual recovery that lead the *Kristian* and *American Express* courts to strike down the class arbitration bars at issue in those cases. Therefore, the Court concludes that *Kristian* and *American Express* are not applicable to the enforceability of the class action bar in this case.

B. Previous Decisions Based on State Unconscionabilty Law Provide Little Guidance

Aside from antitrust cases, a handful **[*52]** of federal courts applying a state law unconscionability analysis have also refused to enforce arbitration clauses that preclude class actions. *See, e.g., Douglas v. United States Dist. Court, 495 F.3d 1062 (9th Cir. 2007)* (applying California law); *Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003)* (same); *Luna v. Household Finance Corp. III, 236 F. Supp. 2d 1166 (W.D. Wash. 2002)* (applying Washington law). Likewise, a few state courts applying state unconscionability law have also declined to enforce provisions that precluded class arbitration. *See, e.g., Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006)* (applying California law); *Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999)* (applying Florida law). On the other hand, at least one state court in New York has enforced an arbitration provision that would have precluded class arbitration. *See Hayes v. County Bank, 26 A.D.3d 465, 811 N.Y.S.2d 741 (N.Y. App. Div. 2006)* (enforcing class arbitration bar under New York law).

Unfortunately, these cases offer only marginal guidance because, in most instances, they involved critically different factual and legal circumstances and unique contractual provisions that render them inapplicable **[*53]** to the instant case. For example, most of the cases cited by the parties and those discovered by the Court's own research focused on whether an *arbitration* clause that barred class actions should be enforced. However, that issue does not arise in this case since there is no arbitration provision. Moreover, with the exception of California, which has radically different consumer protection laws than Colorado, there is no clear trend among the states on this issue. *Compare, e.g., Hayes, 811 N.Y.S. 2d at 743* (applying New York law and finding that "the fact that the arbitration agreements effectively preclude [plaintiff] from pursuing a class action does not alone render them substantively unconscionable") *with Cohen, 48 Cal. Rptr. 3d at 822-23* (applying California law and noting that "class action waivers may be found unconscionable in a variety of circumstances"). Due to the varied nature of the decisions and the critical factual and legal distinctions, the Court can draw little guidance from these previous decisions.

Even the lone case that contains a non-arbitration class action bar provides almost no guiding precedent. *See In re Yahoo! Litig., 251 F.R.D. 459 (C.D. Cal. 2008)* (withholding **[*54]** judgment on enforceability of class action bar under California law). [18] A purported class of Yahoo advertisers sued the internet search engine company alleging that Yahoo had failed to properly place advertisements in a "targeted" manner. *251 F.R.D. at 461-62*. Yahoo moved to dismiss the complaint pursuant to Federal *Rule 12(b)(6)* on the basis that the advertisers were precluded from suing as a class because of a class action bar provision in the Yahoo advertising contract they had signed. *Id. at 463*. In addressing Yahoo's motion, the Central District of California reviewed California law on the topic and found that a class action "waiver" was neither *per se* enforceable (as Yahoo argued) or *per se* unconscionable (as the plaintiffs argued). *Id. at 468-69*. In so holding, Judge Snyder found that the question of enforceability of a class action bar should be based on a well-developed factual record and that no hard-and-fast rules should apply. *Id.* The court then denied the motion to dismiss without prejudice, thus allowing Yahoo to reassert the issue after discovery. *Id.*

Thus, even *Yahoo*, which is analogous to this case, provides this Court with no clear direction regarding class action bars. However, this Court agrees with Judge Snyder that no bright line tests should apply and, in fact, Judge Snyder's pronouncement falls right in line with Colorado law on unconscionability, to which the Court now turns.

---

[18] The contract clause in *Yahoo!* was a pure class action bar, similar to the clause in Section 21.4 of the franchise agreement **[*55]** in this case, as distinguished from the arbitration provisions at issue in nearly all of the other cases that have addressed the class action bar. *See 251 F.R.D. at 468-69*.

VII. UNCONSCIONABILITY UNDER COLORADO LAW

Although the instant case began in New Jersey, the parties now agree that, pursuant to the choice of law clause in the franchise agreement, Colorado law (as well as federal law, when appropriate) will apply.

A. Applicable Law

HN11[] Courts applying Colorado law start with the presumption that a contract clause is enforceable. *See Allen v. Pacheco, 71 P.3d 375, 378 (Colo. 2003)* ("We will enforce the agreement as written unless there is an ambiguity in the language; courts should neither rewrite the agreement nor limit its effect by a strained construction."); *see also State Farm Mut. Auto. Ins. Co. v. Stein, 940 P.2d 384, 387 (Colo. 1997)* (same). The **[*56]** fact that the contract benefits one party more than the other does not alter the presumption of enforceabilty. *See, e.g., Thurmon v. Skipton, 157 Colo. 423, 403 P.2d 211, 214 (Colo. 1965)* ("Courts will enforce a contract as made, regardless of whether it is an improvident one from the standpoint of one of the parties."); *Roberts v. Adams, 47 P.3d 690, 696 (Colo. Ct. App. 2001)* (same); *Sedalia Land Co. v. Robinson Brick & Tile Co., 28 Colo. App. 550, 475 P.2d 351, 354 (Colo. Ct. App. 1970)* ("The general rule is that, if a party enters into a contract or any other legal transaction with sufficient mental capacity to understand it, and not under the influence of fraud, coercion or imposition, the courts will not relieve him of the consequences of his act on the sole ground that the bargain is improvident as to him."). As such, and as noted above, the party seeking to avoid application of a contractual provision bears the burden of showing that it is unconscionable. *See, e.g., Kerr-McGee Corp. v. Northern Utils., Inc., 673 F.2d 323, 329 (10th Cir. 1982)* (applying Wyoming law); *ADT Sec. Servs., Inc. v. Envision Telephone, Inc., 2008 U.S. Dist. LEXIS 100729, 2008 WL 5064268, at *5 (D. Colo. Nov. 21, 2008)* (applying Washington law).

Notably, none of the **[*57]** cases disclosed by the parties (and none found by the Court) involve the application of Colorado law to an unconscionability challenge to a class action bar provision identical to the one at issue in this case. [19] However, ***HN12***[] the Colorado Supreme Court has adopted a seven factor test to determine whether a particular contractual provision is unconscionable. *See Davis v. M.L.G. Corp., 712 P.2d 985, 991 (Colo. 1986)* (discussing unconscionability in context of an automobile rental contract).

In *Davis,* the Colorado Supreme Court listed seven non-exclusive factors that courts can consider in determining whether to enforce a contract provision:

(1) Is the agreement a standardized/form agreement made by parties with unequal bargaining power?
(2) Did the parties have an opportunity read and become familiar with the document before signing it?
(3) Did the document bury the provision in fine print?
(4) Is the provision commercially reasonable?
(5) Is the provision substantively unfair?
(6) What is the relationship between the parties? Was there notice or surprise?

(7) **[*58]** What are the remaining circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect?

Davis, 712 P.2d 985 at 991.

Davis advises that no one factor predominates and courts should examine each of the factors in conjunction with the entirety of the circumstances surrounding the transaction. *Id.* If the entirety of the circumstances discloses evidence of "overreaching" by one party that causes a contract provision to unreasonably favor that party to the detriment of the other party, a court should decline to enforce the provision. [20] *See id.; see also Leprino v.*

---

[19] Nor does it appear that a court applying Colorado law has addressed the issue of unconscionability in the franchisor/franchisee context.

Intermountain Brick Co., 759 P.2d 835, 836-37 (Colo. Ct. App. 1988) (unconscionability under UCC sale of goods contract); *McMillion v. McMillion, 522 P.2d 125, 129 (Colo. Ct. App. 1974)* (unconscionability under dissolution of marriage contract) (unpublished opinion).

HN13[] Regardless of the test used, the question of unconscionability is a **[*59]** matter of law, *Leprino, 759 P.2d at 836*, and the results obtained by any formulation of the test are the same; if a contract clause is unconscionable, a court should not enforce it. *See, e.g., Davis, 712 P.2d at 991* (declining to enforce unconscionable provision). On the other hand, if a party cannot meet its burden to show that the contract clause is unconscionable, the court will enforce it. *Jones v. Dressel, 623 P.2d 370, 374-75 (Colo. 1981)* (enforcing exculpatory clause in non-adhesionary contract).

B. Enforceability of the Class Action Bar Under Colorado Law

With the above-discussion of Colorado law in mind, the Court now reaches the crux of the issue of this Motion: Is the class action bar enforceable? Or, more specifically, is the class action bar unconscionable under Colorado law?

Plaintiffs assert two primary arguments against enforcement of the class action bar: (1) that Quiznos' sales process infected the entire franchise agreement with fraud, thereby rendering the bar unconscionable, and (2) that enforcement of the class action bar is substantively unfair.

1. *The Franchise Agreement is a Standard Form Contract*

Plaintiffs contend that the first *Davis* factor, whether the contract **[*60]** was a standard form or negotiated, favors their position. The Court agrees, but Plaintiffs' advantage on this issue is slight.

It is undisputed that Quiznos offered franchisees a standard form franchise agreement on a take-it-or-leave-it basis. This fact suggests the potential for unconscionability and overreaching by Quiznos. However, unlike the California cases upon which Plaintiffs rely, ***HN14***[] under Colorado law, a take-it-or-leave-it contract does not automatically render the agreement unconscionable. *See Batterman v. Wells Fargo Ag Credit Corp., 802 P.2d 1112, 1116 (Colo. Ct. App. 1990)* (holding that lender could use superior bargaining position and require "protective terms in the contract" without rendering the contract adhesory); *Clinic Masters, Inc. v. District Court for County of El Paso, 192 Colo. 120, 556 P.2d 473, 475-76 (Colo. 1976)* (holding that form contract offered on a take-it-or-leave it basis does not render a contract unconscionable). Moreover, the parties in this case did not have an ongoing relationship prior to executing the franchise agreement. Thus, Plaintiffs were not faced with the Faustian decision of terminating their pre-existing contract or accepting a newly-added class action **[*61]** bar they did not want. *Cf. Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, 1103-04 (Cal. 2005)* (declining to enforce class arbitration bar when credit card issuer added bar in a take-it-or-leave-it change of terms provision to existing agreement). Moreover, Plaintiffs did not have to enter in the franchise agreement with Quiznos. They were free to purchase a different franchise or invest their money elsewhere without any financial repercussions to themselves or Quiznos. *See Jones, 623 P.2d at 375* (no adhesion contract when services provided by defendant could be obtained elsewhere); *Clinic Masters, 556 P.2d at 476* (fact that services could be purchased elsewhere militates against finding of unconscionability).

However, the fact remains that Plaintiffs could not truly negotiate or re-write any provisions of the franchise agreement, including the class action bar. Therefore, because the class action bar is undeniably part of a form agreement signed by parties with unequal bargaining strength, the first *Davis* factor cuts mildly in Plaintiffs' favor.

2. *Plaintiffs Had Ample Opportunity to Read the Franchise Agreement Before Signing It*

The second *Davis* factor, whether the prospective franchisees **[*62]** had a chance to read and become familiar with the document before signing it, favors enforcement of the class action bar.

---

[20] Likewise, although it is not directly applicable to the facts of this case, the U.C.C. recognizes that a contract term's "commercial setting, purpose, and effect" may aid the court in determining whether a term is unconscionable. *See C.R.S. § 4-2-302(2)*.

Quiznos provided a copy of the franchise agreement with the UFOC ten days prior to allowing a potential franchisee to sign the contract. Moreover, Quiznos encouraged franchisees to consult with a lawyer. Plaintiffs contend that this was insufficient because Quiznos did not tell the potential franchisees that "there was only one acceptable way to complete the Disclosure Acknowledgment Statement [21] ("DAS") until the day the DAS was to be signed." (Doc. # 296 at 10.) However, the defect in disclosure that Plaintiffs identify does not relate to the class action bar and the alleged infirmity with the UFOC does not reduce the amount of time that franchisees had to read the franchise agreement. Thus, Plaintiffs cannot deny that they had at least ten days to review a copy of the franchise agreement before they signed it. In fact, most of the Plaintiffs admit that they read some or all of the agreement before signing it. Regarding those franchisees who chose not to read the franchise agreement (or chose not to read all of it), the decision not to read the agreement before **[*63]** signing does not change the fact that Quiznos gave franchisees **the opportunity** to read the agreement.

Given the ten-day disclosure and the ability of the Plaintiffs to procure legal counsel, this factor cuts squarely in Quiznos' favor.

3. *Section 21.4 Does Not Use Fine Print*

The third *Davis* factor, the use of fine print or other typographical trickery, also favors enforcement of the provision.

Plaintiffs argue that Quiznos strategically placed the class action bar in the middle of a paragraph near the end of the forty-page agreement and this placement suggests unconscionability. The Court disagrees. The provision containing the class action bar is written in the same typeface, using the same font size as the remainder of the franchise agreement. The fact that it comes towards the end of the agreement does not make it any more difficult to see or understand than a provision placed **[*64]** on the third or thirteenth page of the franchise agreement. With certain exceptions, courts should not be in the business of telling parties how to style their contracts and this case is no exception. Therefore, this factor also favors enforcement of the class action bar.

4. *The Waiver Serves a Commercial Purpose*

The fourth *Davis* factor, the absence of a commercially reasonable justification for the class action bar, is almost even between the parties. But, on the evidence before it, the Court concludes that it tips slightly in favor of enforceability.

Undoubtedly, the class action bar makes mass litigation more difficult for Quiznos' franchisees. Thus, the waiver potentially reduces the number of large lawsuits that Quiznos faces from disgruntled franchisees. This reduction in litigation could plausibly serve a commercial purpose, at least from Quiznos' perspective. Like other provisions that discourage litigation, even meritorious litigation, *e.g.,* exculpatory clauses, contractual statutes of limitations, limitations on punitive damages, etc., the class action bar likely benefits Quiznos' bottom line. Quiznos attempts to phrase it in somewhat more favorable terms and contends that the **[*65]** class action bar reduces dispute resolution costs and affords "greater predictability in decision-making, budgeting and planning" for Quiznos and its franchisees. (Doc. # 301 at 9.) Although the Court questions whether Quiznos really wants to open up the possibility of thousands of individual lawsuits by disgruntled SNOs, and whether such a result would be commercially beneficial, it is not this Court's responsibility to question the seemingly rational, somewhat heavy-handed business choices made by private parties in their contractual dealings.

Plaintiffs do little to refute Quiznos' position on this factor, but instead try to spin it in their favor in other portions of the *Davis* analysis, mainly the substantive unfairness factor. They contend that a reduction in litigation serves no commercial purpose from their point of view. But, the fact that the class action bar discourages litigation, even if it is a somewhat nefarious goal from Plaintiffs' perspective, does serve a commercial purpose from Quiznos' perspective.

---

[21] The DAS was a form that each franchisee signed to acknowledge Quiznos' compliance with federal franchise law. By signing the DAS, each franchisee theoretically verified that Quiznos made the appropriate disclosures and allowed the franchisees to review those disclosures prior to executing the franchise agreement.

Thus, if Quiznos' business theories are to be believed, and Plaintiffs offer this Court no reason not to believe them, this factor favors enforcement of the class action **[*66]** bar, if only slightly.

5. *The Class Action Bar is Not Substantively Unfair*

The fifth factor is perhaps the most important to the discussion on unconscion-ability: whether the class action bar is substantively unfair. The Court finds that it is not.

Plaintiffs essentially adopt the balancing test -- cost to bring individual lawsuits versus amount of individual recovery -- used in *Kristian* and *American Express* to strike down class action/class arbitration bars. They argue that because of the large number of SNOs and the small amount of money at stake for each individual SNO, only a class action will provide a fair forum for their complaints. Conversely, if the Court enforces the class action bar, Plaintiffs argue that they would be left without a way to vindicate their legal rights. Thus, they contend that the class action bar is substantively unfair. However, as noted above in the section dealing with earlier judicial treatment of class action bars, a number of factors in this case reveal that individual actions, although perhaps more costly in the aggregate, are not unfathomable or unfair.

First and foremost, the SNOs could bring individual lawsuits. In this case, the SNOs typically spent **[*67]** between $ 20,000 and $ 25,000 for their franchises. This amount of money is a far cry from the three-- and four-figure-per-plaintiff amounts in cases like *Kristian* or *American Express.* Further, when trebled, the per-SNO damages figure rises solidly into mid-- or upper-five figure recoveries per franchisee. Plaintiffs have submitted a few affidavits from attorneys who stated that they would not take a SNO's case because of the small amount of money involved. But, these proud attorneys notwithstanding, the Court cannot say that a franchisee who stands to recover $ 60,000 to $ 75,000 **plus attorneys fees** will be left wanting for competent legal representation. [22]

Moreover, an individual case would not require a large up-front investment of resources. The legal issues in this case, unlike those in *Kristian* **[*68]** or *American Express,* do not require expensive expert analysis or massive, widespread discovery. Because the amount of available damages is sufficient and the cost to bring an individual lawsuit is not overwhelming, individual franchisees would not experience the same type of economic roadblocks that the plaintiffs in *Kristian* or *American Express* would have experienced.

Second, the fact that the provision may benefit Quiznos more than the franchisees is not enough to render it substantively unfair. Admittedly, the class action bar benefits Quiznos, potentially at the franchisees' expense. But, Colorado contains important distinctions in this area of law from other states on which Plaintiffs rely *(i.e.,* California). Significantly, ***HN15***[] Colorado does not require bilaterality for a contract to be enforceable. *Compare Morris v. Belfor USA Group, Inc., 201 P.3d 1253, 1260 (Colo. Ct. App. 2008)* ("[I]n Colorado, a fee-shifting provision need not be mutual to be enforceable.") *with Ting, 319 F.3d at 1150* ("'bilaterality' is a requirement in all California arbitration agreements"). Thus, the fact that the class action bar works solely or primarily to Quiznos' advantage does not render the provision **[*69]** substantively unfair. *See, e.g., Rains v. Foundation Health Sys. Life & Health, 23 P.3d 1249, 1255 (Colo. Ct. App. 2001)* ("Under Colorado law, every contractual obligation need not be mutual as long as each party has provided some consideration for the contract.").

Therefore, because Plaintiffs have not shown that the class action bar would preclude them from obtaining legal redress, and because bilaterality of contractual terms is not required under Colorado law, Plaintiffs have not shown that the class action bar is substantively unfair.

6. *The Parties' Relationship Does Not Render the Waiver Unconscionable*

The sixth *Davis* factor, the nature of the parties' relationship, supports Plaintiffs' position, but again, only slightly. Plaintiffs argue that franchisees stand at a unique power disadvantage when dealing with franchisors. Quiznos

[22] Other individual Quiznos franchisees have brought at least thirty lawsuits against Quiznos for the return of the franchise fee after they failed to open a restaurant within one year. (Doc. # 259 at 18.) Interestingly, counsel for Plaintiffs has represented at least some of the previous franchisee litigants in individual suits against Quiznos for the return of the franchisee fee. *(Id.)*

attempts to paint potential franchisees as savvy business investors capable of asserting their own interests. Against these competing visions, the Court that finds neither side has portrayed a completely accurate picture of the parties' relationship, but that Plaintiffs' characterization is the more accurate of the two.

Quiznos contends that the relationship **[*70]** between it and its franchisees is an entirely equal, arms-length situation. Moreover, unlike many of the cases cited by Plaintiffs, ***HN16***[] Colorado law does not automatically afford special protection to franchisees in the same manner that it protects consumers. Compare *ILJ Dominicana S.A. v. It's Just Lunch Int'l, LLC, 2009 U.S. Dist. LEXIS 13689, 2009 WL 305187, *3 (C.D. Cal. Feb. 6, 2009)* (noting that, under California law, franchise agreements "share common aspects of consumer contracts") with *RHC, LLC v. Quizno's Franchising, LLC,* 2005 WL 1799536, *8 (Colo. Dist. Ct. July 19, 2005) (noting in case involving Quiznos franchisee that franchisor-franchisee is an arms-length commercial relationship). Further, in contrast to uninitiated consumers purchasing a cell phone or signing up for a credit card, the purchasers of these franchises were making a major investment involving tens of thousands of dollars in up-front fees and even more than that amount of money over the prospective life of their franchise. Thus, one would expect that plaintiffs entering into such a relationship would do so with a bit more cognizance than a teenager purchasing a phone at the mall.

Nonetheless, it is clear that Quiznos retains far greater **[*71]** power in the parties' relationship than any one franchisee, as Plaintiffs' expert, Professor Resenbloom, points out. Indeed, there would be no reason for the franchisees to form the owners' groups that they have formed if they had a truly equal relationship with Quiznos. Additionally, as noted above, Quiznos relied on a form contract that the franchisees could not negotiate or re-write in any way.

Thus, when the Court views the competing versions of the parties' relationship, it finds that Quiznos retained the bulk of the bargaining power. However, this is only one factor of seven, and, as noted, Colorado law does not provide *per se* protection to franchisees. Therefore, the Court finds that this factor alone does not render the class action bar unconscionable.

7. *Other Circumstances Surrounding Formation of the Agreement*

Plaintiffs contend that the fraudulent nature of the Quiznos' franchise sales pitch infects the enforceability of the class action bar. The Court disagrees.

Many of the facts that Plaintiffs rely on to support this argument are subsumed elsewhere in the Court's analysis of the *Davis* factors and they fail to support Plaintiffs' argument, *e.g.,* the typeface and location **[*72]** of the class action bar and the ten-day waiting period between Quiznos' disclosure of the franchise agreement and a franchisee's execution of the contract. However, even if the Court were to accept Plaintiffs' allegations regarding the questionable nature of Quiznos' scripted franchise marketing pitch, Plaintiffs have pointed to nothing in that pitch that goes directly to enforceability of the class action bar. [23] Plaintiffs' assertions that Quiznos fraudulently induced them into signing the franchise agreement with representations regarding real estate assistance do not affect the enforceability of the dispute resolution clause, which is a completely unrelated and severable provision. Indeed, not once in their declarations or supporting documents do Plaintiffs identify an alleged misrepresentation concerning the dispute resolution clause in the franchise agreement. The Court views the class action bar as akin to other types of dispute resolution clauses, which require targeted allegations of fraud to be rendered unenforceable. [24] *See, e.g., Ornelas, 2007 U.S. Dist. LEXIS 6214, 2007 WL 274738 at *5* ("Because plaintiff challenges the validity of the Lease Agreement, but not specifically its Arbitration Provision, **[*73]** the provision may be enforceable even apart from the remainder of the contract."). Therefore, this factor does not support a finding of unconscionability.

8. *The* Davis *Factors Reflect That the Class Action Bar Should Be Enforced*

---

[23] Plaintiffs repeatedly characterize Quiznos' sales strategy as "aggressive," as if repeating the word enough times and adding emphasis in their briefs somehow equates it with "fraudulent." *(See, e.g.,* Docs. # 235 at 2; 299 at 2.)

[24] In so holding, the Court echoes Judge Cavanaugh's analysis of the venue selection provision. *See supra.*

Plaintiffs have not demonstrated any unreasonable "overreaching" by Quiznos that would render the class action bar provision unconscionable. The most important *Davis* factors -- substantive fairness and commercial purpose -- favor enforcement of the class action bar. Thus, the Court concludes that the class action bar is not unconscionable under Colorado law. The Court will now turn to a brief discussion of its own concerns with potential jurisdictional and prudential problems that may arise when dealing with class action bars.

VIII. PRUDENTIAL CONSIDERATIONS DO NOT RENDER THE CLASS ACTION BAR UNENFORCEABLE

Having addressed the parties' **[*74]** arguments regarding enforceability and unconscionability of the class action bar, the Court will finally address its own concern with the bar, namely, whether such a clause improperly intrudes upon the Court's ability to manage its cases pursuant to the Federal Rules of Civil Procedure. The Court notes that previous opinions addressing class action and/or class arbitration bars have not addressed the concept that a class action bar (or similar agreement by the parties) might impugn the Court's ability to properly regulate litigation before it. Perhaps the Court is answering a question that need not be asked, but the Court feels that it needs to provide some cautionary advice on the topic of waivers. In addition to unconscionability concerns, with respect to the many different waiver provisions being inserted into contractual agreements, at some point parties are going to overstep their bounds and intrude into the province of the Court's by waiving procedural matters that affect case management and judicial economy. *See Evergreen Nat'l Corp. v. Killian Constr. Co., 876 S.W.2d 633, 635 (Mo. Ct. App. 1994)* (allowing party to waive objection to personal jurisdiction and permit variances **[*75]** in the method of service or notice but finding that "there is no authority for the proposition that parties may waive . . . other procedural matters which affect judicial economy rather than the parties' due process rights").

The fact that class actions are judicially created tools of litigation management caused this Court to give serious consideration to whether or not it should sanction the parties' agreement to deviate from the Federal Rules of Civil Procedure. However, ***HN17***[] despite the fact that *Rule 23* is, first and foremost, a tool intended to enhance economy and management, modern district courts cannot certify a class under *Rule 23* on their own initiative without a request from one or both of the parties. *See* *Newsom v. Norris, 888 F.2d 371, 381-82 (6th Cir. 1989)* ("Although a trial 'court may suggest that relief to a definable class would be appropriate, . . . it cannot convert an individual action into a class action on its own motion.'") (quoting 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1785) (omission in original). Indeed, unlike other Federal Rules, *e.g.,* *Rules 13* and *19*, there is nothing compulsory about bringing a claim under *Rule 23*; **[*76]** thus, there is nothing jurisdictional about *Rule 23*. This fact gives the Court some comfort that, by enforcing the class action bar at issue, the Court will not improperly alter other procedural mandates, as would be the case if, for example, the question before the Court was the enforceability of a contractual bar on compulsory counterclaims. *See, e.g.,* *Loader Leasing Corp. v. Kearns, 83 F.R.D. 202, 203-04 (W.D. Penn. 1979)* (declining to enforce waiver of compulsory counterclaim because to do so would "unreasonably restrict the privilege of litigating a claim and limit the jurisdiction of the district courts"). Further, the Court emphasizes that its enforcement of the class action bar in this case is limited to the facts and circumstances of this case. The Court cautions parties that other contractual deviations from the Federal Rules of Civil Procedure may be unconscionable or stricken if they intrude on the Court's ability to manage litigation.

CONCLUSION

Plaintiffs bear the burden of showing why the class action bar should not be enforced in this case. For the above-described reasons, the Court concludes that Plaintiffs have not met their burden. The facts of this case do not support **[*77]** a finding under Colorado law that the class action bar is unconscionable or otherwise unenforceable.

Accordingly, Plaintiffs' Motion for Class Certification (Doc. # 212) is DENIED.

IT IS FURTHER ORDERED that the hearing on the Motion currently scheduled for April 23-24 is VACATED.

DATED: April 20, 2009

BY THE COURT:

/s/ Christine M. Arguello

CHRISTINE M. ARGUELLO

United States District Judge

Princo Corp. v. ITC

United States Court of Appeals for the Federal Circuit

April 20, 2009, Decided

2007-1386

Reporter

563 F.3d 1301 *; 2009 U.S. App. LEXIS 8230 **; 90 U.S.P.Q.2D (BNA) 1673 ***; 2010-2 Trade Cas. (CCH) P77,146

PRINCO CORPORATION and PRINCO AMERICA CORPORATION, Appellants, v. INTERNATIONAL TRADE COMMISSION, Appellee, and U.S. PHILIPS CORPORATION, Intervenor.

Subsequent History: Vacated by, Rehearing, en banc, granted by, Rehearing, en banc, denied by *Princo Corp. v. ITC, 583 F.3d 1380, 2009 U.S. App. LEXIS 22553 (Fed. Cir., 2009)*

Subsequent opinion on rehearing at *Princo Corp. v. ITC, 616 F.3d 1318, 2010 U.S. App. LEXIS 18101 (Fed. Cir., Aug. 30, 2010)*

Prior History: [1]** On Appeal from the United States International Trade Commission in Investigation No. 337-TA-474.

U.S. Philips Corp. v. ITC, 424 F.3d 1179, 2005 U.S. App. LEXIS 20202 (Fed. Cir., 2005)

Disposition: AFFIRMED-IN-PART, VACATED-IN-PART, and REMANDED.

Core Terms

patents, license, technology, pool, manufacture, package, misuse, discs, compliant, blocking, patent misuse, compact disc, royalties, compete, contends, purposes, viable, licensees, patent rights, rule of reason, anticompetitive, encoding, products, digital, competitor, signal, infringed, wobbled, tying arrangement, procompetitive

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN1[] **Defenses, Misuse**

Patent misuse is an equitable defense to patent infringement. It restrains practices that do not in themselves violate any law, but that draw anticompetitive strength from the patent right, and thus are deemed to be contrary to public policy. The key inquiry in determining whether a patentee's conduct constitutes misuse is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect. Experience teaches that some practices, such as when a patentee having market power conditions a license upon the purchase of a separate, staple good, are sufficiently anticompetitive so as to warrant condemnation on their face. Other allegedly-anticompetitive practices beyond the few specific practices identified by the courts as constituting misuse per se are evaluated under the rule of reason to determine whether they impose an unreasonable restraint on competition.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN2[] **Defenses, Misuse**

Perfect certainty is not required to avoid a charge of patent misuse through unlawful tying. Rather, in this context a blocking patent is one that at the time of the license an objective manufacturer would believe reasonably might be necessary to practice the technology at issue.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

Agreements between competitors not to compete are classic antitrust violations. Agreements preventing patent licensing of competing technologies also can constitute such violations.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN4[] **Defenses, Misuse**

The fact that a patent's disclosed embodiments may not be commercially viable is not dispositive to preclude a finding of patent misuse. Technology disclosed in a patent typically needs to be further developed before a viable commercial embodiment is possible. Indeed, one way the patent laws encourage the development of new products is by securing an inventor's rights during the time between patenting of an immature technology and commercialization.

Counsel: Eric L. Wesenberg, Orrick, Herrington & Sutcliffe LLP, of Menlo Park, California, argued for appellants. With him on the brief were Robert E. Freitas, Cynthia Wickstrom Zuniga, Kenneth J. Halpern, and Michael C. Ting.

Clara Kuehn, Attorney, Office of the General Counsel, United States International Trade Commission, of Washington, DC, argued for appellee. With her on the brief were James M. Lyons, General Counsel, and Wayne W. Herrington, Assistant General Counsel.

Jonathan G. Cedarbaum, Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, DC, argued for intervenor. With him on the brief were A. Douglas Melamed, Edward C. DuMont, and Perry A. Lange.

Judges: Before BRYSON, GAJARSA, and DYK, Circuit Judges. Opinion concurring in the result in part and dissenting in part filed by Circuit Judge BRYSON.

Opinion by: DYK

Opinion

[*1674] [*1302]** DYK, *Circuit Judge*.

Princo Corporation and Princo America Corporation (collectively "Princo") appeal from a final order of the United States International Trade Commission ("Commission"). The Commission found that compact discs imported by Princo infringed **[**2]** claims of six patents asserted by U.S. Philips Corporation ("Philips") and rejected Princo's patent misuse **[***1675]** defense. *In re Certain Recordable Compact Discs & Rewritable Compact Discs, No. 337-TA-474, 2007 ITC LEXIS 185, *10 (Int'l Trade Comm'n Feb. 5, 2007) ("Final Determination"), available at 2007 WL 1256290* (public version).

On appeal, Princo contends that the Commission erred by failing to find misuse with respect to two aspects of Philips's licensing practices: first, that Philips conditioned the license of Philips patents essential to the production of Orange Book compliant recordable compact discs upon the purchase of a license to an allegedly-nonessential Sony patent (the Lagadec patent), and second, that Philips allegedly agreed with Sony not to license the Lagadec patent as competing technology to the Orange Book. We affirm the Commission's rejection of Princo's misuse argument based on the first practice; we vacate and remand for further proceedings with regard to the second.

BACKGROUND

I

This is the second time that this case has come before us. *See* *U.S. Philips* ***[*1303]*** *Corp. v. Int'l Trade Comm'n, 424 F.3d 1179 (Fed. Cir. 2005)* ("*Philips I*") (remanding case to Commission); *see also* *U.S. Philips Corp. v. Princo Corp., 173 F. App'x 832 (Fed. Cir. 2006)* **[**3]** ("*Philips II*") (appeal in related infringement action filed by Philips against Princo in federal district court); *In re Princo Corp., 478 F.3d 1345 (Fed. Cir. 2007)* ("*Philips III*") (same).

The central issue is again whether Princo's admitted infringement of Philips's patents is subject to a patent misuse defense. The background on the parties' dispute is as follows.

Philips and three other companies (Sony, Taiyo Yuden, and Ricoh) own patents relevant to the manufacture of recordable compact discs ("CD-Rs") and rewritable compact discs ("CD-RWs"). Some of those patents cover features of discs necessary to comply with the "Orange Book," a technical standard jointly developed by Philips and Sony in the late 1980s and early 1990s. Manufacturers produce CD-R and CD-RW discs in accordance with the Orange Book technical standard in order for the discs to be compatible with CD players and CD-ROM drives installed in computers and home entertainment systems, which are also manufactured in accordance with the corresponding Orange Book specifications.

In the early 1990s, the companies agreed to pool their Orange Book-related CD-R and CD-RW patents. In return for a share of royalties from the pool, **[**4]** Sony, Taiyo Yuden, and Ricoh authorized Philips to administer the pool and to grant package licenses of their pooled patents to manufacturers interested in producing Orange Book compliant compact discs. Philips made available a joint license to the pooled CD-R patents held by Philips, Sony, and Taiyo Yuden and a joint license to the pooled CD-RW patents held by Philips, Sony, and Ricoh. [1] Licensees desiring to produce Orange Book discs could choose one of the packages offered by Philips; licenses to individual patents were not offered. The package licenses required a manufacturer to pay a per-disc royalty on each compact disc produced using at least one licensed patent. The per-disc royalty did not vary depending on which or how many features covered by licensed patents were actually used to produce the disc, "meaning that licensees must pay a royalty based on the number of discs manufactured regardless of how many of the patents are actually used in the manufacturing." *Philips III, 478 F.3d at 1348*.

Princo took a package license from Philips in 1997, but like several other manufacturers of CD-Rs and CD-RWs, ceased paying royalties soon thereafter. Philips filed a complaint with the International Trade Commission, contending that some of the manufacturers were violating *19 U.S.C. § 1337(a)(1)(B)* by importing compact discs

---

[1] Philips contends that in addition to the joint licenses, it also offered a package consisting of only the Philips patents. The Commission found otherwise, however, determining as a factual **[**5]** matter that Philips-only package licenses did not become available until 2000. In addition, in 2001 Philips added additional options by offering packages including only patents that Philips deemed "essential" to the manufacture of Orange Book compliant compact discs.

that infringed Philips's patents. There was no allegation that the manufacturers had infringed patents owned by other pool participants. On July 26, 2002, the Commission instituted an investigation and named nineteen respondents, not including Princo. *In re Certain Recordable Compact **[*1304]** Discs & Rewritable Compact Discs, 67 Fed. Reg. 48,948 (Int'l Trade Comm'n July 26, **[***1676]** 2002)*. Princo thereafter moved to intervene and was added as a respondent.

Although it initially contested the issue of infringement, Princo now admits that its products are within the scope of Philips's patents. Instead, Princo asserts patent **[**6]** misuse by Philips as a defense. Before the Commission, Princo argued that Philips improperly expanded the scope of its statutory patent rights through price fixing, price discrimination, and the use of mandatory package licensing to force manufacturers to take licenses to "nonessential" pool patents in order to obtain licenses to pool patents that were in fact essential to the manufacture of CD-Rs or CD-RWs. The administrative law judge ("ALJ") agreed, ruling that the Philips patents were unenforceable due to patent misuse per se and under the rule of reason. *See In re Certain Recordable Compact Discs & Rewritable Compact Discs*, No. 337-TA-474, slip op. at 219-20 (Int'l Trade Comm'n Oct. 24, 2003) ("*Initial Determination*"). With regard to per se misuse, the ALJ determined that Philips and other pool members fixed prices at higher than competitive levels and charged excessive royalties that would drive manufacturers out of the market, and that Philips committed improper price discrimination by exempting favored disc manufacturers from paying royalties. With regard to misuse under the rule of reason, the ALJ found that anticompetitive effects flowed from the inclusion of nonessential **[**7]** patents in the mandatory package licenses and from the excessive fixed royalty rates set by the pool.

On review, the Commission affirmed the ALJ's misuse determination, but on narrower grounds. *In re Certain Recordable Compact Discs & Rewriteable Compact Discs*, No. 337-TA-474, USITC Pub. No. 3686, slip op. at 4-5 (Apr. 11, 2004). The Commission took no position on the ALJ's ruling of patent misuse per se based on theories other than tying, and no position on eight of the twelve pool patents the ALJ found to be nonessential for the manufacture of Orange Book compliant CD-R/RWs and hence improperly tied to the essential patents. *Id*. at 5 n.3, 50-51. Focusing its analysis on the four remaining allegedly-nonessential patents, the Commission concluded that Philips's "practice of mandatory package licensing constitute[d] patent misuse per se as a tying arrangement between (1) licenses to patents that are essential to manufacture CD-Rs or CD-RWs according to Orange Book standards and (2) licenses to [the four] other patents that are not essential to that activity." *Id*. at 4-5. It agreed with the ALJ that the four patents were not actually essential because for the technology covered by each **[**8]** patent a non-infringing, "economically viable[] alternative technology existed" that could be used to create an Orange Book compliant disc. *Id*. at 61. It also adopted the ALJ's conclusion that the tying arrangement constituted misuse under the rule of reason. *Id*. at 50.

On appeal, we reversed and remanded. *Philips I, 424 F.3d at 1198-99*. We explained that offering the package licenses at issue did not constitute a per se violation "[i]n light of the efficiencies of package patent licensing and the important differences between product-to-patent tying arrangements and arrangements involving group licensing of patents." *Id. at 1193*. In addition, we concluded that Philips's inclusion of the four allegedly-nonessential patents in the package licenses did not constitute misuse under the rule of reason because those patents were essential rather **[*1305]** than nonessential. The patents were essential because they covered features necessary for Orange Book compliance, and the record did not disclose that "any commercially viable alternative actually existed" to those patents. *Id. at 1197-98*. However, because the Commission's relatively narrow decision based on tying of the four patents "did not address **[**9]** all of the issues presented by the administrative law judge's decision under both the per se and rule of reason analysis," we remanded for further proceedings concerning Princo's remaining theories of misuse. *Id. at 1198*.

II

Among Princo's arguments on remand were issues concerning misuse relating to one particular pool patent, Sony's U.S. Patent No. 4,942,565 (the "Lagadec patent" or "'565 Patent"), and those are the sole issues on appeal. A brief description of the development of the Orange Book standard and the relationship of the Lagadec patent to other pool patents is necessary to an understanding of Princo's arguments.

Both the Lagadec patent and Philips's U.S. Patent Nos. 4,999,825 and 5,023,856 (collectively the "Raaymakers patents") were included in the CD-R/RW patent pools. The **[***1677]** Raaymakers patents are undeniably essential to the manufacture of Orange Book compliant discs. The present dispute (as to the tying issue) centers on whether the Lagadec patent is also essential. The Lagadec and Raaymakers patents stem from the joint efforts of Philips and Sony engineers to develop recordable CDs in the late 1980s. The CD-R/RW discs that were eventually developed contain a highly accurate **[**10]** spiral-shaped "pregroove" track that provides a guide for the recording laser to follow when writing data to an unrecorded CD-R/RW. The pregroove is not a perfect spiral, but is slightly "wobbled" at regular intervals. *E.g*. U.S. Patent No. 5,023,856 fig. 4a. The undulating wobble is used by the recorder as a clock signal to control the CD-R/RW's rotation speed, ensuring that the disc rotates at the correct velocity during recording.

During the course of developing the recordable compact disc standard, Philips and Sony engineers exchanged proposals concerning different ways of implementing particular product features. One such feature was the encoding of position data on the "blank" or unrecorded CD-R/RW disc. Sony and Philips found that it was necessary to develop means for a CD-R/RW recorder to determine where along the spiral pregroove track the recorder's laser was positioned at any given time, or "absolute time" position data. [2]

After identifying the need for position data, Philips and Sony separately **[**11]** developed solutions that built upon the wobble signal on the compact discs that was already used to provide velocity control. Philips proposed an *analog* solution, encoding the absolute time position data by frequency modulating the wobble signal. In contrast, Sony proposed a *digital* modulation method to encode position data using the wobble signal. The analog Philips method, known as "Absolute Time in Pregroove" or "ATIP," was covered by the Raaymakers patents, while the digital Sony solution was covered by the Lagadec **[*1306]** patent. [3] Although the two methods solve the same basic problem (the encoding of position data on recordable CDs using the existing wobbled pregroove, and doing so in a manner backwards-compatible with existing CD players), they are fundamentally incompatible, and there is no dispute that a disc made using one technological approach would not work in an CD recorder designed to read position data using the other.

Philips and Sony ultimately chose to define the Orange Book standard using the analog Raaymakers ATIP approach, **[**12]** not the digital Lagadec method. Nevertheless, a license to the Lagadec patent was included along with the Raaymakers patents in the standard CD-RW joint license and perhaps in the CD-R joint license as well. [4] The joint licenses only allowed use of pool patents, including Lagadec, to produce Orange Book compliant discs. They did not allow use of Lagadec to produce a disc using the digital method for encoding position data taught by Lagadec.

On remand, the Commission did not hold hearings or remand to the ALJ. It confined itself to new arguments before the full Commission concerning the previously unaddressed portion of the ALJ's initial decision. Princo advanced, *inter alia*, two misuse theories concerning the Lagadec patent. First, Princo pursued a tying theory, arguing that the Lagadec patent was not essential to the production of Orange Book compliant discs and was unlawfully tied to patents that were actually essential to the manufacture of Orange Book compact discs, including **[**13]** the Raaymakers patents. Second, Princo alleged that the Lagadec and Raaymakers patents covered potentially competing technologies, and that by agreeing with Sony that the Lagadec patent would not be available except

---

[2] "Absolute time" refers to the fact that the laser's location is expressed in terms of the time required to scan the spiral groove from the start of the disc to the current position.

[3] Although the Lagadec patent primarily describes a digital solution, as will be seen, Claim 6 of that patent is arguably not limited to digital modulation.

[4] The record on appeal is unclear as to whether the Lagadec patent was included in the standard CD-R joint license before 2001, when it was expressly listed by Philips in the package of "essential" CD-R patents.

through a package license that also included the Raaymakers patents, Philips engaged in a form of price fixing, i.e., foreclosing potential competition between the technologies of the Lagadec and Raaymakers patents. [5]

On February 5, 2007, the Commission issued a final determination. *Final Determination at 1, 2007 ITC LEXIS 185*. For the reasons discussed below, the Commission reversed the ALJ's previously unaddressed rulings that Philips **[**14]** committed patent misuse. Having determined that Princo's accused compact discs infringed the claims of the six patents asserted by Philips, that the asserted claims were enforceable and not invalid, and that the domestic industry requirement of *section 337* was satisfied, the Commission issued remedial orders.

Princo timely appealed from the final determination of the Commission, and we have jurisdiction under *28 U.S.C. § 1295(a)(6)*.

[*1307] DISCUSSION

HN1[] Patent misuse is an equitable defense to patent infringement. It was designed "'to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed to be contrary to public policy.'" *Philips I, 424 F.3d at 1184* (quoting *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 704 (Fed. Cir. 1992))*. The key inquiry in determining whether a patentee's conduct constitutes misuse "'is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect.'" *Id*. (quoting *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998))*. Experience has taught that some practices, **[**15]** such as when a patentee having market power conditions a license upon the purchase of a separate, staple good, are sufficiently anticompetitive so as to warrant condemnation on their face. *Va. Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997)* (discussing examples of per se misuse). [6] Other allegedly-anticompetitive practices beyond the few specific practices identified by the courts as constituting misuse per se are evaluated under the rule of reason to determine whether they "impose[] an unreasonable restraint on competition." *Id.; see also* *Philips I, 424 F.3d at 1185*.

Against this background, Princo contends that the Commission erred by failing to find patent misuse by Philips either as a result of tying or as a result of an agreement between Sony and Philips concerning the availability of the Lagadec **[**16]** patent. We address these arguments in turn.

I

A

Princo first argues that "Philips has engaged in patent misuse by tying the Lagadec patent to the essential Orange Book patents in a manner prohibited under *Philips I*." Appellants' Br. 48. Princo's primary contention is that through mandatory package licensing, Philips improperly used its market power to force manufacturers seeking patents essential to the production of Orange Book compliant discs to also take a license to Lagadec, an allegedly-nonessential Sony patent.

Tying arrangements have a long history in both the patent misuse and antitrust contexts. Much of the Supreme Court's early patent misuse doctrine was developed in cases involving a challenge to some form of tying

---

[5] The Commission's independent Investigative Attorney ("IA"), whose role as defined in *19 C.F.R. § 210.3* is to "engage in investigatory activities in an investigation or a related proceeding," did not support any of Princo's per se misuse theories below. The IA agreed, however, that inclusion of Lagadec supported a finding of patent misuse under the rule of reason. The IA argued, *inter alia*, that "Philips included the Lagadec patent" to "secure[] Sony's adherence to the . . . Orange Book standard" and to "forestall competition from Sony." *Final Determination at 96, 2007 ITC LEXIS 185*. **[***1678]**

[6] Congress has created a safe harbor in *35 U.S.C. § 271(d)(5)* for certain types of conduct by patentees lacking market power. *See* *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 41-42, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In the present case, "the Commission found that Philips has market power in the relevant market and that *section 271(d)(5)* is therefore inapplicable." *Philips I, 424 F.3d at 1186*.

arrangement. In Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 490-91, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733 (1942), for example, the Court held that a tying arrangement where the patent license was conditioned upon the purchase of a separate, staple product amounted to patent misuse, because in such a case "the patent is used as a means of restraining competition with the patentee's sale of an unpatented product." Id. at 493; *see also* Ill. Tool Works, 547 U.S. at 45-46 (holding that a patent alone **[**17]** does not confer market power necessary to show unlawful tying). Likewise, the early antitrust cases found that various tying **[*1308]** arrangements violated the antitrust laws. *See, e.g.,* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 10-11, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958); *see also* United States v. Loew's Inc., 371 U.S. 38, 44-45, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962); United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-59, 68 S. Ct. 915, 92 L. Ed. 1260 (1948).

Although tying in many of its varied forms has potential to inflict anticompetitive harms, in more recent times it has been recognized that tying also has potential to create substantial **[***1679]** procompetitive efficiencies. *See, e.g.,* Ill. Tool Works, 547 U.S. at 36 ("The assumption that '[t]ying arrangements serve hardly any purpose beyond the suppression of competition,' rejected in [U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977)], 97 S. Ct. 861, 51 L. Ed. 2d 80, has not been endorsed in any opinion since."); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 40-44, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (O'Connor, J., concurring in judgment) ("Tie-ins may entail economic benefits as well as economic harms, and . . . these benefits should enter the rule-of-reason balance."); *see also* Herbert Hovenkamp, Mark. D. Janis & Mark A. Lemley, *IP and Antitrust* § 34.4, at **[**18]** 34-20.1 (2009) ("Typical procompetitive benefits [of patent pools] include the clearing of blocking positions, the advantages flowing from integration of complementary technologies, and the cost savings from avoiding litigation.").

In *Philips I*, we considered one particular form of patent-to-patent tying, where patents essential to the practice of a standardized technology (the Orange Book standard) were licensed together as a package. We concluded that "[i]n light of the efficiencies of package patent licensing and the important differences between product-to-patent tying arrangements and arrangements involving group licensing of patents," Philips's practice of package licensing essential patents together could not be condemned as misuse per se but instead should be evaluated under the rule of reason. Philips I, 424 F.3d at 1193. As we explained, the group of patents essential to practice a particular technology or standard generally may be viewed as a unified product:

> If a patentholder has a package of patents, all of which are necessary to enable a licensee to practice particular technology, it is well established that the [patentholder] may lawfully insist on licensing the patents **[**19]** as a package and may refuse to license them individually, since the group of patents could not reasonably be viewed as distinct products.

Id. at 1196; *see* Hovenkamp, Janis & Lemley, *supra*, § 22.3 at 22-13, 14. Inclusion in a package license of essential patents to enable the practice of the particular technology by clearing blocking positions is not tying of the type that patent misuse doctrine seeks to prevent. *See* Philips I, 424 F.3d at 1196; Int'l Mfg. Co. v. Landon, Inc., 336 F.2d 723, 729 (9th Cir. 1964).

Moreover, we concluded that Philips's practice of offering essential patents as a package survived under the rule of reason. There, the allegation was that four Orange Book pool patents were not actually essential because alternative technologies existed that could be used in their place to produce Orange Book compatible compact discs without infringing the four patents. Philips I, 424 F.3d at 1194-95. We rejected the argument that the four patents were not essential, as the record showed that those patents in fact had "no practical or realistic alternative." Id. at 1194, 1198. **[*1309]** As a result, the tying of those four patents to so-called essential patents would have no anticompetitive **[**20]** effect "because no competition for a viable alternative product is foreclosed." Id. at 1194.

On remand, the Commission rejected Princo's Lagadec tying claim under the framework of *Philips I*, stating that "[Princo]'s argument is fundamentally flawed because the [Raaymakers] patents are inside, not outside, the package." Final Determination at 80, 2007 ITC LEXIS 185. The Commission similarly rejected the IA's Lagadec tying claim, stating that "the premise of the IA's argument . . . that the Lagadec '565 patent cannot be used to make an Orange Book compliant CD, is fatal to his rule of reason tying claim." *Id*. at 94. Elsewhere in its opinion, the Commission declined to decide whether Lagadec was a blocking patent, i.e., a patent that covered the Orange

Book standard and was therefore essential to the production of Orange Book compliant discs. Final Determination at 23, 2007 ITC LEXIS 185.

On appeal, Princo contends that the Commission erred in rejecting its misuse claim under *Philips I*, arguing that the Lagadec patent is not an "essential patent" for purposes of the Orange Book standard. It maintains that requiring licensees to purchase Lagadec, a nonessential patent, in order to obtain licenses to truly essential patents therefore **[**21]** constitutes misuse. We need not parse the Commission's somewhat opaque decision as to the tying claim for, like Philips, we believe that this issue can be resolved by focusing on the issue not decided by the Commission--namely, the scope of Claim 6 of the Lagadec patent.

Philips contends that Lagadec is essential as a blocking patent because at least one patent claim, Claim 6, reads on every Orange Book compliant disc. Claim 6 provides: "A disc-shaped recording medium . . . having formed **[***1680]** thereon a substantially spiral pregroove which is wobbled . . . and formed by . . . a first signal . . . that has been modulated by a second signal . . . ." '565 Patent col. 10 ll.14-24. [7] Philips maintains that Claim 6 is broadly written to cover recordable compact discs containing a wobbled pregroove formed by "a first signal . . . that has been modulated by a second signal that contains coded information," and does not require the use of any particular type of modulation (for example, digital modulation). '565 Patent col.10 ll.22-25. Although it acknowledges that Lagadec "generally teaches a digital method of encoding position data not used by the Orange Book," it contends that the specification **[**22]** cannot be used to read a "digital" limitation into Claim 6 where such a **[*1310]** limitation is absent from the language of the claim. *See* *Phillips v. AWH Corp., 415 F.3d 1303, 1323-24 (Fed. Cir. 2005)* (en banc).

In contrast, Princo argues that Lagadec is not in fact a blocking patent because Claim **[**23]** 6 must be read in light of the specification, which discloses primarily a digital encoding scheme. Princo does not identify any individual claim limitation of Claim 6 that is absent from the Orange Book compact discs; rather, it argues that because the Lagadec specification must be understood as teaching away from analog methods, the patent must be read as claiming only a digital encoding scheme. Princo contends that Lagadec therefore is not an essential patent, because Claim 6 cannot be construed as blocking a recordable compact disc using the analog encoding method required by the Orange Book standard.

The Commission did not decide this question, nor do we need to do so. We conclude that Lagadec can qualify as an essential Orange Book patent if a license to practice Claim 6 of the Lagadec patent could be viewed as reasonably necessary to practice the Orange Book standard. We further conclude that it would have been reasonable for a manufacturer to believe a license under Claim 6 was necessary at the time the licenses were executed.

Philips I recognized that patent pools could generate procompetitive efficiencies in the form of reduced transaction costs, reduced litigation expenses, **[**24]** and most importantly the overall "procompetitive effect of reducing the

---

[7] In full, Claim 6 of the Lagadec patent is as follows:

> 6. A disc-shaped recording medium capable of having a data signal optically recorded thereon and optically reproduced therefrom, said recording medium comprising:
>
> > a substrate layer having first and second surfaces, said first surface having formed thereon a substantially spiral pregroove which is wobbled in a radial direction of said disc-shaped recording medium and formed by a control signal consisting of a first signal that has a predetermined frequency and that has been modulated by a second signal that contains coded information and that has a frequency at least an order of magnitude lower than said predetermined frequency;
> >
> > a recording layer formed on the first surface of said substrate layer and adapted for subsequent optically recording the data signal thereon; and
> >
> > a protective layer formed on said recording layer.

'565 Patent col. 10 ll.14-31.

degree of uncertainty associated with investment decisions." Philips I, 424 F.3d at 1192-93. These efficiencies are not limited to situations in which a potential pool patent is, in fact, a blocking patent. As we noted in *Philips I*, one of the major potential efficiencies of package licensing in the context of innovative technology is the avoidance of "uncertainty that could only be resolved through expensive litigation." Id. at 1198; *see also* id. at 1192 ("Package licensing can also obviate any potential patent disputes . . . and thus reduce the likelihood that a licensee will find itself involved in costly litigation."). Prohibiting the inclusion in a package license of a patent that is arguably essential, merely because it ultimately proved not to be essential would undercut, even eliminate, this potential procompetitive efficiency.

We thus think that **HN2**[] perfect certainty is not required to avoid a charge of misuse through unlawful tying. Rather, in this context a blocking patent is one that at the time of the license an objective manufacturer would believe reasonably might be necessary to practice the technology **[**25]** at issue. A leading treatise has made a similar observation in the context of patent pools and cross-licensing agreements:

> Indeed, *even if the patents are only arguably conflicting*, there are strong reasons to permit the settlement of patent disputes by means of a cross-licensing agreement. Not only will judicial economy be served and litigation costs reduced by settling such disputes, but the delay and uncertainty associated with blocking patent disputes may prevent **[***1681]** either party from going forward with a commercial product for years while litigation is pending. Where two or more patents are arguably blocking, therefore, settling the dispute by means of cross-licensing is likely to be procompetitive.

Hovenkamp, Janis & Lemley, *supra*, § 3.3, at 3-36 (emphasis added); *see also* Roger B. Andewelt, *Analysis of Patent Pools Under* ***[*1311]*** *the Antitrust Laws*, 53 Antitrust L.J. 611, 616 (1985) ("[T]he line between competitive patents and blocking or complementary patents is frequently very difficult to draw. Obtaining access to patents that appear competitive would provide assurance of access to the needed technology if a court later determines that the patents are blocking.").

Our understanding of the **[**26]** likely procompetitive benefits of package licensing patents which reasonably might be necessary to practice a given technology is further informed by industry practice in the analogous area of standards-setting organizations. Such organizations typically seek to reduce the uncertainty involved in developing a technological standard by requiring of their members disclosure of patents that might cover aspects of the standard being developed, because "nondisclosure . . . could put the [patentee member] in a position in which it could literally block the use of the published [standard] by any company unless the company obtained a separate license from the [patentee]." Qualcomm Inc. v. Broadcom Corp.., 548 F.3d 1004, 1013 (Fed. Cir. 2008). The standard-setting industry organization in *Qualcomm* did not require its members to disclose only patents *actually* blocking practice of the standard, however; rather, members understood the duty to require disclosure of those patents that "*reasonably might be necessary* to practice the [standard]." Id. at 1018 (emphasis added); *see also* Rambus Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1100 (Fed. Cir. 2003). In the package licensing context, it may be **[**27]** similarly the case that a given patent that appears to be necessary ultimately may prove not to be so. But including the patent within the package license nevertheless may be procompetitive; for example, doing so may beneficially avoid "continuing disputes over whether the licensee's technology infringes certain ancillary patents owned by the licensor that are not part of the group elected by the licensee." Philips I, 424 F.3d at 1198. Indeed, as with disclosure in the standard-setting context, a major goal of package licensing is this type of avoidance of uncertainty and costly litigation.

Here, we agree with Philips that inclusion of the Lagadec patent in the patent pool did not give rise to an illegal tying arrangement, because Claim 6 reasonably might be necessary as a blocking patent to the Orange Book standard. [8]

---

[8] In its reply brief, Princo argues that because the Commission did not determine whether Lagadec is a blocking patent, we may not uphold its decision on this alternative legal ground. This argument misunderstands the holding of S.E.C. v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The relevant facts concerning the underlying Orange Book technology are undisputed, and whether the patent claims could reasonably be construed to cover that technology is a legal matter well within **[**29]** the competence of an appellate tribunal to decide. *See* id. at 88.

Claim 6, on its face, would have presented an obvious source of concern for an Orange Book manufacturer. Princo does not appear to contend that a recordable disc produced according to Orange Book standards lacks "a substantially spiral pregroove which is wobbled in a radial direction of said disc-shaped recording medium," where that wobbled pregroove is "formed by a control **[**28]** signal consisting of a first signal that has a predetermined frequency and that has been modulated by a second signal that contains coded information." '565 Patent col.10 ll.23-28. As Philips points out, the Lagadec patent contains no express or indisputable disclaimer limiting the scope of the claims, and our attention is not drawn **[*1312]** to any prosecution history that would support such a limitation. Princo contends only that the scope of the claim must be limited by the primarily digital disclosure of the patent's specification. A manufacturer evaluating the patent would thus be left gambling on the uncertain proposition of whether the specification was sufficiently narrow that Claim 6 would be correspondingly limited.

This is especially true in light of the fact that the law of claim construction was unsettled in the late 1990s, when the licenses of which Princo complains were executed. *See* *Philips I, 424 F.3d at 1198* (explaining that the propriety of a license generally must be evaluated as of the time when it is issued). While some cases at that time were perceived by litigants as suggesting, as Princo now argues, that broad claims might be limited to the disclosed **[***1682]** embodiments, [9] other cases continued to caution against improperly importing limitations into otherwise broad claims. [10] Further, several of the core cases of our modern claim construction jurisprudence (including those clarifying the proper role of the specification in construing claim language) were relatively recent or had not yet been decided. *E.g.,* *Phillips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005)* (en banc). Against this background, legitimate questions could have existed as to the scope of the Lagadec patent.

We thus conclude that Princo has failed to meet its burden of demonstrating that at the time the Lagadec patent was included in the package licenses, an objective manufacturer, faced with the patent and the plain language of Claim 6, would not have believed that a license reasonably might be necessary to manufacture Orange Book compact discs. Lagadec qualified as an "essential" patent for purposes of the Orange Book pool. *See* *Philips I, 424 F.3d at 1196*. We affirm the Commission's determination that Princo's misuse claim based on tying is without merit.

B

In a related argument, Princo contends that Philips has violated the Supreme Court's teaching in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*, that "conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent [is] misuse." In short, Princo contends Philips's licensing practice at issue violates *Zenith* because under the joint license royalties from the manufacture of compact **[**31]** discs are paid to Sony because of Lagadec even though "the Lagadec patent cannot be used in an Orange Book compliant disc." Appellants' Br. 43-45. Philips and the Commission reply that Princo has waived this per se misuse argument by failing to raise it below. However, even if we were to assume (without deciding) that Princo is correct about *Zenith's* scope and the argument was not waived--an assumption about which we have considerable doubt--Princo's argument is not persuasive. As previously discussed, at the time the package licenses at issue were executed it appeared that Lagadec reasonably might be necessary to manufacture Orange Book compact discs. Manufacturers taking a package license including Lagadec **[*1313]** eliminated the uncertainty of potentially infringing Claim 6 of that patent when they manufacture Orange Book compliant discs. Because the blocking aspect of the patent is, or reasonably might be, necessary to Orange Book manufacturers, it cannot fairly be said on these facts that a royalty is paid on products which do not use the teaching of the Lagadec patent.

II

---

[9] *See, e.g., Toro Co. v. White Consol. Indus., Inc., 199 F.3d 1295 (Fed. Cir. 1999)*; *Wang Labs., Inc. v. Am. Online, Inc., 197 F.3d 1377 (Fed. Cir. 1999)*

[10] *See,* ***[**30]*** *e.g., Comark Commc'ns, Inc. v. Harris Corp., 156 F.3d 1182, 1186 (Fed. Cir. 1998)*; *Electro Med. Sys., S.A. v. Cooper Life Scis., Inc., 34 F.3d 1048, 1054 (Fed. Cir. 1994)*.

In addition to challenging the practice of requiring manufacturers who sought licenses to essential Orange Book patents **[**32]** to also take a license to Lagadec, Princo challenges a second aspect of Philips's conduct involving Lagadec. Although Princo presents variations of its argument under different names, including price fixing, we understand the essence of its claim to be that, as discussed earlier, Lagadec represented an alternative technological solution to the Raaymakers patents with respect to encoding position data using the preexisting wobble signal. Princo argues that Philips and Sony agreed not to license Lagadec in a way that would allow a competitor "to develop, use or license the [Lagadec] technology to create a competing product." Appellants' Reply Br. 1; *see also* Intervenor's Br. 33-34 ("What Princo calls its principal price-fixing argument . . . thus really amounts to the accusation that Philips bribed Sony not to use . . . Lagadec to compete against the Orange Book."). Thus, Princo contends, even if Lagadec properly may be included in the package licenses, Philips committed patent misuse by agreeing with Sony to not license Lagadec in a manner allowing "the further development of the Lagadec technology and the possibility of competition between that technology and its own [Raaymakers technology]." **[**33]** Appellants' Reply Br. 3.

The Commission rejected Princo's argument under both a per se analysis and under the rule of reason, relying in both cases on substantially the same reasoning. The Commission did not directly address whether there was an agreement to prevent Lagadec from being licensed as a competing technology, apparently **[***1683]** concluding instead that no misuse could exist regardless of any such agreement:

> If Philips is correct that the Lagadec '565 patent is a "technically blocking patent," then no misuse flows from including the patent in the joint licenses. On the other hand, [if Lagadec is not blocking], we reject respondents' and the IA's various theories of patent misuse because there has been no showing that the Lagadec '565 patent competes with another patent in the pool [and] no showing that the pool licensors would have competed in the technology licensing market absent the pooling arrangement, and no showing of the anti-competitive effect required under a rule of reason analysis.
>
> . . .
>
> Notably, even if Lagadec is a substitute technology for the ATIP standard, it is not a substitute technology that can be used to manufacture Orange Book compliant CD-R/RW discs. Consequently, **[**34]** the record in this investigation does not support a finding that the Lagadec '565 patent competes with the '825 or '856 patents.

Final Determination at 23-24, 2007 ITC LEXIS 185 (footnote omitted); *see Id*. at 80-81. We conclude that the Commission erred in holding that these grounds would be sufficient to defeat a claim of misuse even if such an agreement **[*1314]** existed. [11]

The first ground relied upon by the Commission in rejecting Princo's argument was that if "the Lagadec '565 patent is a 'technically blocking patent,' then no misuse flows from including the patent in the joint licenses." *Final Determination at 23, 2007 ITC LEXIS 185*. This conclusion rested on our statement in *Philips I, 424 F.3d at 1196*, that a patentee holding blocking patents may "lawfully insist on licensing the patents as a package and may refuse to license them individually, since the group of patents could not reasonably be viewed as distinct products."

We believe, however, that the Commission read our decision in *Philips I* too broadly if it meant to suggest that Lagadec's **[**35]** status as a blocking patent could immunize an agreement not to compete. While our decision in *Philips I* confirmed that the package licensing of blocking patents is not patent misuse as a form of tying, we did not there consider whether an agreement that would prevent the development of alternatives would constitute misuse under a theory of elimination of competition or price fixing. That poses a different question, and not one foreclosed by our decision in *Philips I*.

Philips I involved a tying claim based on Philips's practice of requiring manufacturers to license four allegedly non-essential patents in order to obtain licenses to truly essential pool patents. The Commission had determined that the four allegedly-nonessential patents were separate products from the package of "essential" Orange Book

---

[11] Because we conclude that the licensing practice alleged by Princo would, if proven, violate the rule of reason, we need not determine whether it should be evaluated under a per se rule.

patents, because the Orange Book features covered by those four patents could be achieved equally well through the use of alternative non-pool technologies *not* covered by those patents. *Id. at 1194-96*. Thus, the Commission reasoned, "the package licensing agreements adversely affected competition in the market for the nonessential technology," because no Orange Book disc manufacturer would **[**36]** have incentive to license and use any of the alternative technologies if they had already been forced to take a license to the equivalent pool patents as part of the package license. *Id. at 1194* (describing findings).

On appeal, we determined that the Commission's findings were unsupported by substantial evidence, as the record did not actually show market foreclosure with regard to alternative technologies. The record did not show that "any commercially viable alternative actually existed" to the allegedly-nonessential patents. *Id. at 1198*. Any potential market foreclosure in that case was simply too speculative to support a finding of misuse, as "the mere possibility that alternative technology might at some point become available is not sufficient to support a finding that at the time the Philips licenses were executed, there was actually a commercially available alternative to the technology." *Id. at 1196*. In contrast, the potential efficiencies we identified from packaging the patents at issue included the integration of complementary technologies, reduced transaction costs, reduced litigation expenses, and most importantly the overall "procompetitive effect of reducing the degree **[**37]** of uncertainty associated with investment decisions." *Id. at 1192-93*. **[***1684]** Because the package licenses had significant potential **[*1315]** to generate procompetitive efficiencies, and the risk of future anticompetitive harm was at best speculative, we concluded that the Commission's analysis finding the licensing agreements unlawful per se and under the rule of reason was in error.

Philips I thus foreclosed arguments that a patent is non-essential because of a supposed alternative where the claimed alternative is not commercially viable; market foreclosure in such a case is typically too speculative to justify a finding of misuse. *See* *424 F.3d 1194, 1198*. But it is also clear that *Philips I* did not consider, let alone foreclose, arguments based on alleged agreements to prevent the development of a competing alternative technology. Notably, in *Philips I*, the pool did not include the allegedly competing alternatives to the four challenged pool patents. There was no agreement not to license those competing technologies, and no allegation that the package licenses directly restrained licensing of the alternative technologies that disc manufacturers might desire to use in place of pool technology. Rather, **[**38]** the market remained free to develop such alternative technologies.

In contrast, here Princo contends that Philips and Sony agreed from the outset to license Lagadec, a potential competitor to the Raaymakers pool patents, in a way that would necessarily prevent it from ever becoming a commercially viable alternative technology that might compete with the Orange Book standard. The essential nature of the Lagadec patent to the Orange Book standard cannot justify the refusal to allow it to be licensed for non-Orange Book purposes. It is one thing to offer a pooled license to competing technologies; [12] it is quite another to refuse to license the competing technologies on any other basis. In contrast to tying arrangements, there are no benefits to be obtained from an agreement between patent holders to forego separate licensing of competing technologies, as counsel for Philips conceded at oral argument. Oral Arg. 26:10-26:25, available at *http://oralarguments.cafc.uscourts.gov/mp3/2007-1386.mp3* (Oct. 6, 2008).

HN3[] Agreements between competitors not to compete are classic antitrust violations. *See, e.g.,* *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*; *Otter Tail Power Co. v. United States, 410 U.S. 366, 377, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. Agreements preventing patent licensing of competing technologies also can constitute such violations. *Standard Oil Co., Ind. v. United States, 283 U.S. 163, 174, 51 S. Ct. 421, 75 L. Ed. 926 (1931)* ("Where domination exists, a pooling of competing process patents . . . is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act."); *Id. at 175* ("In the case at bar, the primary defendants own competing patented processes for manufacturing an unpatented product . . .; and agreements concerning such processes are likely to engender the evils to which the Sherman Act was directed."); *United States v. New Wrinkle,*

[12] As noted by Philips, even when blocking patents are not involved, pooling may in some cases have procompetitive benefits, such as enabling licensees to obtain access to alternative **[**39]** technologies through one negotiation without determining at the outset which technology is the most efficient. Intervenor's Br. 36-37 (citing Andewelt, supra, at 616).

Inc., 342 U.S. 371, 380, 72 S. Ct. 350, 96 L. Ed. 417, 1952 Dec. Comm'r Pat. 411 (1952) ("An arrangement was made between patent holders to pool **[*1316]** their [competing] patents and fix prices on the products **[**40]** for themselves and their licensees. The purpose and result plainly violate the Sherman Act."); *cf*. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.1 ex. 9 (Apr. 6, 1995) ("In the absence of evidence establishing efficiency-enhancing integration from the joint assignment of patent rights, the Agency may conclude that the joint marketing of competing patent rights constitutes horizontal price fixing and could be challenged as a per se unlawful horizontal restraint of trade."). Such agreements are not within the rights granted to a patent holder.

Second, the Commission rejected the misuse defense on the ground that there has been "no showing that the pool licensors [Sony and Philips] would have competed in the technology licensing market absent the pooling arrangement." *Final Determination at 23-24, 96, 2007 ITC LEXIS 185*. Treating this argument as "viewing the licensing arrangement as tantamount to a merger that eliminates Sony as a potential competitor," the Commission found no harm to future competition because there had been no showing that Sony "would probably have entered the market within a reasonable period of time" and "would have entered **[**41]** and survived **[***1685]** to become a significant competitive force." *Id*. at 97-98.

The analogy of a merger of two companies offered by Philips and accepted by the Commission is not an accurate one. The Commission found that there had been no showing, as might be necessary in the case of a challenged merger, that Sony and Philips "would have competed in the technology licensing market" absent the pooling arrangement or that a standard based on Lagadec would have entered the market soon and survived to become a competitive force. *Final Determination at 26, 98, 2007 ITC LEXIS 185* (citing 5 Phillip E. Areeda & Herbert Hovencamp, ***Antitrust Law*** P 1121b at 53, P 1128a at 94 (2d ed. 2003)). But unlike the alleged agreement not to compete at issue here, a merger of two companies has potential countervailing efficiencies that offset potential harms to future competition. For example, mergers have the potential to create socially desirable resource savings through improved economies of scale and improved allocation of capital, to name just a few. *See* 5 Areeda & Hovenkamp, *supra*, PP 1103-1107 at 12-49. In contrast, an agreement of the sort alleged by Princo is unlikely to have any efficiencies that could not be achieved equally **[**42]** well through a non-exclusive agreement that would have left open the possibility that the Lagadec technology could have been further developed. Indeed, as noted earlier, at oral argument counsel for Philips was able to identify no efficiencies flowing from such an agreement.

Third, the Commission rejected Princo's misuse argument on the ground that "even if Lagadec is a substitute technology for the ATIP standard, it is not a substitute technology that can be used to manufacture Orange Book compliant CD-R/RW discs." *Final Determination at 24, 2007 ITC LEXIS 185*. The Commission's analysis was flawed in this respect as well.

While the Commission's observation that the Lagadec patent could not be used in place of the Raaymakers patents to manufacture Orange Book CD-R/RWs is supported by substantial evidence, that observation is irrelevant. The very thrust of Princo's misuse argument is that the alleged agreement to offer Lagadec only through the joint licenses harms competition *because* Lagadec is non-Orange Book **[*1317]** technology and could have been a competitive alternative to Orange Book technology. Thus, the fact that Lagadec is not an "Orange Book compliant" substitute for the Raaymakers ATIP technology does **[**43]** not answer Princo's defense of misuse.

Directing this court's attention to footnote 20 of the Commission's determination, Philips argues that the Commission correctly rejected Princo's argument on the basis that there had been no showing that the Lagadec was in fact a "commercially viable" technology. *Final Determination at 24 n.20, 2007 ITC LEXIS 185*. The Commission's footnote, however, must be understood within the context of the surrounding text, which focuses on whether Lagadec was a commercially viable technology for purposes of the *Orange Book*:

> "[T]he Lagadec '565 patent constitutes *completely different technology* that does not work well *according to the Orange Book Standards*. This testimony renders Lagadec *extraneous to the Orange Book*." . . . [fn 19]
>
> > [fn19] The ALJ credited testimony that the Lagadec approach is prone to errors and "did not provide a scheme that would work and was reliable."

> The ALJ concluded that "Lagadec constitutes, at best, a substitute technology for the ATIP standard, and at worst, an extraneous, non-working add-on *to the patent pool*." Notably, even if Lagadec is a substitute technology for the ATIP standard, it is not a substitute technology that can be used to *manufacture* ***[**44]*** *Orange Book compliant* CD-R/RW discs. [fn20]
>
> [fn20] Respondents have pointed to no evidence that the Lagadec approach is a commercially viable technological alternative to the technology of Philips' '825 or '856 patents. Moreover, the commercial viability of a method that is prone to errors, unreliable, and unworkable is doubtful.

Final Determination at 23-24, 2007 ITC LEXIS 185 (emphases altered, internal citations omitted). [13] The Commission did not determine that Lagadec was **[***1686]** fundamentally incapable of being commercialized as part of an alternative standard, but merely that it was not workable within the context of existing Orange Book technology. The Commission's determination thus does not include findings of fact directed to the question of whether, absent agreement to the contrary, Lagadec could have been developed as part of an alternative technological platform.

To the extent that Philips contends that the Lagadec technology must already have been developed to the point of commercial viability before misuse could be found, it is incorrect. *See* Intervenor's Br. 36 (noting that no evidence showed that Lagadec "was" a commercially viable alternative and therefore "an actual" competitor). The thrust of Princo's argument is that by agreement Lagadec was effectively suppressed; the result of that suppression was that the technology could not become a viable competitor. It cannot be the case that horizontal competitors can insulate themselves from misuse liability simply by agreeing to suppress competing technologies before they are fully developed. If that were the rule, then patentees engaging in such suppression of potential alternative technologies could never be called **[*1318]** to account. In short, because standardization of technology and the development of patent pools are likely to occur early in the development of a given technology market, requiring stringent proof of the destruction of **[**46]** future competition, with its accompanying imponderables, would effectively immunize from misuse manufacturers who agree to suppress competition from alternative technologies.

In determining the appropriate standard under the rule of reason, it is important to bear in mind several pertinent considerations. First, ***HN4***[] the fact that a patent's disclosed embodiments may not be commercially viable cannot be dispositive. Technology disclosed in a patent typically needs to be further developed before a viable commercial embodiment is possible. Indeed, our cases have recognized that one way the patent laws encourage the development of new products is by securing an inventor's rights during the time between patenting of an immature technology and commercialization. *Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1547 (1995)* (en banc) ("The patent laws promote the progress in different ways, prominent among which are by protecting the investment of capital in the development and working of a new invention from ruinous competition till the investment becomes remunerative." (quotation marks omitted)). The efforts required to commercialize an invention disclosed by a patent can be considerable. For example, **[**47]** in *CFMT, Inc. v. Yieldup International Corp., 349 F.3d 1333, 1338 (Fed. Cir. 2003)*, we noted that the invention, while enabled by the issued patent, nevertheless required "hundreds of modifications" and months of experimentation by the inventors to achieve a suitable commercial implementation. In doing so, we observed that issuance of a patent "does not require an inventor to meet lofty standards for success in the commercial marketplace." *Id. at 1338*.

Second, it may be difficult to show that the patented technology would or would not be commercially viable in the absence of market incentives to commercialize the technology.

Third, even a faulty technology may provide some meaningful competition. As a leading commentator has suggested in the analogous context of *Section 2* of the Sherman Act:

---

[13] The Commission based its statement that Lagadec's commercial potential was "doubtful" on the testimony of a Philips expert that the Lagadec method was "prone to errors," "unreliable," and "unworkable." *Final Determination at 24 n.20, 2007 ITC LEXIS 185*. These statements, however, appear to have been volunteered by the expert during testimony related to the **[**45]** validity of the Raaymakers '825 and '856 patents, not in the context of whether Lagadec could have been a competitive alternative to the Orange Book technologies.

> Even the acquisition of one out of several equivalent patents might have exclusionary effects. The acquired patent might, with further advances in the art, turn out to have been the most promising. . . . Further, the inquiry [into whether a given patent is superior or inferior] is rarely worthwhile, for even inferior technologies can provide some, even if not perfect, competition to the patentee.

3 Areeda & Hovenkamp, *supra*, **[**48]** P 707d at 203-04.

Fourth, as discussed above, there are no benefits to be achieved from suppression of potentially competing technology, suggesting that there would be no harm to competition from adopting a protective rule.

While we reject the suggestion that a showing of misuse in these circumstances requires proof that an allegedly-suppressed technology was already commercially viable, the question remains as to what showing must be made to invoke the patent misuse defense. On the one hand, evidence that a suppressed technology would have been viable would be sufficient; on the other, proof that a suppressed technology **[*1319]** could not have been viable would be sufficient to negate a charge of misuse. We need not determine at this time where on the continuum **[***1687]** between "certainly would have been viable" and "certainly could not have been viable" the appropriate standard lies. We leave that issue for consideration in the first instance by the Commission, together with the question of whether the evidence here satisfies the standard. [14]

III

We turn then to the final question--whether there was in fact an agreement between Philips and Sony to prevent the licensing of Lagadec as a competitor to the Orange Book. Philips maintains that Princo has made no showing that Sony agreed with Philips that Lagadec would be unavailable. The Commission did not reach this issue in rejecting Princo's argument. *Final Decision* at 23-26, 80-81, 96-98. There is sufficient evidence supporting Princo's theory that we conclude that further Commission proceedings are necessary.

First, it is undisputed that the Orange Book joint licenses that included Lagadec only permitted the use of the Lagadec license to produce Orange Book compliant discs. As the ALJ noted, "All of Philips' CD-R and CD-RW licenses contain a field of use provision limiting the license grant to use of the patents to manufacture . . . discs that comply with either the CD-R or CD-RW 'Standard Specifications.'" *Initial Determination* at 370. The licenses did not allow the use of Lagadec to produce discs competitive with the Orange Book standard.

Second, there is evidence that could support a finding that Sony granted Philips an exclusive license to Lagadec **[**51]** for CD-R purposes, and that Philips agreed not to license the patent (absent "exceptional" circumstances) except for the manufacture of Orange Book compliant discs.

The parties appear to agree that a 1993 agreement between Philips and Sony "granted exclusive right[s] to license Sony's CD-R patents for purposes of manufacturing CD-R discs and recorders." Intervenor's Br. 40 n.17; *see also id*. at 36 n.13. While it may be that the 1993 agreement did not initially list Lagadec as an included patent, that agreement was not limited to listed patents. It stated that it pertained to "Patent Rights . . . **[*1320]** including but

---

[14] The record appears to contain competing evidence as to Lagadec's potential. On the one hand, both the Commission and Philips recognize that Lagadec provided **[**49]** an alternative to the Orange Book method. *See* [Final Determination at 24, 2007 ITC LEXIS 185]() ("Lagadec constitutes, at best, a substitute technology. . . ."); Intervenor's Br. 35 (noting that Princo had "point[ed] to evidence suggesting that the digital modulation method taught by the Lagadec patent was a technological alternative to the analog method of the [Raaymakers] patents"). On the other, Philips's witness suggested that commercial development might be difficult. However, the record contains a 1986 Sony memorandum describing the Lagadec proposal that suggests potential solutions existed to some of the problems identified by Philips's expert even at that early date. For example, the expert stated that the Lagadec encoding method would cause unwanted interference at the low and high ends of the frequency spectrum. The memorandum indicates that interference caused by the Lagadec method at high frequencies could be reduced by "simple audio oversampling" and that interference at low frequencies could be reduced with "[a] simple digital highpass filter." The patent as issued reflects these solutions. *E.g*. '565 Patent col.6 ll.47-52; *id*. col.7 ll.54-58 (discussing band-limitation to eliminate disturbance **[**50]** at high and low frequencies).

not limited to" the listed patents. J.A. 3319. The parties appear to differ as to whether Lagadec was subject to the 1993 agreement before 2001. Princo points to evidence that Lagadec was, in fact, licensed by Philips for CD-R purposes before 2001. *See* J.A. 3506, 3532 (1999 CD-R joint license and accompanying exhibit of patents listing Lagadec). It is also unclear whether the 1993 agreement was extended to cover Sony's patents for purposes of CD-RW licensing before a separate agreement to that effect was executed in 2000, though Philips admits that it somehow had the authority **[**52]** to license Lagadec for CD-RW purposes before that time. Intervenor's Br. 12; J.A. 3534, 3561 (1999 CD-RW joint license and accompanying exhibit of patents listing Lagadec).

There is also a question as to how to interpret the 1993 agreement. Princo contends that in the agreement Philips agreed not to license Sony patents for non-Orange Book purposes absent "exceptional" circumstances. Appellants' Reply Br. 12-13. Princo urges that the evidence shows that Philips did not, in fact, license Sony patents for any other purposes, again supporting an inference that it agreed not to do so. [15]

The 1993 agreement gave Philips an "exclusive right to license such Patent Rights . . . for use in Articles listed in Appendix **[**53]** 2." J.A. 3319. Appendix 2 lists "CD-WO" (i.e., CD-R) "Disc" and "Recorder." J.A. 3321. The agreement is unclear as to whether Appendix 2 is referring only to Orange Book compliant products. Other portions of the 1993 agreement, however, arguably tend to suggest both that the license was broader than for Orange Book uses and that Philips was to license for non-Orange Book purposes only in "exceptional" circumstances. That agreement went on to state that "it is expressly understood . . . that in licensing . . . any Patent Rights relative to Articles . . . both our companies shall give at all times due regard to our joint efforts to promote the standardization of optical recording and retrieval systems." J.A. 3320. It further noted that "we confirm with respect to the aforementioned Patent Rights . . . that we will license such Patent Rights outside the jointly agreed upon system standards only in cases which can reasonably be considered exceptional." *Id*.

Third, there is evidence that, if the 1993 agreement applied to Lagadec, Sony itself may have agreed with Philips not to license the Lagadec patent for non-Orange Book purposes. Again the agreement stated "we confirm with respect to the **[**54]** aforementioned Patent Rights on joint inventions that we will license such Patent Rights outside the jointly agreed upon system standards only in cases which can reasonably be considered exceptional." J.A. 3320. There is a question as to whether the word "we" refers only to Philips, or to Sony as well. Again, we think the agreement is unclear, and on remand the Commission should consider its proper interpretation.

The portions of the record before us in the joint appendix are thus unclear as to whether the 1993 agreement became applicable to Lagadec, whether Philips received **[*1321]** an exclusive license to Lagadec for all purposes, and whether Philips and Sony agreed generally not to license Lagadec outside the Orange Book standard. On remand, the Commission should determine which interpretation is correct, taking into account any other relevant evidence pertinent to the agreement above.

In summary, the Commission did not determine whether the parties agreed not to license Lagadec outside the Orange Book context. Because we lack the Commission's familiarity with the full record, a remand is appropriate so that the factfinder may make that determination in the first instance. In doing so, we **[**55]** emphasize that the burden of proving misuse, and the corresponding risk of having made an insufficient record, lies with Princo. If the Commission determines on remand that the record contains insufficient evidence to justify a finding that Sony and Philips agreed that Lagadec would not be licensed as competitive technology, then there would be no misuse under Princo's theory.

CONCLUSION

---

[15] Princo points out that when asked if he was "aware of any separate license agreements between a licensee and Philips whereby only certain patents that are identified in the CD-R disc license were licensed," a Philips witness testified "I'm not aware of any such license agreements." J.A. 1934. Such "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*. **[***1688]**

In summary, we affirm the Commission's determination that Princo failed to meet its burden of demonstrating that Philips's patents are unenforceable due to patent misuse on the grounds of unlawful tying.

However, we conclude that the Commission's analysis of the agreement issue was predicated on legal errors in several respects, and that the Commission erred in failing to determine whether Princo established that such an agreement existed. We vacate and remand for the limited purposes of determining (1) whether Lagadec was a potentially workable alternative to the Orange Book technology and (2) whether Princo has established that Sony and Philips agreed that Lagadec would not be licensed in a manner allowing its development as competitive technology.

AFFIRMED-IN-PART, VACATED-IN-PART, and REMANDED

COSTS

No **[**56]** costs.

Concur by: BRYSON (In Part)

Dissent by: BRYSON (In Part)

Dissent

BRYSON, *Circuit Judge*, concurring in the result in part and dissenting in part.

I would affirm the Commission's final determination and would not remand for further findings.

1. The majority rejects Princo's tying claim on a ground not adopted by the Commission, concluding that the Commission's decision on that issue is "somewhat opaque." I find the Commission's decision on that issue to be both clear and sufficient to reject Princo's argument of patent misuse based on tying. I agree, however, that the majority's ground for **[***1689]** decision is also correct and offers a satisfactory alternative rationale for affirming the Commission's determination on that issue.

The tying argument is based on the contention that the Lagadec patent is not among those "essential" to the manufacture of an Orange Book compliant disc. Tying that non-essential patent to the package of essential Orange Book patents, according to the argument, was anticompetitive and unjustified, and thus constituted patent misuse.

As the Commission explained, the premise of that argument--that the Lagadec patent cannot be used to make an Orange Book compliant disc--is fatal to the tying claim. That **[**57]** is because prospective manufacturers **[*1322]** of Orange Book compliant discs would be interested in obtaining a license for the essential patents in the patent pool; they would not be interested in a patent that could not be used to make an Orange Book compliant disc. For that reason, the requirement that purchasers take a license to a pool of patents that included the Lagadec patent could not have adversely affected competition, because at most the licensees were required to accept something they did not want and would not have tried to obtain by other means and from other sellers. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("When a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.").

Princo seeks to dress up its tying claim by referring to Philips's conduct as "sequestering substitute patents within a pool." But the tying of the Lagadec patent to the other patents in the pool, without more, cannot in any reasonable sense be characterized **[**58]** as "sequestering." Princo's real argument on this point, made elsewhere in its brief, is that the Lagadec patent "couldn't be used and that some of the pool cost, must be attributed to its inclusion." That argument, however, is contrary to the Commission's findings and to simple economic analysis. As the Commission found, if the Lagadec patent, as Princo asserts, could not be used to make Orange Book compliant discs, there is no economic reason to conclude that the price of a license to the Orange Book pool of patents would be lower if the Lagadec patent were excluded. The licensees were interested in producing discs, not in counting the number of patents covered by the license. The Commission explained that the profit-maximizing price for the license would be the same regardless of whether it included no unwanted patents or dozens of them, as long as it contained all the patents needed to make Orange Book compliant discs.

2. That reasoning likewise disposes of Princo's argument that Philips has engaged in conduct that constitutes unlawful tying under the Supreme Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Once again, I agree that the majority's **[**59]** ground for deciding this issue is valid, but it is unnecessary to invoke that ground of decision because this case plainly does not involve unlawful tying under the *Zenith* standard. [1] In *Zenith*, the Supreme Court found misuse where a patent holder licensed a package of some 500 patents involving radio and television technologies and set royalties based on the licensees' total radio and television sales--even if some of those sales were of products that used none of the licensed patents. *Id. at 134-35*. Here, in contrast, it is undisputed that many of the patents included in the joint license are necessary to manufacture Orange Book compliant discs, and the licensees were obligated to pay royalties only on discs **[*1323]** that used at least one patent in the package. That difference is a significant one because, as discussed above, as long as some of the patents included in the license are used to manufacture Orange Book compliant discs (and all such necessary patents are included in the license), then the price of the license does not depend on whether the package also includes unwanted patents. Unlike in *Zenith*, Philips was not using the leverage of the Orange Book licenses to increase revenues **[**60]** unrelated to its patent rights, such as by "garner[ing] as royalties a percentage share of the licensee's receipts from sales of other products." *Zenith, 395 U.S. at 135*. **[***1690]**

3. As for Princo's argument that Philips committed patent misuse by "conspiring to include in a mandatory patent pool their competing patents and thereby engag[ing] in prohibited price fixing," the majority holds that the Commission's decision on that issue cannot be sustained and that the case must be remanded to the Commission for further proceedings. I disagree. In my view, the Commission's findings of fact and legal conclusions provide a sufficient ground for upholding the Commission's ruling that Princo has failed to satisfy its burden of showing patent misuse **[**61]** through a horizontal price-fixing agreement.

Princo begins by attacking the Commission's finding that there is no evidence that the patents in the joint package licenses "cover technologies that are close substitutes." Princo contends that the evidence shows that the Lagadec patent and the Raaymakers patents "are substitutes for one another," and that the "Commission's conclusion that there has been no showing that the Lagadec patent was a potential competitor of the Philips Raaymakers patents or that Sony and Philips acted with the purpose of avoiding potential competition with each other" is unsupported by substantial evidence.

The Commission found that the evidence failed to show that the Lagadec and Raaymakers technologies were substitutable. In particular, the Commission stated that the respondents "have not identified, nor are we aware of, evidence in the record that the patents in the joint package licenses 'cover technologies that are close substitutes.'" *Final Determination 22, 2007 ITC LEXIS 185* (citing U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.1 (1995)). For that reason, the Commission concluded, the joint package licenses "have not been **[**62]** shown to be 'the joint marketing of *competing* patent rights.'" *Id*. (emphasis in original). Because "the patents have not been shown to be competing," the Commission ruled, the pool royalty rate set by Philips and its co-licensors was not "a pricing agreement between competing entities with respect to their competing products." *Id*. (citing *Texaco, Inc. v. Dagher, 547 U.S. 1, 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006))*.

---

[1] The parties spend some time debating whether Princo has waived this argument. The Commission and the intervenor contend that the "*Zenith*" argument has been waived because neither Princo nor the Investigative Attorney argued that the tying arrangement in this case constituted per se patent misuse. Because the Supreme Court's analysis in *Zenith* is inapplicable here in any event, I agree with the majority that it is unnecessary to resolve the waiver question.

There is no force to Princo's contention that the Commission's finding on that issue is unsupported by substantial evidence. Because the Commission found that no evidence was introduced on that issue, it fell to Princo on appeal to point to the evidence that would support its contention that the Lagadec patent was a viable potential competitor for the Raaymakers patents. It has not done so. Instead, Princo has relied entirely on an inference that the Lagadec patent must have been a potential competitor for Philips's Orange Book patents because otherwise Philips would not have allowed Sony to share in the patent pool licensing royalties. Princo contends **[*1324]** that the agreement can be explained only as a naked conspiracy to suppress competition or, as Princo puts it, that "Sony was paid not to compete" with Philips. **[**63]** Not only does that argument not constitute evidence of the viability of the Lagadec technology as a potential basis for a system that would compete with the Orange Book system, but it ignores ample record evidence of other reasons that Sony shared in the royalties from the Orange Book licensing agreements.

The Commission rejected, as unsupported by the evidence, the argument made by the Investigative Attorney that "Philips included Sony in the pool not because Sony brought anything necessary to CD-R/RW technology, but rather because Sony is a major player in the industry, whose cooperation Philips wanted." *See Final Determination 97, 2007 ITC LEXIS 185* & n.63. The Commission likewise rejected as unsupported the administrative law judge's remark that the inclusion of Lagadec in the patent pool "appears to be an attempt to forestall digital approaches to achieving what the Philips analog technology has achieved." *Final Determination 23 n.18, 2007 ITC LEXIS 185*.

Not only was there no evidence to support those assertions, but the evidence affirmatively showed that there were other reasons for Sony's receiving a share of the royalties of the Orange Book patent pool, including the evidence that Sony had contributed substantial resources **[**64]** to the project to develop the Orange Book standard, and that the royalty division reflected a rough assessment of the value of each party's portfolio of worldwide patent rights. Because Princo did not persuade the Commission that those justifications for Sony's royalty share in the proceeds of the licensing pool were pretextual, the Commission properly rejected Princo's argument that the only possible reason for Sony's receiving a portion of the proceeds of the agreement is that it had engaged in a horizontal agreement with Philips to fix prices. **[***1691]**

Significantly, the Commission's finding regarding the potential for the Lagadec technology to generate a competing system was not limited to the state of the technology at the time the patent pool was put into place. The Commission found that no evidence had been introduced suggesting that there was any prospect of competition between the Lagadec patent and other patents in the pool. As the Commission put it, "there has been no showing that the Lagadec '565 patent competes with another patent in the pool, no showing that the pool licensors would have competed in the technology licensing market absent the pooling arrangement, and no showing **[**65]** of anti-competitive effect" from the inclusion of the Lagadec patent in the patent pool. *Final Determination 23, 2007 ITC LEXIS 185*; *see also id*. at 26 (Princo has "not pointed to evidence that establishes that, absent the pooling arrangements, the pool licenses would have competed in the technology licensing market"). The Commission noted that the administrative law judge had credited testimony that the Lagadec approach "is prone to errors and 'did not provide a scheme that would work and was reliable.'" *Id*. at 24 n.19. [2] Because "there has been no showing that the patents **[*1325]** in the pool are substitutable," the Commission concluded, "the agreement between the licensors

[2] The majority asserts that the Commission "did not determine that Lagadec was fundamentally incapable of being commercialized as part of an alternative standard, but merely that it was not workable within the context of existing Orange Book technology." I do not interpret the Commission's statements to be so limited. The expert who testified that the Lagadec approach was "prone to errors" **[**66]** (and whose testimony was credited by the administrative law judge) identified several problems with Lagadec's approach that were not restricted to the viability of Lagadec as a component of the Orange Book platform. For example, the expert noted that "from basic physics, you can just see that [Lagadec's approach] is not a good solution, and it really wouldn't work well." Thus, while the Commission noted that Lagadec "does not work well according to the Orange Book standards," it added, separately, that Princo had "pointed to no evidence that the Lagadec approach is a commercially viable technological alternative to the technology of Philips's '825 or '856 patents," and that "the commercial viability of a method that is prone to errors, unreliable, and unworkable is doubtful." *Final Determination 24, 2007 ITC LEXIS 185*. Moreover, the burden was on Princo to show that pool licensors would have competed in the technology licensing market, and the Commission found that Princo did not point to any evidence that Lagadec represented a commercially viable approach, either inside or outside the context of the Orange Book standards.

to set a fixed royalty for the joint licenses under the pool is not price fixing per se in the market for licensing CD-R/RW patents." *Final Determination 26, 2007 ITC LEXIS 185*.

Although the majority suggests that Philips contended that the Lagadec technology **[**67]** "must already have been developed to the point of commercial viability before misuse could be found," I read the Commission's observations about the absence of evidence of substitutability to apply not only to the present but to the future as well. To the extent that the Commission did not deal in detail with the question whether there was a realistic possibility that the Lagadec technology could have been developed into a viable competing system, the fault for any such shortfall rests with Princo, which did not offer any evidence, or even argument, to that effect.

Princo was free to offer evidence that Lagadec was substitutable technology and that there was a realistic prospect that the invention of Lagadec could be refined in the future to the point that it could be used as a platform for technology that would compete with the technology used in the Orange Book compliant discs. But Princo did not offer any such evidence. The Commission did not require a showing that Lagadec could have been used without further development to create a commercially successful technology. To the contrary, even though Princo did not point to any evidence of a realistic possibility that the Lagadec invention **[**68]** could be developed into competing technology in the foreseeable future, the Commission's analysis encompassed the possibility of future developments. Nonetheless, the Commission found no evidence that Lagadec would have been likely to lead to competing technology but for the pooling arrangements. Princo failed to show a likelihood that the digital method of encoding position data recited in the Lagadec patent would lead to the development of discs that would use that technology instead of the Orange Book analog method of encoding position data, and that the digital encoding technology would be used in discs and disc readers that would compete with Orange Book compatible systems. As the Commission explained, unless the competing technology would have entered the market "to become a significant competitive force," it could not have augmented future competition in an important way. Yet the Commission found that the record contained **[***1692]** no evidence that Sony would have entered the market and become a significant competitive force. *Final Determination 98, 2007 ITC LEXIS 185*. Moreover, Princo offered no evidence that any potential licensee ever expressed an **[*1326]** interest in licensing Lagadec for use in technology that **[**69]** would compete with the Orange Book compliant discs. Any suggestion that the Lagadec patent could have provided the basis for a competing system is thus entirely speculative and unsupported by argument or evidence before the Commission.

Finally, the majority's conclusion with respect to Princo's tying argument (with which I agree), that "Lagadec qualified as an 'essential' patent for purposes of the Orange Book pool," undermines Princo's price-fixing argument. Princo sets forth the legal rule that it contends governs this case: "the pooling of non-blocking, substitute patents [is] universally recognized as highly anticompetitive" and is unlawful. If the Lagadec patent is an "essential," or "blocking" patent, that rule by its own terms does not apply. The majority's conclusion that the Lagadec patent was "essential" because claim 6 of that patent "reasonably might be necessary as a blocking patent to the Orange Book standard" thus takes this case outside of the legal rule on which Princo relies. *See* *Standard Oil Co. v. United States, 283 U.S. 163, 171, 51 S. Ct. 421, 75 L. Ed. 926 & n.5 (1931)* (recognizing that the pooling of blocking patents serves a legitimate purpose); Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5, **[**70]** ex. 10 (1995) (noting that where manufacturers pool blocking patents, "the manufacturers are not in a horizontal relationship with respect to those patents").

Although the majority correctly notes that the Commission did not address the question whether Philips and Sony agreed not to license Lagadec as a competitor to the Orange Book, it is not clear that Princo squarely presented that argument to the Commission. In its briefing before the Commission, Princo argued that Orange Book licensees were not permitted to use the package patents for products outside the scope of the Orange Book, but it did not point to evidence that Sony was precluded from licensing Lagadec for non-Orange-Book uses. In any event, Princo still needed to show that any agreement not to allow Lagadec to be licensed outside the Orange Book would have had some anticompetitive effect in order for the agreement to constitute a form of horizontal price fixing. The Commission's finding that Princo failed to demonstrate that absent the patent pool agreement Sony would have competed with the Orange Book technology--either directly or by licensing the Lagadec patent--was sufficient to support the Commission's conclusion **[**71]** that the patent pool was not shown to have any such anticompetitive effect.

I would therefore affirm the Commission's final determination.

Energy Mktg. Servs. v. Columbia Gas Transmission Corp.

United States District Court for the Southern District of West Virginia, Charleston Division

April 21, 2009, Decided; April 21, 2009, Filed

CIVIL ACTION NO. 2:04-0869; CIVIL ACTION NO. 2:04-0870; CIVIL ACTION NO. 2:04-0871; CIVIL ACTION NO. 2:04-0872

Reporter

639 F. Supp. 2d 643 *; 2009 U.S. Dist. LEXIS 40949 **; 176 Oil & Gas Rep. 484

ENERGY MARKETING SERVICES, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION CORPORATION, et al., Defendants. AGF, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION CORPORATION, et al., Defendants. ADVANTAGE ENERGY MARKETING, INC., Plaintiff, v. COLUMBIA GAS TRANSMISSION CORPORATION, et al., Defendants. 1564 EAST LANCASTER AVENUE BUSINESS TRUST, Plaintiff, v. COLUMBIA GAS TRANSMISSION CORPORATION, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *AGF, Inc. v. Columbia Gas Transmission Corp., 2009 U.S. Dist. LEXIS 61987 (S.D. W. Va., July 21, 2009)*

Motion denied by, Summary judgment denied by *AGF, Inc. v. Columbia Gas Transmission Corp., 2009 U.S. Dist. LEXIS 144581 (S.D. W. Va., July 23, 2009)*

Prior History: *Advantage Energy Mktg. v. Columbia Gas Transmission Corp., 2009 U.S. Dist. LEXIS 21490 (S.D. W. Va., Mar. 17, 2009)*

Core Terms

antitrust, anti trust law, Plaintiffs', antitrust claim, imbalances, securities law, lawsuits, pipeline, natural gas, anticompetitive, underwriters, choice of law provision, Disgorgement, regulations, investors, damages, customers, mistakes, shippers, forbid, Reply, unusually high, transportation, line-drawing, Approving, oversight, factors, summary judgment motion, consent agreement, service agreement

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In considering a motion for summary judgment, the court will not weigh the evidence and determine the truth of the matter. Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

With regard to a motion for summary judgment, although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some concrete evidence from which a reasonable juror could return a verdict in his or her favor. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position.

Antitrust & Trade Law > General Overview

HN3[] **Antitrust & Trade Law**

Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.

Antitrust & Trade Law > General Overview

Securities Law > General Overview

HN4[] **Antitrust & Trade Law**

To determine clear incompatibility between securities and antitrust laws, the United States Supreme Court has employed the factors it deemed "critical." These included: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.

Antitrust & Trade Law > General Overview

Securities Law > General Overview

HN5[] **Antitrust & Trade Law**

To determine incompatibility between securities and antitrust laws courts consider: where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.

Antitrust & Trade Law > General Overview

Securities Law > General Overview

HN6[] **Antitrust & Trade Law**

With regard to incompatibility between securities and antitrust laws, any enforcement-related need for an antitrust lawsuit is unusually small in the securities context because: (1) the Securities and Exchange Commission (SEC) actively enforces the rules and regulations that forbid the conduct in question; (2) investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law; and (3) the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.

Antitrust & Trade Law > General Overview

Securities Law > General Overview

HN7[] **Antitrust & Trade Law**

With regard to incompatibility between securities and antitrust laws, in the securities market, joint action is integral to the activity which the Securities and Exchange Commission (SEC) both encourages and regulates. That joint action necessarily exposes the participants to antitrust complaints because they engage in sophisticated financial arrangements in concert.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

HN8[] **US Federal Energy Regulatory Commission, Authorities & Powers**

The Federal Energy Regulatory Commission (FERC) regulates the rates for transporting and selling natural gas in interstate commerce. It also facilitates price transparency for the sale or transportation of physical natural gas in interstate commerce, out of a due regard for fair competition. *15 U.S.C.S. § 717t-2(a)(1)*.

Securities Law > Civil Liability Considerations > General Overview

HN9[] **Securities Law, Civil Liability Considerations**

Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may recover damages under the Securities Exchange Act. *15 U.S.C.S. §§ 78bb*, *78u-4*, *77k*. These carefully crafted provisions seek to regulate the coexistence of the Securities and Exchange Commission (SEC) enforcement and private litigation.

Energy & Utilities Law > Antitrust Issues > General Overview

HN10[] **Energy & Utilities Law, Antitrust Issues**

In the natural gas context, there is an enforcement-related need for antitrust lawsuits.

Counsel: [1]** For Energy Marketing Services, Inc., PLAINTIFF CLASS: Natural Gas Marketing Customers Of Columbia Gas Transmission Corporation ("TCO") That Were Damaged By An Illegal Gas Scheme Perpetrated By Defendants (2:04-cv-00869), Plaintiff: Joshua I. Barrett, Lonnie C. Simmons, Robert M. Bastress, III, Rudolph L. DiTrapano, Sean P. McGinley, LEAD ATTORNEYS, DITRAPANO BARRETT & DIPIERO, Charleston, WV; Robert C. Sanders, LEAD ATTORNEY, LAW OFFICE OF ROBERT C. SANDERS, Upper Marlboro, MD.

For Columbia LNG Corporation (2:04-cv-00869, 2:04-cv-00870, 2:04-cv-00871, 2:04-cv-00872), Defendant: G. Hamilton Loeb, LEAD ATTORNEY, PRO HAC VICE, PAUL HASTINGS JANOFSKY & WALKER, Washington, DC; Johnny M. Knisely, II, Thomas R. Goodwin, LEAD ATTORNEYS, GOODWIN & GOODWIN, Charleston, WV.

For CLNG Corporation (2:04-cv-00869, 2:04-cv-00870, 2:04-cv-00871, 2:04-cv-00872), Defendant: Johnny M. Knisely, II, Thomas R. Goodwin, LEAD ATTORNEYS, GOODWIN & GOODWIN, Charleston, WV.

For Dominion Cove Point LNG LP, Dominion Cove Point LNG Company, LLC, DEFENDANT CLASS A: Three Federally Regulated Interstate Natural Gas Pipeline Companies (Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, And The Cove **[**2]** Point LNG Limited Partnership) That Participated In An Illegal Scheme, etc. (2:04-cv-00869, 2:04-cv-00870, 2:04-cv-00871), Defendants: Bryan A. Fratkin, Howard Feller, J. Brent Justus, LEAD ATTORNEYS, MCGUIRE WOODS, Richmond, VA; Erica M. Baumgras, Jeffrey M. Wakefield, LEAD ATTORNEYS, FLAHERTY SENSABAUGH & BONASSO, Charleston, WV.

For Howard Energy Company, Inc. (2:04-cv-00869, 2:04-cv-00870, 2:04-cv-00871), Defendant: Brian McAleenan, Ruchi Verma, Thomas K. Cauley, LEAD ATTORNEYS, SIDLEY AUSTIN BROWN & WOOD, Chicago, IL; Mark A. Glover, Stephen B. Farmer, LEAD ATTORNEYS, FARMER CLINE & CAMPBELL, Charleston, WV.

For Semco Pipeline Company, Semco Energy Services, Inc. (2:04-cv-00869, 2:04-cv-00870, 2:04-cv-00871, 2:04-cv-00872), Defendants: Avery Gardiner, James W. Draughn, Jr., Michael S. Becker, Thomas M. McDermott, LEAD ATTORNEYS, KIRKLAND & ELLIS, Washington, DC; John H. Tinney, Jr., LEAD ATTORNEY, THE TINNEY LAW FIRM, Charleston, WV.

For AGF, Inc., PLAINTIFF CLASS: Natural Gas Marketing Customers Of Columbia Gas Transmission Corporation ("TCO") That Were Damaged By An Illegal Gas Scheme Perpetrated By Defendants (2:04-cv-00870), Plaintiff: Joshua I. Barrett, Lonnie C. Simmons, Robert **[**3]** M. Bastress, III, Rudolph L. DiTrapano, Sean P. McGinley, LEAD ATTORNEYS, DITRAPANO BARRETT & DIPIERO, Charleston, WV; Robert C. Sanders, LEAD ATTORNEY, LAW OFFICE OF ROBERT C. SANDERS, Upper Marlboro, MD.

For Columbia Gas Transmission Corporation (2:04-cv-00870, 2:04-cv-00871, 2:04-cv-00872), Defendant: G. Hamilton Loeb, LEAD ATTORNEY, PRO HAC VICE, PAUL HASTINGS JANOFSKY & WALKER, Washington, DC; Johnny M. Knisely, II, Richard David Owen, Thomas R. Goodwin, LEAD ATTORNEYS, GOODWIN & GOODWIN, Charleston, WV.

For Base Petroleum, Inc. (2:04-cv-00870, 2:04-cv-00871, 2:04-cv-00872), Defendant: Johnny M. Knisely, II, Richard David Owen, Thomas R. Goodwin, LEAD ATTORNEYS, GOODWIN & GOODWIN, Charleston, WV.

For Advantage Energy Marketing, Inc., PLAINTIFF CLASS: Natural Gas Marketing Customers Of Columbia Gas Transmission Corporation ("TCO") That Were Damaged By An Illegal Gas Scheme Perpetrated By Defendants (2:04-cv-00871), Plaintiff: Joshua I. Barrett, Lonnie C. Simmons, Robert M. Bastress, III, Rudolph L. DiTrapano, Sean P. McGinley, LEAD ATTORNEYS, DITRAPANO BARRETT & DIPIERO, Charleston, WV; Robert C. Sanders, LEAD ATTORNEY, LAW OFFICE OF ROBERT C. SANDERS, Upper Marlboro, MD.

For 1564 **[**4]** East Lancaster Avenue Business Trust, PLAINTIFF CLASS: Natural Gas Marketing Customers Of Columbia Gas Transmission Corporation ("TCO") That Were Damaged By An Illegal Gas Scheme Perpetrated By Defendants (2:04-cv-00872), Plaintiff: Joshua I. Barrett, Lonnie C. Simmons, Robert M. Bastress, III, Rudolph L. DiTrapano, Sean P. McGinley, LEAD ATTORNEYS, DITRAPANO BARRETT & DIPIERO, Charleston, WV; Robert C. Sanders, LEAD ATTORNEY, LAW OFFICE OF ROBERT C. SANDERS, Upper Marlboro, MD.

For Dominion Cove Point LNG LP, Dominion Cove Point LNG Company, LLC, DEFENDANT CLASS A: Three Federally Regulated Interstate Natural Gas Pipeline Companies (Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, And The Cove Point LNG Limited Partnership) That Participated In An Illegal Scheme, etc. (2:04-cv-00872), Defendants: Bryan A. Fratkin, Howard Feller, J. Brent Justus, LEAD ATTORNEYS, MCGUIRE WOODS, Richmond, VA; Jeffrey M. Wakefield, LEAD ATTORNEY, FLAHERTY SENSABAUGH & BONASSO, Charleston, WV.

For Howard Energy Company, Inc. (2:04-cv-00872), Defendant: Brian McAleenan, Ruchi Verma, Thomas K. Cauley, LEAD ATTORNEYS, SIDLEY AUSTIN BROWN & WOOD, Chicago, IL; Mark A. Glover, LEAD ATTORNEY, **[**5]** FARMER CLINE & CAMPBELL, Charleston, WV.

Judges: ROBERT C. CHAMBERS, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT C. CHAMBERS

Opinion

[*644] MEMORANDUM OPINION AND ORDER

Pending before the Court are the Renewed and Incorporated Motions for Summary **[*645]** Judgment (doc. 148, Ex. 2, in each of the above-captioned matters) of Defendant Columbia Gas Transmission Corporation (TCO). For the following reasons, the Court **GRANTS in part** and **DENIES in part** these motions.

I. FACTS

On August 19, 2008, the Court denied Plaintiffs' renewed motion for class certification. In that order, the Court discussed the underlying facts of this case in considerable detail. Accordingly, the Court will not repeat those facts here. Rather, the Court adopts and refers to the factual summary as laid forth in the August 19 Memorandum Opinion and Order.

Since the Court's entry of that opinion and order, the Federal Energy Regulatory Commission (FERC) approved a stipulation and consent agreement between its Office of Enforcement and TCO. *November 6, 2008 Order Approving Stipulation and Consent Agreement,* 2:04-cv-869, doc. 163-3. This order was the second of two events that prompted TCO to file the instant renewed and incorporated summary judgment motions. *TCO's* ***[**6]*** *Memorandum in Support,* at p. 1. The first event was the United States Supreme Court's decision in *Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007)*. According to TCO, *Credit Suisse* stands for the proposition "that conduct subject to comprehensive oversight by a federal regulatory agency can be 'clearly incompatible' with, and hence immune from, the antitrust laws." *TCO's Memorandum in Support,* at p. 1 (quoting *Credit Suisse, 127 S. Ct. at 2397*). TCO argues that because the November 6, 2008 FERC Order "condones and approves the practice upon which Plaintiffs' entire theory of damage causation here is premised . . . , then surely the *Credit Suisse* rule applies," and Plaintiffs cannot end-run FERC oversight through the application of other laws. *Id.* at p. 2.

However, whether the recent FERC order actually "condones and approves the practice upon which Plaintiffs' entire theory of damage causation here is premised" is itself a subject of a contentious factual dispute between the parties. *Id.* TCO argues that Plaintiffs' theory consists of the following:

> TCO entered into long-term PAL [parking and lending] transactions with specific beginning and ending dates, that **[**7]** TCO failed to *recall (i.e.* demand back) outstanding PAL balances when PAL (and other transportation services) were interrupted. Plaintiffs contend that these outstanding and unresolved long-term PAL balances led to the nomination "cuts" upon which they would base their accusations of "illegality" and from which they would calculate all of their asserted damages.

TCO's Memorandum in Support, at p. 2-3 (emphasis in original) (internal citations omitted). In TCO's view, "FERC condone[d] and approve[d] [these] practice[s]" when, in the November 6 Order:

> FERC found no irregularity in long-term PAL transactions, or in specific commencement and termination dates. Moreover, it expressly and affirmatively [concluded that] . . . TCO is *not* required to recall outstanding balances

> during the duration of a PAL service agreement, notwithstanding intervening interruptions of PAL or other, higher-priority services.

TCO's Memorandum in Support, at p. 3 (emphasis in original).

TCO further claims that "[f]or IPP [interruptible paper pool] imbalances to have had anticompetitive *effects* and to have caused antitrust injury under the Sherman Act, it must have been improper for TCO to maintain the imbalance at **[**8]** the time of **[*646]** the supposed harm to each plaintiff." *TCO's Reply,* at p. 8-9 (emphasis in original). TCO believes that damages based on IPP imbalances fail for the same reason as those based on PAL imbalances: "Without the premise that TCO was obligated to recall PAL volumes when the pipeline became tight, the assertion that harm was caused by TCO on days when plaintiffs' nominations were not accepted simply evaporates." *TCO's Reply,* at p. 9. In any event, TCO notes that "Plaintiffs do not even attempt any damages calculation based on IPP imbalances." *Id.*

Plaintiffs dispute the notion that either the November 6, 2008 Order, or the earlier October 23, 2008 Stipulation and Consent Agreement which it approved, "condones [or] approves" the practices upon which they base their causation and damages theory. *Plaintiffs' Response,* at p. 18 (quoting *TCO's Memorandum in Support,* at p. 2). As an initial matter, they point out that FERC's "Second Disgorgement Order [the November 6, 2008 Order] certainly does not condone (or even address) the illegal park and loan transactions during the period covered by the First Disgorgement Order [entered October 25, 2000]." *Id.* They also characterize their causation **[**9]** and damages theory in regards to the conduct covered by the November 6, 2008 Order differently than Defendants. They state that:

> [Their] complaint as to that conduct is that TCO utilized PAL and IPP services to illegally convert its PAL service, the lowest priority and most interruptible of all TCO services, into a "firm" long term service for an expanded group of select shippers by allowing them to maintain IPP imbalances (positive imbalances for the parks and negative imbalances for the loans).

Id. at p. 18-19. They further state that this conduct "is precisely what the FERC found to be illegal in the Second Disgorgement Order." *Id.* at p. 19 (citing *November 6, 2008 Order Approving Stipulation and Consent Agreement,* 2:04-cv-869, doc. 163-3, at p. 3).

Plaintiffs argue that TCO's focus on the fact that FERC concluded that TCO need not recall PAL imbalances when PAL services are posted as "not available" ignores their "underlying point . . . that the PAL imbalances recorded as IPP imbalances never should have been permitted in the first place, and that the existence of these imbalances caused constraints in the system that resulted in cuts to plaintiffs' nominations and other commercial **[**10]** harm." *Id.* Plaintiffs insist that "[i]t is the existence of the imbalances that is at the core of all of plaintiffs' damage claims, and the FERC agrees in the Second Disgorgement Order that the existence of those imbalances was illegal." *Id.*

II. SUMMARY JUDGMENT STANDARD

HN1[] To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In considering a motion for summary judgment, the Court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Instead, the Court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

HN2[] Although the Court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable **[*647]** juror could return a verdict in his [or her] favor." *Anderson, 477 U.S. at 256*. Summary judgment is appropriate when **[**11]** the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett, 477 U.S.*

317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. Anderson, 477 U.S. at 252.

III. DISCUSSION

[1]

A. Federal and State Antitrust Claims

TCO claims that Plaintiffs' antitrust claims are precluded by *Credit Suisse.* [2] In that **[**12]** case, a group of investors filed two antitrust class-action lawsuits against several investment banks that "had acted as underwriters, forming syndicates that helped execute the IPOs [initial public offerings] of several hundred technology-related companies." *Credit Suisse, 127 S. Ct. at 2388*. The investors alleged that the underwriters (banks) had violated antitrust laws "by agreeing among themselves to impose harmful conditions upon potential investors." *Id.* The alleged harmful conditions consisted of various "'additional anticompetitive charges over and above the agreed-upon IPO share price plus underwriting commission." *Id. at 2389*. "The underwriters moved to dismiss the investors' complaints on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question." *Id.* The District Court for the Southern District of New York dismissed the complaints, the Court of Appeals for the Second Circuit reversed the district court, and the Supreme Court in turn reversed the circuit court. *Id.*

The Supreme Court framed the issue before it as "whether there was a 'plain repugnancy' between the[] antitrust claims and the federal securities law." *Id.* (quoting *Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975))*. The Court noted that ***HN3***[] "[w]here regulatory statutes are silent in respect to antitrust, . . . courts must determine whether, and **[**14]** in what respects, they implicitly preclude application of the antitrust laws." *Id.* It further observed **[*648]** that "[t]hose determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws." *Id.* The Court then reviewed, in detail, "three [of its] decisions . . . [that] specifically address the relation of securities law to ***antitrust law***." *Id.* After completing its review, the Court concluded that these securities/antitrust cases "make clear that, when a court decides whether securities law precludes ***antitrust law***, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint--or as we shall subsequently describe the matter, whether the two are 'clearly incompatible.'" *Id. at 2392*.

[1] In the instant motions, TCO argues that Plaintiffs' unjust enrichment claims "are untenable for the same reasons that the antitrust claims are untenable, *i.e.* the rule of *Credit Suisse." TCO's Memorandum in Support,* at p. 14. In light of the Court's findings regarding the antitrust claims and *Credit Suisse,* discussed below, this argument does not behoove TCO. However, because the Court finds Plaintiffs' unjust enrichment claims untenable for reasons more fully discussed in the Court's order addressing Defendants' comprehensive motions for summary judgment, the Court grants summary judgment to TCO as to Plaintiffs' unjust enrichment claims.

[2] TCO also claims that *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, precludes Plaintiffs' antitrust claims **[**13]** because that case "showed that violations of a regulatory regime aimed at promoting competition cannot also transgress ***antitrust law*** unless they would have done so in the absence of the regulatory regime." *TCO's Memorandum in Support,* at p. 8. However, the Court continues to believe, as it explained in its denial of Defendants' motion to dismiss, that "Defendants [including TCO] have not demonstrated that this case involves the same level of regulatory overlay and unique market found in *Trinko." June 14, 2005 Memorandum Opinion and Order,* 2:04-cv-867, doc. 371, at p. 16. Thus the Court rejects TCO's contention that *Trinko* compels summary judgment as to Plaintiffs' antitrust claims. To the contrary, the Court continues to "find[] *Otter Tail [Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*,] more closely on point." *See id.* at p. 16-17.

HN4[] To determine clear incompatibility, the Court employed the factors it deemed "critical" in two of the three securities/antitrust cases that it had reviewed: *Gordon, 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463*, and *United States v. National Ass'n of Securities Dealers [NASD], 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*. **[**15]** These included:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.

Credit Suisse, 127 S. Ct. at 2392. It "also note[d] (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate." *Id.*

The Court found, with little difficulty, that the first, second, and fourth factors had been met. *Id. at 2393*. It therefore turned its focus to the third factor, the risk of conflict between the securities and antitrust laws. The investors argued that the relevant regulatory authority, the Securities and Exchange Commission (SEC), had disapproved of the additional charges imposed by the underwriters, and therefore there was little or no risk of conflict with the antitrust laws. *Id. at 2394*. However, the Court rejected this claim, even assuming that the SEC would continue to disapprove **[**16]** of the charges in the future. Rather, the Court found that "securities law and ***antitrust law*** are clearly incompatible." *Id.*

Analysis of the third factor, risk of conflict, itself involves two elements. First, the Court considered whether antitrust actions could harm the securities market. On this point, the Court concluded that, even if the SEC were likely to disapprove of the conduct attacked in antitrust actions, "permit[ting] antitrust actions . . . *still* threatens serious securities-related harm" because the securities context presents "an unusually serious legal line-drawing problem." *Id.* (emphasis in original). The Court continued: "In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which [the investors] must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on [the investors'] theory, should be open to antitrust attack)." *Id.* This observation led the Court to express doubt that anyone "but a securities expert" could perform the necessary line-drawing. *Id.* Another potential problem was the fact that "evidence tending to show unlawful antitrust activity and evidence **[**17]** tending to show lawful securities marketing activity may overlap, or prove identical." *Id. at 2395*. Consequently, the same evidence might be used to demonstrate both SEC compliance and violation **[*649]** of antitrust laws. *Id.* Finally, the Court expressed concern over different, nonexpert judges and juries evaluating antitrust claims in the securities market throughout the country, particularly in light of the "unusually high risk that different courts will evaluate similar factual circumstances differently." *Id.*

These concerns led the Court to conclude that "there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law." *Id.* Therefore, "antitrust courts are likely to make unusually serious mistakes" in the securities context. *Id. at 2396*. The result of these mistakes would be that:

> underwriters [would have to] act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could **[**18]** lead to an antitrust lawsuit and the risk of treble damages).

Id.

The Court acknowledged that "[t]his kind of problem exists to some degree in respect to other antitrust lawsuits." *Id.* However, the Court also concluded that in the case before it "the factors . . . mentioned [above] make mistakes unusually likely" and "the securities-related costs of mistakes unusually high." *Id.* These considerations led the Court to a rather circumscribed finding regarding the first element of the conflict analysis:

> ***HN5***[] [W]here conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of

> antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.

Id.

Next, the Court considered the second element of the conflict analysis, the need for enforcement of ***antitrust law***. The Court found that ***HN6***[] "any enforcement-related need for an antitrust lawsuit is unusually small" in the securities context because: (1) "the **[**19]** SEC actively enforces the rules and regulations that forbid the conduct in question[;]" (2) "investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law[;]" and (3) "the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." *Id.*

The parties in this case argue over the existence of all four *Credit Suisse* factors, including the dual considerations that comprise the third factor, the risk of conflict between industry-specific regulatory laws and the more general antitrust laws. However, because this Court agrees with Plaintiffs that FERC's regulatory oversight does not involve the same level of risk of conflict with antitrust laws as the SEC's regulatory oversight did in *Credit Suisse,* and thus the vital third factor is not present in this case, the Court need not address the existence of the first, second, and fourth factors discussed in *Credit Suisse.*

In regards to this third factor, TCO argues that "if the complex and heavily nuanced line-drawing that FERC and its regulated entities must undertake is second-guessed by non-expert courts **[**20]** and juries applying antitrust laws, there is a great danger of conflicting and erroneous results." *TCO's Memorandum in Support,* at p. 10. TCO believes this danger **[*650]** persists "even if given conduct [is] currently condemned by both antitrust verdicts and FERC [because] independent application of ***antitrust law*** could tie FERC's hands as regards future adjustments--or even wholesale changes--to its regulatory regime." *Id.* According to TCO:

> FERC has crafted the current competitive environment to maximize the efficiency of the nation's gas transportation system, and fears of unpredictable antitrust liability could cause pipelines to shrink from offering services--yes, like parking and lending--that FERC has approved and that benefit the public through optimal use of pipelines' existing plant and equipment.

Id.

Plaintiffs respond that neither of the risk of conflict factor's twin requirements are present here. "First, the coexistence of FERC oversight and the antitrust laws creates no risk that TCO would [sic] on the receiving end of 'conflicting guidance, requirements, duties, privileges, or standards of conduct'" because, "[b]y contrast [to *Credit Suisse*], the circumstances and regulatory environment **[**21]** in this case bear no resemblance whatsoever to the finely tuned regulation of 'conduct at the core of marketing new securities' that the Court felt the need to insulate from ***antitrust law*** in *Credit Suisse." Plaintiff's Response,* at p. 11-13 (quoting *Credit Suisse, 127 S. Ct. at 2392, 2396)*. Plaintiffs also observe that the Supreme Court found *Credit Suisse* to be an "unusual" case. It involved "an unusually serious legal line-drawing problem," "an unusually high risk that different courts will evaluate similar factual circumstances differently," and an "unusual[] likel[ihood]" of "unusually serious mistakes" with "unusually high" costs. *Credit Suisse, 127 S. Ct. at 2395, 2396*. Furthermore, Plaintiffs argue that TCO's conduct was "patently illegal," and thus there is "no danger that TCO could be found liable for conduct that the FERC permits." *Plaintiffs' Response,* at p. 13.

Second, Plaintiffs maintain that, unlike in *Credit Suisse,* the natural gas industry does not have an "unusually small" "enforcement-related need for . . . antitrust lawsuit[s]." *Credit Suisse, 127 S. Ct. at 2395, 2396*. Plaintiffs observe that the Court in *Credit Suisse* found a limited need for antitrust suits, in **[**22]** part, because "the SEC is required to take into account competitive considerations when it creates securities related policy," thus "mak[ing] it somewhat less necessary to rely on antitrust actions to deter anticompetitive behavior." *Plaintiffs' Response,* at p. 13. They point out that this Court, in denying Defendants' motions to dismiss, already has found "that the FERC's authority to remedy anticompetitive behavior is limited." *Id.* Therefore, Plaintiffs argue that the second factor under the risk of conflict analysis is also missing from this case.

The Court finds that TCO has not made a strong case for the potential applicability of *Credit Suisse* to this case. *Credit Suisse* dealt with the intersection of securities law and ***antitrust law***. Its four-factor test was derived from cases that "address[ed] the relation of securities law to ***antitrust law***." *Credit Suisse, 127 S. Ct. at 2389*. The Supreme Court in *Credit Suisse* suggested that that case shared similarities with other antitrust cases, but it also highlighted that the securities context -- or, at a minimum, the facts of *Credit Suisse* -- presented a variety of "unusual[]" concerns. *See id. at 2396* ("This kind of problem [as existed **[**23]** in *Credit Suisse*] exists to some degree in respect to other antitrust lawsuits. But here the factors we have mentioned make mistakes unusually likely . . . ."). The Court makes no finding as to the scope of *Credit Suisse,* other than to say that the facts of this case do not place it under *Credit Suisse.* The **[*651]** Court also notes that TCO has failed to cite any case applying the *Credit Suisse* framework outside of the securities context.

In any event, assuming *Credit Suisse*'s potential applicability, the Court agrees with Plaintiffs that the third portion of the case's four-part analysis, the risk of conflict between the regulatory laws and the antitrust laws, is not present in this case. First, permitting the antitrust claims at issue does not "threaten[] serious . . . harm" to the relevant market as in *Credit Suisse*. *Id. at 2394*. The unique workings of the securities industry create an "unusually high risk" of "unusually serious mistakes" resulting in "unusually high" "costs," or harm, that is simply not present here. *Id. at 2395-96*.

HN7[] In the securities market, joint action is integral to the activity which the SEC both encourages and regulates. That joint action necessarily exposes the participants **[**24]** to antitrust complaints because they engage in sophisticated financial arrangements in concert. Here, the relationship between an interstate natural gas pipeline and shippers of natural gas on the pipeline conforms to a more traditional business model. Although the natural gas industry is undoubtedly complex, the roles of the pipeline and the shippers are fundamentally common -- the pipeline is the seller of transportation and storage services and the shippers are purchasers of those services. Shippers and the pipeline do not act "jointly" in the way described in *Credit Suisse. See id. at 2392* ("[T]he activities in question here -- the underwriters' efforts jointly to promote and to sell newly issued securities -- is central to the proper functioning of well-regulated capital markets.") Finding the joint activity central to the market and noting the SEC's "considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage," the Court observed the "unusually serious legal line-drawing problem" which antitrust claims would complicate. *See id. at 2394* ("[T]o permit antitrust actions **[**25]** such as the present one *still* threatens securities-related harm. . . . In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages . . . from activity that the SEC must (and inevitably will) forbid . . . .").

Second, and also contrary to *Credit Suisse,* there is a considerable "enforcement-related need for . . . antitrust lawsuit[s]" in the natural gas context. *Id. at 2396*. In its reply, TCO denies this fact, arguing that "Congress has given [FERC] broad authority to regulate fraudulent or anticompetitive conduct in the natural gas market," including "extensive authority to promulgate (and enforce) rules promoting transparency in natural gas markets, *15 U.S.C. § 717t-2*, which rules take into account 'fair competition.'" *TCO's Reply,* at p. 6. In TCO's view, "FERC has fashioned the relevant playing field precisely as it likes, and it can tinker and reform as it likes, when it likes." *Id.* at p. 5.

Undoubtedly, as this Court has previously found, ***HN8***[] "FERC regulates the rates for transporting and selling natural gas in interstate commerce." *June 14, 2005 Memorandum Opinion and Order,* 2:04-cv-867, doc. 371, at p. 16. It also "facilitate[s] price **[**26]** transparency for the sale or transportation of physical natural gas in interstate commerce," out of a "due regard for . . . fair competition." *15 U.S.C. § 717t-2(a)(1)*. Plaintiffs attempt to convince the Court that "FERC certainly does not actively enforce the rules and regulations forbidding the challenged conduct." *Plaintiffs' Response,* at p. 16. While the Court has considerable difficulty accepting Plaintiffs' assertions, the Court does believe that, unlike the securities industry, **[*652]** the natural gas industry does not have an "unusually small" "enforcement-related need for . . . antitrust lawsuit[s]." *Credit Suisse, 127 S. Ct. at 2396*.

Importantly, as the *Credit Suisse* Court observed, "***HN9***[] [p]rivate individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages" under the Securities Exchange Act. *Id. at 2393* (citing *15 U.S.C. §§ 78bb*, *78u-4*, *77k*). These carefully crafted provisions seek to regulate the coexistence of

SEC enforcement and private litigation. *See* *15 U.S.C. §§ 78bb(a)*, *78u-4*, *77k(a)*. Traditional antitrust suits might conflict with this regulation. This fact contributes to the unusual lack of a need for antitrust suits in **[**27]** the securities context. No similar special private actions, which might be compromised by antitrust claims, accompany FERC's regulatory scheme.

Further, the Court also believes that the natural gas industry is distinguishable from the securities industry because FERC appears to wield somewhat less authority to remedy anticompetitive behavior than the SEC. As the Court has already stated, "FERC's [first] order provided relief limited to disgorging the Pipeline Defendants' [including TCO's] ill-gotten profits and a small rebate of SIT fees, neither of which purported to address any anticompetitive results of the scheme." *June 14, 2005 Memorandum Opinion and Order,* 2:04-cv-867, doc. 371, at p. 17. FERC's second order only required TCO to disgorge profits and agree not to provide park or loan services to any customer when that service is posted as "not available." *November 6, 2008 Order Approving Stipulation and Consent Agreement,* 2:04-cv-869, doc. 163-3, at p. 4-5. It therefore also did little "to address any anticompetitive results of the scheme." *June 14, 2005 Memorandum Opinion and Order,* 2:04-cv-867, doc. 371, at p. 17. Both of these disgorgements resulted from negotiations between **[**28]** FERC and TCO. In relation to both disgorgements, Plaintiffs claim damages in a far larger amount and of a different type than that which was disgorged. Prior to *Credit Suisse,* the Court found that "FERC's authority to remedy anti-competitive behavior is decidedly less than the regulatory authority in *Trinko,*" *535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701*, and refused to find that case controlling. Now the Court makes a similar finding in regards to *Credit Suisse.* FERC lacks the authority to remedy anticompetitive behavior that the SEC wielded in *Credit Suisse.* ***HN10***[] In the natural gas context, there is an "enforcement-related need for . . . antitrust lawsuit[s]." *Credit Suisse, 127 S. Ct. at 2396*. Summary judgment as to Plaintiffs' antitrust claims would be improper.

B. Contract Claims

TCO contends that Plaintiffs' contract claims "are untenable for the same reasons that the antitrust claims are untenable, *i.e.* the rule of *Credit Suisse." TCO's Memorandum in Support,* at p. 14. According to TCO, "[t]his case is no commonplace contract enforcement action. The line-drawing that Plaintiffs here would ask a jury to perform in finding that TCO failed to comply with its tariff and General Terms obligations would . . . disrupt[] **[**29]** . . . the finely tuned FERC regulatory balance," by permitting the contract claims to "turn on vagaries in the laws of different states, and in the *ad hoc* decisions of judges and juries within a state." *Id.* at p. 15. Moreover, TCO argues that if *Credit Suisse* renders FERC's "finely tuned agency line drawing . . . off-limits for claims brought under *state* law," then FERC's "careful . . . scrutiny must then surely be off-limits for claims brought under *state* law." *Id.* at p. 16 (emphasis in original).

[*653] In response, Plaintiffs point to the West Virginia choice of law provision that appears in TCO's tariff and is incorporated by reference into the service agreements. They argue that "[t]he choice of law provision applies to disputes over service agreements between TCO customers and TCO, the only parties to the agreements." *Plaintiffs' Response,* at p. 22-23. They note that "[t]here would be no purpose for the choice of law provision in TCO's FERC approved Tariff if, as TCO contends, TCO's customers cannot invoke state remedies," and that "TCO's customers are entitled to rely on the choice of law provision in TCO's Tariff in deciding whether to transact business on the TCO pipeline system." **[**30]** *Id.* at p. 23. For these reasons, they believe that they may maintain their state contract claims against TCO.

The provision provides:

> Choice of Law. Unless otherwise specifically stated in the Service Agreement, interpretation of all Service Agreements or other agreements entered into between Shipper and Transporter, including any provisions of this Tariff related to such agreements, and any disputes arising from such agreements, shall be governed by the law of the State of West Virginia.

General Terms and Conditions, 2:04-cv-869, doc. 183-9, at p. 2. In its reply, TCO dismisses this provision as an "obscure piece of boilerplate" that fails to "create or promise any type of remedy." *TCO's Reply,* at p. 10. However, TCO's argument is unconvincing. Under its view, it is difficult to see what the purpose of the choice of law provision would be. Contrary to TCO's arguments regarding the inapplicability of state law, the choice of law provision demonstrates that the parties have contemplated a place for state law all along. Moreover, the provision should allay TCO's concerns about disputes "turn[ing] on vagaries in the laws of different states." *TCO's Memorandum in Support,* at p. 15. The Court **[**31]** agrees with Plaintiffs that the choice of law provision should be enforced:

> TCO customers are entitled to rely on the choice of law provision in TCO's Tariff in deciding whether to transact business on the TCO pipeline system. TCO cannot lull customers into transacting business on its system by assuring them that they have state law remedies . . . , only to claim that those state law remedies are unavailable when a customer invokes them.

Plaintiffs' Response, at p. 23.

Notwithstanding TCO's fears, this finding does not "overturn the *Supremacy Clause* [or] *Credit Suisse." TCO's Reply,* at p. 10. West Virginia contract law is not "clearly incompatible" with FERC's regulatory oversight. *Credit Suisse, 127 S. Ct. at 2392*. In fact, it appears to the Court that TCO's contention that Plaintiffs' contract claims are precluded by *Credit Suisse* is even weaker than its rejected argument that that case precludes Plaintiffs' antitrust claims. *Credit Suisse* at least dealt with antitrust claims; it did not involve a contract claim. Accordingly, to read into *Credit Suisse* the authority to preclude such a claim would be an expansive interpretation indeed.

C. State Antitrust Claims Only

TCO's only other unaddressed **[**32]** challenge to Plaintiffs' state antitrust claims, set forth in a footnote, is that the West Virginia Antitrust Act, *W. Va. Code §§ 47-18-1 et seq,* "cannot regulate competition in markets outside of West Virginia." *TCO's Memorandum in Support,* at p. 14 n.15. TCO maintains that its assertion is correct because "[a] basic principle of the federal union is that states may govern themselves, but not one another." *Id.* In support of this proposition, TCO selectively **[*654]** cites to a single sentence in *BMW of North America v. Gore,* without offering any explication of that case: "[N]o single state . . . [may] impose its own policy choice on neighboring States." *517 U.S. 559, 571, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)*. However, even a passing glance at *BMW of North America* reveals that this authority offers little guidance regarding whether Plaintiffs may maintain a claim under the West Virginia Antitrust Act. The truism cited by TCO references a hypothetical situation in which one state requires automobile manufacturers, distributors, and dealers in other states to disclose fully every presale repair performed on an automobile. *Id. at 570*. In the instant case, West Virginia is not attempting to regulate activities occurring wholly **[**33]** outside of its borders. *BMW of North America* simply has nothing to do with the antitrust matter at hand.

On the contrary, it is clear to the Court that Plaintiffs' claims should survive. As already discussed, Plaintiffs and TCO executed a choice of law provision settling upon West Virginia law, therefore West Virginia ***antitrust law***. TCO's pipeline network encompasses various states, including West Virginia. *Second Amended Complaint,* 2:04-cv-867, doc. 58, at p. 4. Accordingly, the illegal scheme, if it occurred, resulted "in restraint of trade or commerce in this State." *W. Va. Code § 47-18-13*. Moreover, the Court notes that TCO's operational headquarters are in West Virginia, and one of the two remaining select shipper Defendants, Defendant Base Petroleum, is incorporated under West Virginia law and has its principal place of business in West Virginia. *Second Amended Complaint,* 2:04-cv-867, doc. 58, at p. 4, 6. Contrary to TCO's implied assertions, there is no requirement that an antitrust violation occur entirely within the state of West Virginia before West Virginia ***antitrust law*** will apply. It is sufficient that a portion of the affected market is in West Virginia. *See, e.g., Precision Piping & Instruments, Inc. v. E. I. duPont de Nemours & Co., 707 F.Supp. 225, 226, 231 (W. Va. S.D. 1989)* **[**34]** (denying the defendants' motion for summary judgment on the plaintiff's *W. Va. Code § 47-18-13* antitrust claim, despite the fact that the market at issue encompassed portions of both West Virginia and Ohio). Therefore, the Court denies TCO's summary judgment motion as to Plaintiffs' state antitrust claims.

IV. CONCLUSION

Pending before the Court are the Renewed Motions for Summary Judgment (doc. 148, Ex. 2, in each of the above-captioned matters) of Defendant Columbia Gas Transmission Corporation (TCO). For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** these motions.

The Court **DIRECTS** the Clerk to send a copy of this written Order and Opinion to counsel of record and any unrepresented parties.

ENTER: April 21, 2009

/s/ Robert C. Chambers

ROBERT C. CHAMBERS

UNITED STATES DISTRICT JUDGE

D&G Inc. v. SuperValu, Inc.

United States District Court for the Western District of Wisconsin

April 23, 2009, Decided; April 24, 2009, Filed

08-cv-761-slc [1]

Reporter

2009 U.S. Dist. LEXIS 35514 *; 2009-1 Trade Cas. (CCH) P76,629

D&G INC., d/b/a/ Gary's Foods and ROBERT WARREN WENTWORTH JR., INC., d/b/a Rangeley IGA, on behalf of themselves and all others similarly situated, Plaintiffs, v. SUPERVALU, INC. and C&S WHOLESALE GROCERS, INC., Defendants.

Core Terms

convenient, defendants', parties, witnesses, retailers, exchange agreement, injunctive relief, wholesale, distribution center, interest of justice, choice of forum, deference, closure, grocery, principal place of business, plaintiffs', assigned, speed, motion to dismiss, headquarters, negotiation, facilities, employees, venue, antitrust violation, motion to transfer, dozens, median, cases

Counsel: **[*1]** For D&G INC., doing business as Gary's Foods, Plaintiff: Anne M. Nardacci, Philip J. Iovieno, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Albany, NY; Daniel Aaron Kotchen, LEAD ATTORNEY, Daniel Low, Kotchen & Low, Washington, D.C., DC; Eric J. Wilson, Kevin J. O'Connor, LEAD ATTORNEYS, Hannah L. Renfro, Godfrey & Kahn S.C., Madison, WI; Daniel Flaherty, Godfrey & Kahn, S.C., Milwaukee, WI; Kimberly H. Schultz, Matthew J. Henken, Richard B. Drubel, Boies, Schiller & Flexner LLP, Hanover, NH.

For Robert Warren Wentworth Jr., Inc., doing business as Rangeley IGA, Plaintiff: Anne M. Nardacci, Philip J. Iovieno, LEAD ATTORNEYS, Boies, Schiller & Flexner LLP, Albany, NY; Daniel Aaron Kotchen, LEAD ATTORNEY, Daniel Low Kotchen & Low, Washington, D.C., DC; Eric J. Wilson, Kevin J. O'Connor, LEAD ATTORNEYS, Hannah L. Renfro, Godfrey & Kahn S.C., Madison, WI; Daniel Flaherty, Godfrey & Kahn, S.C., Milwaukee, WI.

For Supervalu, Inc., Defendant: Andrew Clarkowski, Michael J. Modl, LEAD ATTORNEYS, Axley Brynelson, LLP, Madison, WI; E. Casey Beckett, Marta M. Chou, Martin R. Lueck, Stephen Paul Safranski, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN; K Craig Wildfang, Robins, Kaplan, **[*2]** Miller & Ciresi, Minneapolis, MN; Scott W. Hansen, Reinhart Boerner Van Deuren S.C., Milwaukee, WI.

For C&S Wholesale Grocers, Inc., Defendant: Charles A. Loughlin, Christopher MacAvoy, LEAD ATTORNEYS, Howrey LLP, Washington, DC; Nathan A. Frederick, LEAD ATTORNEY, Howrey LLP, Chicago, IL; Christopher E. Ware, Rebecca Frihart, Scott W. Hansen, Reinhart Boerner Van Deuren S.C., Milwaukee, WI; Michael J. Modl, Axley Brynelson, LLP, Madison, WI

Judges: BARBARA B. CRABB, District Judge.

Opinion by: BARBARA B. CRABB

---

[1] The parties have declined the jurisdiction of the magistrate judge. Because no Article III judge has been assigned to this case, I have assumed jurisdiction over the case temporarily to resolve the parties' current disputes.

Opinion

OPINION and ORDER

Plaintiffs D&G Inc. and Robert Warren Wentworth Jr., Inc. have filed this proposed antitrust class action, alleging that defendants SuperValu, Inc. and C&S Wholesale Grocers, Inc. entered into an unlawful agreement to allocate the Midwest and New England markets for the supply of wholesale groceries. Now before the court is defendants' joint motion to transfer venue to the District of Minnesota pursuant to *28 U.S.C. § 1404(a)*.

I will grant defendants' motion because I am persuaded that the transferee district is "clearly more convenient" to the parties. One of the two defendants has its principal place of business in the transferee district, no party has any ties to this district and **[*3]** the only connection plaintiffs can identify between this case and this district is the fact that the alleged antitrust violations resulted in the closure of a distribution center in La Crosse, Wisconsin, a fact that does not appear to be relevant or disputed. As for plaintiffs' contention that the motion should be denied because transfer is likely to cause delay, I am not persuaded that this concern is realistic or that plaintiffs have a special need to achieve speedy resolution of their case.

From the complaint and the parties' submissions related to defendants' motion to transfer, I draw the following facts for the purpose of addressing defendants' motion.

FACTS

A. Parties

Plaintiff D&G is an Iowa corporation with its principal place of business in Mount Vernon, Iowa. Plaintiff Robert Warren Wentworth Jr., Inc. is a Maine corporation with its principal place of business in Rangeley, Maine. Defendant SuperValu is a Delaware corporation with its principal place of business in Eden Prairie, Minnesota. Defendant C&S is a Vermont corporation with its principal place of business in Keene, New Hampshire. Defendants are wholesale grocery providers that supply products and services to retail **[*4]** grocery stores. Plaintiffs own and operate retail grocery stores.

B. The Lawsuit

In 2003, defendant C&S entered the Midwest wholesale grocery distribution market by acquiring three large distribution facilities from a distressed wholesaler named Fleming. The facilities were located in Waukesha, Wisconsin; La Crosse, Wisconsin; and Massillon, Ohio. In September 2003, defendants entered into an "Asset Exchange Agreement" in which defendant C&S agreed to assign to defendant SuperValu its right to acquire the three distribution centers and other Fleming assets and defendant SuperValu agreed to sell C&S its New England distribution centers and other operations. Defendants' representatives negotiated the terms of this agreement at defendant SuperValu's headquarters in Minnesota and at defendant C&S's former headquarters in Vermont. Defendant C&S met with individuals in and around La Crosse to discuss competing against SuperValu. Shortly after the parties entered into the asset exchange agreement in September 2003, both C&S and SuperValu closed the distribution centers that each received as part of the agreement.

On December 31, 2008, plaintiffs filed this lawsuit, alleging that the parties **[*5]** agreed to exchange the distribution centers to allocate the market and that this agreement caused them to pay "charges for grocery wholesale goods and services to Defendants that were higher than they would have been but for Defendants' unlawful agreements." In addition, plaintiffs allege that "through various devices and techniques of secrecy," defendants "fraudulently concealed the existence of the unlawful contracts, combinations and conspiracies alleged herein," concealed the "anticompetitive terms" of the asset exchange agreement and "misled Plaintiffs and [potential class] members . . . as to the true, collusive and coordinated nature of their market and customer allocation and other illegal anticompetitive activities. " Cpt., dkt. # 17, at 13-14.

Plaintiffs ask for both monetary and injunctive relief. Their request for injunctive relief is simply that they receive "such injunctive relief as they may be entitled to by law." Id. at 24. Plaintiff D&G has not bought wholesale goods or services from either defendant since 2005 and plaintiff Robert Warren Wentworth has not bought wholesale goods or services from either defendant since 2004.

C. Local Effect of Alleged Antitrust Violations

According **[*6]** to plaintiffs, as a result of the parties' agreement, grocery wholesale prices increased for retailers that could have obtained products from the La Crosse distribution centers, which would include retailers located in this district and retailers located in Iowa, such as plaintiff D&G. At the time of the asset exchange and subsequent closure of the facilities, plaintiff D&G obtained products from two SuperValu distribution facilities located more than 250 miles away. If SuperValu had decided not to close the just-purchased La Crosse facilities, plaintiff D&G may have obtained products from this closer facility. Or, if C&S had not assigned the facilities in the first place, plaintiff D&G may have had a viable competitive alternative to obtaining products from SuperValu. Aside from its impact on retailers, closure of the La Crosse facility caused employees at the facility to lose their jobs, which plaintiffs allege caused a notable economic impact throughout this district.

D. Witnesses

Nearly all the SuperValu personnel involved with the asset exhange with C&S are located in Minnesota and work out of its headquarters. The "vast majority" of other personnel that SuperValu has identified **[*7]** to date as having personal knowledge regarding the parties' dispute are located in Minnesota. Approximately three dozen Minnesota-based employees were involved in the due diligence, negotiation and execution of the asset exchange agreement.

At least seven of those three dozen are no longer employees of SuperValu. Of those seven, former senior corporate counsel Sheila Hagen and former Vice President of Financial Planning James Stoffel were "central" to the negotiations and the decision to enter into the agreement, although all seven are believed to have knowledge related to the due diligence, negotiation or execution of the asset exchange agreement. Hagen was SuperValu's "lead negotiator" and Stoffel was responsible for financial investigation of the asset exchange. Both Hagen and Stoffel reside in Minnesota.

Defendant C&S **[*8]** has identified Mark Gross, its former Chief Financial Officer, as the key employee involved in the asset exchange agreement that plaintiffs allege violated antitrust laws. He resides in New Hampshire. Most of the paper and electronic documents pertaining to the asset exchange transaction are stored at defendants' respective headquarters in Minnesota and New Hampshire.

E. Expected Time to Trial

In the present case, trial is set for August 23, 2010. However, this trial date is tentative because no Article III judge has been assigned to this case. Currently, one of the two district judges in this district is on medical leave and has taken senior status. To insure that cases are addressed as efficiently as possible, half of the incoming cases are assigned randomly to Magistrate Judge Stephen Crocker. In the event that the parties in those cases decline his jurisdiction (such as in this case), the court assumes that a new district judge will be appointed in time to try the cases. As of 2007, the median time from filing to trial in this district was 10.4 months and the median time from filing to trial in the District of Minnesota was 29 months.

OPINION

Defendants have moved to transfer this **[*9]** case to the District of Minnesota pursuant to *28 U.S.C. § 1404(a)*. (Although defendants have moved in the alternative for transfer to the District of New Hampshire, I need not consider their arguments in favor of transfer to that venue because I conclude that transfer to the District of Minnesota is proper.) Transfer under *§ 1404(a)* is proper when (1) venue is proper in the transferor district; (2) the transferee district is one in which the action could have been brought; and (3) the transferee court is "clearly more convenient." *Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986)*. The parties do not dispute that venue is proper here and that the action could have been brought in the District of Minnesota; the only issue is whether that district is "clearly more convenient" for the parties than this one.

In deciding whether a transferee district is "clearly more convenient" than the transferor district, a court considers the relative convenience of the districts for the parties and witnesses and whether transfer will promote the interest of justice. Issues such as the situs of material events, ease of access to sources of proof, plaintiffs' choice of forum and relative **[*10]** docket speed are all relevant to this decision. *Id. at 219 n.3, 221*; *Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc., 851 F. Supp. 1265, 1269 (E.D. Wis. 1994)*; *Kinney v. Anchorlock Corp., 736 F. Supp. 818, 829 (N.D. Ill. 1990)*.

A. Choice of Forum

Plaintiffs contend that their choice of forum should be afforded deference. Generally, a plaintiff's choice of forum deserves less deference when a plaintiff chooses to litigate outside his home forum because it is less reasonable to assume that a plaintiff is choosing such a forum for convenience. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)*.

Plaintiffs do not deny that this district is not their home forum. Nonetheless, they contend that their choice of forum should be given deference because this district is the "situs of material events." It may be reasonable to assume that a plaintiff would choose a forum that is the situs of material events for its convenience, in which case deference would be proper. Cf. *Chicago, Rock Island & Pacific Railroad Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955)* (suggesting choice of forum may be given deference if material events occur in district). However, plaintiffs fail to make a **[*11]** persuasive showing of the materiality of events that occurred in this district. The only event that occurred in this district is the closing of the La Crosse distribution center. Defendants' alleged market allocation agreement happened elsewhere, as did the impact on plaintiffs, whose retail stores are all located outside this district.

Plaintiffs point out that retailers in Wisconsin were likely affected by the closure as well and that the closure had a general economic impact in the district, causing a mass layoff of workers. Unfortunately for plaintiffs, neither of those points is relevant. The general economic impact of the distribution centers' closure is not at issue; this antitrust lawsuit involves the specific economic impact on grocery retailers. As for the effect of the closure on retailers in Wisconsin, none of them have joined the case as parties. In other words, at this stage, the case involves only the economic impact on *plaintiffs,* which occurred outside this district. If the case is certified as a class action, it may include Wisconsin retailers, but such a possibility is too speculative to warrant special deference to plaintiffs' choice of forum.

At any rate, even if **[*12]** the closing of the La Crosse distribution center could be said to be "material," this would not help plaintiffs because nothing about the closure appears to be in dispute. Plaintiffs' choice to litigate in a forum in which certain events occurred deserves no special deference when it is undisputed that these events took place, regardless whether the events are "material" to the lawsuit. *Chicago, Rock Island, 220 F.2d at 304* (no deference for choice of forum when "no controverted question depends on any event occurring" in district).

B. Convenience of Parties

The District of Minnesota is clearly more convenient for defendant SuperValu. Its headquarters and principal place of business are located in that district, as are dozens of employees who worked on the allegedly illegal asset exchange agreement. (It is irrelevant that electronic and paper documents are located in Minnesota , given the portability of such documents.) As for the other parties, there appears to be no identifiable difference in convenience between districts. Plaintiffs and defendant C&S are located elsewhere and do not say they have documents or employees located in this district or in the District of Minnesota.

Plaintiffs **[*13]** contend that the employee witnesses located in the District of Minnesota would be testifying to establish a "business excuse," a point they argue is irrelevant in this case because plaintiffs contend that defendants' agreement amounts to a "naked restraint of trade," for which business excuses are no defense. *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. However, plaintiffs do not argue that this is their *only* theory; they assert a rule-of-reason theory for their Sherman Act § 1 claims, cf. *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985)* (explaining difference between "naked restraints" and restraints analyzed under rule of reason) and they allege that there are no legitimate business justifications for defendants' actions in alleged violation *§ 2* of the Sherman Act. Defendants' evidence of a "business excuse" is relevant to either of these theories and therefore cannot be disregarded.

C. Convenience of Witnesses

The District of Minnesota would be more convenient for some witnesses. In particular, dozens of defendant SuperValu's employees have information about the asset exchange agreement and at least two non-party witnesses **[*14]** located in Minnesota were key in negotiating and executing the agreement. Against this, plaintiffs state vaguely that there are "likely numerous non-party witnesses" in this district because defendants met with individuals in La Crosse to discuss competing against SuperValu. However, plaintiffs do not explain who these individuals might be or where they are located.

As plaintiffs point out, the number of non-party witnesses specified by name (two) is almost insubstantial. However, this evidence is but one piece of the larger analysis; it must be considered in light of the evidence that dozens of employee witnesses located in Minnesota are expected to have information relevant to the asset exchange and that one of the two defendants has its principal place of business and headquarters there. Together, these things establish that the District of Minnesota is "clearly more convenient" for defendant SuperValu and for the witnesses.

I **[*15]** agree with plaintiffs that the relative convenience of litigating in the District of Minnesota is lessened in light of technological advances, but I am still persuaded that the convenience of the parties and witnesses weighs in favor of the District of Minnesota.

D. Interest of Justice

Plaintiffs have one more string to their bow. They contend that the case should not be transferred for the reason that many advance when facing a motion to transfer venue in this district: speed. Speed is a valid concern, *Coffey, 796 F.2d at 221* ("Factors traditionally considered in an 'interest of justice' analysis relate to the efficient administration of the court system."); *In re National Presto Industries, Inc., 347 F.3d 662, 664 (7th Cir. 2003)* (lighter docket speed of proposed transferee district relevant to interest of justice analysis), one that may even be dispositive, *Coffey, 796 F.2d at 219-20* (interest of justice may be determinative factor); *Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996)*.

Plaintiffs contends that transfer would not further the interest of justice because plaintiffs could expect substantial delay in the District of Minnesota, pointing out **[*16]** that the median time to trial in that district is 29 months, substantially longer than the median time to trial in this district. However, the unusual circumstances of this case make those 2007 statistical estimates of median time to trial as uncertain as the actual trial date set in this case. Because this case has not yet been assigned to an Article III judge and is not likely to be so assigned until a new judge has been appointed, it is difficult to say how quickly the parties may expect a trial. Although plaintiffs are correct that some delay is likely to occur if this case is transferred, I am less certain that the delay is substantial given the current circumstances of this district.

This is not plaintiffs' only problem. As defendants point out, it is not clear how plaintiffs expect to obtain injunctive relief. If, as defendants contend, plaintiffs may be compensated with money damages, there is less need for speedy resolution. Although plaintiffs seek injunctive relief in their complaint, they do not explain how they might be entitled to such relief. The alleged antitrust violations arise from an agreement defendants entered into in 2003.

Plaintiffs assert that defendants' unlawful **[*17]** agreement is ongoing, that plaintiffs and potential class members continue to suffer substantial harm and that defendant SuperValu has stated that it "is hoping to enter similar agreements." Plts.' Br., dkt. # 29, at 9. However, plaintiffs' only alleged injury is that of having paid more for goods purchased from defendants, and neither plaintiff has purchased any goods from defendants since 2005 at the latest. The allegations provide little basis to draw an inference that injunctive relief might be available to plaintiffs. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)* (*Rule 8* requires request for relief to be "plausible on its face"); see also *Limestone Development Corp. v. Village of Lemont, 520 F.3d 797, 803 (7th Cir. 2008)* (under Twombly, plaintiff must plead a "a fuller set of factual allegations" to show his claim is not "largely groundless" in complex cases such as those arising under ***antitrust law***).

As for the possibility that potential class members may have better grounds for injunctive relief than plaintiffs, it is too speculative. No potential class member is identified. Moreover, to the extent plaintiffs have no viable basis for injunctive relief, it may be **[*18]** difficult to certify a class including those seeking injunctive relief, in light of class certification requirements such as typicality and adequate representation. *Fed. R. Civ. P. 23(a)(3)-(4)*).

Finally, defendants raise the possibility that plaintiffs delayed filing suit, another reason to afford less weight to their request for speed. Plaintiffs contend that they did not delay filing suit, pointing out that they have alleged that defendants concealed their antitrust violations. If that is the case, plaintiffs' delay could not be held against them. However, it is curious that plaintiffs decided to say so little about how or when they discovered the antitrust violation or why they did not discover it until more than five years had passed. After all, defendants argued in their initial brief that the original exchange agreement was widely publicized. Dfts.' Br., dkt. # 22, at 14. If plaintiffs hoped to rely on their need for speed, they should have explained why the public nature of the exchange agreement did not give them notice of their current cause of action. They did not.

I am not persuaded that the interest of justice weighs against transfer. Because plaintiffs have failed to set **[*19]** out plausible grounds for the injunctive relief they seek or explain their five-year delay in bringing this suit, I am not persuaded that speed is crucial in this case or that plaintiffs have an interest in speedy resolution of the case. Moreover, because there is no Article III judge assigned to this case, it is unlikely that the case could be resolved more quickly here than in Minnesota.

In sum, the factors weigh in favor of transfer. The District of Minnesota is "clearly more convenient" for the parties and witnesses. It would not further the interest of justice to stand in the way of such transfer. I will grant defendants' motion to transfer to the District of Minnesota under *28 U.S.C. § 1404(a)* .

One final matter requires attention. After defendant filed their motion to dismiss, several other motions are ready to be decided. In particular, defendants have moved to dismiss the case as time-barred and pursuant to *Fed. R. Civ. P. 8*. Dkt. # 33. In connection with that motion, they have moved for leave to submit materials outside the pleadings, dkt. # 37, and for leave to stay discovery until the motion to dismiss is resolved, dkt. # 35. In addition, because Magistrate Judge Crocker **[*20]** granted a limited stay of discovery on March 4, 2009, plaintiffs have filed a motion for early, limited discovery. Dkt. # 51. Because I have decided that the case should be transferred pursuant to *28 U.S.C. § 1404(a)*, it would not be proper to consider the merits of the motion to dismiss or make decisions about the scope of allowable discovery while the motion to dismiss remains pending or about what materials may be considered in the context of the motion to dismiss. Therefore, I will decline to rule on these issues.

ORDER

IT IS ORDERED that the motion to transfer venue filed by defendants SuperValu, Inc. and C&S Wholesale Grocers, Inc. pursuant to *28 U.S.C. § 1404(a)*, dkt. # 21, is GRANTED. The clerk of court is directed to transmit the case file to the United States District Court for the District of Minnesota.

Entered this 23rd day of April, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

Gurvey v. Cowan, Liebowitz & Latman, P.C.

United States District Court for the Southern District of New York

April 23, 2009, Decided; April 24, 2009, Filed

06 Civ. 1202

Reporter

2009 U.S. Dist. LEXIS 34839 *; 2009-1 Trade Cas. (CCH) P76,623; 2009 WL 1117278

AMY R. GURVEY, Plaintiff, v. COWAN, LIEBOWITZ & LATMAN, PC., CLEAR CHANNEL COMMUNICATIONS, INC., INSTANTLIVE CONCERTS, LLC, LIVE NATION, INC., NEXTICKETING, INC. DALE HEAD, STEVE SIMON, and DOES I-VIII, INCLUSIVE, Defendants.

Subsequent History: Reconsideration denied by *Gurvey v. Cowan, Liebowitz & Latman, PC, 2010 U.S. Dist. LEXIS 144236 (S.D.N.Y., Sept. 20, 2010)*

Affirmed in part and vacated in part by, Remanded by, in part, Motion denied by, Request denied by *Gurvey v. Cowan, Liebowitz & Latman, P.C., 462 Fed. Appx. 26, 2012 U.S. App. LEXIS 2737 (2d Cir. N.Y., Feb. 10, 2012)*

Prior History: *Gurvey v. Cowan, Liebowitz & Latman, PC, 2009 U.S. Dist. LEXIS 21183 (S.D.N.Y., Mar. 16, 2009)*

Core Terms

misappropriation, allegations, tortious interference, trade secret, Lanham Act, speculation, advertising, inventions, quotation, statute of limitations, legal representation, antitrust violation, legal malpractice, cause of action, misrepresentation, recordings, fiduciary, concert, damages, patents, unfair

Counsel: **[*1]** For Amy R. Gurvey, Plaintiff: Olimpio Lee Squitieri, Squitieri & Fearon LLP, New York, NY.

For Cowan, Liebowitz & Lathman, PC, Defendant: Andrew B. Cripe, LEAD ATTORNEY, Hinshaw & Culbertson, L.L.P., Chicago, IL; John Richard Supple, Jr, Schuyler Blake Kraus, LEAD ATTORNEYS, Hinshaw & Culbertson, L.L.P., New York, NY.

For Clear Channel Communications, Inc., Live Nation, Inc., Instant Live Concerts, LLC, Nexticketing, Inc., Defendants: Ian Hugh Hummel, Baker Botts, L.L.P.(NYC), New York, NY; Jonathan B. Rubenstein, Baker Botts L.L.P., Dallas, TX; Steven Gregory Schortgen, Baker Botts LLP(Dallas), Dallas, TX.

Judges: Barbara S. Jones, UNITED STATES DISTRICT JUDGE.

Opinion by: Barbara S. Jones

Opinion

Opinion & Order

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Plaintiff Amy Gurvey brings claims of misappropriation (trade secrets; ideas, labor or skill), Sherman Act and state antitrust violations, Lanham Act violations, interference with prospective economic relations, tortious interference with contract, legal malpractice, breach of fiduciary duty, and unjust enrichment against her former employer, Cowan, Liebowitz & Latman, P.C. ("CLL"), named CLL partners ("CLL Partners"), and various entities affiliated with Clear **[*2]** Channel Communications ("CCC Defendants") [1].

BACKGROUND [2]

Plaintiff was employed as Of Counsel to CLL pursuant to an employment agreement dated January 15, 2002. (Third Amended Complaint ("TAC") P19). At that time, CLL agreed to represent the Plaintiff before the US Patent and Trademark office ("USPTO") to file Provisional Patent Applications ("PPA"s) for inventions developed by Plaintiff prior to joining CLL. (TAC PP28, 33).

Plaintiff's inventions included business plans to edit, package and distribute live recordings of live music events, as well as electronic ticketing methods related to these recordings. (TAC PP 28, 33.)

Shortly after beginning at CLL, Plaintiff presented her projects, business plans, and inventions at the firm's monthly partners' conference. (TAC P34).

After the meeting a CLL **[*3]** Partner told Plaintiff that the her business plans would be of significant interest to the firm's client CCC. (TAC P36). This same CLL Partner also told Plaintiff that he preferred to have her as a client of CLL rather than as Of Counsel. (TAC P37.)

In early May 2002, Plaintiff was notified that she would no longer be employed Of Counsel, but that CLL continued to have interest in the subject matter of her patents and would file the Plaintiff's PPA's before the USPTO. (TAC P43). On May 22, 2002 and May 24, 2002, CLL filed two patents with the USPTO naming the plaintiff as sole inventor and CLL as attorneys of record. (TAC P44).

In August 2002, Plaintiff returned from a business trip to find that she had been locked out of her office. (TAC P47)

On or about February 16, 2003, the Plaintiff received notification from the USPTO that CLL had withdrawn as the attorney on one of her patents because of a conflict of interest. (TAC P50).

In March 2003, the CCC affiliated entity InstantLive posted ads/statements on their website announcing a new program that would allow concert-goers to purchase its recordings. (TAC P55). On May 5, 2003, *The New York Times* published an article describing InstantLive. **[*4]** Plaintiff alleges that this description mirrored her business models for the onsite distribution of live recordings at concerts. (Band members of Phish were also interviewed for the article and identified their interest in this new product. (TAC P52). A member of Phish is married to a CLL attorney.)

In Fall 2005, CCC formed defendant LiveNation, which acquired defendant InstantLive. (TAC P57).

On June 5, 2006, Plaintiff filed an Amended Complaint, which was served on the CLL law firm and the CCC Defendants on June 16, 2006. [3] The named CLL partners were added as parties to the TAC, filed on March 4, 2008. [4]

---

[1] Although two entities affiliated with the Clear Channel family have been released from this case after personal jurisdiction was found lacking, two other affiliated entities, InstantLive and NextTicketing, remain. They will continue to be referred to as the CCD Defendants.

[2] The facts described are taken from Plaintiffs' Complaint and are assumed to be true for the purposes of this motion only.

[3] An earlier Complaint was filed on February 15, 2006, but was never served.

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal **[*5]** of a complaint that fails to state a claim upon which relief may be granted. "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991)*. The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

"While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (internal quotation marks, citations, and alterations omitted). A plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." *Id. at 1974*. This "plausibility standard" is a flexible one, "oblig[ing] a pleader to amplify a claim with some **[*6]** factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)*, *cert. granted*, *128 S. Ct. 2931, 171 L. Ed. 2d 863 (2008)*.

DISCUSSION

A. Misappropriation Claims

i. Misappropriation of Trade Secrets

The date upon which a cause of action for misappropriation of trade secrets begins to accrue depends on the nature of the misappropriation alleged: "If a defendant misappropriates and discloses a trade secret, he becomes liable to plaintiff upon disclosure. On the other hand, if the defendant keeps the secret confidential, yet makes use of it to his own commercial advantage, each successive use constitutes a new, actionable tort for the purpose of the running of the Statute of Limitations." *Architectronics, Inc. v. Control Systems, Inc., 935 F.Supp. 425, 433 (S.D.N.Y. 1996)* (citing *Lemelson v. Carolina Enterprises, Inc., 541 F.Supp. 645, 659 (D.C.N.Y. 1982)*. Plaintiff here has alleged the former. The TAC describes a misappropriation that occurred and was disclosed some time between Plaintiff's CLL presentation in early 2002 and the May 5, 2003 *New York Times* article that allegedly revealed (in the guise of CCC's own venture) **[*7]** Plaintiff's "entire confidential business models for the onsite distribution of live music at concerts" (TAC PP34, 52). [5] The statute of limitations for this cause of action is three years. Plaintiff's Amended Complaint (the first to be served on Defendants) was not filed until June 5, 2006. [6] The claim was therefore brought more than three years subsequent to the disclosure of the allegedly misappropriated trade secret. Plaintiff's claim is time-barred and is DISMISSED as against all Defendants.

ii. Unfair Competition/Misappropriation of Ideas, Labor, or Skill

---

[4] It is unclear whether the individual partners were ever served with the Third Amended Complaint. Plaintiff appears to argue that constructive notice was sufficient, since the CLL firm was itself served with the Amended Complaint on June 5, 2006. The Court need not, however, reach the constructive notice argument, since the relevant claims are time-barred whether they are measured from the Amended Complaint or the TAC.

[5] Plaintiff argues that the May 5 article did not "disclose" the misappropriated trade secret, but only "addressed its practical application." (Opp'n at 11.) However, the TAC itself is clear in stating that disclosure of Plaintiff's "entire confidential business models" occurred on in that article, on that date.

[6] Plaintiff has failed to establish that the earlier Complaint should operate to bring these claims against these Defendants within the applicable period.

Under New York law, a claim for unfair competition claim premised on misappropriation and unauthorized use is subject to a three-year statute of limitations under *N.Y. C.P.L.R. § 214*. **[*8]** *Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488, 448 N.E.2d 1324, 462 N.Y.S.2d 413 (1983)*. In a case such as this, where the unfair competition claim is identical to a misappropriation claim and where the extent of the misappropriation alleged is more akin to a wholesale conversion rather than a mere interference with Plaintiff's alleged property interest, the statute of limitations period is identical to that of a claim for misappropriation of trade secrets. See *Greenlight Capital, Inc. v. GreenLight (Switzerland) S.A., No. 04-cv-3136, 2005 U.S. Dist. LEXIS 2, 2005 WL 13682, at*7 (S.D.N.Y. 2005)*; *Opals on Ice Lingerie v. BodyLines, Inc., 425 F.Supp.2d 286, 296-297 (E.D.N.Y. 2004)* ("Defendant's unlawful actions culminated in numerous products it designed, sold and manufactured that are 'substantially similar' to those of [Plaintiff],… which were 'generally unavailable in the marketplace' during the time period in which [Plaintiff] shared samples with [Defendant]…As in Sporn, these allegations of misappropriation amount to more than mere interference with [Plaintiff's] designs and, as such, constitute a "taking" or conversion of plaintiff's property."); *LinkCo, Inc. v. Fujitsu Ltd., 230 F.Supp.2d 492, 501 (S.D.N.Y. 2002)*.

Therefore, Plaintiff's **[*9]** claim began to run on than May 5, 2003. Defendants were not notified of her claims until the filing of the Amended Complaint on June 5, 2006, and its service on June 16, 2006. This claim is therefore time-barred and DISMISSED as against all Defendants.

B. Sherman Act and State Antitrust

Plaintiff claims that the CCC Defendants violated federal and state antitrust laws, and that CLL and its partners aided and abetted those antitrust violations. Plaintiff has failed to adequately plead these causes of action.

In order to state a claim under *Section Two of the Sherman Act*, [7] Plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (internal quotation marks and citation omitted).

The TAC describes various business practices implemented by the CCC Defendants, speculating as to various concert recording arrangements, describing corporate structures, and referring vaguely to supposed admissions of "monopoly" control. (TAC PP128-130.) These practices, as alleged, do not describe the holding or wielding of monopoly power--"the power to control prices in the relevant market or to exclude competitors," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, n. 20, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)*--and so do not provide a basis for Plaintiff's conclusory pleadings of antitrust violations. .

Similarly, Plaintiff has made little attempt to define the market within which CCC's monopoly supposedly exists, alleging only that Defendants have made certain efforts to operate within "the relevant live concert venue market in the United States" (TAC para. 128) or the "US pop concert venues and radio markets." (TAC P129.). The relevant market on **[*11]** claims of antitrust violation involves the specification of its dimensions, its product, geographic and time dimensions. *Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp., 224 F.Supp.2d 657, 666 (S.D.N.Y. 2002)* (citing 2 Earl W. Kintner, *Federal* ***Antitrust Law*** § 12.2 (1980), and must provide a factual basis for the Court's evaluation of the marketplace in light of "the realities of competition" *Balaklaw v. Lovell, 14 F.3d 793, 797 n. 9 (2d Cir. 1994)* (quotation omitted); see *United States v. E.I, du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co., No. 00-cv-5563, 2001 U.S. Dist. LEXIS 18831, 2001 WL 1468168, at *12 (S.D.N.Y. Nov. 19, 2001)*.

---

[7] The TAC attempts to state claims under both *section 2* of the Sherman Act and "the antitrust laws of the states of New York, Texas, and California." (TAC para. 140.) It is unclear from the TAC precisely which state antitrust statutes and **[*10]** provisions Plaintiff refers to. Based on the TAC and the parties' papers pursuant to this motion, however, there do not appear to be any substantive differences amongst the various antitrust claims brought by Plaintiff.

Plaintiff has failed to adequately plead these elements and her claims of antitrust violations, federal and state, are hereby DISMISSED as against all Defendants.

C. Lanham Act

Section 43(a) of the Lanham Act provides two grounds upon which a plaintiff may assert a claim: false designation and false advertising. *15 U.S.C. § 1125(a)(1)*. Plaintiff alleges that Defendant misrepresented various products or services as their own and argues that such misrepresentations constitute false advertising.

Plaintiff's **[*12]** claim, however, is more accurately described as one for "passing off," as her allegations make clear. The TAC identifies the May 3, 2003 *New York Times* article (TAC P52), as well as various website advertisements and press releases (TAC PP55-59) that describe technology and a business plan allegedly similar to those developed by Plaintiff. While Plaintiff attempts to label this as "false and misleading statements of fact in advertising" (TAC P83.), the pleadings make clear that Plaintiff's claim is aimed at Defendants' holding out as their own that which is allegedly Plaintiff's. [8]

Plaintiff's claim of "passing off" is not properly brought under the Lanham Act, as it disputes the "origin" of an idea. "[A]s used in the Lanham Act, the phrase 'origin of goods' is…incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the **[*13]** Lanham Act and inconsistent with precedent." *Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32, 123 S.Ct. 2041, 2047, 156 L. Ed. 2d 18 (U.S. 2003)*.

A failure to attribute the authorship of an idea simply does not amount to the misrepresentation of the "nature characteristics, qualities, or geographic origin of…goods, services, or commercial activities" as required under section 43(a) of the Lanham Act. See *Antidote International Films, Inc. v. Bloomsbury Publishing, PLC, 467 F.Supp.2d 394 (S.D.N.Y. 2006)* (dismissing false advertising claim alleging misrepresentations relating to authorship of a novel); see also *Thomas Publishing Co., LLC v. Technology Evaluation Centers, Inc., No. 06 Cv 14212(RMB), 2007 U.S. Dist. LEXIS 55086, 2007 WL 2193964 (S.D.N.Y. July 27, 2007)* (dismissing false advertising claim "premised upon the assertion that Defendant passed off Plaintiff's work as its own," where defendant misrepresented itself as the developer, creator or owner of materials comprising a software directory, because "a failure to attribute authorship to Plaintiff does not amount to misrepresentation of 'the nature, characteristics, qualities or geographic origin' of … [Defendant's] goods.").

Plaintiff's allegations do not **[*14]** describe a violation of the Lanham Act and this claim is therefore DISMISSED as against all Defendants.

D. Tortious Interference with Prospective Economic Relations

In order to state a claim for tortious interference with prospective economic relations under New York law, a plaintiff must allege: "(1) that [she] had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *Friedman v. Coldwater Creek, Inc., No. 08-cv-979, 321 Fed. Appx. 58, 2009 U.S. App. LEXIS 7514, 2009 WL 932546, at * 1 (2d Cir. April 8, 2009)*; *Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir. 2006)*. The New York Court of Appeals has explained that, "as a general rule, a defendant's conduct must amount to a crime or an independent tort" in order to amount to tortious interference with a prospective economic advantage. *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 190, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004)*. A defendant who has not committed a crime or independent tort

---

[8] One particularly relevant section of the TAC is in fact entitled "Defendants Live Nation and Clear Channel Pass Off as Their Own The Trade Secrets Misappropriated from Plaintiff." (TAC s.H.)

or acted solely out of malice may nevertheless be liable if he has employed "wrongful means." "'Wrongful **[*15]** means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions," *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980)* (quotation and citation omitted) and "'extreme and unfair' economic pressure." *Carvel, 3 N.Y.3d at 190*.

Here, Plaintiff has alleged that she "lost the opportunity to complete a private placement offering of securities to be issued by her own company which was to have served as seed money for the development of technologies utilizing her trade secrets and inventions." (Compl. para. 146.) In addition to the evident vagueness of this pleading, Plaintiff neglects to allege that Defendants knew of this private placement opportunity and wrongfully interfered with it. [9] The allegations therefore do not state a claim for tortious interference with prospective economic relations and must be DISMISSED as against all Defendants.

E. Tortious Interference with Contract (against the CLL Defendants)

In New York, the statute of limitations for a tortious interference with contract claim is three years. See *N.Y. C.P.L.R. § 214(4)*; *Norris v. Grosvenor Marketing Ltd., 803 F.2d 1281, 1287 (2d Cir. 1986)*. The TAC describes a series of events occurring in early 2002, culminating in the alleged usurpation of Plaintiff as counsel to Legend Films. (TAC P29(f).) Defendants were made aware of this claim for the first time in the Amended Complaint filed on June 5, 2006 and served on June 16, 2006. The three year statute of limitations on this claim has therefore lapsed, and the claim is hereby DISMISSED.

Moreover, even if the claim were not time-barred, it would be subject to dismissal pursuant to *Rule 12(b)(6)*, for failure to state a claim.

To state a claim for tortious interference with contract under New York law, a plaintiff must allege: (1) "the existence of a valid contract between the plaintiff and a third party"; (2) the "defendant's knowledge of the contract"; (3) the "defendant's intentional procurement of the **[*17]** third-party's breach of the contract without justification"; (4) "actual breach of the contract"; and (5) damages. *Kirch v. Liberty Media Corp., 449 F.3d 388, 401-02 (2d Cir. 2006)* (quoting *Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 646 N.Y.S.2d 76, 668 N.E.2d 1370, 1375 (N.Y. 1996))*. FN21 In addition, a plaintiff must assert, with respect to each defendant, that the defendant's actions were the "but for" cause of the alleged breach-in other words, that there would not have been a breach but for the activities of the defendant. *Sharma v. Skaarup Ship Mgmt. Corp., 916 F.2d 820, 828 (2d Cir. 1990)* (citing *Special Event Entm't v. Rockefeller Ctr., Inc., 458 F.Supp. 72, 78 (S.D.N.Y. 1978))*.

Plaintiff has alleged that "shortly after [she] became 'of counsel' to CLL, CLL attorney Mark Montague was introduced to plaintiff's client, Legend Films, whom plaintiff had also served as General Counsel up to 2002. CLL orchestrated plaintiff's ouster from Legend and induced Legend to renege on its obligation to pay plaintiff for her services." (TAC para. 29(f).) It is insufficient to merely state, without more, that Defendants "orchestrated" Plaintiff's ouster. "[T]he law requires some factual **[*18]** specificity in pleading tortious interference." *World Wide Commc'ns, Inc. v. Rozar, No. 96 Civ. 1056, 1997 U.S. Dist. LEXIS 20596, at *7, 1997 WL 795750, (S.D.N.Y. December 30, 1997)* (citation omitted). As such, Plaintiff has failed to adequately plead that the Defendants intentionally procured, without justification, the breach in question, and Plaintiff's claim on this issue is DISMISSED.

F. Legal Malpractice (against the CLL Defendants)

---

[9] Although the parties further submit arguments concerning the statute of limitations applicable to this cause of action, the TAC's allegations on this cause are too vague to determine when, precisely, Plaintiff alleges that the tortious interference occurred. Because this same vagueness disposes of Plaintiff's **[*16]** claim under the *Rule 12(b)(6)* motion, the Court need not make a final conclusion on the issue of timeliness.

"To state a claim for legal malpractice under New York law, a plaintiff must allege: (1) attorney negligence; (2) which is the proximate cause of a loss; and (3) actual damages." *Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 337 (2d Cir. 2006)* (citing *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108, 573 N.Y.S.2d 981, 986 (App.Div. 1991))*.

In order to establish negligence in a legal malpractice case, a plaintiff must allege that the attorney's conduct "fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." *Achtman, 464 F.3d at 337* (quoting *Grago v. Robertson, 49 A.D.2d 645, 370 N.Y.S.2d 255 (N.Y.App.Div. 1975))*. "A complaint that essentially alleges either an error of **[*19]** judgment or a selection of one among several reasonable courses of action fails to state a claim for malpractice…Generally, an attorney may only be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action." *Achtman, 464 F.3d at 337* (quotations omitted) (citing *Rosner v. Paley, 65 N.Y.2d at 738, 492 N.Y.S.2d 13, 481 N.E.2d 553 (NY 1985)*; *Bernstein v. Oppenheim & Co., 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 (1990))*.

Here, Plaintiff offers only vague and non-actionable challenges to CLL's legal representation. Plaintiff first pleads that CLL "failed to protect and safeguard her trade secrets." TAC P120(1). This allegation appears to refer either to the presence of non-attorney CLL employees at the initial presentation of Plaintiff's inventions or to the misappropriation at the heart of Plaintiff's TAC. However, neither instance is premised on anything more than speculation, and neither presents a challenge to the actual quality of CLL's legal representation Plaintiff also alleges that CLL "fail[ed] to properly advise [her] with respect to the opportunities for commercial exploitation of [her] **[*20]** inventions and trade secrets" (TAC P120(2)). This allegation again does not address CLL's legal representation and merely challenges the "selection of one among several reasonable courses." Finally, Plaintiff alleges that CLL failed to eliminate a conflict of interest to its representation of Plaintiff TAC PP120(3) and (4). Because this allegation includes no detail, even in speculation, as to the supposed conflict, the allegation does not provide a basis for a malpractice claim.

Moreover, the TAC fails to identify the precise damages suffered or how the Defendant's legal representation of her actually caused these damages. A plaintiff must properly plead that, "'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages." *Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP, No. 06 Civ. 14211(GBD), 629 F. Supp. 2d 259, 2007 U.S. Dist. LEXIS 56222, 2007 WL 2219485, *3 (S.D.N.Y. Aug. 2, 2007)* (citing *Weil Gotshal & Manges v. Fashion Boutique of Short Hills, 10 A.D.3d 267, 780 N.Y.S.2d 593, 596 (2004))*. "Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is **[*21]** not the proximate cause of the injury. Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice." *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 A.D.2d 63, 67, 750 N.Y.S.2d 277 (N.Y.App.Div. 2002)*. See also *Morgan, Lewis & Bockius, LLP v. IBuyDigital.com, Inc., 14 Misc. 3d 1224A, 836 N.Y.S.2d 486, 2007 N.Y. Slip Op 50149U, at 6 (N.Y.Misc. 2007)*. The TAC fails to allege that CLL's legal representation constitutes 'but for' causation of some ascertainable and actionable damage.

For these reasons, Plaintiff's claim of legal malpractice against the CLL Defendants is DISMISSED.

G. Breach of Fiduciary Duty (against the CLL Defendants)

To state a claim for breach of fiduciary duty in New York, "plaintiff must allege three elements: (1) the existence of fiduciary relationship; (2) knowing breach of a duty that relationship imposes; and (3) damages suffered." *Nay ex. rel. Thiele v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 05 Civ. 10264, 2006 U.S. Dist. LEXIS 52074, 2006 WL 2109467, at *6 (S.D.N.Y. July 25, 2006)* (quoting *Carruthers v. Flaum, 388 F. Supp. 2d 360, 380 (S.D.N.Y. 2005))* (internal quotation marks omitted).

Here, it appears that the same set of speculative allegations that comprised the legal malpractice **[*22]** claim is also relied upon for Plaintiff's fiduciary duty claim. As discussed above, the TAC does not identify with any more than broadly-worded speculations what duty was breached or what damage was caused by that breach.

This claim is hereby DISMISSED.

H. Unjust Enrichment

In order to state a claim for unjust enrichment, "plaintiff must establish 1) that the defendant benefited; 2) at plaintiff's expense; and 3) that 'equity and good conscience' require restitution." *Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000)*. (citing *Dolmetta v. Uintah Nat'l Corp., 712 F.2d 15, 20 (2d Cir. 1983))*. As with her other claims, Plaintiff has provided only assertion and speculation as to the benefit that was taken from her by Defendants. Even under the low threshold that plaintiffs must meet under *Rule 12(b)(6)*, the unjust enrichment claim must be DISMISSED as against all Defendants.

H. Accounting

Plaintiff attempts to state a claim for "accounting." "Accounting" is a remedy available in certain circumstances, not a claim in itself. That cause of action is therefore DISMISSED as against all Defendants.

CONCLUSION

Plaintiff's claims against all Defendants are hereby DISMISSED. The Clerk of Court is hereby **[*23]** directed to close this case.

SO ORDERED:

Dated: New York, New York

April 23, 2009

/s/ Barbara S. Jones

Barbara S. Jones

UNITED STATES DISTRICT JUDGE

End of Document